12–27–04 Monday
Vol. 69 No. 247 Dec. 27, 2004

Pages 77139–77608

Federal Register

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A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

Rules and Regulations

Federal Register
Vol. 69, No. 247
Monday, December 27, 2004

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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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 630

Absence and Leave

CFR Correction

In Title 5 of the Code of Federal Regulations, Parts 1 to 699, revised as of January 1, 2004, on page 718, § 630.407 is corrected to read as follows:

§ 630.407 Sick leave used in computation of annuity.

Sick leave which is used in the computation of annuity for an employee shall be charged against his sick leave account and may not thereafter be used, transferred, or recredited.

[34 FR 17617, Oct. 31, 1969]

[FR Doc. 04–55530 Filed 12–23–04; 8:45 am]
BILLING CODE 1505–01–D

FEDERAL RESERVE SYSTEM

12 CFR Part 203

[Regulation C; Docket No. R–1219]

Home Mortgage Disclosure

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule; staff commentary.

SUMMARY: The Board is publishing a final rule amending the staff commentary that interprets the requirements of Regulation C (Home Mortgage Disclosure). The staff commentary is amended to increase the asset-size exemption threshold for depository institutions based on the annual percentage change in the Consumer Price Index for Urban Wage Earners and Clerical Workers. The adjustment from $33 million to $34 million reflects the increase of that index by 2.45 percent during the twelve-month period ending in November 2004. Thus, depository institutions with assets of $34 million or less as of December 31, 2004, are exempt from data collection in 2005.

DATES: Effective January 1, 2005. This rule applies to all data collection in 2005.

FOR FURTHER INFORMATION CONTACT: John C. Wood or Kathleen C. Ryan, Counsels, or Dan S. Sokolov, Senior Attorney, Division of Consumer and Community Affairs, at (202) 452–3667; for users of Telecommunications Device for the Deaf (TDD) only, contact (202) 263–4869.

SUPPLEMENTARY INFORMATION: The Home Mortgage Disclosure Act (HMDA; 12 U.S.C. 2801 *et seq.*) requires most mortgage lenders located in metropolitan areas to collect data about their housing-related lending activity. Annually, lenders must report that data to their federal supervisory agencies and make the data available to the public. The Board's Regulation C (12 CFR part 203) implements HMDA.

Provisions of the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (codified at 12 U.S.C. 2808(b)) amended HMDA to expand the exemption for small depository institutions. Prior to 1997, HMDA exempted depository institutions with assets totaling $10 million or less, as of the preceding year-end. The statutory amendment increased the asset-size exemption threshold by requiring a one-time adjustment of the $10 million figure based on the percentage by which the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPIW) for 1996 exceeded the CPIW for 1975, and provided for annual adjustments thereafter based on the annual percentage increase in the CPIW. The one-time adjustment increased the exemption threshold to $28 million for 1997 data collection.

Section 203.2(e)(1)(i) of Regulation C provides that the Board will adjust the threshold based on the year-to-year change in the average of the CPIW, not seasonally adjusted, for each twelve-month period ending in November, rounded to the nearest million. Pursuant to this section, the Board raised the threshold to $29 million for 1998 data collection, raised it to $30 million for 1999 data collection, and kept it at that level for data collection in 2000. The Board raised the threshold to $31 million for data collection in 2001, to $32 million for data collection in 2002, kept the threshold at $32 million in 2003, and raised the threshold to $33 million for 2004.

During the period ending November 2004, the CPIW increased by 2.45 percent. As a result, the exemption threshold is raised to $34 million. Thus, depository institutions with assets of $34 million or less as of December 31, 2004, are exempt from data collection in 2005. An institution's exemption from collecting data in 2005 does not affect its responsibility to report the data it was required to collect in 2004.

Under the Administrative Procedure Act, notice and opportunity for public comment are not required if the Board finds that notice and public comment are unnecessary. 5 U.S.C. 553(b)(3)(B). Comment 2(e)–2 to section 203.2 of the regulation is amended to implement the increase in the exemption threshold. This amendment merely applies the formula established by Regulation C for determining adjustments to the exemption threshold. For these reasons, the Board has determined that publishing a notice of proposed rulemaking and providing opportunity for public comment are unnecessary. Therefore, the amendment is adopted in final form.

List of Subjects in 12 CFR Part 203

Banks, Banking, Mortgages, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, the Board amends 12 CFR part 203 as follows:

PART 203—HOME MORTGAGE DISCLOSURE (REGULATION C)

■ 1. The authority citation for part 203 continues to read as follows:

Authority: 12 U.S.C. 2801–2810.

■ 2. In Supplement I to part 203, under section 203.2—Definitions, under *2(e) Financial Institution,* paragraph 2. is revised.

SUPPLEMENT I TO PART 203—STAFF COMMENTARY

* * * * *

Section 203.2—Definitions

* * * * *

2(e) Financial Institution

* * * * *

2. *Adjustment of exemption threshold for depository institutions.* For data collection in 2005, the asset-size

exemption threshold is $34 million. Depository institutions with assets at or below $34 million are exempt from collecting data for 2005.

* * * * *

By order of the Board of Governors of the Federal Reserve System, acting through the Director of the Division of Consumer and Community Affairs under delegated authority, December 21, 2004.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. 04–28215 Filed 12–23–04; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[CGD05–04–224]

RIN 1625–AA00

Safety Zone; Delaware River

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone in the Delaware River encompassing all waters from the Tacony-Palmyra Bridge to the Bellevue/Marcus Hook ship ranges at Buoy 2M, shoreline to shoreline. The temporary safety zone prohibits persons or vessels from entering the zone, unless authorized by the Captain of the Port Philadelphia, PA or designated representative. This safety zone is necessary to provide for the safety of life, property and to facilitate oil spill environmental response activities.

DATES: This rule is effective from December 15, 2004 until January 15, 2005.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket CGD05–04–224 and are available for inspection or copying at Coast Guard Marine Safety Office Philadelphia, One Washington Avenue, Philadelphia, Pennsylvania, 19147, between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Lieutenant Junior Grade Kevin Sligh or Ensign Jill Munsch, Coast Guard Marine Safety Office/Group Philadelphia, at (215) 271–4889.

SUPPLEMENTARY INFORMATION:

Regulatory Information

We did not publish a notice of proposed rulemaking (NPRM) for this regulation. Under 5 U.S.C. 553(b)(B) and (d)(3), the Coast Guard finds that good cause exists for not publishing a NPRM and for making this regulation effective less than 30 days after publication in the **Federal Register**. Publishing a NPRM and delaying its effective date would be contrary to public interest, since immediate action is needed to protect mariners against potential hazards associated with oil spill recovery operations and to ensure the safety of the environment on the Delaware River and its tributaries.

Background and Purpose

On November 27, 2004 at 9:30 p.m. the T/V ATHOS I reported a major discharge of oil on the waters of the Delaware River. Oil spill response operations are being conducted in the safety zone. A number of oil spill response vessels and clean up personnel will be in the safety zone during the duration of the response operations. This rule establishes a safety zone, on the Delaware River covering all the waters of the area bound from the Tacony-Palmyra Bridge to the Bellevue/Marcus Hook ship ranges, at Buoy 2M. Mariners will only be allowed to transit the safety zone with the permission of the COTP or his designated representative. The safety zone will protect mariners and oil spill responders from the hazards associated with spill recovery and clean up operations. The Captain of the Port will notify the maritime community, via marine broadcasts, of the ability of vessels to transit through the safety zone. Mariners allowed to travel through the safety zone with the permission of the COTP must maintain a minimum safe speed, in accordance with the Navigation Rules as seen in 33 CFR Chapter I, Subchapters D and E.

Regulatory Evaluation

This temporary rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866 and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. It is not significant under the regulatory policies and procedures of the Department of Homeland Security (DHS).

We expect the economic impact of this rule to be minimal that a full Regulatory Evaluation under the regulatory policies and procedures of DHS is unnecessary.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we considered whether this rule will have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

This will have virtually no impact on any small entities. This rule does not require a general notice of proposed rulemaking and, therefore, it is exempt from the requirement of the Regulatory Flexibility Act. Although this rule is exempt, we have reviewed it for potential economic impact on small entities.

Therefore, the Coast Guard certifies under section 605 (b) of the Regulatory Flexibility Act (5 U.S.C 605(b)) that this will not have a significant impact on a substantial number of small entities.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule so that they can better evaluate its effects on them and participate in the rulemaking process.

Small businesses may send comments on the actions of Federal employees who enforce or otherwise determine compliance with Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency?s responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–743–3247).

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

We have analyzed this rule under Executive Order 12211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. It has not been designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Environment

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

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies. This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701; 50 U.S.C. 191, 195; 33 CFR 1.05–1(g), 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1

■ 2. Add temporary § 165.T05–224 to read as follows:

§ 165.T05–224 Safety zone; Delaware River

(a) *Location.* The following area is a temporary safety zone: All waters of the Delaware River from the Tacony-Palmyra Bridge to the Bellevue/Marcus Hook ship ranges at Buoy 2M, shoreline to shoreline.

(b) *Regulations.* All persons are required to comply with the general regulations governing safety zones in 33 CFR 165.23 of this part.

(1) All vessel traffic is prohibited in the safety zone.

(2) All Coast Guard assets enforcing this safety zone can be contacted on VHF marine band radio, channels 13 and 16. The Captain of the Port can be contacted at (215) 271–4807.

(3) All persons desiring to transit through the safety zone must contact the Captain of the Port at telephone number (215) 271–4807 or on VHF channel 13 or 16 to seek permission prior to transiting the area. If permission is granted, all persons and vessels shall comply with the instructions of the Captain of the Port Philadelphia, PA or designated representative.

(4) The Captain of the Port will notify the public of any changes in the status of this safety zone by Marine Safety Radio Broadcast on VHF–FM marine band radio, channel 22 (157.1 MHZ).

(5) Mariners granted permission to transit the safety zone must maintain the minimum safe speed necessary to maintain navigation as per 33 CFR Chapter I, Subchapters D and E.

(c) *Definitions.*

Captain of the Port means the Commanding Officer of the Coast Guard Marine Safety Office/Group Philadelphia or any Coast Guard commissioned warrant or petty officer who has been authorized by the Captain of the Port to act on his behalf.

(d) *Effective period.* This section is effective from December 15, 2004 until January 15, 2005.

Dated: December 14, 2004.

Jonathan D. Sarubbi,

Captain, U.S. Coast Guard, Captain of the Port Philadelphia.

[FR Doc. 04–28226 Filed 12–23–04; 8:45 am]

BILLING CODE 4910–15–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 64

[CG Docket No. 04–53; DA 04–3944; FCC 04–194]

Rules and Regulations Implementing the Controlling of the Assault of Non-Solicited Pornography and Marketing Act of 2003; Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991

AGENCY: Federal Communications Commission.

ACTION: Final rule; announcement of effective date.

SUMMARY: In this document, the Commission announces that the Office

of Management and Budget (OMB) has approved for three years the information collections contained in the Commission's rules at § 64.3100(a)(4), (d), (e), and (f). We also announce that now that OMB has approved the rules, Commercial Mobile Radio Service (CMRS) carriers will have until January 21, 2004 to submit all of their electronic mail domain names for wireless messaging to the Commission for inclusion in a wireless domain names database.

DATES: 47 CFR 64.3100(a)(4), (d), (e), and (f) published at 69 FR 55765, September 16, 2004, are effective December 27, 2004.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Washington, DC, 20554.

FOR FURTHER INFORMATION CONTACT: Ruth Yodaiken at 202–418–2512, Consumer & Governmental Affairs Bureau, *Ruth.Yodaiken@fcc.gov.*

SUPPLEMENTARY INFORMATION: On August 12, 2004, the Commission released an *Order, In the Matter of Rules and Regulations Implementing the Controlling of the Assault of Non-Solicited Pornography and Marketing Act of 2003,* published at 69 FR 55765 (September 16, 2004). 47 CFR 64.3100 (a)(4), (d), (e) and (f) of the Commission's rules implementing the Controlling of the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN–SPAM Act), which contain information collections, were approved by OMB for three years on December 15, 2004. OMB Control No. 3060–1078. The Commission publishes this notice of the effective date of the rules. If you have any comments on the burden estimates, or how we can improve the collection(s) and reduce the burden(s) they cause you, please write to Les Smith, Federal Communications Commission, Room 1–A804, 445 12th Street, SW., Washington, DC 20554. Please include the OMB Control Number, 3060–1078, in your correspondence. We will also accept your comments regarding the Paperwork Reduction Act aspects of the collections via the Internet, if you send them to *Leslie.Smith@fcc.gov* or call (202) 418–0217.

Synopsis

On August 12, 2004, the Commission released an *Order* to implement the Controlling of the Assault of Non-Solicited Pornography and Marketing Act of 2003, or the CAN–SPAM Act (69 FR 55765, September 16, 2004). The *Order* adopts rules to protect wireless subscribers from unwanted commercial electronic mail messages. Specifically, the rules prohibit the transmission of commercial messages to any address referencing an Internet domain name associated with a wireless subscriber messaging service; unless the individual addressee has given the sender express prior authorization. To assist the senders of such messages in identifying wireless subscribers, the Commission's rules require that Commercial Mobile Radio Service (CMRS) providers file with the Commission the names of all electronic domain names used to offer electronic mail messages that are transmitted directly to a wireless device utilized by a subscriber of a commercial mobile service (as such term is defined in section 332(d) of the Communications Act of 1934 (47 U.S.C. 332(d))) in connection with such service.

On December 15, 2004, the Office of Management and Budget (OMB) approved the information collections associated with the Commission's CAN–SPAM rules. Therefore, we announce that CMRS carriers will have until January 21, 2004 to submit to the Commission all of their electronic mail domain names used for wireless messaging.

CMRS carriers may begin the submission process by accessing the following Web site address: *http://www.fcc.gov/cgb/policy* and clicking on ''Domain Name Data Entry for Wireless Providers Only.'' Each CMRS carrier must enter their submissions directly into the fields provided on the Domain Name Data Entry. The first section of fields asks the filing party to indicate the type of submission: (1) Submission of a new mailing domain name, (2) updated contact information, or (3) deletion of a mailing domain name already on the wireless domain names list. The next section consists of contact information fields, including the name of the filing party and the organization's address, phone number, and an e-mail address. The Commission will only make public the mailing domain name provided in the submission, not the contact information. The final section allows the CMRS carrier to enter the mailing domain name(s) pursuant to the rules in the *Order*. Prior to submitting the information, the CMRS carrier must read and agree to a legal notice, which certifies that the domain name(s) submitted is used for mobile service messaging as defined in section 332(d) of the Communications Act of 1934 (47 U.S.C. 332(d)). The CMRS carrier completes the transaction by clicking ''Submit.'' Any filing party who cannot file electronically should contact the Commission's Consumer & Governmental Affairs Bureau at (202) 418–2512 to make alternate arrangements to submit domain names.

As stated in the *Order,* the Commission will compile the domain name submissions into the Commission's wireless domain names list. A paper version will also be available at the Commission's headquarters in Washington, DC. This list will be updated regularly as the Commission receives additional submissions. Furthermore, CMRS carriers are responsible for the continuing accuracy and completeness of information furnished for the wireless domain names list. Therefore, CMRS carriers must:

(1) File any future updates to listings with the Commission not less than thirty (30) days before issuing subscribers any new or modified domain name.

(2) Remove any domain name that has not been issued to subscribers or is no longer in use within six (6) months of placing it on the list or last date of use.

The Commission will issue a second public notice announcing the date on which the senders of commercial electronic mail, and the general public, will have access to the list from the Commission's Web site. Senders of mobile service commercial messages (MSCMs) will then have an additional thirty (30) days from the date the list becomes publicly available to comply with the rules to avoid sending MSCMs to wireless subscribers absent express prior authorization. We emphasize that the fact that a domain name was not on the list or not on the list for a full 30 days shall not excuse any willful violation of the rules on sending unwanted messages to wireless subscribers. Any person or entity will be considered in violation of the rules if a message is initiated knowingly to a subscriber of the applicable wireless service without the subscriber's express prior authorization, even if it is sent within 30 days of the domain name appearing on the list.

As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507), the FCC is notifying the public that it received approval for three years from OMB on December 15, 2004 for the collection(s) of information contained in the Commission's CAN–SPAM rules at 47 CFR 64.3100. The OMB Control Number is 3060–1078. The annual reporting burden for this collection(s) of information, including the time for gathering and maintaining the collection of information, is estimated to be: 11,027,600 respondents, a total annual hour burden of 115,645,100 hours, and $37,105,000 in total annual costs.

Under 5 CFR 1320, an agency may not conduct or sponsor a collection of information unless it displays a current valid OMB 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 OMB Control Number. The OMB Control Number is 3060–1078.

The Foregoing notice is required by the Paperwork Reduction Act of 1995, Pub. L. 104–13, October 1, 1995, 44 U.S.C. 3507.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 04–28178 Filed 12–23–04; 8:45 am]

BILLING CODE 6712–01–P

Proposed Rules

Federal Register
Vol. 69, No. 247
Monday, December 27, 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 TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2004–19930; Directorate Identifier 2004–NE–33–AD]

RIN 2120–AA64

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

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for Rolls-Royce plc (RR) RB211 Trent 800 series turbofan engines. This proposed AD would require initial and repetitive borescope inspections of the high pressure-and-intermediate pressure (HP–IP) turbine internal and external oil vent tubes for coking and carbon buildup, and cleaning or replacing the vent tubes if necessary. This proposed AD results from a report of an RB211 Trent 700 series engine experiencing a disk shaft separation, overspeed of the IP turbine rotor, and multiple blade release of IP turbine blades. Preliminary findings suggest these events resulted from an internal oil fire in the HP-IP turbine oil vent tubes due to coking and carbon buildup. This fire led to a second fire in the internal air cavity below the IP turbine disk drive shaft. We are proposing this AD to prevent internal oil fires in RB211 Trent 800 series turbofan engines due to coking and carbon buildup, that could cause uncontained engine failure and damage to the airplane.

DATES: We must receive any comments on this proposed AD by February 25, 2005.

ADDRESSES: Use one of the following addresses to comment on this proposed AD.

- *DOT Docket Web Site:* Go to *http://dms.dot.gov* and follow the instructions for sending your comments electronically.
- *Government-wide Rulemaking Web Site:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–001.
- *Fax:* (202) 493–2251.
- *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.

Contact Rolls-Royce plc, PO Box 31, Derby, England; telephone: 011–44–1332–249428; fax: 011–44–1332–249223 for the service information identified in this proposed AD.

FOR FURTHER INFORMATION CONTACT: Ian Dargin, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803–5299; telephone (781) 238–7178; fax (781) 238–7199.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to submit any written relevant data, views, or arguments regarding this proposal. Send your comments to an address listed under **ADDRESSES.** Include ''Docket No. FAA–2004–19930; Directorate Identifier 2004–NE–33–AD'' in the subject line of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD. We will consider all comments received by the closing date and may amend the proposed AD in light of those comments.

We will post all comments we receive, without change, to *http://dms.dot.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this proposed AD. Using the search function of the DMS Web site, anyone can find and read the comments in any of our dockets, including the name of the individual who sent the comment (or signed the comment on behalf of an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78) or you may visit *http://dms.dot.gov.*

Examining the AD Docket

You may examine the docket that contains the proposal, any comments received, and any final disposition in person at the DMS Docket Offices between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone (800) 647–5227) is on the plaza level of the Department of Transportation Nassif Building at the street address stated in **ADDRESSES.** Comments will be available in the AD docket shortly after the DMS receives them.

Discussion

As a member of the National Transportation Safety Board (NTSB) investigation team, we are investigating an incident event on RR RB211 Trent 700 series engines and possible unsafe condition on RB211 Trent 800 series engines. The Civil Aviation Authority (CAA), which is the airworthiness authority for the United Kingdom (UK) is helping us investigate. A report was received of an RB211 Trent 700 series engine experiencing a disk shaft separation, overspeed of the IP turbine rotor, and multiple blade release of IP turbine blades. Preliminary findings suggest these events resulted from an internal oil fire in the HP–IP turbine oil vent tubes due to coking and carbon buildup. This fire led to a second fire in the internal air cavity below the IP turbine disk drive shaft. Because the oil vent tubes on the event engine were destroyed, the partner engine on the same airplane was inspected. That inspection revealed heavy coking and carbon buildup, with partial blockage of the HP–IP turbine oil vent tubes. Both engines had the same on-wing life of 15,169 hours with 2,344 cycles-since-new. Both engines contained Mobil Jet Oil 291, which also is suspect and will be removed from the list of approved oils for these engines. The NTSB investigation is ongoing and a probable cause finding has not yet been made. The fire, disk overspeed, and blade release appear to be the result of the coking and carbon buildup, evident in the sister engine and linked by cycles and oil use to the event engine. The Trent 800 series engines have similar

design HP–IP turbine oil vent tubes and are the subject of this proposed AD.

Relevant Service Information

We have reviewed and approved the technical contents of RR Alert Service Bulletin (ASB) No. RB.211–72–AE362, dated May 7, 2004, that describes procedures for:

- Initial and repetitive borescope inspections for coking and carbon buildup in the HP–IP turbine oil vent tubes; and
- Cleaning the tubes if necessary, and removing the engine from service to clean or replace the tubes.

This ASB requires that all operators submit inspection data to the manufacturer. The CAA classified this ASB as mandatory and issued AD G–2004–0009, dated May 27, 2004, in order to ensure the airworthiness of these RB211 Trent 800 series engines in the UK.

Differences Between This Proposed AD and the Manufacturer's Service Information

Although RR ASB No. RB.211–72–AE362, dated May 7, 2004, requires replacing the scavenge oil filter and sending the removed filter to RR for examination as part of returning the engine to service, this proposed AD does not require sending the removed filter to RR.

FAA's Determination and Requirements of the Proposed AD

These Trent 800 series engines, manufactured in the U.K., are type-certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. In keeping with this bilateral airworthiness agreement, the CAA kept us informed of the situation described above. We have examined the CAA's findings, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States. For this reason, we are proposing this AD, which would require:

- Initial and repetitive borescope inspections of the HP-IP turbine oil vent tubes for coking and carbon buildup; and
- Cleaning the oil vent tubes or removing the engine from service if the tubes fail the inspection.

Interim Action

These actions are interim actions and we may take further rulemaking actions in the future.

Costs of Compliance

There are about 420 RB211 Trent 800 series engines of the affected design in the worldwide fleet. We estimate that this proposed AD would affect 120 engines installed on airplanes of U.S. registry. We also estimate that it would take about 1.5 work hours per engine to perform the proposed on-wing inspections, and about 0.5 work hour to perform the proposed in-shop inspections. The average labor rate is $65 per work hour. Based on these figures, we estimate the total cost for U.S. operators to perform one on-wing inspection to be $11,700, and the total cost to perform one in-shop inspection to be $3,900.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, Section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701, ''General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

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

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

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

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

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

We prepared a summary of the costs to comply with this proposal and placed it in the AD Docket. You may get a copy of this summary at the address listed under **ADDRESSES.**

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Rolls-Royce plc: Docket No. FAA–2004–19930; Directorate Identifier 2004–NE–33–AD.

Comments Due Date

(a) The Federal Aviation Administration (FAA) must receive comments on this airworthiness directive (AD) action by February 25, 2005.

Affected ADs

(b) None.

Applicability: (c) This AD applies to Rolls-Royce plc (RR) RB211 Trent 875–17, 877–17, 884–17, 884B–17, 892–17, 892B–17, and 895–17 series turbofan engines. These engines are installed on, but not limited to, Boeing 777 airplanes.

Unsafe Condition

(d) This AD results from a report of an RB211 Trent 700 series engine experiencing a disk shaft separation, overspeed of the IP turbine rotor, and multiple blade release of IP turbine blades. Preliminary findings suggest these events resulted from an internal oil fire in the HP–IP turbine oil vent tubes due to coking and carbon buildup. This fire led to a second fire in the internal air cavity below the IP turbine disk drive shaft. We are issuing this AD to prevent internal oil fires in RB211 Trent 800 series turbofan engines due to coking and carbon buildup, that could cause uncontained engine failure and damage to the airplane.

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

Initial Visual Inspection

(f) Using paragraph 3.A. (on-wing) or 3.B. (in-shop) of Accomplishment Instructions of RR Alert Service Bulletin (ASB) RB.211–72–AE362, dated May 7, 2004, and the inspection schedule in Table 1 of this AD, perform an initial borescope inspection of the high pressure-and-intermediate pressure (HP–IP) turbine internal and external oil vent tubes for coking and carbon buildup as follows:

(1) Insert an 8 mm diameter flex borescope to see if it will pass along the full length of the vent tube into the bearing chamber.

(2) If the vent tube prevents an 8 mm diameter flex borescope from passing along the full length of the tube into the bearing chamber, repeat the action using a 6 mm flex borescope.

(3) If the 6 mm diameter flex borescope passes through to the bearing chamber, continue using the engine in service, and perform the repetitive inspections in this AD at the required intervals specified in Table 2 of this AD.

(4) If the vent tube prevents the 6 mm diameter flex borescope from passing along the full length of the tube into the bearing chamber, remove the engine from service within 10 cycles-since-last inspection (CSLI).

TABLE 1.—INITIAL INSPECTION SCHEDULE

If the engine or the 05 module:	Then initially inspect:
Has reached the threshold life of 15,000 hours time-since new (TSN) or reached the threshold life of 3,000 cycles-since-new (CSN) on the effective date of this AD.	Within 1,000 hours time-in-service (TIS) or 200 cycles-in service (CIS) after the effective date of this AD, whichever occurs first.
Has fewer than 15,000 hours TSN or fewer than 3,000 CSN on the effective date of this AD.	Within 1,000 hours TIS or 200 CIS after reaching the threshold life.

Repetitive Visual Inspections

(g) Using paragraph 3.A. (on-wing) or 3.B. (in-shop) of Accomplishment Instructions of RR ASB RB.211–72–AE362, dated May 7, 2004, paragraphs (f)(1) through (f)(4) of this AD, and the inspection schedule in Table 2 of this AD, perform repetitive borescope inspections of the HP–IP turbine internal and external oil vent tubes for coking and carbon buildup.

TABLE 2.—REPETITIVE INSPECTION SCHEDULE

If at the previous inspection, before any cleaning was performed:	Then:
(1) There was no coking and carbon buildup of a visible thickness; or an 8 mm diameter flex borescope could pass along the full length of the internal vent tube into the bearing chamber.	Reinspect within 6,000 hours time-since-last-inspection (TSLI) or within 1,200 cycles-since-last-inspection (CSLI), whichever occurs first.
(2) The coking or carbon buildup prevented an 8 mm diameter flex borescope from passing through the internal vent tube, but a 6 mm diameter flex borescope could pass along the full length of the internal vent tube into the bearing chamber.	Reinspect within 1,500 hours TSLI or within 300 CSLI, whichever occurs first.
(3) The coking or carbon buildup prevented the 6 mm diameter flex borescope from passing through the full length of the internal vent tube and into the bearing chamber.	Remove the engine from service within 10 CSLI.

Reporting Requirements

(h) Report findings of the inspection to Rolls-Royce using Table 1 (On-wing Inspection Findings) or Table 2 (In-shop Inspection Findings) of RR ASB RB.211–72–AE362, dated May 7, 2004. The Office of Management and Budget (OMB) has approved the reporting requirements specified in Table 1 and Table 2 of RR ASB RB.211–72–AE362, dated May 7, 2004, and assigned OMB control number 2120–0056.

Alternative Methods of Compliance

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

Related Information

(j) CAA airworthiness directive No. G–2004–0009, dated May 27, 2004, also addresses the subject of this AD.

Issued in Burlington, Massachusetts, on December 17, 2004.

Francis A. Favara,

Acting Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 04–28145 Filed 12–23–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2004–19289; Airspace Docket No. 04–AGL–20]

Proposed Establishment of Class E Airspace; McGregor, MN

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposes to establish Class E airspace at McGregor, MN. Standard Instrument Approach Procedures have been developed for McGregor/Isedor Iverson Airport, McGregor, MN. Controlled airspace extending upward from 700 feet or more above the surface of the earth is needed to contain aircraft executing these approaches. This action would establish an area of controlled airspace for McGregor/Isedor Iverson Airport.

DATES: Comments must be received on or before February 20, 2005.

ADDRESSES: Send comments on the proposal to the Docket Management System, U.S. Department of Transportation, Room Plaza 401, 400 Seventh Street, SW., Washington, DC 20590–0001. You must identify the docket Number FAA–2004–19289/ Airspace Docket No. 04–AGL–20, at the beginning of your comments. You may also submit comments on the Internet at *http://dms.dot.gov.* You may review the public docket containing the proposal, any comments received, and any final

disposition in person in the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone 1–800–647–5527) is on the plaza level of the Department of Transportation NASSIF Building at the above address.

An informal docket may also be examined during normal business hours at the office of the Regional Air Traffic Division, Federal Aviation Administration, 2300 East Devon Avenue, Des Plaines, Illinois 60018.

FOR FURTHER INFORMATION CONTACT: J. Mark Reeves, Central Service Office, Airspace Branch, AGL–520, Federal Aviation Administration, 2300 East Devon Avenue, Des Plaines, Illinois 60018, telephone (847) 294–7477.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this document must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2004–19289/Airspace Docket No. 04–AGL–20.'' The postcard will be date/time stamped and returned to the commenter. All communications received on or before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this action may be changed in light of comments received. All comments submitted will be available for examination in the Rules Docket, FAA, Great Lakes Region, Office of the Regional Counsel, 2300 East Devon Avenue, Des Plaines, Illinois, both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRM's

An electronic copy of this document may be downloaded through the Internet at *http://dms.dot.gov.* Recently published rulemaking documents can also be accessed through the FAA's web page at *http://www.faa.gov* or the Superintendent of Document's web page at *http://www.access.gpo.gov/nara.*

Additionally, any person may obtain a copy of this notice by submitting a request to the Federal Aviation Administration, Office of Air Traffic Airspace Management, ATA–400, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267–8783. Communications must identify both docket numbers for this notice. Persons interested in being placed on a mailing list for future NPRM's should contact the FAA's Office of Rulemaking, (202) 267–9677, to request a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

The FAA is considering an amendment to 14 CFR part 71 to establish Class E airspace at McGregor, MN, for McGregor/Isedor Iverson Airport. Controlled airspace extending upward from 700 feet or more above the surface of the earth is needed to contain aircraft executing instrument approach procedures. The area would be depicted on appropriate aeronautical charts. Class E airspace areas extending upward from 700 feet or more above the surface of the earth are published in paragraph 6005 of FAA Order 7400.9M dated August 30, 2004, and effective September 16, 2004, which is incorporated by reference in 14 CFR 71.1. The Class E designation listed in this document would be published subsequently in the Order.

The FAA has determined that this proposed regulation only involves an establishment body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore this, proposed regulation—(1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, CLASS B, CLASS C, CLASS D, AND CLASS E AIRSPACE AREAS; AIRWAYS; ROUTES; AND REPORTING POINTS

1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9M, Airspace Designations and Reporting Points, dated August 30, 2004, and effective September 16, 2004, is amended as follows:

* * * * *

Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface of the earth.

* * * * *

AGL MN E5 McGregor, MN [New]

McGregor/Isedor Iverson Airport, MN
(Lat. 46°37′08″ N., long. 93°18′35″ W.)

That airspace extending upward from 700 feet above the surface within a 6.3-mile radius of the McGregor/Isedor Iverson Airport.

* * * * *

Issued in Des Plaines, Illinois, on December 3, 2004.

Nancy B. Kort,

Area Director, Central Terminal Operations.

[FR Doc. 04–28232 Filed 12–23–04; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF HOMELAND SECURITY

33 CFR Part 151

[USCG–2004–19621]

RIN 1625–AA89

Dry Cargo Residue Discharges in the Great Lakes

AGENCY: Coast Guard, DHS.

ACTION: Advanced notice of proposed rulemaking; request for information.

SUMMARY: The Coast Guard announces that it has begun a rulemaking project

for the regulation of non-hazardous and non-toxic dry cargo residue discharges by vessels operating on the Great Lakes. As part of the rulemaking project, the Coast Guard will conduct an environmental assessment. In order to conduct this environmental assessment, the Coast Guard intends to determine the current status of dry cargo operations on the Great Lakes. The Coast Guard requests information in response to any of these matters.

DATES: All relevant information and related material must reach the Docket Management Facility on or before March 28, 2005.

ADDRESSES: You may submit comments identified by Coast Guard docket number USCG–2004–19621 to the Docket Management Facility at the U.S. Department of Transportation. To avoid duplication, please use only one of the following methods:

(1) Web Site: *http://dms.dot.gov.*

(2) Mail: Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW., Washington, DC 20590–0001.

(3) Fax: 202–493–2251.

(4) 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. The telephone number is 202–366–9329.

FOR FURTHER INFORMATION CONTACT: Lieutenant Commander Mary Sohlberg, U.S. Coast Guard, Environmental Standards Division, telephone: 202–267–0713, e-mail: *msohlberg@comdt.uscg.mil.* If you have questions on viewing the docket, call Andrea M. Jenkins, Program Manager, Docket Operations, telephone: 202–366–0271.

SUPPLEMENTARY INFORMATION:

Background and Purpose

In a related non-rulemaking docket (USCG–2003–16814), the Coast Guard previously published two notices on the subject of non-hazardous and non-toxic dry cargo residue discharges by vessels operating on the Great Lakes (''dry cargo discharges''; see 69 FR 57711, Sep. 27, 2004; 69 FR 1994, Jan. 13, 2004). At present, some incidental dry cargo discharges are allowed under the Coast Guard?s Interim Enforcement Policy (IEP), which the Coast Guard and Maritime Transportation Act of 2004 (''the Act'') continues until September 30, 2008. Unless we issue new regulations in accordance with the rulemaking authority provided by the Act, those discharges will be prohibited after September 30, 2008.

The Act requires the Coast Guard to begin a regulatory environmental assessment not later than November 7, 2004. We met that requirement on September 29, 2004.

A first step in the environmental assessment is to collect and examine information on current dry cargo residue discharge operations in the Great Lakes. We will compare that information to the ''Study of Dry Cargo Residue in the Great Lakes'' that we compiled in 2000, which is docketed in USCG–2003–16814. This will allow us to see if the 2000 data are still valid or if dry cargo residue discharge operations on the Great Lakes have changed, and if any trends can be discerned.

The information we want to collect includes what types of vessels engage in cargo residue discharge, where they discharge, what they discharge, how they discharge, and how much they discharge. We expect to complete this study during the summer of 2005, and complete the rulemaking before the IEP expires in 2008. Therefore, we ask that you provide any relevant information on dry cargo residue discharges in the Great Lakes (*see* **DATES**).

Once we have collected and reviewed information regarding dry cargo residue discharges in the Great Lakes, we will formulate a proposed regulatory action and alternatives for an environmental assessment. Under the environmental assessment, we presently plan to focus primarily on toxicity data to make sure any residue discharges we might allow are neither hazardous nor toxic, and assess the environmental impact of allowing some incidental discharges to continue.

Under the National Environmental Policy Act, the Coast Guard has initiated an environmental assessment in which we will consider alternative courses of action, including a ''no action'' alternative, which in this case means declining to issue a regulation and letting the policy expire, thus prohibiting incidental discharges of dry cargo residues. Other alternatives might include continuing the current policy, or modifying it as to the quantities or locations of incidental discharges, or engineering alternatives. We welcome any suggestions you may have on what alternatives we should consider.

We will continue to issue additional **Federal Register** notices to keep you informed and to invite your continued participation, as we proceed with the environmental assessment and regulatory processes.

Request for Information

We ask that you submit your comments, or other relevant information, on dry cargo residue discharges in the Great Lakes. As discussed in ''Background and Purpose'', we are particularly interested in information that will help us determine what types of vessels perform these discharges, where they discharge, what they discharge, and how much they discharge. We will consider all comments and information received during the comment period.

Submissions should include:

- Docket number USCG–2004–19621.
- Your name and address.
- Your reasons for making each comment or for bringing information to our attention.

Submit comments or material using only one of the following methods:

- Electronic submission to the Docket Management Facility's Docket Management System (DMS) (*http://dms.dot.gov*).
- Fax, mail, or hand delivery to the Docket Management Facility (*see* **ADDRESSES**). Faxed or hand delivered submissions must be unbound, no larger than 8½ by 11 inches, and suitable for copying and electronic scanning. If you mail your submission and want to know when it reaches the Facility, include a stamped, self-addressed postcard or envelope.

Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the DMS Web site (*http://dms.dot.gov*), and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to read the Privacy Act notice that is available on the DMS Web site, or the Department of Transportation Privacy Act Statement that appeared in the **Federal Register** on April 11, 2000 (65 FR 19477).

You may view docket submissions in person, at the Docket Management Facility (*see* **ADDRESSES**), or electronically on the DMS Web site.

Dated: December 13, 2004.

Joseph J. Angelo,

Director of Standards, Marine Safety, Security & Environmental Protection.

[FR Doc. 04–28227 Filed 12–23–04; 8:45 am]

BILLING CODE 4910–15–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[R03–OAR–2004–DC–0007; FRL–7854–9]

Approval and Promulgation of Air Quality Implementation Plans; District of Columbia; VOC Emission Standards for AIM Coatings

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve a State Implementation Plan (SIP) revision submitted by the District of Columbia (the District). This revision pertains to the volatile organic compound (VOC) emission standards for architectural and industrial maintenance (AIM) coatings in the District. This action is being taken under the Clean Air Act (CAA or the Act).

DATES: Written comments must be received on or before January 26, 2005.

ADDRESSES: Submit your comments, identified by Regional Material in EDocket (RME) ID Number R03–OAR–2004–DC–0007 by one of the following methods:

A. *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments.

B. *Agency Web site: http://www.docket.epa.gov/rmepub/RME,* EPA's electronic public docket and comment system, is EPA's preferred method for receiving comments. Follow the on-line instructions for submitting comments.

C. *E-mail: morris.makeba@epa.gov.*

D. *Mail:* R03–OAR–2004–DC–0007, Makeba Morris, Chief, Air Quality Planning Branch, Mailcode 3AP21, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

E. *Hand Delivery:* At the previously-listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to RME ID No. R03–OAR–2004–DC–0007. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at *http://www.docket.epa.gov/rmepub/,* 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 RME, regulations.gov or e-mail. The EPA RME and the Federal regulations.gov websites are 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 RME 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.

Docket: All documents in the electronic docket are listed in the RME index at *http://www.docket.epa.gov/rmepub/.* 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 RME or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the District of Columbia Department of Public Health, Air Quality Division, 51 N Street, NE., Washington, DC 20002.

FOR FURTHER INFORMATION CONTACT: Rose Quinto, (215) 814–2182, or by e-mail at *quinto.rose@epa.gov.*

SUPPLEMENTARY INFORMATION: On April 16, 2004, the District of Columbia (the District) submitted several revisions to its SIP. The SIP revisions include both new regulations and amendments to Title 20 of the District of Columbia Municipal Regulations (20 DCMR). The new regulations in Title 20 DCMR (Environment), Subtitle A: Air Quality, Chapter 7, Volatile Organic Compounds are:

(1) New Section 718—''Mobile Equipment Repair and Refinishing''.

(2) New Sections 719 through 734—''Consumer Products''.

(3) New Sections 735 through 741—''Portable Fuel Containers and Spouts''.

(4) New Sections 742 through 748—''Solvent Cleaning''.

(5) New Sections 749 through 754—''Architectural and Industrial Maintenance Coating''.

The April 16, 2004 submittal also includes new definitions that were added in section 799, a new section 307 to Chapter 3—to provide for a fee penalty pursuant to section 185 of the Act, and amendments to Chapters 1, 2, 6, 7, and 8 to satisfy the Act's requirements for severe ozone nonattainment areas pursuant to the Metropolitan Washington DC 1-hour ozone nonattainment area's reclassification on January 24, 2004 from serious to severe nonattainment.

On September 20, 2004, the District supplemented its April 16, 2004 submittal. This supplemental submittal provides copies of standards that are incorporated by reference in the Districts's new and amended regulations and a copy of the District's responses to comments it received during its rule adoption process. On November 26, 2004, the District submitted another supplemental revision to its April 16, 2004 submittal. This supplemental submittal consists of revised versions of the new VOC regulations. These are minor revisions to the regulations which clarify the standards that are incorporated by reference and correct cross-referencing and typographical errors. This proposed action concerns only new sections 749 through 754 (AIM Coatings) and revised section 799 containing the associated definitions for the District's AIM coatings rule. The remaining SIP revisions submitted on April 16, 2004 and supplemented on September 20, 2004 and November 26, 2004 are the subjects of separate rulemaking actions.

I. Background

As stated previously, this proposed approval pertains only to the District's regulations for AIM coatings. The standards and requirements contained in the District's AIM coatings rule are based on the Ozone Transport Commission (OTC) model rule. The OTC developed control measures into model rules for a number of source categories. The OTC AIM coatings model rule is based on the existing rules developed by the California Air Resources Board, which were analyzed and modified by the OTC workgroup to

address VOC reduction needs in the Ozone Transport Region (OTR).

II. Summary of SIP Revision

The District's AIM coatings rule (sections 749 through 754) applies to any person who supplies, sells, offers for sale, or manufactures, applies or solicits the application of any AIM coating on or after January 1, 2005 within the District. The rule does not apply to the following: (1) Any AIM coating that is sold or manufactured for use outside of the District, or for shipment to other manufacturers for reformulation or repackaging; (2) any aerosol coating product; or (3) any architectural coating that is sold in a container with a volume of one liter (1.057 quarts) or less. The rule sets specific VOC content limits, in grams per liter, for AIM coating categories with a compliance date of January 1, 2005. The rule contains administrative requirements for labeling and reporting as well as text methods for demonstrating compliance. The test methods used to test coatings must be the most current approved method at the time testing is performed.

III. Proposed Action

EPA is proposing to approve a revision to the District of Columbia SIP to establish a regulation for the control of emissions from AIM coatings (sections 749 through 754), and also section 799 containing the associated definitions for the AIM coatings rule. EPA is soliciting public comments on the issues discussed in this document. These comments will be considered before taking final action.

IV. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this proposed action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. 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)). This action merely proposes to approve state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this proposed 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.*). Because this rule proposes to approve 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 (Public Law 104–4). This proposed rule also does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it 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), because it merely proposes to approve 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. This proposed rule also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant.

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. As required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996), in issuing this proposed 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. EPA has complied with Executive Order 12630 (53 FR 8859, March 15, 1988) by examining the takings implications of the 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.

This proposed rule pertaining to the District of Columbia's AIM coatings 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.*).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

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

Dated: December 14, 2004.

Donald S. Welsh,

Regional Administrator, Region III.

[FR Doc. 04–28200 Filed 12–23–04; 8:45 am]

BILLING CODE 6560–50–P

NATIONAL TRANSPORTATION SAFETY BOARD

49 CFR Part 830

Notification and Reporting of Aircraft Accidents or Incidents and Overdue Aircraft, and Preservation of Aircraft Wreckage, Mail, Cargo, and Records

AGENCY: National Transportation Safety Board (NTSB).

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The NTSB is proposing to amend 49 *Code of Federal Regulations* (CFR) Part 830, ''Notification and Reporting of Aircraft Accidents or Incidents and Overdue Aircraft, and Preservation of Aircraft Wreckage, Mail, Cargo, and Records,'' to include certain events that are not currently covered by the regulations. This amendment is intended to enhance aviation safety by providing the NTSB direct notification of these events so that we can investigate and take corrective actions in a timely manner.

DATES: Submit comments on or before February 25, 2005.

ADDRESSES: Mail comments concerning this proposed rule to Deepak Joshi, Lead Aerospace Engineer (Structures), National Transportation Safety Board, Room 5235, 490 L'Enfant Plaza, SW., Washington, DC 20594.

FOR FURTHER INFORMATION CONTACT: Deepak Joshi, (202) 314–6348.

SUPPLEMENTARY INFORMATION:

Proposed Revision to § 830.2, Definitions

Part 830 requires that an event that results in substantial damage to a civil or public aircraft not operated by the Armed Forces or an intelligence agency be reported to the NTSB. We are proposing to modify the current definition of *substantial damage* in

§ 830.2 by removing reference to ground damage to helicopter rotor blades from the list of exclusions. We believe this revision is necessary because the main rotor blades of a helicopter are the lifting surfaces of the aircraft and are considered to be equivalent to the wings of an airplane. The tail rotor blades of a helicopter provide yaw control and are analogous to the rudder control surface of an airplane. Any damage to main or tail rotor blades—regardless of how it occurs—will likely adversely affect the performance of the aircraft and, if so, should be considered substantial damage. Therefore, we are proposing to bring events involving ground damage to main or tail rotor blades within the definition of an accident and clearly make them reportable events.

Proposed Revision to § 830.5, Immediate Notification

The NTSB is proposing that the following events be added to the current list of events requiring immediate NTSB notification:

(a) Failure of any internal turbine engine component that results in the escape of debris other than out the exhaust path.

Currently, § 830.5(a)(3) excludes the failure of compressor and turbine blades and vanes from required NTSB notification. Although the NTSB requires notification of such an event if one of these components escapes and results in substantial damage to the aircraft or an in-flight fire, we believe that the failure of any internal turbine engine component that results in the escape of debris other than out the exhaust path warrants immediate NTSB notification because the high energy levels of exiting fragments pose a significant safety hazard to the aircraft and its occupants. The importance of protecting the aircraft from high-energy engine fragments is reflected in the Federal Aviation Regulations (notably § 23.903(b)(1), and § 33.19), which explicitly require design precautions to minimize hazards to the aircraft in the event of an engine rotor failure. In addition, § 33.75 requires that the engine's cases provide for the containment of damage from rotor blade failure.

The NTSB will investigate engine failures when the debris escapes through a path other than the exhaust regardless of whether such failures result in substantial damage to the airplane because of the safety implications. However, to initiate an investigation in these instances, we have to rely on the Federal Aviation Administration (FAA), the operator, or the engine manufacturer to notify us. Such notifications are not required and often are not provided. If notification is provided, it may not be timely. Accordingly, the NTSB proposes that § 830.5(a)(3) be revised to require that the failure of any internal turbine engine component that results in the escape of debris other than out the exhaust path be a reportable event (debris that exits the exhaust path and causes substantial damage or serious injury is reportable as an accident under § 830.5(a)(6)).

(b) Structural failure of a propeller resulting in the release of all or a portion of a propeller blade from an aircraft, excluding release caused solely by ground contact.

The current notification regulations do not ensure that the failure of a propeller blade resulting in the release of all or a portion of a blade from an aircraft will be reported to the NTSB. In some cases, the NTSB has been notified of an accident in which a structural failure of a propeller blade was an initiating event but only because the failure resulted in substantial damage or reportable injuries as defined in Part 830. If no substantial aircraft damage and no reportable injuries to the occupants have occurred because of such a failure and an uneventful landing is made, there is no requirement to notify the NTSB. Although substantial damage or serious injury may not result from a propeller blade failure, there may be airworthiness and safety issues that should be addressed.

For example, on January 12, 2002, an ATR–42 experienced a propeller blade failure during takeoff. The pilot was able to shut down the engine and make an uneventful landing. No significant aircraft damage was noted and no other factors made it a reportable event under § 830.5. However, the NTSB became aware of the failure and issued two safety recommendations (A–03–13 and –14) relating to inspection and repair of propeller blades as a direct result of its investigation.

Title 14 CFR 25.905 requires that design precautions be taken to minimize, among other hazards, airplane structural damage in the event of a propeller blade failure. However, the FAA has granted waivers to this rule because the airplane's structure is unable to withstand the forces of unbalance should a propeller blade separate. On August 21, 1995, an Embraer EMB–120 crashed following the separation of a propeller blade that broke the engine's mounts. Because the propeller is a critical part of the powerplant operation on these airplanes, the NTSB believes that there are safety benefits to be derived from requiring that a structural failure of a propeller resulting in the release of all or a portion of a propeller blade from an aircraft be included as a reportable event.

(c) Loss of information from a majority of an aircraft's certified electronic primary displays (excluding momentary inaccuracy or flickering from display systems that are certified installations).

Generally, in aircraft where electronic displays are used as primary displays, six or seven displays provide flight and engine information to flight crews. If one or two displays go blank, redundancy features allow for the remaining displays to be reconfigured and the aircraft to continue safe flight. However, if a majority of the displays malfunction, flight safety may be compromised. The NTSB has investigated two events (occurring on November 6, 2001, and January 24, 2003) in which all primary flight information and all engine information were lost, leaving only standby flight instruments and no standby engine instruments available. The current use of electronic displays to present flight and engine information has resulted in the loss of primary flight information through failure mechanisms that did not exist when 49 CFR part 830 was originally written.

(d) Any Airborne Collision and Avoidance System (ACAS) resolution advisories (RA) issued when an aircraft is being operated on an instrument flight rules (IFR) flight plan.

Because ACAS resolution advisories do not occur until aircraft are in relatively close proximity, RAs indicate a potential hazard in the air traffic control (ATC) system. Requiring that ACAS resolution advisories involving aircraft operating under IFR be subject to NTSB notification would assist us in detecting, tracking, and investigating these hazardous occurrences. Knowing about these incidents soon after they occur would ensure that radar and voice data are available when needed to support investigations of ACAS incidents.

List of Subjects in 49 CFR Part 830

Aircraft accidents or incidents and overdue aircraft notification and reporting, Aviation safety, Reporting and record-keeping requirements.

For the reasons set forth in the preamble, the National Transportation Safety Board proposes to amend 49 CFR Part 830 as set forth below:

PART 830—NOTIFICATION AND REPORTING OF AIRCRAFT ACCIDENTS OR INCIDENTS AND OVERDUE AIRCRAFT, AND PRESERVATION OF AIRCRAFT WRECKAGE, MAIL, CARGO, AND RECORDS

1. The Authority citation for Part 830 is proposed to be revised to read as follows:

Authority: Independent Safety Board Act of 1974, as amended (49 U.S.C. 1101 *et seq.*); Federal Aviation Act of 1958, as amended (49 U.S.C. 40101 *et seq.*).

2. Section 830.2 is amended by revising the definition of ''substantial damage'' to read as follows:

§ 830.2 Definitions.

* * * * *

Substantial damage means damage or failure which adversely affects the structural strength, performance, or flight characteristics of the aircraft, and which would normally require major repair or replacement of the affected component. Engine failure or damage limited to an engine if only one engine fails or is damaged, bent fairings or cowling, dented skin, small punctured holes in the skin or fabric, ground damage to propeller blades, and damage to landing gear, wheels, tires, flaps, engine accessories, brakes, or wingtips are not considered *substantial damage* for the purpose of this part.

3. Section 830.5 is amended by revising the introductory paragraph, revising paragraphs (a), (3), (4), and (5), and adding paragraphs (a)(8), (9), and (10).

§ 830.5 Immediate notification.

The operator of any civil aircraft, or any public aircraft not operated by the Armed Forces or an intelligence agency of the United States, or any foreign aircraft shall immediately, and by the most expeditious means available, notify the nearest National Transportation Safety Board (Board) regional office [1] when:

(a) An aircraft accident or any of the following listed incidents occur:

* * * * *

(3) Failure of any internal turbine engine component that results in the escape of debris other than out the exhaust path;

(4) In-flight fire;

(5) Aircraft collide in flight;

* * * * *

(8) Structural failure of a propeller resulting in the release of all or a portion of a propeller blade from an aircraft, excluding release caused solely by ground contact;

(9) Loss of information from a majority of an aircraft's certified electronic primary displays (excluding momentary inaccuracy or flickering from display systems that are certified installations);

(10) Any Airborne Collision and Avoidance System (ACAS) resolution advisories (RA) issued when an aircraft is being operated on an instrument flight rules (IFR) flight plan.

* * * * *

Dated: December 16, 2004.

Vicky D'Onofrio,

Federal Register Liaison Officer.

[FR Doc. 04–28148 Filed 12–23–04; 8:45 am]

BILLING CODE 7533–01–M

[1] The Board regional offices are listed under U.S. Government in the telephone directories of the following cities: Anchorage, AK; Atlanta, GA; West Chicago, IL; Denver, CO; Arlington, TX; Gardena (Los Angeles), CA; Miami, FL; Parsippany, NJ (metropolitan New York City); Seattle, WA; and Washington, DC.

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition To List the Kern Brook Lamprey as Threatened or Endangered

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of petition finding.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce a 90-day finding on a petition to list the Kern brook lamprey (*Lampetra hubbsi*) under the Endangered Species Act of 1973, as amended. We find the petition and other information available did not present substantial scientific or commercial information indicating that listing the Kern brook lamprey may be warranted. Therefore, we will not be initiating a further status review in response to this petition. We ask the public to submit to us any new information that becomes available concerning the status of or threats to the species. This information will help us monitor and encourage the conservation of the species.

The Pacific lamprey (*Lampetra tridentata*), river lamprey (*Lampetra ayresi*), and western brook lamprey (*Lampetra richardsoni*) were also identified in the petition. However, these species are addressed in a separate finding, prepared by the Portland Fish and Wildlife Office in Oregon, and are not addressed in this notice.

DATES: The finding announced in this document was made December 27, 2004. Submit any new information concerning this species for our consideration at any time.

ADDRESSES: Comments, material, information, or questions concerning this petition and 90-day finding should be sent to the Field Supervisor, Sacramento Fish and Wildlife Office, U.S. Fish and Wildlife Service, 2800 Cottage Way, Room W–2605, Sacramento, CA 95825–1846. The petition and supporting information are available for public inspection, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Wayne White, Field Supervisor, Sacramento Fish and Wildlife Office (see **ADDRESSES** above) (telephone 916/414–6600; facsimile 916/414–6712).

SUPPLEMENTARY INFORMATION:

Background

Section 4(b)(3)(A) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) (Act), requires that we make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information indicating that the petitioned action may be warranted. We are to base this finding on all information available to us at the time we make the finding. To the maximum extent practicable, we are to make this finding within 90 days of our receipt of the petition, and publish our notice of this finding promptly in the **Federal Register**.

Our standard for substantial information within the Code of Federal Regulations (CFR) with regard to a 90-day petition finding is ''that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted'' (50 CFR 424.14(b)). If we find that substantial information was presented, we are required to promptly commence a review of the status of the species, if one has not already been initiated, under our internal candidate assessment process.

In making this finding, we relied on information provided by the petitioners and evaluated that information in accordance with 50 CFR 424.14(b). This finding summarizes information included in the petition and information available to us at the time of the petition review. Our process of coming to a 90-day finding under section 4(b)(3)(A) of the Act and section 424.14(b) of our regulations is limited to a determination of whether the information in the

petition meets the ''substantial information'' threshold.

We do not conduct additional research at this point, nor do we subject the petition to rigorous critical review. Rather, as the Act and regulations contemplate, in coming to a 90-day finding, we accept the petitioner's sources and characterizations of the information unless we have specific information to the contrary.

Our finding considers whether the petition states a reasonable case for listing on its face. Thus, our finding expresses no view as to the ultimate issue of whether the species should be listed. We reach a conclusion on that issue only after a more thorough review of the species' status. In that review, which will take approximately 9 more months, we will perform a rigorous, critical analysis of the best available scientific and commercial information, not just the information in the petition. We will ensure that the data used to make our determination as to the status of the species is consistent with the Act and Information Quality Act.

On January 27, 2003, we received a petition, dated January 23, 2003, from the Siskiyou Regional Education Project and 10 other organizations, requesting we list the Pacific lamprey, western brook lamprey, river lamprey, and Kern brook lamprey in Oregon, Washington, Idaho, and California. Further, the petitioners requested designation of critical habitat for the range of the species or for distinct population segments comprised of one or more major river basins. The petition clearly identified itself as such and contained the names, addresses, and signatures of the petitioning organizations' representatives. The petition included the following information for each lamprey species: life history information; population status and local distribution; destruction, modification, or curtailment of habitat or range; other natural or manmade factors affecting the species' continued existence; predation; overutilization for commercial or recreational purposes; inadequacy of existing mechanisms; and a conclusion for each lamprey species.

In response to the petitioners' requests to list these species, we sent a letter to the petitioners dated March 12, 2003, explaining that we would not be able to address their petition until fiscal year 2004. The reason for this delay was that existing court orders and settlement agreements for other listing actions required nearly all of our listing funding for fiscal year 2004. In March 2004, we received a 60-day notice of intent to sue, and on May 26, 2004, received a complaint regarding our failure to carry out the 90-day and 12-month findings on the status of the four species of lamprey. On November 23, 2004, we reached an agreement with the plaintiffs to complete the 90-day finding by December 20, 2004, and to complete if applicable, the 12-month finding by November 15, 2005.

Species Information

The Kern brook lamprey adult has gray-brown sides and dorsal region, a white ventral area, unpigmented dorsal fins, and some black pigmentation restricted to the area around the notochord (the cartilaginous rod that runs along the back) in the caudal fin (Vladykov and Kott 1976). The Kern brook lamprey has poorly developed plates (teeth) on its oral disc (mouth). In adults, the supraoral lamina plate (the thin plates above the oral opening) typically has two cusps (projections on the teeth) (Moyle et al. 1995) with three or four (usually four) lateral plates on each side of the oral disc (Moyle 2002). In addition, this species has 9 to 12 posterial teeth (average 10.3) (Vladykov and Kott 1976). The Kern brook lamprey has only three velar tentacles, which prevent undesirable objects from entering the digestive cavity and are present in the junction of the pharynx and esophagus. In other lamprey species the number of velar tentacles varies from 5 to 18 (Vladykov and Kott 1976). The Kern brook lamprey has 51 to 57 trunk myomeres (Moyle 2002), which are the ''blocks'' of muscle mass along the body (Moyle et al. 1995). Males have a longer urogenital papilla, a small conical tube through which gametes are expelled, located just ahead of the anal fin and usually visible only during, or shortly before, spawning (Vlaydykov and Kott 1984). Only the females develop an anal finlike fold close to spawning time, and can be distinguished from the males based on this morphological characteristic (Vladykov and Kott 1984).

Identification of the Kern brook lamprey can be problematic. While definitive identifications of the Kern brook lamprey can be made through genetic analysis (Docker et al. 1999), identifications are more commonly made by analyzing adult morphological characteristics, such as tooth patterns on the oral disc (Vladykov and Kott 1976). When utilizing morphological characteristics to determine a lamprey species, adults must be analyzed because the juveniles, or ammocoetes, of the different lamprey species are not readily distinguishable from each other (Kostow 2002). For example, the number of trunk myomeres is frequently counted to determine species. However, Kern brook lamprey ammocoetes have 51 to 57 trunk myomeres, while the western brook lamprey has 52 to 67 (52 to 58 in California populations), making these two species indistinguishable using this morphological characteristic (Moyle 2002). Identification of lamprey species is made more difficult because lamprey species are in the adult stage for a relatively short duration of their life. Based on the life history of other lamprey species, the Kern brook lamprey spends approximately the first five years of its life as an ammocoete, and approximately one year as an adult, which reduces the opportunity to make conclusive identifications during the adult stage. In addition, misidentifications may also occur between parasitic and brook lamprey species at early stages of metamorphosis because they both have eyes and the development of the oral discs are still incomplete, making these characteristics unreliable until further development (Kostow 2002; Brian Beale, California Department of Fish and Game (CDFG), pers. comm. 2004).

Range and Distribution

The Kern brook lamprey is endemic to the east side of the San Joaquin Valley and found only in the San Joaquin River drainage in California (Vladykov and Kott 1976). This species has been reported in the Friant-Kern Canal and Merced, San Joaquin, Kings, and Kaweah Rivers (Moyle 2002). Brown and Moyle (1993) made a considerable effort to find Kern brook lamprey in the Kern, Tule, Tuolumne, and Stanislaus Rivers, which are tributaries in the same geographic region as those with Kern brook lamprey, but were unsuccessful in capturing the species.

This species was first discovered by Vladykov and Kott in February 1972 in the Friant-Kern Canal, east of Delano, Kern County (Vladykov and Kott 1976). The Friant-Kern Canal is connected to Millerton Reservoir and the upper San Joaquin River through an extensive irrigation system (Wang 1986). This canal also connects the Kern River with the San Joaquin River, which led Vladykov and Kott (1976) to believe that this species originated in the Kern River system. The canal is not considered typical habitat for the Kern brook lamprey because it is concrete lined and flows are greater than the rivers where this species is found (Vladykov and Kott 1976). In 1988, ammocoetes and adults were collected by CDFG from the siphons of the Friant-Kern Canal when they were poisoned with rotenone as part of an effort to eradicate white bass (Morone chrysops) from the system (Brown and Moyle 1993; Moyle et al.

1995). The Kern brook lamprey still occurs in the Friant-Kern Canal, but spawning habitat is not available within the canal, so ammocoetes that enter the canal do not reproduce in the canal itself (Moyle 2002).

Between February and March 1977, ammocoetes and adult Kern brook lamprey were collected from the Merced River, below McClure Reservoir, near Merced Falls (Vladykov and Kott 1984). Brown and Moyle (1993) also collected Kern brook lamprey ammocoetes from the Merced River during surveys from 1985 through 1987. Recently, Kern brook lamprey ammocoetes have been incidentally reported in the Merced River during rotary screw trap salmonid surveys (Tim Heyne, CDFG, pers. comm. 2004; Dave Vogel, Natural Resource Scientists, pers. comm. 2004).

Wang (1986) collected ammocoetes between July and September of 1979 in the upper San Joaquin River downstream of Kerckoff Dam to the junction with Millerton Lake. The trunk myomeres count (53 to 58) of those specimens fit the description for ammocoetes of either the western brook lamprey or Kern brook lamprey. No adult specimens of either species were captured, but these ammocoetes were likely Kern brook lamprey, based on their low number of trunk myomeres (Brown and Moyle 1993; Moyle et al. 1995; Moyle 2002). Brown and Moyle (1993) also collected Kern brook lamprey ammocoetes from the San Joaquin River below Friant Dam during surveys from 1985 through 1987. We are not aware of recent surveys for this species on the San Joaquin River.

Brown and Moyle (1993) collected Kern brook lamprey during surveys on the Kings River above and below Pine Flat Dam. The Kings River is still known to support Kern brook lamprey. The Kings River Conservation District has performed surveys for trout species from 1990 to the present and has found Kern brook lamprey adults and ammocoetes both above and below Pine Flat Reservoir during all years surveyed (Jeff Halstead, Kings River Conservation District, pers. comm. 2004).

Brown and Moyle (1993) surveyed fish fauna in the lower Kaweah River, downstream of the Kaweah Reservoir, and collected Kern brook lamprey ammocoetes from 1985 through 1986. We are not aware of recent surveys on the Kaweah River for this species.

Habitat

The Kern brook lamprey is known to occur in four of the San Joaquin River tributaries emerging from the west side of the Sierra Nevada mountains and has been observed at elevations of 100 to 1,000 feet (30 to 305 meters) (Moyle et al. 1995; Moyle 2002). This species commonly occupies sand, gravel, and rubble substrates (Moyle et al. 1995). It has been reported at stream depths of 12 to 43 inches (in) (30 to 110 centimeters (cm)) (Moyle 2002). Adults seek riffles with gravel for spawning and rubble for cover, while ammocoetes are typically found in sandy-bottomed backwaters, shallow river edges, and shallow pools, and along edges of runs where there are low stream velocities, where they remain buried with their heads protruding above the substrate for feeding (Moyle et al. 1995).

Reproduction and Growth

Little information regarding the life history of the Kern brook lamprey is available, but it is presumably similar to the western brook lamprey (Moyle 2002). Adults are non-predatory, and feeding is confined to the ammocoete stage (Moyle 2002). Because recently transformed Kern brook lamprey adults have been collected in the spring, it is likely that Kern brook lamprey undergo metamorphosis in the fall (Moyle et al. 1995; Moyle 2002). During metamorphosis, the Kern brook lamprey develops eyes and more distinctive fins, and the oral disc enlarges (Kostow 2002). As with other lamprey species, the adults do not eat and they shrink in size following metamorphosis (Vladykov and Kott 1976). Adults are 3 to 5.5 in (8 to 14 cm) and ammocoetes are 4 to 6 in (10 to 15 cm) in length (Moyle 2002).

Based on the life history of western brook lamprey, it is likely that the Kern brook lamprey ammocoetes overwinter in burrows while they undergo metamorphosis in mud and sand substrates, emerge in the spring as sexually mature adults after completing metamorphosis, and then migrate to spawning areas (Moyle 2002). Adults build nests in the gravel-bottomed substrate, spawn, and then die (Moyle 2002). The eggs are sticky and dense, and they are deposited in nests prepared by spawning adults. The eggs are then buried by the adults beneath sand and gravel. Based on the life history of the western brook lamprey (Kostow 2002), the newly hatched larva of the Kern brook lamprey likely spend another week to a month in the nest. The ammocoetes then emerge and are carried downstream to mud and sand-bottomed backwaters where they burrow into stream sediments (Moyle 2002). If life history is comparable to other brook lamprey, Kern brook lamprey live for 4 to 5 years as ammocoetes (Moyle et al. 1995) and would therefore live up to 6 years or more after completing metamorphosis and spawning as adults. When encountered, the ammocoetes are usually locally abundant (Brown and Moyle 1993) and can be found in sand and mud substrates, where they remain buried with their heads protruding above the substrate and feeding by filtering diatoms and other micro-organisms from the water (Moyle 1995).

Discussion of Listing Factors

Section 4 of the Act and its implementing regulations (50 CFR 424) set forth the procedures for adding species to the Federal list of endangered and threatened species. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1) of the Act. In the following discussion, we respond to each of the major assertions made in the petition, as well as our analysis of other information in our files, organized by the Act's listing factors. The five listing factors include: (1) The present threatened destruction, modification, or curtailment of its habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease and predation; (4) the inadequacy of existing regulatory mechanisms; and (5) other natural or manmade factors affecting its continued existence. The petition provided specific information regarding the Kern brook lamprey in its discussion of poisoning, water diversions, and channelization, under Factor A. We have determined that the threat of poisoning would be more appropriately addressed under Factor E, as a natural or manmade factor affecting the continued existence of the species. The petition also specifically addressed the Kern brook lamprey in its discussion of the inadequacy of regulatory mechanisms to manage dam operations within the Kern brook lamprey's range, under Factor D. These are the only threats for which the petition specifically addresses the Kern brook lamprey, as the petition primarily focuses on the Pacific lamprey. This 90-day finding is not a status assessment and does constitute a status review under the Act.

A. The Present or Threatened Destruction, Modification, or Curtailment of its Habitat or Range

The petition discusses the following threats under Factor A: (1) Artificial barriers; (2) road culverts; (3) water diversions; (4) poisoning; (5) dredging; (6) streambed scouring and degradation; (7) channelization; and (8) ocean conditions. The petition provided

specific information regarding the Kern brook lamprey in its discussions of poisoning, water diversions, and channelization. For the threats described under Factor A, the petition states that all of the factors affecting the Pacific lamprey would also affect the Kern brook lamprey, so we have analyzed all of the factors listed under Factor A, except for ocean conditions, which does not apply to the Kern brook lamprey because it is not an anadromous (migrates to the ocean and spawns in freshwater tributaries) species and the threat of poisoning which was addressed under Factor E.

Artificial Barriers and Road Culverts

Information provided in the petition: The petition lists dams, culverts, or other artificial barriers as a threat to the Pacific lamprey. The petition did not provide information regarding the effects that dams, culverts, or other artificial barriers may have on the Kern brook lamprey, including the extent to which artificial barriers may threaten population numbers or distribution of the Kern brook lamprey.

Analysis of the information provided in the petition and information in our files: Artificial barriers may prevent upstream dispersal for adults because lampreys are not strong swimmers, are unable to jump, and their movement is determined by flow velocity (Kostow 2002). It is likely that if artificial barriers are present within the range of the Kern brook lamprey, and if encountered, the Kern brook lamprey would not likely be able to negotiate upstream passage around the barriers. However, we are not aware of information describing the number, distribution, or location of dams or artificial barriers, and therefore, the overall extent to which these artificial structures may affect Kern brook lamprey movement. Therefore, we are unable to determine if dams, culverts, or other artificial barriers have caused a reduction in the range or population size of the species.

Water Diversions

Information provided in the petition: The petition stated that water diversions pose a threat to the Kern brook lamprey. The petition supports this assertion by stating that the siphons of the Friant-Kern Canal mimic habitat preferred by Kern brook lamprey ammocoetes, and the species is not able to successfully reproduce in the canal due to a lack of spawning habitat.

Analysis of information provided in the petition and information in our files: We are unaware of the extent or number of Kern brook lamprey which may be lost as a result of ammocoetes entering into the Friant-Kern Canal system through the siphons. Therefore, we are unable to determine if ammocoetes entering the siphons has caused a substantial reduction in Kern brook lamprey population numbers.

Information in our files does indicate that the loss of habitat through water diversions for irrigation may have an effect on Kern brook lamprey population numbers. Most of the water that once flowed into the San Joaquin River has been diverted for irrigation. The limited remaining water is being used for human population growth in the region, especially in the vicinity of the cities of Modesto, Fresno, and Bakersfield (Brown and Moyle 1993). This reduction in stream flow may result in a loss in both the range and numbers of this species. However, we are unaware of information quantifying the loss of habitat that has occurred within the range of the Kern brook lamprey, or to what degree this threat has reduced the range or population size of this species. In addition, we are not aware of information describing how future population growth in those cities will threaten the population size and range of the Kern brook lamprey.

Dredging

Information provided in the petition: The petition provided information on threats from dredging to lamprey species in general, and cited specific examples from Oregon. Kern brook lamprey are not addressed in this discussion. The petition indicates that most lamprey die after passing through dredges (Kostow 2002).

Analysis of information provided in the petition and information in our files: We are not aware of information detailing the extent that dredging activities occur in streams within the range of the Kern brook lamprey, or specific information regarding the threats that these factors pose to the continued survival of the Kern brook lamprey. Therefore, it is unknown at this time if dredging activities have significantly affected the population status or distribution of the Kern brook lamprey, or are likely to do so in the future.

Streambed Scouring and Degradation

Information provided in the petition: The petition's discussion of streamed scouring did not specifically address the Kern brook lamprey, but discussed logging practices that scour streams to bedrock, and the effects that these practices have on lamprey species in general. The petition focused on logging practices in Oregon, and cited examples on the central coast of Oregon and in the Umpqua River basin.

Analysis of information provided in the petition and information in our files: We are not aware of information regarding the extent to which logging practices that result in streambed scouring occur in streams within the range of the Kern brook lamprey, or if these activities occur at all. In addition, there is a lack of information determining whether these activities, if they occur, have caused a substantial reduction in population size or range for the species. Therefore, it is unknown at this time if logging practices that result in streambed scouring have threatened or have the potential to threaten in the future the population status or distribution of the Kern brook lamprey.

Stream Channelization and Destruction of Riparian Vegetation

Information provided by the petition: Similar to the petition's discussion of streambed scouring, the petition's discussion of stream channelization and destruction of riparian habitat did not specifically address the Kern brook lamprey, but discussed the effects that many activities, including stream channelization, floodplain filling, and destruction of riparian habitat, have on lamprey species in general. According to the petition, these activities are widespread in low gradient stream areas favored by lamprey species. The petition indicated that these activities result in water temperatures that are too warm for lamprey species, a loss in depositional areas favored by larval lamprey, and a loss in wetlands, side channels, back eddies, and beaver ponds. The petition did not provide information specific to the Kern brook lamprey regarding these threats, or information describing to what extent these activities have occurred or are likely to occur within the range of the Kern brook lamprey.

Analysis of information provided in the petition and information in our files: Development along the west side of the Sierra Nevada foothills, where the Kern brook lamprey occurs, has accelerated greatly, which has resulted in changes in land and water use (Moyle and Nichols 1973, 1974). There is a lack of information determining to what extent these activities have reduced the population size or range of the species, and if activities that cause stream channelization and riparian degradation have significantly affected the population status or distribution of the Kern brook lamprey, or is likely to do so in the future. Without this information we are unable to determine that stream channelization and

degradation of riparian habitat threaten to substantially reduce the population or range of the species.

B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

We concur with the petitioner's opinion that the Kern brook lamprey is not known to be harvested for commercial or recreational purposes. The Service did not locate information regarding the importance of the Kern brook lamprey to Tribes in the range of this species, and this information was not provided in the petition.

C. Disease and Predation

Information provided in the petition: The petitioners stated that the Pacific lamprey, river lamprey, western brook lamprey, and Kern brook lamprey are all vulnerable to predation by non-native fish species, especially in California, where conditions are favorable for predator fish from eastern states. The petition did not provide any information regarding the threats of disease to the Kern brook lamprey.

Analysis of information provided in the petition and information in our files: Healthy populations of native fishes are in decline throughout California, in large part because of an increase in non-native predators (Moyle and Nichols 1973, 1974). Human activities in the lower elevation foothills of the San Joaquin drainage tributaries have led to an increase in stream habitat alteration. These alterations have mostly been in the form of water impoundment, reduced stream flows, and siltation, which creates habitat that is ideal for predatory non-native fish (Moyle and Nichols 1973, 1974; Brown and Moyle 1993). However, we are unaware of information describing the extent to which non-native fish species have affected Kern brook lamprey population size or their range, and this information was not provided in the petition. It is unknown at this time if non-native fish species have caused a substantial reduction in population size or range of the species or are likely to do so in the future.

The petition did not provide information regarding the threat that disease may pose to the Kern brook lamprey, and we are not aware of any diseases at this time that threaten this species.

D. The Inadequacy of Existing Regulatory Mechanisms

The petition stated that State and Federal agencies have not adequately regulated dam building, logging, mining, water withdrawals, road building, and construction activities, all of which have led to a decline in population numbers and range in lamprey species. The petition divided its discussion of regulatory mechanisms into the following categories: water law and flow regulations, passage at dams and culverts, harvest and escapement goals, private and Federal logging, and mining and dredging activities. The only category for which the petition specifically addresses the Kern brook lamprey is water law and stream flow regulation.

Water Law and Stream Flow Regulation

Information in the petition: The petition described various threats posed by dams, water irrigation, and fish screens, and stated that State agencies have not been able to ensure that aquatic species such as lamprey have adequate flows for migration and long freshwater rearing periods. According to the petition, flows and habitats of lower reaches of rivers of the San Joaquin River drainage are not managed for the needs of Kern brook lamprey.

Analysis of information provided in the petition and information in our files: There are dams on all of the primary tributaries of the San Joaquin River drainage. All collections of Kern brook lamprey have been below the lowermost major dams, with the exception of the Kings River population, which is found above Pine Flat Reservoir. These dams may cause fluctuations or sudden reductions in stream flows, which may isolate or kill ammocoetes (Moyle 2002). According to Moyle (2002), if the Kern brook lamprey is going to persist, flows and habitats of lower reaches of rivers of the San Joaquin drainage should be managed with the consideration of the species' biological requirements. However, at this time we are not aware of how the operations of the four major dams are affecting the Kern brook lamprey, and if the operations of these dams could substantially reduce or extirpate the species. In addition, we do not have information at this time regarding the specific spatial distribution of the Kern brook lamprey, and how changes in stream flows affect this species. Without this information, it is speculative to state that a single action, such as a rapid drawdown in stream flows, could cause a significant reduction in the range or population of the species. While it is possible that Kern brook lamprey populations have been reduced by the management of stream flows from these dams, the petition provides no evidence that the operation of these dams has led to a significant decline in either population sizes or range of the species, or is likely to do so in the future.

Through diverting nearly all of the San Joaquin River's flow, Friant Dam's stream flow management on the San Joaquin River has likely led to a reduction in native fishes (*Natural Resource Defense Council, et al.* v. *Kirk Rodgers* (Case No. CIV–S–88–1658 LKK/GGH)). In this case, the court found that this absence of water in the San Joaquin River has led to a reduction in many native fish, including the Pacific lamprey and western brook lamprey. While the court did not specifically list the Kern brook lamprey as a native fish affected by the dam, it is likely to be affected in the same manner as the other lamprey species. Therefore, Friant Dam may have caused a reduction in the range and distribution of the Kern brook lamprey because of a lack of stream flows, but there is no information available to us or provided in the petition that quantifies a reduction in the range and distribution of this species, if any.

Passage at Dams and Culverts

Information in the petition: The petition provided information regarding lamprey species in general, and did not specifically address the Kern brook lamprey. The petition stated that current laws and regulations do not require fish ladders, fish screens, and road culverts to effectively pass adult lamprey species upstream or provide for safe passage of ammocoetes and young adults downstream.

Analysis of information provided in the petition and information in our files: The petition reiterates the threats discussed in its earlier discussion of artificial barriers under Factor A. Please refer to the discussion of Artificial Barriers, under Factor A described above. We are not aware of, and the petition did not provide information that indicates that a lack of regulatory mechanisms on fish passage has significantly reduced Kern brook lamprey population numbers and distribution. Because of this lack of information, we are unable to determine that the current regulatory mechanisms have led to a significant reduction in the range and population size of the species.

Harvest, Escapement Goals

Information in the petition: The petition focused on the harvest and escapement goals for the Pacific lamprey, and did not provide information that specifically addressed the Kern brook lamprey. The petition stated that the current laws and regulations pertaining to harvest and escapement goals are not adequate to

protect lamprey species. The petition also stated that the Kern brook lamprey is not known to be harvested for commercial or recreational purposes in its discussion under Factor B.

Analysis of information provided in the petition and information in our files: We concur with the petitioner's opinion that the Kern brook lamprey is not known to be harvested for commercial or recreational purposes.

Logging Activities

Information in the petition: The petition did not provide information that specifically addressed the Kern brook lamprey, and focuses on Pacific lamprey in Oregon. The petition discusses the Northwest Forest Plan and the Oregon Forest Protection Act, and cites examples from rivers in Oregon, including the Smith River, Illinois River, and Umpqua River. The petition indicated that the current laws and regulations do not adequately protect lamprey species from logging activities.

Analysis of information provided in the petition and informatin in our files: We are not aware of information that indicates that a lack of regulatory mechanisms on logging activities has substantially reduced Kern brook lamprey population numbers and distribution. We also do not have information regarding the extent that logging activities affect the Kern brook lamprey, both within its range and upstream of areas where it is known to occur. Because of this lack of information, we are unable to determine that the current regulatory mechanisms on logging activities have led to a reduction in the range and population size of the species, or that a reduction in the range and population of this species is likely to occur in the future.

Mining and Dredging Activities

Information in the petition: The petition reiterated the threats described in its discussion of dredging under Factor A, and indicated that the current regulatory mechanisms do not adequately protect lamprey species from mining and dredging activities. The petition did not provide any information specific to the Kern brook lamprey, and focuses on lamprey species in general.

Analysis of information provided in the petition and information in our files: We are not aware of information that indicates that a lack of regulatory mechanisms on mining and dredging activities has significantly reduced Kern brook lamprey population numbers and distribution. We also do not have information regarding the extent that mining and dredging activities occur within the range of the Kern brook lamprey. Because of this lack of information, we are unable to determine that the current regulatory mechanisms on mining and dredging activities have led to a reduction in the range and population size of the species, or that significant reductions in the range and distribution of Kern brook lamprey is likely to occur in the future.

E. Other Natural or Manmade Factors Affecting Continued Existence

According to the petitioners, a lack of monitoring data, lack of taxonomic determinations between lamprey species, and vulnerability to high density lamprey concentration areas are other threats to the Kern brook lamprey. We have also addressed the threat of poisoning under Factor E.

Lack of Monitoring Data and Lack of Taxonomic Determinations

Information provided in the petition: The petition indicated that data gathering by State and Federal agencies is inadequate to determine population trends and identify necessary conservation measures, and that most monitoring is done in conjunction with salmonid monitoring. During the petition's discussion of the need for more monitoring data and taxonomic determinations, the petition did not address the Kern brook lamprey specifically, and focuses on lamprey species in Oregon.

Analysis of information provided in the petition and information in our files: There is a need for taxonomic clarity for all lamprey species, as well as a need for more complete monitoring data (Kostow 2002; P. Moyle, pers. comm. 2004); the same could be said for thousands of other species. However, lack of monitoring data and taxonomic clarifications, in themselves, do not pose a threat to the continued existence of the Kern brook lamprey.

Vulnerability of High Density Areas

Information provided in the petition: The Kern brook lamprey is not specifically addressed in this discussion. The petition describes the tendency of lamprey species to be locally dense in certain areas. According to the petition, a local habitat disturbance, such as a chemical spill or dredging operation, in an area that is densely populated by lamprey species, could cause a major reduction in population numbers.

Analysis of information provided in the petition and information in our files: According to Moyle (2002), Kern brook lamprey ammocoetes are locally abundant when found. Because of this species' propensity to congregate in high densities in particular locations, they may be vulnerable to localized habitat disturbances (Kostow 2002). Furthermore, if a local population of Kern brook lamprey is extirpated and the species is unable to recolonize the area, the range and distribution of the species would be reduced (Brown and Moyle 1993). If enough local extirpations occur, this could lead to the eventual extinction of the species (Vladykov and Kott 1976, 1984). However, we do not have enough information at this time to conclude that the Kern brook lamprey is at risk of substantial reductions in population or range because of it's propensity to congregate in high densities. Based on the information available to us, it is speculative at this time to state that a single event, such as a chemical spill or dredging operation, could cause the extirpation of the species from an entire river system, or significantly reduce the population or range of the species.

The petition did not provide, and we are not aware of information on the precise locations inhabited by Kern brook lamprey ammocoetes. We also do not have information regarding the locations of activities such as dredging, or activities that could cause a poisoning event, in relation to the areas where Kern brook lamprey are known to congregate. In addition, we do not have information detailing how the operations of the four major dams are affecting the Kern brook lamprey, and if the operations of these dams could substantially reduce or extirpate the species (see Factor A above), and if the operations of these dams could substantially reduce or extirpate the species. Without this information, it is speculative to state that a single action, such as a chemical spill, rapid drawdown in stream flows, or a dredging operation, could cause the extirpation of the species from an entire river system or significantly reduce the Kern brook lamprey's population size or range.

Poisoning

Information provided in the petition: Poisoning is described in the petition as a major threat to the Kern brook lamprey. The petition cites the only known occurrence of poisoning that resulted in the deaths of Kern brook lamprey, when ammocoetes and adults were collected by CDFG from the siphons of the Friant-Kern Canal when they were poisoned with rotenone as part of an effort to eradicate white bass from the canal system in 1988 (Brown and Moyle 1993; Moyle et al. 1995).

Analysis of information provided in the petition and information in our files: The use of rotenone in the Friant-Kern Canal has not occurred since 1988, and there are no future plans for this practice to occur again (Peter Moyle, University of California-Davis, pers. comm. 2004). Other than this one-time poisoning event, the petition did not provide any information regarding the use of chemicals or poisons within close proximity to known occurrences of the Kern brook lamprey. Because of a lack of information regarding activities that could cause a poisoning event within the range of the Kern brook lamprey, as well as a lack of information on the spatial distribution patterns of the species, it is speculative to state that a single event, such as a chemical spill, could cause the extirpation of the species from an entire river system, or significantly reduce the population or range of the species.

Summary

The petition to list the four lamprey species primarily provides information about the Pacific lamprey, and information specific to the Kern brook lamprey is lacking. The petition did not present substantial information that indicates rangewide declines, a reduction in population numbers, or threats to existing Kern brook lamprey populations that place them in danger of extinction now or in the foreseeable future.

According to the petition, many of the threats to the Pacific lamprey would also apply to the Kern brook lamprey. Threats to the Pacific lamprey, as described by the petition, included dams and artificial barriers, passage at road culverts, dredging, streambed scouring and degradation from logging activities, poisoning, water diversions, channelization, and ocean conditions. Of these reported threats, there are only four for which the petition specifically addresses the Kern brook lamprey (poisoning, water diversions, channelization, and lack of regulatory mechanisms regarding water law and stream flow regulation). While these threats may affect populations of this species, the information provided in the petition was speculative in nature and not substantiated. The petition did not provide specific information to document the degree that the species has been affected by these threats, or if these threats have led to a significant decline in the range or distribution of the species or are likely to do so in the future.

There is a lack of survey information supporting reliable population and distribution estimates for this recently described species. The petition did not provide historical or current data to compare abundance of the Kern brook lamprey in any of the rivers where it is known to occur. We are not aware of quantitative documentation from surveys that shows declines in Kern brook lamprey populations or a reduction in range. In addition, the surveys that we are aware of which have recorded Kern brook lamprey, did not use a consistent level of effort in collecting Kern brook lamprey, occurred over periods of time that were too short in duration to establish trends, or used data that may be based on ammocoete counts where the surveyed species, whether the Kern brook lamprey, western brook lamprey, or Pacific lamprey were misidentified. Therefore, population and distribution trends at this time are not known.

All of the known occurrences of Kern brook lamprey, with the exception of the population above Pine Flat Reservoir on the Kings River, are below major dams. The petition stated that these dams are not managed to meet the biological needs of the Kern brook lamprey. However, the petition did not provide information on how stream flows below the four dams are managed and how these management practices affect the population status and distribution of the Kern brook lamprey. The petition provides no evidence that the operation of these dams has led to a significant decline in either population sizes or range of the species, or is likely to do so in the future.

Finding

We have reviewed the petition and supporting literature, as well as other literature and information available in our files. The petition and other information available did not present substantial information that indicates rangewide declines, a substantial reduction in population numbers, or substantiated threats to existing populations that rise to the level that indicate the Kern brook lamprey is either in imminent danger of extinction, or likely to become so in the foreseeable future.

We will continue to monitor available information on the species, and maintain the option of initiating listing procedures in the future should such an action become necessary. We ask the public to submit to us any new information that becomes available concerning the status of this species. If you wish to provide materials concerning this finding, submit them to the Field Supervisor, Sacramento Fish and Wildlife Office (see **ADDRESSES** section above).

Literature Cited

A complete list of all references cited herein is available, upon request, from the Sacramento Fish and Wildlife Office (see **ADDRESSES** section above).

Author

The primary author of this notice is the Sacramento Fish and Wildlife Office, U.S. Fish and Wildlife Service (see **ADDRESSES** section above).

Authority: The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: December 20, 2004.

Marshall P. Jones, Jr.,

Deputy Director, Fish and Wildlife Service.

[FR Doc. 04–28162 Filed 12–23–04; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition To List Three Species of Lampreys as Threatened or Endangered

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of petition finding.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce a 90-day finding on a petition to list three species of lampreys: Pacific lamprey (*Lampetra tridentata*), western brook lamprey (*Lampetra richardsoni*), and river lamprey (*Lampetra ayresii*), as threatened or endangered under the Endangered Species Act of 1973, as amended (Act). We find that the petition and additional information in our files does not present substantial scientific or commercial information indicating that listing these species may be warranted. We will not be initiating a further status review in response to this petition. We ask the public to submit to us any new information that becomes available concerning the status of or threats to the species. This information will help us monitor and encourage the conservation of these species.

The Kern brook lamprey (*Lampetra hubbsi*) was also identified in the petition. However, this species is being addressed in a separate finding, which is being prepared by the Sacramento Fish and Wildlife Office in California, and is not addressed in this notice.

DATES: The finding announced in this document was made on December 27,

2004. You may submit new information concerning this species for our consideration at any time.

ADDRESSES: Data, information, or questions concerning this petition or this 90-day finding should be sent to Kemper McMaster, State Supervisor, Oregon Fish and Wildlife Office, U.S. Fish and Wildlife Service, 2600 SE. 98th Avenue, Suite 100, Portland, OR 97266. The petition finding and supporting information are available for public inspection, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Bianca Streif, Lamprey Coordinator, Oregon Fish and Wildlife Office (see **ADDRESSES** section above) (telephone 503/231–6179; facsimile 503/231–6195).

SUPPLEMENTARY INFORMATION:

Background

Section 4(b)(3)(A) of the Act requires that we make a finding on whether a petition to list, delist, or reclassify a species presents substantial information to indicate that the petitioned action may be warranted. To the maximum extent practicable, this finding is to be made within 90 days of receipt of the petition, and the finding is to be published promptly in the **Federal Register**.

This finding summarizes information included in the petition and information available to us at the time of the petition review. Our review of a 90-day finding under section 4(b)(3)(A) of the Act and section 424.14(b) of our regulations is limited to a determination of whether the information in the petition meets the ''substantial information'' threshold. Our standard for substantial information within the Code of Federal Regulations (CFR) with regard to a 90-day listing petition finding is ''that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted'' (50 CFR 424.14(b)).

We do not conduct additional research at this point, nor do we subject the petition to rigorous critical review. Rather, at the 90-day finding stage, we accept the petitioner's sources and characterizations of the information, to the extent that they appear to be based on accepted scientific principles (such as citing published and peer reviewed articles, or studies done in accordance with valid methodologies), unless we have specific information to the contrary.

On January 27, 2003, we received the petition, dated January 23, 2003, from the Siskiyou Regional Education Project and 10 other organizations, requesting we list the Pacific lamprey, western brook lamprey, river lamprey, and Kern brook lamprey in Oregon, Washington, Idaho, and California. The petitioners also requested designation of critical habitat for the range of the species or for distinct population segments (DPSs) comprised of one or more major river basins. The petition identified itself as such and contained the names, addresses, and signatures of the petitioning organizations' representative. The petition provided information relating to one or more of the petitioned lamprey species, including: life history information; population status and local distribution; destruction, modification, or curtailment of habitat or range; other natural or manmade factors affecting the species' continued existence; predation; overutilization for commercial or recreational purposes; inadequacy of existing mechanisms; and a conclusion for each lamprey species.

In response to the petition to list these species, we sent a letter to the petitioners dated March 12, 2003, stating that we would not be able to address their petition before fiscal year 2004, which was to begin October 1, 2003. The reason for this delay was that complying with existing court orders and settlement agreements for other listing actions required nearly all of our listing funding for fiscal year 2004. In March 2004, we received a 60-day notice of intent to sue, and on May 26, 2004, a complaint regarding our failure to carry out the 90-day and 12-month findings on the status of the four species of lampreys. On November 23, 2004, we reached an agreement with the plaintiffs to complete the 90-day finding by December 20, 2004, and, if appropriate, to complete the 12-month finding by November 15, 2005.

General Biology

The petitioned lampreys belong to the genus *Lampetra* in the family Petromyzontidae and subfamily Petromyzontinae, a primitive group of fishes that are eel-like in form but lack the jaws and paired fins. These species have a round sucker-like mouth (oral disc), no scales, and breathing holes instead of gills. Most lamprey species have a similar life cycle: all begin life in freshwater, but some are anadromous (going from ocean to freshwater tributaries to spawn). In the beginning of their life cycle, the lamprey eggs hatch and the young ammocoetes (larvae) drift downstream to areas of low velocity and silt or sand substrate. They remain burrowed in the stream bottom, living as filter feeders for 2 to 7 years, filter-feeding on algae and detritus (Kostow 2002; Moyle 2002).

Metamorphosis of ammocoetes to macropthalmia (juvenile phase) occurs gradually over several months as they develop eyes, teeth, and become free swimming. Depending on the species, macropthalmia mature into adults and then either begin their migration to salt water or remain in fresh water (Kostow 2002; Moyle 2002). Lampreys lack paired fins and their elongated body shape causes them to swim by using an undulatory (snakelike) movement (Mesa et al. 2002; Moyle 2002) and they do not have swim bladders that allow them to maintain neutral buoyancy and must, therefore, swim constantly or hold fast to objects to maintain their position (Liao 2002; Mesa et al. 2002).

Pacific and river lampreys are parasitic as adults and feed on a variety of marine and anadromous fish. Nonparasitic western brook lampreys remain in fresh water, not feeding as adults, resulting in a short life span (Wydoski and Whitney 2003). After the adult feeding phase, both Pacific and river lampreys migrate to spawning areas and cease feeding. Their degree of fidelity to their natal streams is unknown. Adult lampreys spawn in gravel bottomed streams, at the upstream end of riffle habitat, typically above suitable ammocoete habitat (Moyle 2002). Both sexes construct the nests, often moving stones with their mouths. After the eggs are deposited and fertilized, the adults typically die within 3 to 36 days (Kostow 2002).

Pacific, river, and western brook lamprey ammocoetes are nearly indistinguishable from each other. Although there is some color differentiation between the species, this characteristic is not reliable (Kostow 2002). Moyle (2002) states, ''Classification and identification of lampreys depends largely on the number, structure, and position of horny plates (teeth) of the sucking disc found in adult lampreys.''

Pacific Lamprey

Adult Pacific lampreys are characterized by the presence of 3 large sharp teeth (cusps) and posterior teeth on the oral disc (Wydoski and Whitney 1979; Moyle 2002). The two dorsal fins are slightly separated and the second dorsal fin is continuous with the caudal fin. The anal fin, distinctive in females, is lacking in males. The ammocoetes at age 5 ranges in size from approximately 4 to 8.5 inches (in) (9.5 to 22 centimeters (cm)), depending on the geographic area (Wydoski and Whitney 2003).

Pacific lampreys are found in streams from Hokkaido Island, Japan, and along the Pacific Rim, including Alaska, Canada, Washington, Oregon, Idaho, and California to Punta Canoas, Baja California, Mexico (Nawa et al. 2003). Pacific lampreys are the most widely distributed lamprey species on the west coast of the United States (U.S.). Their distribution includes major river systems such as the Fraser, Columbia, Klamath-Trinity, Eel, and Sacramento-San Joaquin Rivers. Pacific lamprey distribution patterns are similar to that of anadromous salmonids (Simpson and Wallace 1982; Close et al. 1995; Close et al. 2002).

Adult Pacific lampreys parasitize a wide variety of ocean fishes, including Pacific salmon (*Oncorhynchus* spp.), flatfish (such as *Pleuronectes* spp. and *Platichthys* spp.), rockfish (*Sebastes* spp.), and pollock (*Theragra chalcogramma*), and are preyed upon by sharks, sea lions, and other marine animals. They have been caught in depths ranging from 300 to 2,600 feet (ft) (90 to 800 meters (m)), and as far as 62 miles off the coast (mi) (100 kilometers (km)) in ocean haul nets (Close et al. 2002).

After spending 1 to 3 years in the marine environment, Pacific lampreys return to freshwater between February and June (Kostow 2002; Moyle 2002). They are thought to overwinter and remain in freshwater habitat for approximately 1 year before spawning. In freshwater they may shrink in size up to 20 percent (Beamish 1980). Pacific lampreys primarily migrate upstream at night and adult size at the time of migration ranges from about 15 to 24.5 in (38 to 62 cm). They spawn between March and July, depending upon location within their range (Beamish 1980). Fecundity is high but variable, with females producing between 20,000 and 200,000 eggs (Moyle 2002). After the eggs are fertilized and deposited in the nest, embryos hatch in approximately 19 days at 59° Fahrenheit (F) (15° Celsius (C)). Once the ammocoetes reach about 6 in (15 cm), they begin metamorphosis into macropthalmia (Moyle 2002; Wydoski and Whitney 2003).

Population Distribution and Trends

The petition provides both anecdotal and empirical information on Pacific lamprey occurrences and documented declines in Oregon, Washington, and California; less information for British Columbia and Alaska; and little information for Idaho, Mexico, or the extensive area of their range from Alaska to Japan. In our review of the petition and other information, we found additional information for Idaho and northwestern California that suggests a decline in Pacific lamprey abundance and reduction in distribution (Cochnauer and Claire 2004; Service, in litt. 2004a).

Some data indicating a decline in Pacific lampreys on the west coast of the U.S. come from dam window counts and stream salmonid surveys. Limitations of these data for evaluating trends include uncertainty about consistency in reporting lampreys, and a lack of standardized counts at dams over time designed to document lamprey (Close et al. 1995). In addition, data based on ammocoete counts can include the similar-appearing western brook and river lampreys.

Historically, Pacific lampreys were thought to be distributed wherever salmon and steelhead once occurred (Simpson and Wallace 1982; Close et al. 1995; Close et al. 2002). Based on the information in the petition and Service files, the distribution of the Pacific lamprey has been reduced in specific drainages in the 4 States identified in the petition. They are extirpated in parts of southern California, above dams and other impassable barriers in coastal streams and larger rivers, and in the upper Snake and Columbia Rivers.

California

In California, Pacific lampreys are currently found as far south as Malibu Creek, Los Angeles County (Moyle 2002). In 1997, a single Pacific lamprey ammocoete was collected from the San Luis Rey River in San Diego County (Moyle 2002), but there is no further evidence of lampreys in this area. Pacific lampreys spawned in the Los Angeles River basin including the Los Angeles, San Gabriel, and Santa Ana Rivers, until 1955 (Swift et al. 1993). Lampreys were not recorded again until an adult was observed near the mouth of the Santa Ana River in 1991 (Swift et al. 1993). Comprehensive historical and current abundance data for Pacific lampreys in specific streams of southern California is lacking.

For the central and south coast of California, the petition identifies Pacific lampreys occurring either currently or historically in Malibu Creek, Santa Clara River, Sespe Creek, Santa Ynez River, Santa Margarita River (the petition identifies this drainage as occurring in San Luis Obispo County; we assume this refers to Santa Margarita Creek, which is a tributary of the Salinas River in San Luis Obispo County), Salinas River, and San Lorenzo River. In addition to streams identified in the petition, Pacific lampreys have been documented in the Pajaro, Santa Maria, Ventura, Carmel, and Big Sur Rivers, and Big, San Carpoforo, Arroyo de la Cruz, and San Luis Obispo Creeks (Swift et al. 1993; Entrix and Lee and Pierce 2003). There is little comparative data between historical and current distribution and abundance.

Pacific lampreys have been historically or recently documented in many streams of the San Francisco Bay area, including: Alameda, Walnut, Walker, Lagunitas, Coyote, Dry, Pena and Sonoma Creeks, and the Napa River. Information for these streams consists primarily of presence or absence surveys. Long-term trend data are not available.

Pacific lampreys occur within the Sacramento River and many of its tributaries. This species also occurs in the lower San Joaquin River and many of its tributaries, including the Stanislaus, Tuolumne, Merced, and Kings Rivers (Brown and Moyle 1993). Data are limited and mostly incidental from surveys designed to sample salmonids over the past 5 to 10 years. Anecdotal data for the Mokelumne, Sacramento, and San Joaquin Rivers indicate negative trends in the last 5 to 10 years.

In northwestern California, Pacific lampreys are documented from the Garcia, Big, Eel, Van Duzen, Mattole, Mad, Klamath, Scott, Trinity, and Smith Rivers. However, the actual distribution and abundance have not been determined for individual lamprey species because most lampreys captured in these rivers are not identified to the species level. Anecdotal evidence from early historical accounts and Tribal interviews suggest that Pacific lampreys have undergone substantial declines in the Eel and Lower Klamath Rivers in recent decades. Preliminary analysis of Service rotary trap data from the Klamath and Trinity Rivers suggests a declining trend from 1997 to 2004 for all life stages, with a notable decline in adult captures for the Klamath River system (Service, in litt. 2004a). We do not have lamprey population trend data for other streams in the area.

Idaho

The petition describes the Pacific lamprey declines from historical levels in Idaho, but contains little information on the Pacific lamprey in the Snake River drainage in this State. We reviewed other reports that document the overall decline of the Pacific lamprey in the Snake River basin and associated tributaries. The Snake River basin in Idaho comprises the Snake River from Asotin Creek, Washington, upstream to Shoshone Falls, as well as many tributaries of the Snake River

(Boise, Payette, Weiser, Powder, Wildhorse, and Indian Rivers), and the entire Clearwater and Salmon River drainages.

Historical data indicate that the Pacific lamprey distribution included the Salmon, Clearwater, and Wildhorse Rivers, and the Snake River upstream to Shoshone Falls, and probably mirrored ranges of native salmon and steelhead (Scott and Crossman 1973; Simpson and Wallace 1982; Close et al. 1995; Groves et al. 2001). Pacific lampreys once ascended the Snake River in large numbers (Wydoski and Whitney 1979). In the Hells Canyon area, R.J. Bell (Idaho Department of Fish and Game, in litt. 1958) collected 33 lampreys while operating a weir on the Wildhorse River during May 1958. Hammond (1979) completed a larval biology study on Pacific lampreys documenting occurrences from the Potlatch River, Lolo Creek, and South Fork Salmon River in the 1970s. Pacific lampreys were easily collected at Lower Salmon Falls for use as white sturgeon bait (Gilbert and Everman cited in P. Bowler, in litt. 2004). Several sources of anecdotal information corroborate historical distribution of Pacific lampreys throughout the majority of the Salmon River basin (draft Salmon River Subbasin Assessment 2004).

Currently, Pacific lampreys are distributed throughout much of the Salmon and Clearwater River basins, excluding the North Fork Clearwater River above Dworshak Dam. Pacific lampreys were once plentiful in the Snake River from Asotin Creek to Shoshone Falls (Scott and Crossman 1973; Simpson and Wallace 1982; Close et al. 1995; Groves et al. 2001). The construction of several Hells Canyon dams, which do not provide for fish passage, has reduced lamprey distribution due to lack of passage (Cochnauer and Claire 2004). Because Pacific lampreys no longer have access to habitats upstream of Hells Canyon and Dworshak dams, their habitat has been reduced by 50 percent (Cochnauer and Claire 2004). In addition, the number of adult lamprey capable of navigating upstream through fish ladders at Columbia and Snake River dams is only a fraction of what was observed prior to the dams being built on those rivers (Claire 2004). Pacific lampreys are at a very low number in the Snake River basin based upon counts at lower Snake River dams (Kostow 2002).

Oregon

Potential distribution of Pacific lampreys in Oregon includes the Columbia River mainstem to McNary Dam, associated Columbia River tributaries in Oregon including the Willamette River, tributaries of the Snake River in Oregon, and Oregon coastal rivers (Kostow 2002). A significant portion of the Pacific lamprey historical range in upper reaches of many rivers has been lost because of construction of dams with no fish passage structures (i.e., upper Deschutes River and tributaries, Hood River, and many tributaries of the Willamette River) (Kostow 2002).

There is anecdotal information that Pacific lamprey distribution and abundance have been reduced in recent decades, especially in Oregon rivers furthest from the Pacific Ocean such as the Umatilla, Walla Walla, John Day, and Grande Ronde Rivers (Jackson et al. 1996). Observations and records of adult Pacific lamprey passage at mainstem Columbia and Snake River dams indicate the species has declined substantially in these rivers and their tributaries in Oregon (Kostow 2002). Dam counts suggest that the largest declines occurred in the 1960s and 1970s. Although lamprey numbers have increased in recent years (U.S. Army Corps of Engineers (Corps) 2003), we do not know whether these numbers are attributable to favorable ocean conditions resulting in greater host base or other factors, such as the recent inclusion of night counts at many dams, which has increased overall sampling efforts (Kostow 2002).

The petition and other information provide some evidence that the Willamette River was, and may still be, an important area for Pacific lamprey production in the Columbia River basin (Kostow 2002). Although impassable dams and other artificial barriers have likely resulted in reduced distribution and abundance of lampreys in the Willamette River basin, information suggests that thousands of Pacific lampreys still ascend Willamette Falls and are still widely distributed in the Willamette Valley (Kostow 2002).

There is a long history of commercial and Tribal harvest of Pacific lampreys at Willamette Falls. Commercial harvest records dating from the early 1900s show a peak of approximately 397,000 pounds (180,076 kilograms) of Pacific lampreys in the mid-1940s. From 1943 to 1949, 80,000 to 500,000 lampreys, estimated to be 10 to 20 percent of the run, were harvested (Close et al. 1995). As recently as 1994, about 5,000 lampreys were harvested. Commercial harvest was ultimately eliminated in 2002 by the Oregon Fish and Wildlife Commission because it could not determine the percent of the total run harvested annually (Kostow 2002). The State of Oregon listed the Pacific lamprey as a sensitive species in 1993, and gave the species protected status in 1996. Tribal and personal harvest continues under State permit.

Detailed data in the petition from coastal Oregon comes from the Umpqua and Rogue Rivers (Nawa et al. 2003). Counts of Pacific lampreys at dams on both rivers indicate a dramatic decline over the past 40 years. On the North Umpqua River, Pacific lamprey numbers have declined from a high of over 46,000 in 1966 to 15 in 1997 at the Winchester Dam (Nawa et al. 2003).

Surveys conducted by various entities in the Alsea River basin documented Pacific lampreys to be well distributed, but generally absent from higher reaches above culverts (Kostow 2002). The Nestucca River and rivers draining to Tillamook Bay appear to be areas of low production for the Pacific lamprey, based on incidental data collected from salmonid smolt trap captures (Kostow 2002). For the majority of coastal streams in Oregon, however, there is little or no trend data and very little basin-specific distribution data in Oregon. The petition presents anecdotal evidence that lamprey populations have declined from historic numbers for the Applegate, Coquille, Siletz, and Siuslaw Rivers.

For the remainder of the streams in Oregon mentioned in the petition, there is not sufficient data to determine historical or current distribution and abundance, or documented evidence of decline.

Washington

Available information and abundance data for the Pacific lamprey in western Washington is limited and largely anecdotal (Molly Hallock, Washington Department of Fish and Wildlife (WDFW), cited in Bob Vadas, WDFW, pers. comm. 2004). Much of the data references only ''lamprey.'' The current distribution of the Pacific lamprey in western Washington includes most large rivers and streams along the coast and the Strait of Juan de Fuca, throughout Puget Sound, including the Nisqually Reach, and parts of the Hood Canal systems (Cook-Tabor 1999; Wydoski and Whitney 2003). The species' range extends long distances inland in the Columbia, Snake, and Yakima River systems (Wydoski and Whitney 2003). Collection records show Pacific lampreys widely distributed on the Olympic Peninsula in Ozette Lake; the Big, Salmon, Hoh, Queets, Quinault, Humptulips, Ozette, and Satsop Rivers; Kalaloch Creek; and streams flowing into the Strait of Juan de Fuca (Mongillo and Hallock 1997; Sam Brenkman,

Olympic National Park, pers. comm. 2004). However, no population status and trend data are available.

Pacific lampreys in the Columbia River basin have declined from their pre-1940s population numbers based on individuals counted at Columbia and Snake River dams (Close et al. 1995; Pirtle et al. 2003). Substantial declines in the distribution and abundance of Pacific lampreys in Washington have apparently occurred in tributaries of the Columbia and Snake Rivers, and in the Elwha River and Salt Creek on the Olympic Peninsula. R. Fuller (WDFW, in litt. 2004) indicates the species was more common in the 1980s, then declined in the 1990s, and has increased in counts in 2003 and 2004, although not to past levels. WDFW biologists noted this pattern of change in the Stillaguamish, Snohomish, Skagit, Green, Tolt, and Quillayute Rivers, Hood Canal, and the Strait of Juan de Fuca (R. Fuller, in litt. 2004). Pacific lamprey redds (a spawning nest formed by fish in a river bed where their eggs and sperm are deposited) and individuals have been observed less frequently in the past 10 years in streams and rivers of the Strait of Juan de Fuca (B. Vadas, pers. comm. 2004).

Tribal elders of the Elwha Klallam Tribe report that Pacific lampreys were historically abundant in the Elwha River and other north Olympic Peninsula rivers, including the Pysht, Hoko, and Dungeness Rivers, and Salt Creek (Mike McHenry, Elwha Klallam Tribe, pers. comm. 2004). Anecdotal information suggests current numbers may represent less than 5 percent of their historical observations (M. McHenry, pers. comm. 2004). Only one Pacific lamprey (a juvenile in 2003) has been recorded on the Elwha River, below the dam, in the last 20 years (M. McHenry, pers. comm. 2004).

In southwest Washington, Pacific lampreys are common in Mill Creek and in the Grays, Skamokawa, Elochoman, Abernathy, Germany, Kalama, South Fork Toutle, and Green Rivers (R. Fuller, in litt. 2004). In the 1960s, Pacific lampreys were common in the Chehalis River system (Nawa et al. 2003), and appeared to be more common on the coast than in the Puget Trough (R. Fuller, in litt. 2004). From 1997 to 2000, thousands of lampreys were trapped on the North Fork Toutle River, but numbers have declined from 2000 to 2004 (R. Fuller, in litt. 2004). Pacific lampreys have been documented in Cedar Creek and its tributaries (Pirtle et al. 2003), at the Speelyai Hatchery on the Lewis River (R. Fuller, in litt. 2004), and in streams near Franz Lake National Wildlife Refuge in Skamania County (Nawa et al. 2003).

In eastern Washington, Pacific lampreys historically occurred in numerous other basins, including the Spokane River and Asotin Creek (ACCDLSC 1995; Wydoski and Whitney 2003). The purported historical occurrence of Pacific lampreys in the mainstem Columbia River above Chief Joseph Dam and Grand Coulee Dam prior to their construction (BioAnalysts, Inc. 2000) is supported by historical documentation of remnant Pacific lamprey at Kettle Falls and in the Spokane River up to Spokane Falls (Wydoski and Whitney 2003).

Where historical information does exist for river basins (Walla Walla, Wenatchee, Tucannon, Asotin), Pacific lampreys were described as ''abundant,'' ''common,'' or ''likely had large runs'' (Service 1959; ACCDLSC 1995; G. Mendel, WDFW, pers. comm. 1994, cited in Jackson et al. 1996; Lane and Lane cited in Confederated Tribes of the Umatilla Indian Reservation (CTUIR) 2004; Swindell cited in CTUIR 2004). In 1999, surveys found Pacific lamprey ammocoetes were absent from reaches in the Walla Walla River subbasin (Bronson cited in CTUIR 2004). Adult Pacific lampreys have not been documented in the Asotin Creek watershed since at least 1980, although small lampreys of unknown species have been observed (ACCDLSC 1995). A 2002 trapping study designed to capture emigrating Chinook salmon in the Entiat River found Pacific lampreys to be the most numerous species captured during the time of the study. Most out-migration of lampreys occurred during the highest stream flows of the trapping period (Service, in litt. 2002). Although Pacific lampreys are occasionally caught incidentally at a screw trap on the Tucannon River, lamprey production in this subbasin is considered low (Close 2000) because the population has rapidly declined since 1981 (G. Mendel, pers. comm. 1994, cited in Jackson et al. 1996).

Pacific lampreys occur throughout the mid-Columbia and Snake Rivers and many associated river basins, including the Tucannon, Walla Walla, Yakima, Wenatchee, Entiat, and Methow Rivers. The Pacific lamprey distribution currently extends up to Chief Joseph Dam on the Columbia River, and to Hells Canyon Dam on the Snake River (Nass et al. 2003; CTUIR 2004).

Passage data from numerous mainstem Columbia (McNary, Rock Island, Rocky Reach, and Wells) and Snake River dams (Ice Harbor) suggest that, although annual numbers fluctuate widely at each project, there is a decreasing trend in the number of adult Pacific lampreys counted at each project (BioAnalysts, Inc. 2000). Data indicate that large declines occurred during the late 1960s and 1970s, and that current counts continue to be well below historical levels (Close et al. 1995; BioAnalysts, Inc. 2000; Corps 2003). For example, the number of adult Pacific lampreys counted at the fish ladder at Ice Harbor Dam on the Snake River declined from 50,000 in 1963 to approximately 1,700 in 2003 (Corps 2003).

Although adult lamprey counts have increased at Snake River dams (Ice Harbor, Lower Monumental, Little Goose, and Lower Granite) and Columbia River dams (McNary, Priest Rapids, Rock Island, Rocky Reach, and Wells) in recent years, they are still considered to be well below historical levels (Close et al. 1995; Corps 2003; BioAnalysts, Inc. 2004). For example, counts at Rocky Reach Dam have shown a decline from more than 17,000 adult Pacific lampreys in 1969 to an average of 330 between 1983 and 2001. However, counts increased to 1,842 and 2,521 adult Pacific lampreys in 2002 and 2003, respectively (BioAnalysts, Inc. 2004). Increased numbers of lampreys in recent years may be an artifact of increased sampling or due to increased food abundance in the ocean (BioAnalysts, Inc. 2000).

Mexico, Alaska, Canada, and Pacific Ocean

Information on Pacific lampreys in areas beyond the coterminous U.S. is lacking. Only a few observations of Pacific lampreys have been documented in Baja California, and no information was found on Pacific lampreys for areas beyond Alaska around the Pacific Rim to Japan. Some information is available from British Columbia, Canada.

Pacific lampreys, first recorded in Canada in 1891, were historically abundant off the entire coast of British Columbia (Hart 1973). They were probably present in all coastal streams (Carl et al. 1977) and found in all major rivers, including the Columbia River in British Columbia, and the Fraser and Thompson Rivers upstream as far as Shuswap Lake (Scott and Crossman 1973). The Nicola River is a major producer of Pacific lampreys in the Fraser River drainage (Beamish and Levings 1991). Large numbers of recently metamorphosed adult Pacific lampreys migrating out of the Nicola River during 1984 and 1985 and from 1987 to 1988 indicate Pacific lampreys were abundant in the Fraser and Nicola Rivers at least through the 1980s (Beamish and Levings 1991).

Little information is available for the Pacific lamprey in Alaska. Surveys have been limited or nonexistent. We have only seven records of Pacific lampreys in southeast Alaska (Dan Cushing, Service, in litt. 2004). Information for other parts of Alaska is not available due to the lack of surveys (Mark Lisac, Service, in litt. 2004; Jim Larson, Service, in litt. 2004).

The petition presents data on the number of lampreys (both Pacific and unidentified lampreys combined) captured in ocean hauls between 1980 and 2001 along the Pacific coast off Washington, Oregon, and California. Fewer lampreys were caught off the coast of California than coastal Oregon and Washington. The petition also presents data on the percent occurrence of lampreys in those ocean hauls that indicate an increasing trend between 1977 and 2001.

Conservation Status of the Pacific Lamprey

The petition identified and described a number of threats to Pacific lampreys, including artificial barriers to migration, poor water quality, harvest, predation by nonnative species, stream and floodplain degradation, loss of estuarine habitat, decline in prey, ocean conditions, dredging, and dewatering (Jackson et al. 1996; Close et al. 1999; BioAnalysts, Inc. 2000; Close 2000; Nawa et al. 2003). Much like salmon, there are many reasons for the observed reductions in range and abundance of Pacific lampreys, and not one single threat can be pinpointed as the primary reason for their apparent decline.

Similar to salmon, barriers to Pacific lamprey spawning and rearing habitat may pose a large threat. Beamish and Northcote (1989) note that Pacific lampreys persist for only a few years above impassable barriers before dying out, and are unable to establish a non-anadromous form under these circumstances. Artificial structures such as dams, road culverts, and water diversions can impede upstream migrations by adult Pacific lampreys and downstream movement of ammocoetes and macropthalmia.

Declining lamprey populations observed at dams indicate the effects barriers have on lamprey access to upstream spawning habitat. Since the completion of the Willamette Valley Project, which included construction of 13 dams by 1967, annual commercial harvest of lampreys decreased from an average of 218,000 pounds per year (1943 to 1952) to 13,000 pounds per year (1969 to 2001) (Kostow 2002). Although these numbers do not reflect varying efforts in harvest, they do indicate a negative population trend (Kostow 2002; Nawa et al. 2003). In addition, as previously noted, passage is completely blocked by the Elwha Dam on the Elwha River in Washington, the Shasta Dam on the upper Sacramento River in California, Hells Canyon Dam on the Snake River in Idaho, Wells Dam on the Columbia River in Washington, and Iron Gate Dam on the Klamath River in California. Culverts may also act as a barrier to lampreys as determined in the Alsea Basin, where lampreys were often absent above road culverts (Kostow 2002).

During downstream migrations, juvenile lampreys may be entrained in water diversions or turbine intakes. In many cases, these water diversions and hydroelectric projects have been screened to bypass juvenile salmonids. However, due to their size and weak swimming ability, juvenile lampreys are frequently impinged on the screens resulting in injury or death (Hammond 1979; Jackson et al. 1996; Moursund et al. 2000). In addition, downstream migrations through large reservoirs created by dams may increase susceptibility to predation, and alterations in reservoir levels may impact ammocoetes, as a result of dewatering areas where they are burrowed (BioAnalysts Inc. 2000).

There is evidence that dams with fish ladders designed to pass salmonids do not effectively pass lampreys (Close et al. 1995; Vella et al. 1999; Kostow 2002). The excessive use of swimming energy required by Pacific lampreys to negotiate fishways at dams may be a factor in their decline (Mesa et al. 2003). Lampreys are unable to negotiate fish ladders or culverts designed with sharp angles because they cannot maintain suction with their mouth on discontinuous surfaces that, in combination with high water velocities, effectively block or restrict passage (Ocker et al. 2001). Although adult lamprey counts are not consistent or standardized (Close et al. 1995), the data available from the limited counts at dams indicate large population declines throughout the Columbia and Snake Rivers. Lamprey counts on the Columbia River from the 1960s to 2003 include the following; Bonneville Dam passed 350,000 lampreys in the early 1960s down to 177,027 in 2003; The Dalles Dam went from 300,000 lampreys in the early 1960s to 28,995 in 2003; Ice Harbor Dam has gone from 50,000 adult Pacific lampreys in 1963 to 1,702 in 2003 (Kostow 2002; Corps 2003; Nawa et al. 2003). Adult Pacific lamprey counts in 2003 on the mainstem Snake River at Lower Monumental, Little Goose, and Lower Granite dams were 468, 660, and 282, respectively (Corps 2003).

Another identified threat associated with dams results from alterations in reservoir levels, which may dewater areas where ammocoetes occur (Pacific Northwest National Laboratory 2002). Water diversions at dams for agricultural or municipal purposes may also dry up stream reaches where ammocoetes reside.

Pacific lampreys are harvested for food or commercial purposes, which may present a threat, particularly if these activities are concentrated on rivers with low population numbers of these species. Pacific lampreys are culturally important to Tribes in the Pacific Coast for sustenance, medicinal, and ceremonial purposes. Harvest was historically more widespread for lampreys than at present (Close et al. 2002). Although commercial harvest of Pacific lampreys for food, bait, animal feed, and fertilizer at the Willamette Falls on the Willamette River was discontinued by the State of Oregon in 2002, Tribal and personal use harvest at that location is still permitted (Kostow 2002). Due in part to declining numbers, harvest effort for Pacific lampreys is low across much of their range, except for California, which allows unlimited harvest of lampreys. There is evidence that lampreys are regularly collected for bait on the Mokelumne and American Rivers (Michelle Workman, East Bay Municipal Utility District, pers. comm. 2004; Rob Titus, California Department of Fish and Game, pers. comm. 2004).

Nonnative freshwater fish prey on juvenile and adult Pacific lampreys (Close et al. 1995; Moyle 2002) and may pose a threat to lamprey abundance. Nonnative fishes such as bass (*Micropterus* spp.), sunfish (*Lepomis* spp.), walleye (*Stizostedion vitreum vitreum*), striped bass (*Morone saxatilis*), and catfish (*Ictalurus* spp.), among others, have become established over the last century in some rivers in the western U.S.

Elevated water temperature has been documented as a factor resulting in mortality of eggs and early stage ammocoetes under laboratory conditions. Water temperatures at 72°F (22° C) may cause significant death or deformation of eggs or ammocoetes (Meeuwig et al. 2004). A water temperature of 72°F (22° C) or higher may be a common occurrence in degraded streams during the early-to-mid-summer period of lamprey spawning and ammocoete development.

In addition, because ammocoetes colonize specific areas for 2 to 7 years, are relatively immobile in the stream substrates, and often occur in high

densities, they are prone to effects from chemical poisoning and from channel alterations that may affect many age classes from a single action (Scott and Crossman 1973; Kostow 2002; Nawa et al. 2003).

The petition identified ocean conditions as a possible threat to the Pacific lamprey. Pacific salmon (*Oncorhynchus* spp.), Pacific hake (*Merluccius productus*), and walleye pollock (*Theragra chalcogramma*) have declined in numbers or are commercially harvested; reductions in the availability of these host/food species may present a threat to Pacific lampreys.

Research and monitoring specifically designed to address the Pacific lamprey began in the 1990s, initiated by several Tribes in the Columbia River basin. More recently, Tribes in the Lower Klamath River have initiated research and monitoring studies on lampreys in the main stem Klamath River and its tributaries below Iron Gate Dam. Limited studies have also been done recently within the area of the Klamath River Hydroelectric Project by PacifiCorp. Along with many Tribes, State and Federal agencies are now beginning to incorporate the needs of lampreys into management and monitoring plans. For example, the Corps has funded many studies on lamprey passage issues and is researching ways to improve dam passage for lampreys. However, there is still a lack of knowledge of the species and little systematic monitoring of abundance and distribution.

Western Brook Lamprey

Adult western brook lampreys are generally 7 in (18 cm) or less in total length (Wydoski and Whitney 1979; Moyle 2002). In the adult life stage, the oral disc is small and poorly developed and the two teeth (cusps) are rounded and nonfunctional (Wydoski and Whitney 2003). Adults are dark on the back and sides and yellow to white on the underside. Ammocoetes are sometimes distinguished by a dark tail and pigmentation of the head above the gill openings (Moyle 2002).

Western brook lampreys are found from coastal southeast Alaska to California, which includes inland distribution in the Columbia, Sacramento, and San Joaquin River basins (Moyle 2002). They have been documented in the Columbia River as far upstream as the Yakima River basin; none have been confirmed in the Snake River basin. However, Mendel and others (Mendel, cited in Asotin County Conservation District Landowner Steering Committee (ACCDLSC) 1995) captured small lampreys that were either river or western brook lampreys in Asotin Creek, in Washington. Detailed information on western brook lamprey distribution is lacking.

Spawning occurs from March to July, where between 1,100 to 5,500 eggs per female are deposited (Kostow 2002; Moyle 2002; Wydoski and Whitney 2003). The newly hatched ammocoetes emerge about 10 days after spawning (Moyle 2002) and drift into silty backwater areas. Western brook lamprey ammocoetes have been observed at densities as high as 203 per square yard (170 per square meter) (Scott and Crossman 1973). These lamprey ammocoetes are about 3.5 to 6 in (9 to 15 cm) in length, and are about 5 years old (Wydoski and Whitney 2003). Metamorphosis to adult stage occurs from February through July (Wydoski and Whitney 2003), and at this time their gonads are not fully developed. They burrow into the stream substrate where they remain dormant through the winter months. In the spring when water temperatures are above 50° F (10° C), western brook lampreys emerge from their burrows sexually mature and they remain in freshwater where they may migrate short distances to spawn. Western brook lampreys are nonparasitic and do not feed as adults (Kostow 2002).

Population Status and Distribution

The petition provides little information regarding the status or trends of the western brook lamprey. Historical and current abundance data, as well as information on their distribution are lacking. We found limited additional information that identified some local declines and extirpations, but this information does not indicate a broad reduction in abundance or distribution supporting the petition's claim.

California

In California, the western brook lamprey has been observed primarily in the Sacramento River drainage (Moyle 2002), but has also been reported in San Francisco Bay streams such as Mark West Creek and Coyote Creek (Moyle 2002). A small population may occur in Kelsey Creek, a tributary to Clear Lake (Moyle 2002), and the species is rare or extirpated from the Putah and Cache Creek watersheds (P. Moyle, pers. comm. 2004). Ammocoetes previously collected from streams in the Los Angeles River may have been the western brook lamprey, although according to Swift et al. (1993), this population is now extirpated. Western brook lampreys are known to occur in the Navarro and Eel Rivers in Mendocino County and in Willow Creek in Humboldt County (Moyle 2002), and are suspected to occur in other streams along the northern California coast. They apparently persist above the impassable Scott Dam on the upper Eel River (Moyle 2002).

Oregon

Very little information exists for the western brook lamprey in Oregon. The distribution of the western brook lamprey in Oregon may include most coastal streams and the Columbia River upstream to the Yakima River (Kostow 2002). This distribution is based heavily on museum records as there are little recent data available on the distribution and abundance of this species. In a recent inventory by CTUIR, western brook lampreys were absent from all areas inventoried (rivers in northeast and northcentral Oregon), except for a small population observed in the South Fork Walla Walla River. Kostow (2002) also notes their historical abundance in these basins is unknown and they were perhaps naturally rare and irregularly distributed. The petition and Kostow (2002) suggest the status of the western brook lamprey in the lower Columbia Basin is largely unknown. Kostow (2002) also noted the difficulty in determining their status in the lower Columbia River because it is hard to differentiate between species in the ammocoete phase, and the only adults regularly observed are the Pacific lamprey.

A systematic survey completed for both Pacific and the western brook lampreys in the Alsea River basin demonstrated that both western brook and Pacific lampreys were present, but that the Pacific lampreys were more common (Kostow 2002). Neither species was found in the upstream reaches of the basin above road culverts, apparently because culverts frequently prevent passage. Pacific lampreys were observed at higher densities than western brook lampreys (Kostow 2002).

Washington

Although western brook lampreys were considered common in Washington in 1936 (Nawa et al. 2003), Morrow (1980) stated, without documentation, that the species ''is not particularly abundant anywhere as far as is known.'' The species' known distribution includes parts of the Olympic Peninsula, including streams on the southern and western boundaries of the Olympic Peninsula, but not streams on the northern and eastern boundaries (Mongillo and Hallock 1997). In surveys conducted during the

1930s, western brook lampreys were collected on the Olympic Peninsula from the Quillayute, Queets, Quinault, Humptulips, Wynoochee, and Satsop Rivers, but not the Hoh River, and from Chimacum Creek (Mongillo and Hallock 1997; Cooper cited in R. Fuller, in litt. 2004). Mongillo and Hallock (1997) include the Hoh River in the distribution of the western brook lamprey because the species is found in the adjacent Quillayute and Queets Rivers. Other observed localities include coastal and Puget Sound streams, including the lower reaches of the Nisqually River (Cook-Tabor 1999), North Creek near Seattle, and Dry Creek in Mason County (Froese and Pauly 2004). This species has also been recently reported from the Nooksack River (R. Fuller, in litt. 2004), the North Fork and South Fork Chelatchie Creeks, and tributaries of Cedar Creek in the Lewis River watershed (Pirtle et al. 2003).

Historically, western brook lampreys were considered abundant in the Walla Walla River subbasin (Lane and Lane cited in CTUIR 2004; Swindell cited in CTUIR 2004). Numerous unidentified lampreys were documented as ''abundant'' at the Tumwater trap on the Wenatchee River in 1955 (Service 1959).

Western brook lampreys are known to occur in the Yakima and Walla Walla River basins. While the abundance of the western brook lamprey is unknown, the populations in the Walla Walla River subbasin appear to be self sustaining (CTUIR 2004). In 1998, assessments of the Walla Walla River subbasin indicated that lampreys were present in 8 of 12 subwatersheds inventoried (Mendel cited in CTUIR, in litt. 2004). Although not identified to species, these individuals were assumed to be western brook lampreys because Pacific lampreys have not been documented in recent sampling efforts (Bronson cited in CTUIR 2004). Western brook lampreys are thought to be in the Entiat River (Phil Archibald cited in Service, in litt. 2004b). Small river or western brook lampreys were documented in Asotin Creek by Mendel and others (ACCDLSC 1995).

Alaska and Canada

Historical distribution of the western brook lamprey in Canada includes the Cowichan River, Vancouver Island; tributaries of the Fraser River; Hooknose Creek, King Island; Cultus Lake on the lower mainland, and Lakelse Lake on the Skeena River system (Scott and Crossman 1973; Carl et al. 1977). Additional locations include Blake Creek and Burns Bog (Nawa et al. 2003) and the Queen Charlotte Islands (Nawa et al. 2003). A distinct, rare population of the western brook lamprey, having both parasitic and nonparasitic forms, may be endemic to the Morrison Creek watershed on Vancouver Island (Environment Canada 2004). Between 1978 and 1984, the population was relatively stable, but numbers may have declined in recent years. The Morrison Creek population was listed as endangered under the Species at Risk Act in Canada in May 2000 (Environment Canada 2004).

There is little information available for the western brook lamprey in Alaska. Surveys have been limited or nonexistent. We have four records of the western brook lampreys in southeast Alaska (D. Cushing, in litt. 2004).

Conservation Status of the Western Brook Lamprey

The western brook lamprey distribution overlaps with a portion of the Pacific lamprey range in Oregon, Washington, California, Canada and Alaska. Consequently, this species may experience many of the same threats discussed for Pacific lampreys. However, western brook lampreys are not anadromous, and thus are not subject to threats associated with ocean conditions, loss of estuarine habitat, and barriers to and from ocean environments which are threats experienced by Pacific lampreys and river lampreys. No specific data from the petition or available from our files is available that documents threats to this species.

River Lamprey

The adult river lamprey has two teeth (cusps) and no posterior teeth on the oral disc (Wydoski and Whitney 2003). Adult river lampreys average between 7 and 12 in (18 and 30 cm) in length. They are dark on the back and sides with silvery yellow on the belly and dark pigmentation on the tail (Moyle 2002). Except for the last 6 months to 1 year of life, the western brook lamprey and the river lamprey are indistinguishable from each other (Kostow 2002).

River lampreys are found from just north of Juneau, Alaska, to San Francisco Bay in California (Nawa et al. 2003). However, detailed information on their distribution is lacking. River lampreys are associated with large river systems such as the Fraser, Columbia, Klamath, Eel, and Sacramento Rivers. Beamish (1980) and others have noted that river lamprey production appears to be concentrated only in particular rivers, and only in the lower portions of these large rivers. The river lamprey is thought to be closely related to the resident western brook lamprey (Docker et al. 1999).

Little information is available on river lamprey life history. Metamorphosis from the ammocoete to macropthalmia life stage occurs between July and April (Kostow 2002; Moyle 2002). At this time, macropthalmia are thought to live deep in the river channel, which may explain why they are rarely observed (Kostow 2002). As adults, their oral disc develops just before they enter the ocean between May and July (Kostow 2002; Moyle 2002). During the approximately 10 weeks they are at sea in the parasitic phase, they remain close to shore, feeding primarily on smelt and herring near the surface (Kostow 2002). According to Moyle (2002), their life span is 6 to 7 years. River lampreys lay 11,400 to 37,300 eggs per adult female (Kostow 2002; Moyle 2002).

Population Status and Trends

The petition provides little information regarding the status or trends of the river lamprey, and acknowledges the difficulty of acquiring data for this species (Nawa et al. 2003). Both historical and current abundance data as well as distribution data is lacking. Both the petition and other information in our files indicate some potential local declines, but we have no data to substantiate a significant decline in abundance or distribution of river lampreys.

California

In California, most records for the river lamprey are for the lower Sacramento and San Joaquin River system tributaries in the Central Valley, especially in the Stanislaus and Tuolumne Rivers (Moyle 2002). River lampreys have been historically reported in the Alameda and Napa Rivers, and Sonoma and Cache Creeks, which are tributaries of San Francisco Bay (Wang 1986; Moyle et al. 1995; Moyle 2002). River lampreys appear to spawn regularly in Salmon Creek and in tributaries to the lower Russian River (Moyle 2002). River lamprey juveniles have been captured in recent years (1996, 1997, 1999, and 2004) in rotary trapping operations below the Red Bluff Diversion Dam, Sacramento River (Tom Kisanuki, Service, pers. comm. 2004). A single adult female was collected at Cape Horn Dam on the Eel River (Moyle 2002). River lampreys are known to occur in the Trinity and Klamath Rivers, where they are reported as being common in the incoming tides during spawning migration, although no quantitative estimates or historical comparisons of abundance data are available.

River lamprey data are limited in California and long-term data are not available; most data are incidental to salmonid surveys. According to Moyle et al. (1995), the river lamprey has become uncommon in California. Anecdotal information suggests populations are declining because the Sacramento, San Joaquin, and Russian River systems have been altered by dams, diversions, pollution, and degradation of suitable spawning and rearing habitat in rivers and tributaries; however, there are no quantitative data to confirm this information. River lampreys are known to be extirpated from Cache Creek (P. Moyle, pers. comm. 2004).

Oregon

In Oregon, information regarding the status of river lampreys is lacking because so few river lampreys have been recently documented in Oregon. River lamprey remains were identified in harbor seal (*Phoca vitulina richardsi*) scat in the Umpqua River estuary in 1997 and 1998 (Orr et al. 2004). In 1980, river lampreys were caught in Yaquina Bay and from the Columbia River estuary (Bond et al. 1983). Most museum records are from the lower Columbia River, although there is a single record from the Columbia River Gorge, and several from small coastal streams (Kostow 2002).

Lack of observations of river brook lampreys in Oregon may be because of the following reasons: the species are naturally rare; they are hard to detect in freshwater (Beamish 1980; Beamish and Youson 1987); there have been a lack of appropriate surveys; and river lampreys have been misidentified as western brook lampreys.

Washington

In Washington, there are no historical distribution records for river lamprey, although the species probably occurred in most major rivers (Wydoski and Whitney 1979). Morrow (1980) stated, without documentation, that the river lamprey ''does not appear to be particularly abundant anywhere within its range.'' The current distribution of river lamprey includes rivers and streams along the coast from the mouth of the Columbia River to the mouth of the Hoh River, throughout Puget Sound, and in the Lake Washington basin (Wydoski and Whitney 2003), but not on the Olympic Peninsula (Mongillo and Hallock 1997). Two records (1931 and 1959) of river lamprey in Lake Cushman (Mongillo and Hallock 1997; S. Brenkman, pers. comm. 2004), suggest this lake may have once supported an adfluvial (lake dwelling) population (Mongillo and Hallock 1997). The petition notes specimens were collected from the Bogachiel River in 1897, Lake Pleasant (date unknown), off the coast of Washington in 1999, and 4.0 mi (6.4 km) off La Push, Washington in 2002. River lamprey ammocoetes were trapped in the 1980s in the lower reach of the Nisqually River, but no river lamprey population estimates or in-stream distribution information are available (Cook-Tabor 1999).

WDFW listed the river lamprey as a ''State Candidate'' in 1998 because of its uncertain status. Surveys are ongoing to determine if the species should be listed as State endangered, threatened, or sensitive (Wydoski and Whitney 2003; WDFW 2004).

River lampreys occur in the Columbia River and have been documented in the Yakima River basin. River lampreys were identified by the Pacific Northwest National Laboratory (2004) in the Hanford Reach of the Columbia River. Numerous unidentified lamprey species were documented as ''abundant'' at the Tumwater trap on the Wenatchee River in 1955 (Service 1959), but may have been either river or western brook lampreys. Also, small lampreys documented in Asotin Creek by Mendel and others (Mendel cited in ACCDLSC 1995) were not identified to species and may have been either river or western brook lampreys.

Canada

In Canada, the river lamprey was first recorded in British Columbia in 1942. Although considered uncommon in British Columbia (Carl et al. 1977), river lampreys were more abundant in the southern part of the Province (Scott and Crossman 1973). Historical records from both fresh and salt water locations include the following: the Strait of Georgia, the sea off Discovery Island, Yellow Point, and the Sechelt Peninsula; English Bay; Porlier Pass; mouth of the Fraser River, Howe Sound, and the Skeena River; Powell Lake; and the Queen Charlotte Islands (Hart 1973; Carl et al. 1977; Beamish 1980). In 1979, an estimated 6,500,000 young adult river lampreys migrated out of the Fraser River (Beamish and Youson 1987).

Alaska

Little information exists for river lampreys in Alaska. Surveys have been limited or non-existent. There are five river lamprey specimens that have been collected in southeast Alaska (D. Cushing, in litt. 2004).

Conservation Status of the River Lamprey

River lampreys are likely susceptible to some of the threats discussed for Pacific lampreys because their distribution overlaps with a portion of the Pacific lamprey range in Oregon, Washington, California, Canada and Alaska. The threats to this species include activities such as dredging, loss of habitat, and poor water quality; all attributes common to the lower reaches of large developed rivers. Predation by nonnative fish species can also threaten the river lamprey because the diversity and abundance of nonnatives may be high in developed rivers (Moyle 2002). However, there is little documentation of specific threats to this species is in either the petition or in our files.

Summary

Our evaluation of the petition and other information indicates there is a decline in Pacific lamprey historical abundance and distribution throughout California, Oregon, Washington, and Idaho and that threats to the species occur in much of the petitioned range of the species. However, the petition did not attempt to describe or justify a listable entity within the petitioned area, stating only that, ''Pacific lamprey populations could be subdivided into distinct population segments at spatial scales similar to the ESUs developed for listed salmon species (see Evolutionary Significant Units for steelhead in NMFS 1996). Petitioners believe that delineation of distinct population segments is best left to the discretion of USFWS'' (Nawa et al. 2003).

The petition requested that we evaluate the Pacific lamprey within California, Oregon, Washington, and Idaho without providing information suggesting how that portion of the range, or any smaller portion, could be considered a potentially appropriate distinct population segment (*e.g.*, what the discrete entity would be or the potential significance of the undefined population). Neither the information provided in the petition nor otherwise available in Service files presents substantial scientific or commercial information to demonstrate that the petition to list Pacific lamprey located in the lower 48 states may be warranted. Accordingly, we are unable to define a listable entity of the Pacific lamprey at this time and is, therefore, ineligible to be considered for listing, we did not evaluate its status as endangered or threatened on the basis of either the Act's definitions of those terms or the factors in section 4(a) of the Act.

Little specific information was presented in the petition documenting significant declines to the western brook and river lamprey. The western brook lamprey and river lamprey distribution overlaps with the petitioned range of the Pacific lamprey. Consequently, these two species likely experience some of the same threats as documented for Pacific lampreys. Like the Pacific lamprey, the river lamprey may be prone to threats common to the lower reaches of large developed rivers. In contrast, the non-anadromous western brook lamprey is not known to be subject to threats associated with ocean conditions. Most lamprey abundance data is based on counts of ammocoetes that have not been identified to species. While declines or extirpations in specific locations have been documented, very little quantitative information is available to evaluate population trends compared to historical conditions. The petitioners contend that all of the petitioned lamprey species have been subjected to habitat losses and population declines due to a variety of threats. While we have no information to the contrary, the petition does not provide the substantial scientific or commercial information required indicating that listing the western brook lamprey or the river lamprey may be warranted.

Finding

The Service has reviewed the petition to list the Pacific lamprey, western brook lamprey, and river lamprey, the literature cited in the petition that was available to us, and other available scientific literature and information in our files. Neither the information presented in the petition nor that available in Service files presents substantial scientific or commercial information to demonstrate that the Pacific lamprey located in the lower 48 states is a listable entity. Accordingly, we are unable to define a listable entity of the Pacific lamprey. Since the population of Pacific lamprey cannot be defined as a DPS at this time, thus ineligible to be considered for listing, we did not evaluate its status as endangered or threatened on the basis of either the Act's definitions of those terms or the factors in section 4(a) of the Act. We also find that there is not substantial scientific or commercial information indicating that listing the western brook lamprey or the river lamprey in California, Oregon, Washington, and Idaho may be warranted.

Even though we did not find that substantial scientific or commercial information has been presented to indicate that the petitioned action may be warranted for these three species of lamprey, we encourage interested parties to continue to gather data that will assist with the conservation of the species. Although a nonsubstantial finding does not initiate a formal status review for these species, we encourage additional information gathering and research to increase our understanding of the status of these species on such topics as the following:

(1) The Pacific, river, or western brook lamprey biology and ecology, their current and historical distribution and abundance, and habitat needs during all life stages;

(2) The range, status, and trends of these species;

(3) Specific threats to these species or their habitats;

(4) Techniques for improving identification of lamprey ammocoetes to species;

(5) Any other information that would aid in determining these species, population status, trends, and structure;

(6) The adequacy of existing regulatory mechanisms to protect or conserve lampreys and their habitat.

If you wish to provide information regarding any of the three lamprey species, you may submit your information or materials to the State Supervisor, Oregon Fish and Wildlife Office (see **ADDRESSES** section above).

References Cited

A complete list of all references cited herein is available, upon request, from the Oregon Fish and Wildlife Office (see **ADDRESSES** section above).

Author

The primary author of this notice is the staff of the U.S. Fish and Wildlife Service, Oregon Fish and Wildlife Office (see **ADDRESSES** section above), with support from staff of Service offices in California, Oregon, Washington, and Idaho.

Authority: The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: December 20, 2004.

Marshall P. Jones, Jr.,

Director, Fish and Wildlife Service.

[FR Doc. 04–28167 Filed 12–23–04; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; 12-Month Findings on Resubmitted Petitions To List the Southern Idaho Ground Squirrel, Sand Dune Lizard, and Tahoe Yellow Cress

AGENCY: Fish and Wildlife Service, Interior.

ACTION: 12-Month Findings on Resubmitted Petitions to List Three Species Under the Endangered Species Act.

SUMMARY: We, the Fish and Wildlife Service (Service), announce our 12-month findings on resubmitted petitions to list the southern Idaho ground squirrel (*Spermophilus brunneus endemicus*), the sand dune lizard (*Sceloporus arenicolus*), and the Tahoe yellow cress (*Rorippa subumbellata*) pursuant to the Endangered Species Act (Act) of 1973, as amended. We find that proposed rules to list these species continue to be warranted but precluded by other higher priority listing actions. We will continue to consider each of these species as a candidate for listing.

We request additional status information that may be available for any of these three candidate species. This information will help us in monitoring changes in the status of these candidate species and conserving them. Also, we will consider this information in preparing subsequent reviews to determine whether listing remains warranted, and in the preparation of listing documents in the event that a proposal for listing for one or more of these species is no longer precluded.

DATES: This finding was made on December 17, 2004. We will accept comments on these three candidate species at any time.

ADDRESSES: Submit your comments regarding any of the three species to the Regional Director of the Region identified in **SUPPLEMENTARY INFORMATION** as having the lead responsibility for that species. Written comments and materials received will be available for public inspection by appointment at the appropriate Regional Office listed in **SUPPLEMENTARY INFORMATION.**

A species assessment form with information and references regarding each of these three candidate species' range, status, habitat needs, and listing priority assignment is available for review at the appropriate Regional

Office listed below in **SUPPLEMENTARY INFORMATION** or on our Internet Web site, which is *http://endangered.fws.gov/candidates/index.html.*

FOR FURTHER INFORMATION CONTACT: The Endangered Species Coordinator(s) in the appropriate Regional Office(s) identified in **SUPPLEMENTARY INFORMATION** as having the lead responsibility for that species.

SUPPLEMENTARY INFORMATION:

Background

Petition for a Candidate Species

Under section 4 of the Act the Service may identify and propose species for listing based on the factors identified in section 4(a)(1). Section 4 also provides a mechanism for the public to petition us to add a species to the lists of species determined to be threatened species or endangered species (''Lists'') pursuant to the Act. Under section 4(b)(3)(A) of the Act, to the maximum extent practicable we must determine within 90 days of receiving such a petition whether it presents substantial information that listing may be warranted; we refer to this as a ''90-day finding.'' The Act requires that in the event of a positive 90-day finding, we must promptly commence a status review of the species.

Section 4(b)(3)(B) specifies that in the event of a positive 90-day finding, we shall make and publish in the **Federal Register** one of three possible findings within 12 months of the receipt of the petition, which we refer to as a ''12-month finding':

1. The petitioned action is not warranted;

2. The petitioned action is warranted (in which case we are required to promptly publish a proposed regulation to implement the petitioned action); or

3. The petitioned action is warranted but that (a) the immediate proposal of a regulation and final promulgation of regulation implementing the petitioned action is precluded by pending proposals, and (b) expeditious progress is being made to add qualified species to the lists of endangered or threatened species. (We refer to this as a ''warranted but precluded'' finding.)

Section 4(b)(3)(C) of the Act requires that when we make a warranted but precluded finding on a petition, we are to annually treat such a petition as one that is resubmitted on the date of such a finding. Thus we are required to publish a new finding on these ''resubmitted'' petitions on an annual basis.

On June 21, 2004, the United States District court for the District of Oregon (*Center for Biological Diversity* v. *Norton,* Civ. No. 03–1111–AA) found that our resubmitted petition findings for the southern Idaho ground squirrel, the sand dune lizard, and the Tahoe yellow cress that we published as part of the Candidate Notice of Review (CNOR) on May 4, 2004 (69 FR 24876) were not sufficient. The court indicated we did not specify what listing action is proposed for the higher priority species that precluded publishing a proposed rule for these three species, and that we did not adequately explain the reasons why actions for the identified species are deemed higher in priority, or why such actions result in the preclusion of listing actions for the southern Idaho ground squirrel, sand dune lizard, or Tahoe yellow cress. The court ordered that we publish updated findings for these species within 180 days of the order.

We previously received petitions and made findings that listing each of these species was warranted but precluded; the most recent resubmitted petition findings for these species were part of the CNOR published on May 4, 2004 (69 FR 24876). We subsequently have updated our information and incorporated any new information in updated assessments of the status of and threats to these three species. As a result of these updated assessments and after taking into consideration available funding in relation to pending listing actions (described below), we now are making continued warranted-but-precluded 12-month findings on the petitions for these three species. (In the ''Summary of Petitioned Candidates,'' below, we present summaries of why these three species continue to warrant listing and we specify the listing priority number that we have assigned to each species.) These findings mean that the immediate publication of proposed rules to list these species remains precluded by our work on higher priority listing actions. A description and evaluation of the reasons and data on which these findings are based is provided below, including specific reasons why the issuance of a proposed listing rule is precluded for each of these species, as well as a description of expeditious progress being made by the Service to add qualified species to the Lists. We will continue to monitor the status of these three species as new information becomes available to determine if a change in status is warranted, including the need to emergency-list any or all of the three species under section 4(b)(7) of the Act.

Preclusion and Expeditious Progress

Preclusion is a function of a species' listing priority in relation to the resources that are available and competing demands for those resources. (The listing priority of a species is represented by the listing priority number (LPN) we assign to it in accordance with our priority guidance as published on September 21, 1983 (48 FR 43098)). Thus, in any given fiscal year (FY), multiple factors dictate whether it will be possible to undertake work on a proposed listing regulation or whether promulgation of such a proposal is warranted but precluded by higher priority listing actions.

The resources available for listing actions are determined through the annual appropriations process and we cannot spend more than is appropriated for the Listing Program without violating the Anti-Deficiency Act. The Listing Program includes work related to proposed and final listing regulations under the Act, critical habitat designations, and petitions from the public to list species (including work on petitions being addressed for the first time as well as the annual review to make findings on resubmitted petitions for ''warranted but precluded'' candidate species).

The number of listing actions that we can undertake in a given year also is influenced by the complexity of those listing actions, i.e., more complex actions generally are more costly and this affects the number of listing actions that we can work on with a fixed amount of funding in a given year. For example, for FY 2002 to FY 2004, the costs (excluding publication costs) for conducting a 12-month finding, without a proposed rule, ranged from approximately $9,600 for one species with a restricted range and involving a relatively uncomplicated analysis, to $305,000 for another species that was wide-ranging and with a complex analysis.

In FY 1998 and for each fiscal year since then, Congress placed a statutory cap on funds which may be expended for listing and critical habitat actions (*i.e.* the Listing Program), equal to the amount expressly appropriated for that purpose in that fiscal year. This cap was designed to prevent funds appropriated for other ESA functions, or for other Service programs, from being used for listing or critical habitat actions (see House Report 105–163, 105th Congress, 1st Session).

Beginning in FY 2002, Congress also put in place the critical habitat ''subcap,'' which put an upper limit on the Listing Program funds that could be

spent on work related to critical habitat designations for already listed species. Recognizing that designation of critical habitat for species already listed would consume most of the overall Listing Program appropriation, Congress put the subcap in place to ensure that some funds would be available to make other listing determinations: ''The critical habitat designation subcap will ensure that some funding is available to address other listing activities'' (H.R. Rep. No. 103, 107th Cong., 1st Sess. 2001 at 30, 2001 WL 695998). Because the Service has had to use virtually the entire critical habitat subcap to address court-mandated designations of critical habitat, Congress in effect determined, through the listing cap and the critical habitat subcap, the amount available for other listing activities.

Congress also has recognized that the availability of resources was the key element in deciding whether there would be a listing proposal or a ''warranted but precluded'' finding for a given species. The Conference Report accompanying Pub. L. 97–304, which established the current statutory deadlines and the ''warranted but precluded'' finding, states (in a discussion on 90-day petition findings that by its own terms also covers 12-month findings) that the deadlines were ''not intended to allow the Secretary to delay commencing the rulemaking process for any reason other than that the existence of pending or imminent proposals to list species subject to a greater degree of threat would make allocation of resources to such a petition [i.e. for a lower-ranking species] unwise.'' Therefore, in fiscal year 2004, the outer parameter within which ''expeditious progress'' must be measured is that amount of progress that could be achieved by spending $3.38 million, which was the amount available in the Listing Program appropriation other than the critical habitat subcap (all the critical habitat subcap funds were used for designations required by court order or court-approved settlement agreements).

Our process is to make our determinations of preclusion on a nationwide basis to ensure that the species most in need of listing will be addressed first and also because we allocate our listing budget on a nationwide basis. However, through court orders and court-approved settlements, federal district courts have mandated that FWS must complete certain listing activities with respect to specified species and established the schedules for completing those activities. The species involved in these court-mandated listing activities are not always those that we have identified as being most in need of listing. A large majority of the appropriation available for new listings of species was consumed by such court-mandated listing activities in FY 2004, and by ordering or sanctioning these actions the courts essentially determined that these were the highest priority actions to be undertaken with available funding. Accordingly, in FY 2004, FWS had little discretion to determine what listing activities to undertake and what species to address. Copies of all of the court orders and settlement agreements referred to below are available from the Service and are part of the administrative record for these resubmitted petition findings.

On November 10, 2003, the President signed the 2004 Interior and Related Agencies Appropriations Act (Pub. L. 108–108), which included $3,386,000 for listing activities not related to critical habitat designations for species that already are listed. This appropriation was fully allocated to fund the following categories of actions in the Listing Program: Emergency listings; essential litigation-related, administrative, and program management functions; compliance with court orders and court-approved settlement agreements requiring that petition findings or listing determinations be completed by a specific date; section 4 listing actions with absolute statutory deadlines; and high-priority listing actions. Based on the available funds and their allocation for these purposes, no FY 2004 funds were available for listing actions for the southern Idaho ground squirrel, sand dune lizard, or Tahoe yellow cress. Specific details regarding the individual actions taken using the FY 2004 funding, which precluded our ability to undertake listing proposals for any of these three candidate species, are provided below.

We note here that the category of ''high-priority listing actions'' mentioned above refers to actions for which no timeline has been established by a court order or settlement agreement, and that also are not subject to a statutory deadline. Our ability to work on such listing actions is quite limited. In recent years, our allocation of Listing Program funds has included a limited amount of funding ($100,000) to each Regional office to ensure that the office maintains minimal core capacity for listing actions (*e.g.,* tracking the status of species to help ensure that an emergency listing action can be taken if necessary, participating in work to meet the statutory requirement to annually review and make findings on resubmitted petitions). In a Region that faces a relatively limited workload in the Listing Program with regard to deadlines resulting from court orders or settlement agreements, and a relatively limited workload related to meeting statutory deadlines, some of this ''capability'' funding may be available to address high priority listing actions. However, in most Regions, including the Regions with responsibility for listing actions involving the southern Idaho ground squirrel, Tahoe yellow cress, and sand dune lizard, the limited amount of capability funding to Regional offices included in an allocation is used for work associated with supporting listing actions related to court orders or settlement agreements, and for meeting statutory deadlines (*i.e.,* there are no funds available for high priority listing actions).

The overall Listing Program situation in FY 2005 is similar to that in FY 2004. For FY 2005, Congress recently appropriated $4,043,000 for listing actions other than critical habitat for already listed species (Pub. L. 108–447, signed on December 8, 2004). The Service is in the process of preparing the allocation of this appropriation. We anticipate that the $4,043,000 will be fully allocated to fund the following listing actions: Any emergency listings; essential litigation-related, administrative, and program management functions; compliance with court orders or court-approved settlement agreements requiring petition findings or listing determinations; and high-priority listing actions. As was the case in FY 2004, during the current fiscal year, we will issue proposed listing rules for the highest priority candidate species only if doing so does not jeopardize our ability to comply with court orders, court-approved settlement agreements, or unqualified statutory deadlines. Consequently, at this time we do not anticipate that we will have any FY 2005 funds available to work on proposals to list the southern Idaho ground squirrel, sand dune lizard, or Tahoe yellow cress, and consequently we continue to find that proposals to list these species are warranted but precluded. We note also that all of the actions that demonstrate our expeditious progress on listing (see below) contribute to the preclusion of work on listing proposals for these three candidate species.

In addition to being precluded by lack of available funds, work on proposed rules to list the southern Idaho ground squirrel, Tahoe yellow cress, and sand dune lizard also is precluded by work on candidate species with higher listing

priorities. For the southern Idaho ground squirrel and Tahoe yellow cress, which each have an LPN of 6, this means that the 210 candidate species with a LPN of 1 through 5 are of higher priority. The sand dune lizard, with an LPN of 2, has a higher priority than the southern Idaho ground squirrel and Tahoe yellow cress. However, there are 12 other candidate species with this same LPN in the Southwest Desert Region, which has the lead for the sand dune lizard. Of these 12 species, 8 have been candidate species longer than the sand dune lizard and, thus, we likely would work on proposed listing determinations for these species prior to working on a proposal for the sand dune lizard. Additionally, there are more than 70 candidate species nationwide that have LPNs of 2, and thus have the same or higher priority (based on length of time on the candidate list) than the sand dune lizard.

As explained above, part of the basis for making a warranted-but-precluded finding is that expeditious progress is being made to add qualified species to the Lists. Our progress in FY 2004 includes work in the following categories: (1) Evaluation of the potential need for emergency listing of 1 species; (2) preparation and publication of final listing determinations involving 10 species; (3) preparation and publication of a proposed listing action for 1 species; (4) preparation of proposed or final listing actions (not yet completed so not yet published) for 6 species; (5) and work on petition findings for 54 species. Specific information regarding each of these categories for FY 2004 is provided below.

(1) Emergency listings—We are currently working on a proposed rule to list the Miami blue butterfly. The Miami blue butterfly is restricted to one isolated population on Bahia Honda Key in Florida and is threatened by the combined influences of catastrophic environmental events, habitat destruction or modification, mosquito control activities, potential illegal collection, potential loss of genetic heterogeneity, and potential predation. Work on assessing the status of the species and preparing a listing rule originally was approved for funding and was initiated in FY 2004 because at the time, the Region considered that it was an emergency. When senior officials in Washington reviewed the draft emergency listing material, they did not concur that emergency listing action was needed (because of an existing captive-bred population). However, because a review of the species had been conducted and the emergency rule already was drafted, and because it is a high-priority species (with imminent threats of a high magnitude, which is the equivalent of a LPN of 3 for this subspecies), continuing work on the proposed listing rule was approved. At that point, the small amount of resources required to complete the proposed rule would not have made a significant contribution to issuing a proposed rule to list a species with an LPN of 2. Moreover, failure to continue work to complete the proposed rule would have resulted in a significant waste of resources, as the work already completed would to some degree go stale over time and thus would have to be re-done.

(2) Final listing determinations—We prepared and published in the **Federal Register** final listing determinations for ten species, all of which involved deadlines mandated by court orders or court-approved settlement agreements. These included final regulations listing eight species, which are: Rota bridled white-eye (69 FR 3022; January 22, 2004; LPN = 2), Santa Catalina Island fox, Santa Rosa Island fox, San Miguel Island fox, and Santa Cruz Island fox (69 FR 10335 for all four fox subspecies; March 5, 2004; LPN = 3); two plant species (*Nesogenes rotensis* and *Osmoxylon mariannense*) from the Commonwealth of the Northern Mariana Islands (69 FR 18499; April 8, 2004; LPN = 1 and 2, respectively); and the California tiger salamander (69 FR 47211; August 4, 2004; LPN = 3). (We note here that the work on the salamander included funding for the designation of critical habitat for the central California distinct population segment (DPS). The critical habitat subcap pertains to critical habitat designations for species already listed; we may use listing funds for critical habitat designation work conducted in conjunction with a listing action, as was the case with this DPS.) Also included in this category of final listing actions is the work involved in FY 2004 in completing the preparation of, and publishing, final listing determinations for the slickspot peppergrass (69 FR 3094; January 22, 2004; it had been an LPN = 2), and *Tabernaemontana rotensis* (a plant species with LPN = 2); the determination for the latter species was included as part of the **Federal Register** publication of the final rules listing the two plant species from the Commonwealth of the Northern Mariana Islands, mentioned above (69 FR 18499).

(3) We prepared and published a proposed regulation to list the southwest Alaska distinct population segment (DPS) of the northern sea otter, which has an LPN = 3 (69 FR 6600; February 11, 2004)). This population of northern sea otter occurs in nearshore locations from Attu Island in the west to Kamishak Bay in the east, including waters along the Aleutian Islands, the Alaska Peninsula, and the Kodiak archipelago. Although its range has not been curtailed, this population has declined by 56–68 percent since the mid-1980's and the decline shows no evidence of abating. The cause of the decline is not known, but predation by killer whales (*Orcinus orca*) has been hypothesized (see proposed rule for additional information). This proposal was not the result of a deadline established by a court order or a court-approved settlement agreement. Rather, this was the highest priority listing action for the Alaska Region. (Initially we determined that the Aleutian Islands DPS of the northern sea otter was a candidate with LPN = 3 (66 FR 54807), and subsequently determined that the DPS encompasses southwest Alaska.) The Alaska Region generally has not faced the relatively heavy Listing Program workload experienced by several other Regions, and consequently was able to use their limited Regional office capability funding in FY 2004 to support the completion of this proposed listing regulation. We could not have utilized this capability funding to complete listing actions in other Regions without eliminating the ability of this Region to monitor the status of candidate species and address any emergency situations that might arise.

(4) We funded work on proposed or final listing actions for 6 species for which work was not completed in FY 2004. This included work on final listing actions for the Sacramento Mountains checkerspot butterfly, the Mariana fruit bat (LPN = 3), and the southwest Alaska DPS of the northern sea otter (LPN = 3). It also included work on proposed listing actions for the boreal toad (LPN = 3), Salt Creek tiger beetle (LPN = 3), and Miami blue butterfly. The work on all these species, except on the northern sea otter (see (3) above) and Miami blue butterfly (see (1) above), was in response to a court order or a court-approved settlement agreement.

(5) We funded work on 54 petition findings. This involved 90-day findings, 12-month findings, and findings on resubmitted petitions. In some instances, the work has been based on meeting deadlines established by court order or by settlement agreements. In other instances, the work has been related to meeting statutory deadlines. All 12-month findings are subject to an unqualified statutory deadline. With regard to 90-day findings, we note that

the decision in *Biodiversity Legal Foundation* v. *Badgley,* 309 F. 3d 1166 (9th Cir. 2002), held that the Act requires that 90-day petition findings (*i.e.*, the initial finding as to whether a petition contains substantial information, which the Act directs us to make within 90 days of receipt of a petition, if practicable) must be made no later than 12 months after receipt of the petition, regardless of whether it is practicable to do so. Thus, all 90-day findings are arguably subject to an absolute statutory deadline. As a result of this ruling, which changed our interpretation of section 4(b)(3) of the Act, we have been working on addressing petition findings on most or all of the outstanding petitions for those species that we have not previously determined to warrant candidate status.

Some petition findings are ''complete'' actions. This includes 12-month petition findings in which we determine that listing was not warranted and 90-day petition findings in which we determine that the petition did not present substantial information. In these cases, our listing work is complete.

In FY 2004, we funded work and published 10 petition findings that involved the following species: wolverine (not-substantial 90-day finding) (68 FR 60112; October 21, 2003); eastern subspecies of the greater sage-grouse (not-substantial 90-day finding) (69 FR 933; January 7, 2004); Midvalley fairy shrimp (not-warranted 12-month finding) (69 FR 3592; January 26, 2004); *Cymopterus deserticola* (desert cymopterus—substantial 90-day finding) (69 FR 6240; February 10, 2004); fisher (West coast DPS) (warranted-but-precluded 12-month finding) (69 FR 18769; April 8, 2004); Florida black bear (partial remand of not-warranted 12-month finding (69 FR 2100; January 14, 2004); greater sage-grouse (substantial 90-day finding;) (69 FR 21484; April 21, 2004); Colorado river cutthroat trout (not-substantial 90-day finding) (69 FR 21151; April 20, 2004); New England cottontail (substantial 90-day finding) (69 FR 39395; June 30, 2004); and black-tailed prairie dog (not-warranted 12-month resubmitted petition finding) (69 FR 51217; August 18, 2004). The work on all these species, with the following exceptions, was in response to court orders or court-approved settlement agreements. The New England cottontail was the highest priority listing action for the Northeast Region. The Northeast Region generally has not faced the relatively heavy Listing Program workload experienced by several other Regions, and consequently was able to use their limited Regional office capability funding in FY 2004 to support the completion of this petition finding. We could not have utilized this capability funding to complete listing actions in other Regions without eliminating the ability of this Region to monitor the status of candidate species and address any emergency situations that might arise. Work on the greater sage-grouse was a high priority action since we were already working on sage-grouse issues related to the court-ordered petition finding for the eastern sage-grouse. Work on the black-tailed prairie dog was a high priority listing action; we had previously funded much of the work on this species in 2000 when we made the initial 12-month warranted-but-precluded petition finding and in 2001–2003 when we made resubmitted petition findings that listing was still warranted but precluded. The Mountain-Prairie Region was able to use some of their capability funds from FY 2004 to make the not-warranted petition finding for the black-tailed prairie dog.

The allocated funds also supported work on petition findings that were not completed in FY 2004. These included work on findings for the following 4 species: white-tailed prairie dog (90-day finding), greater sage-grouse (12-month finding), *Bromus arizonicus* (Arizona brome 90-day finding), and *Nasselia cernua* (nodding needlegrass 90-day finding). Work on the white-tailed prairie dog was in response to a court order, while the work on the sage-grouse was a high priority listing action with a statutory deadline (see above). Initial work on the statutorily-required petition findings for Arizona brome and nodding needlegrass was started using a small amount of capability funds that was left at the end of the fiscal year; this was a high priority for the Pacific Region.

In addition, we completed resubmitted petition findings required by statute for 40 petitioned species that are candidates. We published these findings on May 4, 2004, as part of the 2003 Candidate Notice of Review (CNOR) (69 FR 24876). Since we had identified many of these species as candidates prior to receiving a petition to list them, we had already assessed their status using funds from our Candidate Conservation Program (a separate budget item within the Endangered Species Program).

Our anticipated progress in FY 2005 includes work in the following categories: (1) Preparation and publication of final listing actions for 10 species; (2) preparation and publication of proposed listing actions for 3 species; (3) and work on petition findings for 11 species and resubmitted petition findings for 268 candidate species. Specific information regarding each of these categories for FY 2005 is provided below. We note also that Regions will continue to monitor the status of candidates and prepare emergency listing packages as needed.

(1) We are funding work on the final listing determinations for the following species: Mariana fruit bat, southwest Alaska DPS of the northern sea otter, boreal toad, Gila chub, Salt Creek tiger beetle, Sacramento Mountains checkerspot butterfly, and four Southwestern invertebrates (Koster's tryonia snail, Pecos assiminea snail, Roswell springsnail, and Noel's amphipod). All of these final listing determinations are responding to court orders or court-approved settlement agreements, with the exception of the work on the final listing determination for the southwest Alaska DPS of the northern sea otter (see above for explanation on why this work was funded). Now that the sea otter is proposed for listing, a final listing determination is subject to an absolute statutory deadline.

(2) We are funding proposed listing determinations for the boreal toad and the Salt Creek tiger beetle, pursuant to court-approved settlement agreements. We also are funding completion of work on the proposed listing determination for the Miami blue butterfly (see above background information regarding work in FY 2004).

(3) We also are funding work on petition findings for the following species: white-tailed prairie dog (not-substantial 90-day finding completed and published on November 9, 2004 (69 FR 64889)), Queen Charlotte goshawk (remanded not-warranted 12-month finding), greater sage-grouse (entire range) (12-month finding), *Cicurina cueva* (cave spider—90-day finding), four species of Pacific lamprey (90-day and 12-month findings), *Cymopterus deserticola* (desert cymopterus—12-month finding), (12-month finding), *Dalea tentaculoides* (Gentry's indigobush—90-day and 12-month findings), *Ptilagrostis porteri* (porter feathergrass—90-day and 12-month findings). The work on all of the above species is per court orders or court-approved settlement agreements, except for work on the greater sage-grouse (which is needed to meet the statutory deadline). We are also funding work on initial and resubmitted petition findings for 268 petitioned candidate species. These initial and resubmitted petition findings are required by statute and will be published as part of the next CNOR, which we anticipate completing in early 2005. Because the majority of these

species were already candidate species prior to our receipt of a petition to list them, we had already assessed their status using funds from our Candidate Conservation Program. We also continue to monitor the status of these species through our Candidate Conservation Program. The cost of updating the species assessment forms and publishing the joint publication of the CNOR and resubmitted petition findings is shared between the Listing Program and the Candidate Conservation Program.

As with our ''precluded'' finding, ''expeditious progress'' is a function of the resources that are available and the competing demands for those funds. As discussed above, the funds in the Listing Program that would be otherwise available for adding other qualified species to the Lists in FY 2004 and FY 2005 have been spent or must be spent on complying with court orders and court-approved settlement agreements to designate critical habitat and make petition findings, court orders and court-approved settlement agreements to make final listing determinations for other species, a few high-priority Service-initiated listing determinations, essential litigation support, and administrative and management tasks.

Because virtually all of the money to add qualified species to the list is consumed in complying with court orders or court-approved settlement agreements requiring petition findings or listing determinations, and essential litigation-related, administrative, and program management functions related to these findings and determinations, we have endeavored to make our listing actions as efficient and timely as possible, given the requirements of the relevant law and regulations, and constraints relating to workload and personnel. We are continually considering ways to streamline processes or achieve economies of scale, such as by batching related actions together. Given our limited budget for implementing section 4 of the Act, these actions collectively constitute expeditious progress.

Summary of Petitioned Candidates

Here we present summaries of why the southern Idaho ground squirrel, sand dune lizard, and Tahoe yellow cress continue to warrant listing, and we specify the listing priority number that we have assigned to each species. More complete information, including references, is available in the species assessment form for each species. You may obtain a copy of these forms from the Regional Office having the lead for the species, or from the Fish and Wildlife Service's Internet Web site: *http://endangered.fws.gov/ candidates/ index.html.*

Southern Idaho ground squirrel (*Spermophilus brunneus endemicus*)—The following summary is based on information contained in our files and the petition received on January 29, 2001. During the past 30 years, a population decline of the southern Idaho ground squirrel has occurred. The southern Idaho ground squirrel occupies only 44 percent of its historical range and within its range, populations have declined precipitously. Scientists attribute the decline to invasive nonnative plants associated with a change in the fire frequency and the lack of reclamation or restoration of habitat by various land management agencies and private landowners.

Even though habitat degradation is pervasive in many areas of this species' range, suitable habitat areas that can support southern Idaho ground squirrels still persist. Conservation and habitat rehabilitation actions have begun in some areas, and in 2001 and 2002, over 100 squirrels were captured from the Weiser Golf Course (the largest known colony site) and translocated to suitable habitat on lands covered by a Candidate Conservation Agreement with Assurances. Survey results in 2002 and 2003 found a total of 75 new active population sites.

The magnitude of threats to this species has been reduced due to the significant conservation efforts that have been implemented and are ongoing (described in the species assessment form) and because additional populations have recently been found. While there is still concern for genetic constriction and isolation due to generally low numbers of individuals at existing sites, natural dispersal is occurring at some sites, and translocation efforts are being implemented each year. Additionally, to reflect that the existing threats meet the definition of ''imminent'' (*i.e.*, they are ongoing), we are changing the listing priority number from a 6 to a 9.

Sand dune lizard (*Sceloporus arenicolus*)—The following summary is based on information in our files and the petition received on June 6, 2002. The sand dune lizard is endemic to a small area in southeastern New Mexico (Chaves, Eddy, Lea, and Roosevelt Counties) and adjacent west Texas (Andrews, Crane, Ward, and Winkler Counties). Within this area, the known occupied and potentially occupied habitat is only 1,697 square kilometers (655 square miles) in New Mexico, and an unknown amount in west Texas. The lizard's distribution is localized and fragmented (*i.e.*, known populations are separated by vast areas of unoccupied habitat), and the species is restricted to sand dune blowouts associated with active sand dunes and shinnery oak (*Quercus harvardii*) and scattered sandsage (*Artemisia filifolia*) vegetation. Sand dune lizards are not found at sites lacking shinnery oak dune habitat.

Extensive surveys within New Mexico, conducted in conjunction with a 5-year study, documented sand dune lizards at only half of the sites surveyed. It is clear that shinnery oak removal (*e.g.*, by treating with the herbicide Tebuthiuron for livestock range improvements) results in dramatic reductions and extirpation of sand dune lizards. Scientists repeatedly confirmed the extirpation of sand dune lizards from areas with herbicide treatment to remove shinnery oak. In 1999, biologists estimated that about 25 percent of the total sand dune lizard habitat in New Mexico had been eliminated in the previous 10 years. The population of sand dune lizards has also been affected by oil and gas field development. An estimated 50 percent decline in sand dune lizard populations can be expected in areas with approximately 25 to 30 oil and/or gas wells per section. The distribution of sand dune lizards is localized and fragmented, and this species is a habitat specialist. Therefore, impacts to its habitat will most likely greatly decrease populations. If current herbicide application continues and oil and gas development progresses as expected, the magnitude of threat to sand dune lizards will increase. Continued pressure to develop oil and gas resources in areas with sand dune lizards poses an imminent threat to the species. Therefore, we continue to assign this species a listing priority number of 2.

Rorippa subumbellata (Tahoe yellow cress)—The following summary is based on information in our files and the petition received on February 8, 2001. Tahoe yellow cress is a small perennial herb known only from the shores of Lake Tahoe in California and Nevada. Data collected over the last 25 years suggest a relationship between lake level and site occupancy by Tahoe yellow cress. The data generally indicate that species occurrence fluctuates yearly as a function of both lake level and the amount of exposed habitat. Records kept since 1900 indicate a preponderance of years with high lake levels that would isolate and reduce Tahoe yellow cress occurrences at higher beach elevations. From the standpoint of the species, less favorable peak years have occurred almost twice as often as more favorable low-level

years. In addition, there has been widespread and intensive use of the shorezone since European settlement. Today, shorezone conditions are influenced by heavy recreational use, boating, construction of piers and boat launches, and dam operations that control lake elevation.

Annual surveys are conducted to determine population numbers, site occupancy, and general disturbance regimes. During the 2003 annual survey period, the lake level was approximately 6,224 ft (1,898 m). This was the third consecutive year of low water. The survey located Tahoe yellow cress at 45 of the 72 sites surveyed (65 percent occupied), up from 15 sites (19 percent occupied) in 2000 when the lake level was high at 6,228 ft. Approximately 25,200 stems were counted or estimated in 2003, whereas during the 2000 annual survey, the estimated number of stems was 4,590. Over the past 3 years, the survey effort has increased considerably, largely due to our elevation of this species to candidate status.

Many Tahoe yellow cress sites are intensively used for commercial and public purposes and are subject to various activities such as erosion control, marina developments, pier construction, and recreation. The U.S. Forest Service, California Tahoe Conservancy, and California Department of Parks and Recreation have management programs for Tahoe yellow cress that include monitoring, fenced enclosures, and transplanting efforts when funds and staff are available. Public agencies (including the Service), private landowners, and environmental groups collaborated to develop a conservation strategy, coupled with a Memorandum of Understanding/Conservation Agreement. The conservation strategy, completed in 2003, contains goals and objectives for recovery and survival and a research and monitoring agenda, and will serve as the foundation for an adaptive management program.

Because of the continued commitments to conservation demonstrated by regulatory and land management agencies participating in the conservation strategy, we have determined the threats to Tahoe yellow cress from various land uses have been reduced from a high magnitude to a moderate magnitude. However, since these threats are still ongoing, they are imminent. Thus, based on the change in magnitude of threats, we are changing the LPN from a 2 to an 8.

Request for Information

We request you submit any further information on these three species as soon as possible or whenever it becomes available. We are particularly interested in any information:

(1) Recommending areas that we should designate as critical habitat for a species, or indicating that designation of critical habitat would not be prudent for a species;

(2) Documenting threats to any of these three species;

(3) Describing the immediacy or magnitude of threats facing these species; and

(4) Pointing out taxonomic or nomenclature changes for any of the species.

Submit your comments on southern Idaho ground squirrel or *Rorripa subumbellata* (Tahoe yellow cress) to the Regional Director (TE), U.S. Fish and Wildlife Service, Eastside Federal Complex, 911 NE. 11th Avenue, Portland, Oregon 97232–4181 (503/231–6158).

Submit your comments on the sand dune lizard to the Regional Director (TE), U.S. Fish and Wildlife Service, 500 Gold Avenue SW., Room 4012, Albuquerque, New Mexico 87102 (505/248–6920).

Our practice is to make comments, including names and home addresses of respondents, available for public inspection. Individual respondents may request that we withhold their home addresses from the public record, which we will honor to the extent allowable by law. In some circumstances, we can also withhold from the public record a respondent's identity, as allowable by law. If you wish for us to withhold your name and/or address, you must state this request prominently at the beginning of your comments. However, we will not 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.

Authority

This notice is published under the authority of the Endangered Species Act (16 U.S.C. 1531 *et seq.*).

Dated: December 17, 2004.

Marshall P. Jones, Jr.,

Acting Director, Fish and Wildlife Service.

[FR Doc. 04–28168 Filed 12–23–04; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[I.D. 121504I]

Gulf of Mexico Fishery Management Council; Public Hearings

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

ACTION: Notice of public hearing; request for comments.

SUMMARY: The Gulf of Mexico Fishery Management Council (Council) will hold a public hearing to solicit comments on ''Draft Amendment 3 for Addressing EFH Requirements, Habitat Areas of Particular Concern (HAPCs), and Adverse Effects of Fishing in the Following Fishery Management Plans of the Gulf of Mexico: Shrimp, Red Drum, Reef Fish, Stone Crab, Coral and Coral Reef in the Gulf of Mexico and Spiny Lobster and the Coastal Migratory Pelagic Resources of the Gulf of Mexico and South Atlantic.'' The Amendment contains proposed alternatives to further identify essential fish habitat (EFH), establish HAPCs, and, to the extent practicable, prevent adverse impacts of fishing activities on coral in HAPCs.

DATES: The public hearing will be held January 4, 2005, beginning at 7 p.m. and concluding no later than 10 p.m. Public comments received by mail that are received in the Council office by 5 p.m., January 5, 2005, will be presented to the Council.

ADDRESSES: The public hearing will be held at the DoubleTree Grand Key Resort, 3990 South Roosevelt Boulevard, Key West, FL 33040; phone: (888) 310–1540.

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

FOR FURTHER INFORMATION CONTACT: Rick Leard, Deputy Executive Director, Gulf of Mexico Fishery Management Council; phone: (813) 228–2815.

SUPPLEMENTARY INFORMATION: Following the judicial decision in *American Oceans Campaign* v. *Daley* (Civil Action No. 99–982), NOAA Fisheries and the Council prepared an ''Environmental Impact Statement (EIS) for the Generic Essential Fish Habitat (EFH) Amendment to the Following Fishery Management Plans of the Gulf of Mexico: Shrimp, Red Drum, Reef Fish, Stone Crab, Coral and Coral Reef in the

Gulf of Mexico and Spiny Lobster and the Coastal Migratory Pelagic Resources of the Gulf of Mexico and South Atlantic.'' The EIS analyzes within each fishery a range of potential alternatives to: (1) describe and identify essential fish habitat for each fishery; (2) identify other actions to encourage the conservation and enhancement of such EFH; and (3) identify measures to minimize to the extent practicable any adverse effects of fishing on such EFH. Based on this EIS, the Council has subsequently developed ''Draft Amendment 3 for Addressing EFH Requirements, Habitat Areas of Particular Concern (HAPCs), and Adverse Effects of Fishing in the Following Fishery Management Plans of the Gulf of Mexico: Shrimp, Red Drum, Reef Fish, Stone Crab, Coral and Coral Reef in the Gulf of Mexico and Spiny Lobster and the Coastal Migratory Pelagic Resources of the Gulf of Mexico and South Atlantic.''

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Dawn Aring at the Council (see **ADDRESSES**) by December 28, 2004.

Dated: December 17, 2004.

Alan D. Risenhoover,

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

[FR Doc. 04–28129 Filed 12–23–04; 8:45 am]

BILLING CODE 3510–22–S

Notices

Federal Register
Vol. 69, No. 247
Monday, December 27, 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

Farm Service Agency

Notice of Request for Extension of a Currently Approved Information Collection

AGENCY: Farm Service Agency.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the intent of the Farm Service Agency (FSA) to request an extension of a currently approved information collection used in support of the Standards for Approval of Volunteer Programs.

DATES: Comments must be submitted on or before February 25, 2005 to be assured consideration.

FOR FURTHER INFORMATION CONTACT: Ms. C. Mondina Jolley, USDA, Farm Service Agency, Human Resources Specialist, Domestic Operations Branch, Human Resources Division, 1400 Independence Ave., SW., Washington, DC 20250–0596, FAX 202–418–9120.

SUPPLEMENTARY INFORMATION:

Title: Volunteer Programs.

OMB Control Number: 0560–0232.

Expiration Date for Approval: October 30, 2004.

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

Abstract: The Volunteer Program PM Notice authorizes the FSA to enter into volunteer agreements with students, individuals, groups or organizations who sponsor individual's services without compensation, and who performs those services in furtherance of the programs of the Agency. The information collected allows FSA to effectively recruit, train, and accept, volunteers to carry out programs of, or supported by, the Department.

The forms covered by this collection are the Student; Individual; and Sponsored Volunteer Program Service Agreements; and supporting documents that allow the Agency to document its use of individuals who are not Federal employees to provide voluntary service, except for the purpose of Chapter 81 of Title 5, U.S.C. (relating to Worker Compensation Program) and Sections 2671 through 2680 of Title 28 U.S.C. relating to tort claims. The forms are furnished to selected volunteers to secure and record information regarding the agreement and permit the volunteer to submit time and attendance information. Documentation is required by the Office of Personnel Management letter dated April 18, 1996, *i.e.*, to inform volunteers of the nature of their appointment with respect to service credit for leave or other employees benefits and record time and attendance.

Estimate of Burden: The recording keeping requirements in this clearance are normal business records and, therefore, have no burden. Public reporting burden for this information collection is estimated to average 15 minutes per response.

Total Number of Respondents: 20.

Total Travel Time Per Respondent: 1 hour.

Total Annual Burden Hours: 16.

Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (b) the accuracy of the Agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including those who respond through the use of appropriate automated, electronic, or mechanical, collection techniques, or other forms of information technology. These comments should be sent to the Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503 and to Ms. C. Mondina Jolley, Student Employment Program Manager, USDA, FSA, Human Resources Division, Domestic Operations Branch, 1400 Independence Ave., SW., Washington, DC 20250–0596. Copies of the information collection may be obtained from Ms. Jolley at the above address.

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.

Signed in Washington, DC, on December 16, 2004.

James R. Little,

Administrator, Farm Service Agency.

[FR Doc. 04–28160 Filed 12–23–04; 8:45 am]

BILLING CODE 3410–05–P

DEPARTMENT OF AGRICULTURE

Forest Service

Freds Fire Restoration, Eldorado National Forest, El Dorado County, CA

AGENCY: Forest Service, USDA.

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

SUMMARY: In October 2004, the Freds Fire burned approximately 7,700 acres on the Eldorado National Forest and on private timberlands. The project area for this analysis is the approximately 4,600 acre portion of the Freds Fire on National Forest System lands. The USDA, Forest Service, Eldorado National Forest will prepare an environmental impact statement (EIS) for a proposal to treat approximately 3,200 acres of fire killed and damaged trees in the Freds Fire burned area. The land allocations within the fire area, as identified in the Sierra Nevada Forest Plan Supplemental EIS, are threat zone, defense zone, general forest, protected activity centers for spotted owls, spotted owl home range core areas, and riparian conservation areas adjacent to perennial, seasonal and ephemeral streams.

The purpose of the project is to: (1) Reduce long term fuel loading to reduce future fire severity and resistance to control; (2) improve roads and establish effective ground cover in severely burned areas to reduce erosion and sedimentation to streams in the short term, and to contribute to long term soil productivity; (3) recover the economic value of timber killed or severely injured by the fire, in an expeditious manner, for the purpose of generating funds to offset the cost of future restoration activities; and (4), reduce safety hazards to the public and forest workers.

DATES: Comments concerning the scope of the analysis must be received by January 12, 2005. The draft environmental impact statement is expected in March 2005 and the final environmental impact statement is expected in June 2005.

ADDRESSES: Send written comments to John D. Berry, Forest Supervisor, Eldorado National Forest, 100 Forni Road, Placerville, CA 95667, Attention: Freds Fire Restoration.

FOR FURTHER INFORMATION CONTACT: Laura Hierholzer, Project Leader, Placerville Ranger District, 4260 Eight Mile Road, Camino, CA 95709, or by telephone at 530–647–5382.

SUPPLEMENTARY INFORMATION:

Purpose and Need for Action

The fire burned with varying intensity. Many areas of the fire burned at high and moderate intensity, killing 75%–100% of the trees and completely consuming the duff and litter that protected the soil. In these areas, the fire resulted in high rates of soil erosion, sedimentation to streams, destruction of wildlife habitat for sensitive species, and loss of old forest characteristics. The fire killed tens of thousands of trees, that if left untreated will contribute to extremely high fuel loading over time. As these dead trees fall and fuel accumulates, future fires will be even more severe. Treating the dead and dying tree component of the landscape is the first step in reducing long term fuel loading and restoring the historic fire regime, thereby reducing the impacts of fires on the future forest and contributing to the restoration of old forest habitats. Without treatment to begin to restore the fire area, significant additional impacts to soil, water quality, cultural resources, and wildlife habitat are likely over the short and long term. This Environmental Impact Statement (EIS) addresses treating the dead and dying tree component of the landscape and improving rocks to reduce sediment delivery to streams. The process of removing dead trees would reduce soil erosion by immediately increasing effective ground cover (limbs, twigs, and small boles) and maintain soil productivity for tree growth.

Proposed Action

The proposed action would remove dead trees using ground based, skyline, and helicopter logging methods. Trees posing a safety hazard to the public and forest workers would be removed along roads, trails, residential and recreation areas. Roads would be reconstructed and improved to facilitate tree removal and to improve watershed condition. Approximately 1 mile of newly constructed road would be built. Slash and small dead trees would be treated to provide ground cover and reduce short term fuel loading. Protection would be applied to sensitive plants and wildlife species, and cultural resources.

The proposed action is consistent with the 1989 Eldorado National Forest Land and Resource Management Plan as amended by the Sierra Nevada Forest Plan Amendment Record of Decision (2004).

Nature of Decision To Be Made

The decision to be made is whether to adopt and implement the proposed action, an alternative to the proposed action, or take no action to remove fire killed and damaged trees in the project area, to undertake road improvements, or to implement fuel treatments.

Other alternatives will be developed based on significant issues identified during the scoping process for the environmental impact statement. All alternatives will need to respond to the specific condition of providing benefits equal to or better than the current condition. Alternatives being considered at this time include: (1) The Proposed Action and (2) No Action.

Scoping Process

Public participation will be especially important at several points during the analysis. The Forest Service will be seeking information, comments, and assistance from the Federal, State, and local agencies and other individuals or organizations who may be interested in or affected by the proposed action. To facilitate public participation, information about the proposed action will be mailed to all who express interest in the proposed action and notification of the public scoping period will be published in the Mountain Democrat, Placerville, CA.

Comments submitted during the scoping process should be in writing and should be specific to the proposed action. The comments should describe as clearly and completely as possible any issues the commenter has with the proposal. The scoping process includes:

(a) Identifying potential issues;

(b) Identifying issues to be analyzed in depth;

(c) Eliminating nonsignificant issues or those previously covered by a relevant previous environmental analysis;

(d) Exploring additional alternatives;

(e) Identifying potential environmental effects of the proposed action and alternatives.

A public meeting will be held on Thursday, January 13, 2005, from 7 p.m. to 9 p.m. at the Pollock Pines Community Center, Sanders Drive, Pollock Pines, California.

Comment Requested

This notice of intent initiates the scoping process which guides the development of the environmental impact statement.

Early Notice of Importance of Public Participation in Subsequent Environmental Review

A draft environmental impact statement will be prepared for comment. The comment period on the draft environmental impact statement will be 45 days from the date the Environmental Protection Agency publishes the notice of availability in the **Federal Register**.

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

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

National Environmental Policy Act at 40 CFR 1503.3 in addressing these points.

Comments received, including the names and addresses of those who comment, will be considered part of the public record on this proposal and will be available for public inspection.

(Authority: 40 CFR 1501.7 and 1508.22; Forest Service Handbook 1909.15, Section 21.)

The final EIS is scheduled to be completed in June, 2005. In the final EIS, the Forest Service is required to respond to substantive comments received during the comment period that pertain to the environmental consequences discussed in the draft EIS and applicable laws, regulations, and policies considered in making the decision regarding this proposal.

John D. Berry, Forest Supervisor, Eldorado National Forest is the responsible official. As the responsible official he will document the decision and reasons for the decision in the Record of Decision. That decision will be subject to Forest Service appeal regulations (36 CFR part 215).

Dated: December 17, 2004.

Kathryn D. Hardy,

Acting Forest Supervisor.

[FR Doc. 04–28141 Filed 12–23–04; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF COMMERCE

[I.D. 122004C]

Submission for OMB Review; Comment Request

The Department of Commerce has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Weather Modification Activities Reports.

Form Number(s): NOAA Forms 17–4, 17–4A, 17–4B.

OMB Approval Number: 0648–0025.

Type of Request: Regular submission.

Burden Hours: 330.

Number of Respondents: 55.

Average Hours Per Response: 30 minutes for Forms 17–4 and 17–4A; 5 hours for Form 17–4B.

Needs and Uses: The Weather Modification Activities Reports are required by Public Law 92–205, Section 6(b). All entities which engage in weather modification (e.g. cloud-seeding to enhance precipitation or disperse fog) are required to report various data to NOAA. NOAA maintains the data for use in scientific research, historical statistics, international reports, and other purposes.

Affected Public: Business or other for-profit organizations; individuals or households; not-for-profit institutions; Federal government; State, local or tribal government.

Frequency: On occasion, annually.

Respondent's Obligation: Mandatory.

OMB Desk Officer: David Rostker, (202) 395–3897.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW, Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to David Rostker, OMB Desk Officer, FAX number (202) 395–7285, or *David__Rostker@omb.eop.gov*.

Dated: December 17, 2004.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 04–28130 Filed 12–23–04; 8:45 am]

BILLING CODE 3510–KD–S

DEPARTMENT OF COMMERCE

[I.D. 122004B]

Submission for OMB Review; Comment Request

The Department of Commerce has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Processed Products Family of Forms.

Form Number(s): NOAA Forms 88–13, 88–13c.

OMB Approval Number: 0648–0018.

Type of Request: Regular submission.

Burden Hours: 680.

Number of Respondents: 1,320.

Average Hours Per Response: 30 minutes for Form 88–13; 15 minutes for Form 88–13c.

Needs and Uses: This is a survey of seafood and industrial fish processing firms. The firms processing fish from certain fisheries must report on their annual volume, the wholesale value of products, and monthly employment figures. Data are used in economic analyses to estimate the capacity and extent to which processors utilize domestic harvest. These analyses are necessary to carry out the provision of the Magnuson-Stevens Fishery Conservation and Management Act.

Affected Public: Business or other for-profit organizations.

Frequency: Monthly, annually.

Respondent's Obligation: Mandatory.

OMB Desk Officer: David Rostker, (202) 395–3897.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW, Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to David Rostker, OMB Desk Officer, FAX number (202) 395–7285, or *David__Rostker@omb.eop.gov*.

Dated: December 17, 2004.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 04–28133 Filed 12–23–04; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

Under Secretary for Industry and Security

[Docket No. 03–BIS–013]

In the Matters of: Yaudat Mustafa Talyi a.k.a. Yaudat Mustafa a.k.a. Joseph Talyi, 41 Chamale Cove East, Slidell, Louisiana 70460, Respondents; Decision and Order

On June 22, 2004, the Bureau of Industry and Security (''BIS'') issued a charging letter against the respondent, Yaudat Mustafa Talyi, a.k.a. Yaudat Mustafa, a.k.a. Joseph Talyi (''Talyi''), that alleged 11 violations of the Export Administration Regulations (Regulations),[1] which were issued under the Export Administration Act of 1979,

[1] The violations charged occurred between 2001 and 2002. The Regulations governing the violations at issue are found in the 2001 and 2002 versions of the Code of Federal Regulations (15 CFR parts 730–774 (2001–2002)). The 2004 Regulations establish the procedures that apply to this matter.

as amended (50 U.S.C. app. 2401–2420 (2000)) (''Act'').[2]

Specifically, the charging letter alleged that, on or about May 29, 2001, Talyi exported oil field parts, items subject to both the Regulations and the Libyan Sanctions Regulations of the Treasury Department's Office of Foreign Assets Control (''OFAC''), to Libya without obtaining authorization from OFAC as required by section 746.4 of the Regulations. In doing so, Talyi committed one violation of section 764.2(a) of the Regulations.

The charging letter also alleged that, in March 2002, Talyi solicited a violation of the Regulations by ordering oil field parts, items subject to both the Regulations and the Libyan Sanctions Regulations, from an original equipment manufacturer located in the United States, for export to an end-user in Libya without the required OFAC authorization. In doing so, Talyi committed one violation of section 764.2(c) of the Regulations.

The charging letter alleged that Talyi ordered the items related to the May 2001 export and the March 2002 solicitation from original equipment manufacturers located in the United States with knowledge that a violation of the Regulations would occur. Specifically, Talyi ordered the items knowing that they would be exported to end-users in Libya and with knowledge that authorization from OFAC was required but would not be obtained. In doing so, Talyi committed two violations of section 764.2(e) of the Regulations.

Further, the charging letter alleged that, between October 2002 and on or about December 13, 2002, Talyi participated in four transactions concerning items subject to the Regulations that were to be exported from the United States in violation of a BIS order temporarily denying his export privileges. On two separate occasions—or about October 22, 2002, and on or about November 11, 2002—Talyi sent e-mails to an oil field equipment broker located in the United States that directed the broker to obtain price quotations for oil field parts that were to be exported from the United States to the United Arab Emirates. Between October and November of 2002, Talyi also arranged for the attempted export of items subject to the Regulations from the United States to the United Arab Emirates from a grocery store in Slidell, Louisiana. Then, on or about December 13, 2002, Talyi sent an e-mail to the oil field equipment broker referenced above that included an attachment describing the technical information about the oil field parts to be exported from the United States to the United Arab Emirates. In the e-mail, Talyi asked the broker if he would like to handle the file and directed the broker to clarify parts specifications in response to comments provided by the end-user in the United Arab Emirates. Talyi's participation in these four transactions was contrary to the terms and conditions of a September 30, 2002, BIS Temporary Denial Order denying Talyi's export privileges. In doing so, Talyi committed four violations of Section 764.2(k) of the Regulations.

The charging letter alleged that, in connection with three of the violations of Section 764.2(k) of the Regulations discussed above, Talyi ordered the items at issue with knowledge that such actions were in violation of the terms and conditions of a September 30, 2002, BIS Temporary Denial Order. In so doing, Talyi committed three violations of section 764.2(e) of the Regulations.

On the basis of the factual record before the Administrative Law Judge (''ALJ''), he found that Talyi failed to file an answer to BIS's charging letter within the time required by the Regulations. Indeed, as service of the notice of issuance of the charging letter on Talyi's counsel was properly effected on June 30, 2004, a response to the charging letter was due no later than July 30, 2004. The record does not include any such response from the respondent. The ALJ therefore held Talyi in default.

Under the default procedures set forth in section 766.7(a) of the Regulations, ''[f]ailure of the respondent to file an answer within the time provided constitutes a waiver of the respondent's right to appear,'' and ''on BIS's motion and without further notice to the respondent, [the ALJ] shall find the facts to be as alleged in the charging letter.'' Accordingly, on November 18, 2004, the ALJ issued a Recommended Decision and Order, in which he found that the facts alleged in the charging letter constitute the findings of fact in this matter and, thereby, establish that Talyi committed one violation of section 764.2(a), one violation of section 764.2(c), five violations of section 764.2(e), and four violations of section 764.2(k) of the Regulations. The ALJ also recommended a 20-year denial of the respondent's export privileges and a maximum civil penalty of $121,000 against the respondent.

Pursuant to Section 766.22 of the Regulations, the ALJ's Recommended Decision and Order has been referred to me for final action. Based on my review of the entire record, I find that the record supports the ALJ's findings of fact and conclusions of law regarding each of the above-referenced charges. I also find that the penalty recommended by the ALJ is appropriate given the complete disregard for U.S. export control laws demonstrated by the respondent. Talyi knowingly violated the Regulations, violated the terms and conditions of a Temporary Denial Order, breached his plea agreement in a criminal case by refusing to sign a civil settlement agreement offered by BIS, and failed to participate in this administrative proceeding.

Specifically, Talyi knowingly violated the Regulations by ordering and shipping oil field parts from the United States to Libya, a sanctioned country. He also violated the terms and conditions of a BIS Temporary Denial Order on four occasions by participating in exports and attempted exports to the United Arab Emirates. On three of these occasions, Talyi ordered the items at issue with knowledge that the required U.S. government authorization would not be obtained. In January 29, 2004, pursuant to a plea agreement filed with the U.S. District Court for the Eastern District of Louisiana, Talyi pled guilty to two felony counts of violating the International Emergency Economic Powers Act for his participation in the export and attempted export of items from the United States to the United Arab Emirates in violation of the Temporary Denial Order. In the plea agreement, Talyi agreed to settle the BIS administrative case by paying a $75,000 civil penalty and accepting a 10-year denial of export privileges. However, Talyi subsequently refused to sign the settlement agreement, and Talyi's counsel ignored repeated attempts by counsel for BIS to discuss the matter in spring of 2004. Moreover, once this administrative proceeding was initiated against Talyi, he did not respond to the charging letter or otherwise participate in the proceeding. In light of these circumstances, I affirm the findings of fact and conclusions of law of the ALJ's Recommended Decision and Order.

It is hereby ordered,

First, that a civil penalty of $121,000 is assessed against Talyi, which shall be

[2] From August 21, 1994, through November 12, 2000, the Act was in lapse. During that period, the President, through Executive Order 12924, which had been extended by successive Presidential Notices, the last of which was August 3, 2000 (3 CFR, 2000 Comp. 397 (2001)), continued the Regulations in effect under the International Emergency Economic Powers Act (50 U.S.C. 1701–1706 (2000)) (IEEPA). On November 13, 2000, the act was reauthorized and it remained in effect through August 20, 2001. Executive Order 13222 of August 17, 2001 (3 CFR, 2001 Comp., p. 783 (2002)), which has been extended by successive Presidential Notices, the most recent being that of August 7, 2003 (68 FR 47833, August 11, 2003), continues the Regulations in effect under IEEPA.

paid to the Department of Commerce within 30 days from the date of entry of this Order. Payment shall be made in the manner specified in the attached instructions.

Second, that, pursuant to the Debt Collection Act of 1982, as amended (31 U.S.C. 3701–3720E (2000)), the civil penalty owed under this Order accrues interest as more fully described in the attached Notice, and, if payment is not made by the due date specified herein, Talyi will be assessed, in addition to the full amount of the civil penalty and interest, a penalty charge and an administrative charge, as further described in the attached Notice.

Third, that, for a period of 20 years from the date on which this Order takes effect, Yaudat Mustafa Talyi, a.k.a. Yaudat Mustafa, a.k.a. Joseph Talyi (''Talyi''), 41 Chamale Cove East, Slidell, Louisiana 70460, and, when acting for or on behalf of Talyi, his representatives, agents, assigns, and employees (individually referred to as ''a Denied Person''), may not, directly or indirectly, participate in any way in any transaction involving any commodity, software, or technology (hereinafter collectively referred to as ''item'') exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations, including, but not limited to:

A. Applying for, obtaining, or using any license, License Exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations; or

C. Benefiting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or in connection with any other activity subject to the Regulations.

Fourth, that no person may directly or indirectly, do any of the following:

A. Export or reexport to or on behalf of a Denied Person any item subject to the Regulations;

B. Take any action that facilitates the acquisition or attempted acquisition by a Denied Person of the ownership, possession, or control of any item subject to the Regulations that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby a Denied Person acquires or attempts to acquire such ownership, possession, or control;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from a Denied Person of any item subject to the Regulations that has been exported from the United States;

D. Obtain from a Denied Person in the United States any item subject to the Regulations with knowledge or reason to know that the item will be, or is intended to be, exported from the United States; or

E. Engage in any transaction to service any item subject to the Regulations that has been or will be exported from the United States and that is owned, possessed, or controlled by a Denied Person, or service any item, of whatever origin, that is owned, possessed, or controlled by a Denied Person if such service involves the use of any item subject to the Regulations that has been or will be exported from the United States. For purposes of this paragraph, ''servicing'' means installation, maintenance, repair, modification, or testing.

Fifth, that, after notice and opportunity for comment as provided in Section 766.23 of the Regulations, any person, firm, corporation, or business organization related to a Denied Person by affiliation, ownership, control, or position of responsibility in the conduct of trade or related services may also be made subject to the provisions of this Order.

Sixth, that this Order shall be served on the Denied Person and on BIS, and shall be published in the **Federal Register.** In addition, the ALJ's Recommended Decision and Order, except for the section related to the Recommended Order, shall be published in the **Federal Register.**

This Order, which constitutes the final agency action in this matter, is effective upon publication in the **Federal Register.**

Dated: December 20, 2004.

Kenneth I. Juster,

Under Secretary of Commerce for Industry and Security.

Notice

The Order to which this Notice is attached describes the reasons for the assessment of the civil monetary penalty. It also specifies the amount owed and the date by which the civil penalty is due and payable.

Under the Debt Collection Act of 1982, as amended (31 U.S.C. 3701–3720E (2000)), and the Federal Claims Collection Standards (31 CFR Parts 900–904 (2002)), interest accrues on any and all civil monetary penalties owed and unpaid under the Order, from the date of the Order until paid in full. The rate of interest assessed respondent is the rate of the current value of funds to the U.S. Treasury on the date that the Order was entered. However, interest is waived on any portion paid within 30 days of the date of the Order. *See* 31 U.S.C. 3717 and 31 CFR 901.9

The civil monetary penalty will be delinquent if not paid by the due date specified in the Order. If the penalty becomes delinquent, interest will continue to accrue on the balance remaining due and unpaid, and respondent will also be assessed both an administrative charge to cover the cost of processing and handling the delinquent claim, and a penalty charge of six percent per year. Although the penalty charge will be computed from the date that the civil penalty becomes delinquent, it will be assessed only on sums due and unpaid for over 90 days after the date. *See* 31 U.S.C. 3717 and 31 CFR 901.9.

The foregoing constitutes the initial written notice and demand to respondent in accordance with section 901.2(b) of the Federal Claims Collection Standards (31 CFR 901.2(b)).

Instructions for Payment of Civil Penalty

1. The civil penalty check should be made payable to: U.S. Department of Commerce.

2. The check should be mailed to: U.S. Department of Commerce, Bureau of Industry and Security, Export Enforcement Team, Room H–6883, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Attn: Sharon Gardner.

United States Department of Commerce, Bureau of Industry and Security

[Docket No. 03–BIS–13]

In the Matter of: Yaudat Mustafa Talyi a.k.a Yaudat Mustafa a.k.a. Joseph Talyi 41 Chamale Cove East, Sidell, Louisiana 70460 and Oakdale FDC Federal Bureau of Prisons P.O. Box 5060 Oakdale, Louisiana 71463 Respondent; *Decision and Order on Motion for Default Order.*

On June 22, 2004, the Bureau of Industry and Security, U.S. Department of Commerce (''BIS'') issued a charging letter initiating this administrative enforcement proceeding against Respondent, Yaudat Mustafa Talyi, a.k.a. Yaudat Mustafa, a.k.a. Joseph Talyi (''Talyi''). The charging letter alleged that Talyi committed eleven (11) violations of the Export Administration Regulations (currently codified at 15 CFR parts 730–774 (2004)) (the ''Regulations'',[1] issued under the Export

[1] The charged violations occurred from 2001 to 2002. The Regulations governing the violations at

Continued

Administration Act of 1979, as amended (50 U.S.C. App. 2401–2420 (2000)) (the ''Act''),[2] relating to his export activities concerning items exported or to be exported from the United States to Libya in violations of U.S. export control laws and to the United Arab Emirates in violation of a temporary denial order (''initial TDO'') issued by BIS on September 30, 2002. *See* Exhibit 1, BIS Initial TDO, dated September 30, 2002 (67 FR 62225 (October 4, 2002)).

I. Procedural Background

The procedural background in this matter insists of three interrelated elements concerning Talyi and his unlawful export activities: (i) a BIS temporary denial order (''initial TDO''),[3] (ii) a federal criminal case against Talyi, and (iii) this resulting administrative enforcement proceeding.

a. BIS Temporary Denial Orders Issued Against Talyi

On September 30, 2002, the Assistant Secretary of Commerce for Export Enforcement (''Assistant Secretary'') issued the initial TDO denying the export privileges of International Business Services, Ltd. (''IBS''), and its owner, Talyi, for one hundred and eighty (180) days based on evidence indicating they were involved in illegal exports of oil field parts to Libya and Sudan. *See* Exhibit 1, BIS Initial TDO, dated September 30, 2002 (67 FR 62225 (October 2, 2002)).[4] The Assistant Secretary renewed the initial TDO against Talyi on four subsequent occasions, each for the maximum period of one hundred and eighty (180) days, based on further evidence demonstrating Talyi had violated the initial TDO. *See* 68 FR 15982 (April 2, 2003); 68 FR 56261 (September 30, 2003); 69 FR 15291 (March 25, 2004); and 69 FR 57671 (September 27, 2004). The current TDO is set to expire on March 12, 2005.

b. Criminal Case Against Talyi

On January 29, 2004, pursuant to a plea agreement filed in the U.S. District Court for the Eastern District of Louisiana, Talyi pled guilty to two felony counts of violating the International Emergency Economic Powers Act for his participation in the export and attempted export of items from the United States to the United Arab Emirates that were violations of the initial TDO. *See* Exhibit 2, Talyi Plea Agreement, dated January 29, 2004.

On April 28, 2004, Talyi was sentenced to five months in prison, five months of home confinement, and one year of supervised release for the two felony convictions. *See* Exhibit 3, Talyi Judgment Commitment Order, dated April 29, 2004. Talyi was also ordered to pay a twenty-five thousand dollar ($25,000) criminal fine and a two hundred dollar ($200) special asssessment. *See id.* Talyi has a projected release date from federal prison on December 1, 2004, at which time he will begin his five month term of home confinement.

Talyi's plea agreement stated that Talyi agreed to settle the BIS administrative case by paying a seventy-five thousand dollar ($75,000) civil penalty and accepting a ten (10) year denial of exporting privileges. *See* Exhibit 2, Talyi Plea Agreement, dated January 29, 2004. The plea agreement also states that a copy of the settlement agreement for BIS's administrative case was attached thereto. *See id.* The settlement agreement for BIS's administrative case was attached thereto. *See id.* The settlement agreement incorporated BIS's allegations that Talyi committed eleven (11) violations of the Regulations for his export activities concerning oil field parts to be exported from the United States to Libya without the required U.S. Government authorizations for participating in export transactions in violation of the initial TDO. *See* Exhibit 4, BIS Settlement Agreement.

c. Administrative Case Against Talyi

On March 2, 2004, about six weeks prior to Talyi's criminal sentencing, BIS sent settlement documents to Talyi's counsel for the administrative case. Those settlement documents contained the agreement that Talyi would pay a seventy-five thousand dollar ($75,000) civil penalty and receive a ten (1) year denial of his export privileges for the eleven (11) charges contained in the proposed charging letter. However, Talyi refused to sign the settlement agreement and Talyi's counsel ignored repeated attempts by counsel for BIS to discuss the matter throughout the spring of 2004. Specifically, Talyi's counsel did not return any of BIS's calls nor did he respond to any correspondence sent by BIS's counsel concerning this matter. *See e.g.* Exhibits 5 and 6, BIS Letters to Frank DeSalvo, dated May 25, 2004 and June 16, 2004.

As a result, on June 22, 2004, BIS filed a charging letter thereby initiating this formal administrative proceeding against Talyi. *See* Exhibit 7, BIS Charging Letter, dated June 22, 2004. As discussed *infra,* BIS served a copy of this charging letter on Talyi's counsel. *See* Exhibit 8, U.S. Postal Service, Certified Mail Returned Receipt. On July 9, 2004, after no response from Talyi or his counsel, Talyi's failure to enter into the BIS settlement agreement, and his apparent breach of his plea agreement, BIS withdrew its offer of settlement. *See* Exhibit 9, Letter to Frank DeSalvo, dated July 9, 2004. To date, Talyi has not entered into a settlement agreement that is consistent with his criminal plea agreement and has been unwilling to engage in constructive settlement negotiations with BIS.[5]

II. Facts

a. Talyi's Illegal Exports to Libya

The BIS charging letter stated that on or about May 29, 2001, Talyi ordered and exported oil field parts from the United States to Libya with knowledge that the required authorization from the U.S. Government would not be obtained. *See* Exhibit 7, BIS Charging Letter, dated June 22, 2004, Charges 1–2. BIS further charged that between, on, or about March 14, 2002, and on or about March 26, 2002, Talyi ordered oil field parts from an original equipment manufacturer located in the United States for export to an end-user in Libya with knowledge that the required U.S. Government authorization not be obtained. *See id.*, Charges 3–4.

b. Talyi's Participation in Illegal Exports or Attempted Export to the United Arab Emirates.

BIS also charged Talyi with violations concerning his participation in exports or attempted exports to the United Arab Emirates. *See* Exhibit 7, BIS Charging Letter, dated June 22, 2004. Specifically, BIS charged that on four occasions between, on, or about October 22, 2002, and on or about December 13, 2002, Talyi participated in an export or attempted export of items from the United Arab Emirates in violation of the initial TDO. *See id.*, Charges 9–11.

III. Service of the Charging Letter

In accordance with Section 766.3(b)(1) of the Regulations, on June 22, 2004, BIS mailed the notice of issuance of a charging letter by registered mail to Talyi's attorney, Frank G. DeSalvo, at his last known address: Frank G. DeSalvo, Esq., 201 South Galvez Street, New Orleans, Louisiana, 70119. *See* Exhibit 10, U.S. Postal Service Certified mail Receipt, dated June 22, 2004. According to the registered mail receipt, the notice of issuance of a charging letter was received by Mr. DeSalvo's office on June 30, 2004. *See* Exhibit 8, U.S. Postal Service, Certified Mail Returned Receipt. To date, Talyi has failed to answer or otherwise respond to the charging letter.

Accordingly, because Talyi has not answered or otherwise responded to the charging letter within thirty (30) days from the time he received notice of issuance of the charging letter, as required by Section 766.6 of the Regulations, Talyi has defaulted in this matter.

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issue are found in the 2001 to 2002 versions of the Code of Federal Regulations (15 CFR parts 730–774 (2001–2002)). The 2004 Regulations establish the procedures that apply to this matter.

[2] From August 21, 1994, through November 12, 2000, the Act was in lapse. During that period, the President, through Executive Order 12924, which had been extended by successive Presidential Notices, the last of which was August 3, 2000 (3 CFR 2000 Comp. 397 (2001)), continued the Regulations in effect under the International Emergency Economic Powers Act (50 U.S.C. 1701–1706 (2000)) (''IEEPA'').

On November 13, 2000, the Act was reauthorized and it remained in effect through August 20, 2001. Since August 21, 2001, the Act has been in lapse and the President, through Executive Order 1322 of August 17, 2001 (3 CFR 2001 Comp. 783 (2002)), as extended by the Notice of August 6, 2004 (69 *Fed. Reg.* 48763, August 10, 2004), has continued the Regulations in effect under the IEEPA.

[3] A temporary denial order may be issued against a person by the Assistant Secretary of Commerce for Export Enforcement for up to 180 days based on a finding that there is sufficient evidence that the order is necessary in the public interest to prevent an imminent violations of the Act, the Regulations, or any order license or authorization issued there under. *See* 15 CFR 766.24.

[4] The initial TDO also named Talyi's business, Top Oil Tools, as a related person. *See id.*

[5] After BIS filed the charging letter and withdrew its settlement offer, Talyi (through his counsel) made a counter-offer to BIS. However, because this counter-offer was not consistent with the terms of Talyi's plea agreement and the BIS settlement agreement to which Talyi had previously agreed, BIS rejected Talyi's counter-offer.

IV. Legal Basis for Issuing an Order of Default

Section 766.7 of the Regulations states that BIS may file a motion for an Order of Default if a responder fails to file a timely answer to a charging letter. That section, entitled Default, provided in pertinent part:

Failure of the respondent to file an answer within the time provided constituted a waiver of the responder's right to appear and contest the allegations in the charging letter. In such event, the administrative law judge, on BIS's motion and without further notice to the respondent, shall find the facts to be as alleged in the charging letter and render an initial or recommended decision containing findings of fact and appropriate conclusions of law and issue or recommend an order imposing sanctions.

15 CFR 766.7 (2004).

Pursuant to section 766.6 of the Regulations, a respondent must file an answer to the charging letter ''within 30 days after being served with notice of the issuance of the charging letter'' initiated the proceeding.

V. Sanctions

Section 764.3 of the Regulations establishes the sanctions that BIS may seek for the violations charged in this proceeding. The applicable sanctions are: (i) a civil penalty; (ii) suspension from practice before the Department of Commerce; and (iii) a denial of export privileges under the Regulations. *See* 15 CFR 764.3 (2004).

BIS requests that I recommend to the Under Secretary of Commerce for Industry and Security (''Under Secretary'')[6] that Talyi's export privileges under the Regulations be denied for twenty (20) years and that Talyi be ordered to pay a one hundred twenty-one thousand dollar ($121,000) civil penalty to the Department of Commerce, the maximum civil penalty allowable based on the charges in the charging letter. *See* Bureau of Industry and Security's Motion for Default Order, at 7–9. I agree with BIS, in that Talyi has exhibited a severe disregard and contempt for U.S. export control laws. *See* Exhibit 2, Talyi Plea Agreement, dated January 29, 2004; *see also* Exhibit 3, Talyi Judgment and Commitment Order, dated April 29, 2004. Talyi has deliberately and covertly participated in export transactions of items from the United States to the United Arab Emirates in violation of an initial TDO issued by BIS. *See id.* Talyi is currently serving a prison term resulting from his felony guilty plea to these violations of the TDO. *See* Exhibit 3, Talyi Judgment and Commitment Order, dated April 29, 2004. Furthermore, Talyi exported and solicited oil field parts from the United States to Libya, a country against which the United States maintained an economic embargo because of Libya's support for international terrorism, when Talyi knew the required U.S. government authorization would not be obtained. *See* Exhibit 7, BIS Charging Letter, dated June 22, 2004.

BIS has also established that Talyi failed to enter into a settlement agreement consistent with that to which Talyi previously agreed in his criminal plea agreement, but has refused to engage in any good faith settlement negotiations with BIS concerning the case. *See* Exhibit 2, Talyi Plea Agreement, dated January 29, 2004; *see also* Exhibit 3, Talyi Judgment and Commitment Order, dated April 29, 2004; Exhibits 5 and 6, EIS Letters to Frank DeSalvo, dated May 25, 2004, and June 16, 2004. In light of the above, through his illegal actions Talyi has demonstrated that this is the kind of case for which a lengthy denial order and the maximum civil penalty are necessary because Talyi simply cannot be trused to comply with U.S. export control laws. *See id.*

Based on the foregoing, I concur with BIS and recommend that the Under Secretary enter an Order denying Talyi's export privileges for a period of twenty (20) years and assess a twenty-one thousand dollar ($121,000) civil penalty against Talyi. Such a denial order and civil penalty are consistent with penalties imposed in recent cases under the Regulations involving illegal exports to Iran, a country that is subject to a similar embargo as that which had applied to Libya during the relevant time period. *See In the Matter of Jabal Damavand General Trading Company*, 67 FR 32009 (May 13, 2002) (affirming the ALJ's recommendations that a ten year denial was appropriate where violations involved shipments of EAR99 items to Iran); *In the Matter of Adbulamir Mahdi*, 68 FR 57406 (October 3, 2003) (affirming the ALJ's recommendations that a twenty (20) year denial was appropriate where violations involved shipments of oil field equipment to Iran as part of a conspiracy to ship items through Canada to Iran).

The recommended penalties are also consistent with settlements reached in significant BIS cases under the Regulations concerning illegal exports of pipe coating materials to Libya. *See In the Matter of Jerry Vernon Ford*. 67 FR 7352 (Tuesday, February 19, 2002) (settlement agreement for a twenty-five (25) year denial); and *In the Matter of Thane-Coat, Inc.*, 67 FR 7351 (Tuesday, February 19, 2002) (settlement agreement for a civil penalty of one million, one hundred twenty thousand dollars ($1,120,000) (five hundred twenty thousand dollars ($520,000) suspended for two years and a twenty-five (25) year denial).

[Portions Redacted]

Accordingly, I am referring this Recommended Decision and Order to the Under Secretary for review and final action for the agency, without further notice to the Respondent, as provided in Section 766.7 of the Regulations.

Within 30 days after receipt of this Recommended Decision and Order, the Under Secretary shall issue a written order affirming, modifying, or vacating the Recommended Decision and Order. *See* 15 CFR 766.22(c).

Done and dated this 18 of November, at Baltimore, MD.

Joseph N. Ingolia,

Chief Administrative Law Judge.

CERTIFICATE OF SERVICE

I hereby certify that I served the *Decision and Order on Motion for Default Order* by Federal Express to the following person: Frank G. DeSalvo, Esq., 201 South Galvez St., New Orleans, LA 70119.

Done and dated this 18 day of November 2004 Baltimore, Maryland.

Alyssa L. Paladino,

Law Clerk, ALJ Docketing Center, United States Coast Guard, 40 S. Gay Street, Room 412, Baltimore, MD 21202. Phone: (410) 962–7434. Facsimile: (410) 962–1742.

[FR Doc. 04–28186 Filed 12–23–04; 8:45 am]

BILLING CODE 3510–DT–M

[6] Pursuant to section 13(c)(1) of the Act and section 766.17(b)(2) of the Regulations, in export control enforcement cases, the ALJ issues a recommended decision and order which is reviewed by the Under Secretary, who issues the final decision for the agency.

DEPARTMENT OF COMMERCE

International Trade Administration

Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part

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

ACTION: Notice of initiation of antidumping and countervailing duty administrative reviews and request for revocation in part.

SUMMARY: The Department of Commerce (the Department) has received requests to conduct administrative reviews of various antidumping and countervailing duty orders and findings with November anniversary dates. In accordance with the Department's regulations, we are initiating those administrative reviews. The Department also received a request to revoke one antidumping duty order in part.

EFFECTIVE DATE: December 27, 2004.

FOR FURTHER INFORMATION CONTACT: Holly A. Kuga, Office of AD/CVD Operations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230, telephone: (202) 482–4737.

SUPPLEMENTARY INFORMATION:

Background

The Department has received timely requests, in accordance with 19 CFR 351.213(b)(2004), for administrative reviews of various antidumping and countervailing duty orders and findings with November anniversary dates. The Department also received a timely request to revoke in part the

antidumping duty order on Certain Hot-Rolled Carbon Steel Flat Products from Thailand.

Initiation of Reviews

In accordance with section 19 CFR 351.221(c)(1)(i), we are initiating administrative reviews of the following antidumping and countervailing duty orders and findings. We intend to issue the final results of these reviews not later than November 30, 2005.

Antidumping duty proceedings	Period to be reviewed
Mexico:	
Carbon and Certain Alloy Steel Wire Rod, A–201–830	10/1/03—9/30/04
Siderurgica Lazaro Cardenas las Truchas S.A. [1]	
Circular Welded Non-alloy Steel Pipe, A–201–805	11/1/03—10/31/04
Hylsa, S.A. de C.V.	
Niples Del Norte, S.A. de C.V.	
Netherlands: Certain Hot-Rolled Carbon Steel Flat Products, A–421–807	11/1/03—10/31/04
Corus Staal B.V.	
Romania: Certain Hot-Rolled Carbon Steel Flat Products, A–485–806	11/1/03—10/31/04
S.C. Ispat Sidex S.A., aka Sidex S.A.	
Sidex Trading S.r.l.	
Metalexportimport, S.A.	
Thailand: Certain Hot-Rolled Carbon Steel Flat Products, A–549–817	11/1/03—10/31/04
Nakornthai Strip Mill Public Co., Ltd.	
Sahaviriya Steel Industries Public Co., Ltd.	
Siam Strip Mill Public Co., Ltd.	
The People's Republic of China:	
Certain Cut-to-Length Carbon Steel Plate [2], A–570–849	11/3/03—10/31/04
Beijing Shougang Xingang Co., Ltd.	
Beijing Alliance of Xingang Science and Trade Co., Ltd.	
Fresh Garlic*, A–570–831	11/1/03—10/31/04
Clipper Manufacturing Ltd.	
Jinxiang Dong Yun Freezing Storage Co., Ltd.	
Fook Huat Tong Kee Pte., Ltd. (FHTK)	
Heze Ever-Best International Trade Co., Ltd. (f/k/a Shandong Heze International Trade and Developing Company)	
H&T Trading Company	
Huaiyang Hongda Dehydrated Vegetable Company	
Jinxiang Shanyang Freezing Storage Co., Ltd.	
Jinxiang Hongyu Freezing and Storing Co., Ltd.	
Jinan Yipin Corporation, Ltd.	
Jining Yun Feng Agriculture Products Co., Ltd.	
Linshu Dading Private Agricultural Products Co., Ltd.	
Linyi Sanshan Import & Export Trading Co., Ltd.	
Pizhou Guangda Import and Export Co., Ltd.	
Shandong Jining Jinshan Textile Co., Ltd.	
Shanghai Ever Rich Trade Company	
Shanghai LJ International Trading Co., Ltd.	
Sunny Import & Export Co., Ltd.	
Taiyan Ziyang Food Co., Ltd.	
Tancheng County Dexing Foods Co., Ltd.	
Weifang Shennong Foodstuff Co., Ltd.	
Jining Trans-High Trading Co., Ltd.	
Xiangcheng Yisheng Foodstuffs Co.	
Zhengzhou Harmoni Spice Co., Ltd.	

[1] Company inadvertently omitted from previous initiation notice.

[2] If one of the above-named companies does not qualify for a separate rate, all other exporters of certain cut-to-length carbon steel plate from the People's Republic of China who have not qualified for a separate rate are deemed to be covered by this review as part of the single PRC entity of which the named exporters are a part.

* If one of the above-named companies does not qualify for a separate rate, all other exporters of fresh garlic from the People's Republic of China who have not qualified for a separate rate are deemed to be covered by this review as part of the single PRC entity of which the named exporters are a part.

Countervailing Duty Proceedings

None.

Suspension Agreements

None.

During any administrative review covering all or part of a period falling between the first and second or third and fourth anniversary of the publication of an antidumping duty order under section 351.211 or a determination under section 351.218(f)(4) to continue an order or suspended investigation (after sunset review), the Secretary, if requested by a domestic interested party within 30 days of the date of publication of the notice of initiation of the review, will determine, consistent with *FAG Italia* v. *United States*, 291 F.3d 806 (Fed. Cir. 202), as appropriate, whether antidumping duties have been absorbed by an exporter or producer subject to the review if the subject merchandise is sold in the United States through an importer that is affiliated with such exporter or producer. The request must include the name(s) of the exporter or producer for which the inquiry is requested.

Interested parties must submit applications for disclosure under administrative protective orders in accordance with 19 CFR 351.305.

These initiations and this notice are in accordance with section 751(a) of the Tariff Act of 1930, as amended (19 U.S.C. 1675(a)), and 19 CFR 351.221(c)(1)(i).

Dated: December 16, 2004.

Holly A. Kuga,

Senior Office Director, Office 4 for Import Administration.

[FR Doc. E4–3804 Filed 12–23–04; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

(A–588–811)

Drafting Machines and Parts Thereof from Japan: Revocation of Antidumping Duty Order

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

SUMMARY: On October 1, 2004, the Department of Commerce (''the Department'') initiated a second sunset review of the antidumping duty order on drafting machines and parts thereof from Japan. *See Initiation of Five-year (''Sunset'') Reviews*, 69 FR 58890 (October 1, 2004). However, on October 27, 2004, the only domestic interested party, Vemco Drafting Products Corporation (''Vemco''), withdrew its interest in this proceeding. Therefore, the Department is revoking the antidumping duty order on drafting machines and parts thereof from Japan.

EFFECTIVE DATE: November 24, 2004

FOR FURTHER INFORMATION CONTACT: Martha V. Douthit, Office of Policy, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–5050.

SUPPLEMENTARY INFORMATION:

Scope

The scope of this order includes drafting machines that are finished, unfinished,assembled, or unassembled, and drafting machine kits. For purposes of this sunset review, ''drafting machine'' refers to ''track'' or ''elbow–type'' drafting machines used by designers, engineers, architects, layout artists, and others. Drafting machines are devices for aligning scales (or rulers) at a variety of angles anywhere on a drawing surface, generally a drafting board. A protractor head allows angles to be read and set and lines to be drawn. The machine is generally clamped to the board. Also included within the scope of this order are parts of drafting machines. Parts include, but are not limited to, horizontal and vertical tracks, parts of horizontal and vertical tracks, band and pulley mechanisms, protractor heads, and parts of protractor heads, destined for use in drafting machines. Accessories, such as parallel rulers, lamps and scales are not subject to this investigation. This merchandise is currently classifiable under the Harmonized Tariff Schedule of the United States (''HTSUS'') item 9017.10.00 and 9017.90.00. (This merchandise was previously classified under HTSUS item 710.8025.) Although the HTSUS subheadings are provided for convenience and customs purposes, the written description remains dispositive.

Background

On December 29, 1989, the Department issued an antidumping duty order on drafting machines and parts thereof from Japan. *See Antidumping Duty Order: Drafting Machines and Parts Thereof from Japan*, 54 FR 53671 (December 29, 1989). Following the first sunset review of the order, pursuant to 19 CFR 351.218(f)(4), the Department published a notice of continuation in the **Federal Register**. *See Continuation of Antidumping Duty Order: Drafting Machines and Parts Thereof From Japan*, 64 FR 66166 (November 24, 1999).

On October 1, 2004, the Department initiated a second sunset review of the order pursuant to section 751(c) of the Tariff Act of 1930, as amended, (''the Act''), and 19 CFR part 351, in general. *See Initiation of Five-year (''Sunset'') Review*, 69 FR 58890 (October 1, 2004). As a courtesy to interested parties, the Department sent letters, via certified and registered mail, to each party listed on the Department's most current service list for this proceeding to inform them of the automatic initiation of a sunset review.

On October 18, 2004, within the applicable deadline, the Department received a Notice of Intent to Participate from Vemco, the only domestic interested party in this proceeding. See 19 CFR 351.218(d)(1)(i). On October 27, 2004, the Department received a response from the sole producer or exporter, Mutoh Industries Ltd. (''Mutoh''), indicating that it would not participate in the sunset review on drafting machines and parts thereof from Japan because Mutoh was not an interested party within the meaning of section 771(9)(A) of the Act.

On November 3, 2004, Vemco withdrew its Notice of Intent to Participate and withdrew its interest in maintaining the antidumping duty order on drafting machines and parts thereof from Japan. Because Vemco (the only domestic interested party in the sunset proceeding) withdrew its interest in this sunset proceeding, the Department has determined to treat this situation as if no domestic interested party responded to the notice of initiation. Therefore, the Department is revoking the antidumping duty orders on drafting machines and parts thereof from Japan.

Determination to Revoke

Pursuant to section 751(c)(3)(A) of the Act and 19 CFR 351.218(d)(1)(iii)(B)(3), if no domestic interested parties respond to the notice of initiation, the Department shall make a final determination no later than 90 days after the initiation of the sunset review, revoking the order.

Because the only domestic interested party withdrew its interest in this sunset review (*see* 19 CFR 351.218(d)(1)(i) and 351.218(e)(1)(i)(C)(1)), consistent with the provision of section 751(c)(3)(A) of the Act, we are revoking the antidumping duty order on drafting machines and parts thereof from Japan.

Effective Date of Revocation

Pursuant to sections 751(c)(3)(A) and 751(d)(2) of the Act and 19 CFR 351.222(i)(2)(i), the Department will instruct U.S. Customs and Border Protection to terminate the suspension of liquidation of the merchandise subject to this order entered, or withdrawn from warehouse, on or after November 24, 2004, the fifth anniversary of the date of the determination to continue the order. Entries of subject merchandise prior to the effective date of revocation will continue to be subject to suspension of liquidation and antidumping duty deposit requirements. The Department will complete any pending administrative reviews of this order and will conduct administrative reviews of subject merchandise entered prior to the effective date of revocation in response to appropriately filed requests for review.

This five-year (''sunset'') review and notice are in accordance with sections 751(c), 751(d)(2), and 777(i)(1) of the Act.

Dated: December 17, 2004.

James J. Jochum,

Assistant Secretary for Import Administration.

[FR Doc. E4–3821 Filed 12–23–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–863]

Honey From the People's Republic of China: Preliminary Results, Partial Rescission, and Extension of Final Results of Second Antidumping Duty Administrative Review

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

SUMMARY: In response to requests from interested parties, the Department of Commerce (''the Department'') is conducting the second administrative review of the antidumping duty order on honey from the People's Republic of China (''PRC''). The period of review (''POR'') is December 1, 2002 through November 30, 2003. Petitioners issued a timely withdrawal of their request for an administrative review for two companies named in the initiation of this review; consequently, we rescinded our review of these companies. In addition, we rescinded our review of five companies because they are participating in new shipper reviews covering the periods December 1, 2002 through May 31, 2003, or December 1, 2002, through November 30, 2003. Another company had no exports or sales of the subject merchandise during the POR; therefore, we are preliminarily rescinding our review of this company. We preliminarily determine that three companies have failed to cooperate by not acting to the best of their ability to comply with our requests for information and, as a result, should be assigned a rate based on adverse facts available. Finally, we have preliminarily determined that five respondents made sales to the United States of the subject merchandise at prices below normal value.

We invite interested parties to comment on these preliminary results. Parties that submit comments are requested to submit with each argument (1) a statement of the issue and (2) a brief summary of the argument(s).

DATES: *Effective Date:* December 27, 2004.

FOR FURTHER INFORMATION CONTACT: Anya Naschak, Kristina Boughton, or Bobby Wong at (202) 482–6375, (202) 482–8173, or (202) 482–0409, respectively; AD/CVD Operations, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Background

On December 2, 2003, the Department published a Notice of Opportunity to Request an Administrative Review of Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation, 68 FR 67401 (December 2, 2003). On December 29, 2003, Anhui Honghui Foodstuff (Group) Co., Ltd. (''Anhui Honghui''); Eurasia Bee's Products Co., Ltd. (''Eurasia''); Jiangsu Kanghong Natural Healthfoods Co., Ltd. (''Jiangsu Kanghong''); Inner Mongolia Autonomous Region Native Produce and Animal By-Products Import & Export Corp. (''Inner Mongolia''); Jinfu Trading Co., Ltd. (''Jinfu''); Shanghai Eswell Enterprise Co., Ltd. (''Eswell''); Shanghai Shinomiel International Trade Corporation (''Shanghai Shinomiel''); and Wuhan Bee Health Company, Ltd. (''Wuhan Bee''), requested that the Department conduct an administrative review of each respective company's entries during the POR. On December 31, 2003, Sichuan-Dujiangyan Dubao Bee Industrial Co., Ltd. (''Dubao'') requested that the Department conduct an administrative review of its entries during the POR. Also on December 31, 2003, the American Honey Producers Association and the Sioux Honey Association (collectively, ''petitioners'') requested, in accordance with section 351.213(b) of the Department's regulations, an administrative review of entries of subject merchandise made during the POR by 20 Chinese producers/exporters.[1]

On January 14, 2004, petitioners filed a letter withdrawing their request for review of Henan, High Hope, Jinan, and Native Produce. On January 22, 2004, the Department initiated the review for the remaining 16 companies. *See* Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part, 68 FR 3009 (January 22, 2004) (''Review Initiation''). On January 29, 2004, the Department issued antidumping duty questionnaires to the 16 PRC producers/exporters of the subject merchandise covered by this administrative review.

On February 13 and February 18, 2004, petitioners withdrew their request for review of Foodworld and Anhui Native, respectively. On February 24, 2004, Cheng Du stated that all of its direct and indirect export sales of honey to the United States during the POR fall within a separate new shipper review covering the period December 1, 2002 through May 31, 2003, and requested that the Department rescind this proceeding for Cheng Du. *See* Honey From the People's Republic of China: Initiation of New Shipper Antidumping Duty Reviews, 68 FR 47537 (August 11, 2003). On February 25, 2004, Inner Mongolia Youth similarly stated that the only sale it made during the POR was currently being reviewed under another new shipper review, covering the identical period as this current administrative review, and requested that the Department rescind this administrative review for Inner Mongolia Youth. *See* Honey from the People's Republic of China: Initiation of New Shipper Duty Administrative Reviews, 69 FR 5835. On March 5, 2004, Anhui Honghui, Eurasia, and Jiangsu Kanghong withdrew their requests for the administrative review covering the POR because all of their entries of subject merchandise during the POR were also subject to the new shipper review covering the identical POR.

On March 10, 2004, the Department rescinded the administrative review for Foodworld and Anhui Native because petitioners had withdrawn their review request for these companies. *See* Honey from the People's Republic of China: Notice of Partial Rescission of Antidumping Duty Administrative Review, 69 FR 11383 (March 10, 2004).

On March 12, 2004, petitioners also withdrew their request for an administrative review of entries made by Anhui Honghui, Cheng Du, Eurasia, Inner Mongolia Youth, and Jiangsu Kanghong. On April 27, 2004, the Department rescinded the review for Anhui Honghui, Cheng Du, Eurasia, Inner Mongolia Youth, and Jiangsu Kanghong. *See* Honey from the People's Republic of China: Notice of Partial Rescission of Antidumping Duty Administrative Review, 69 FR 22760 (April 27, 2004).

On March 25, 2004, we invited interested parties to comment on the Department's surrogate country selection and/or significant production in the other potential surrogate countries and to submit publicly available information to value the factors of production. On April 15,

[1] The request included: Anhui Honghui, Eurasia, Jiangsu Kanghong, Anhui Native Produce Import & Export Corp. (''Anhui Native''); Cheng Du Wai Yuan Bee Products Co., Ltd. (''Cheng Du''); Foodworld International Club, Ltd. (''Foodworld''); Henan Native Produce and Animal By-Products Import & Export Company (''Henan''); High Hope International Group Jiangsu Foodstuffs Import & Export Corp. (''High Hope''); Inner Mongolia; Inner Mongolia Youth Trade Development Co., Ltd. (''Inner Mongolia Youth''); Jinan Products Industry Co., Ltd. (''Jinan''); Jinfu; Kunshan Foreign Trade Company (''Kunshan''); Native Produce and Animal Import & Export Co. (''Native Produce''); Eswell; Shanghai Shinomiel; Shanghai Xiuwei International Trading Co., Ltd. (''Shanghai Xiuwei''); Dubao, Wuhan Bee; and Zhejiang Native Produce and Animal By-Products Import & Export Group Corp. (''Zhejiang'').

2004, petitioners submitted comments on the selection of the proper surrogate country. On May 10, 2004, petitioners and respondents submitted comments on surrogate information with which to value the factors of production in this proceeding. On May 20, 2004, respondents submitted comments on petitioners' submissions for surrogate values.

With regard to Dubao, Eswell, Jinfu, Wuhan Bee, and Zhejiang, between March and December 2004, the Department received timely filed original and supplemental questionnaire responses and petitioners' comments on those responses.

Inner Mongolia

We received timely responses from Inner Mongolia to the Department's original questionnaire and petitioners commented on these submissions. We subsequently issued a supplemental questionnaire to Inner Mongolia and received a partial response. The Department then received a letter from Inner Mongolia's counsel stating that Inner Mongolia was withdrawing its request for an annual review. On June 23, 2004, the Department issued a letter to Inner Mongolia, noting that petitioners have not withdrawn their request for review, that the Department is proceeding with the review, and that the Department requires Inner Mongolia's continued participation or the Department may resort to facts available. The Department received a response from counsel for Inner Mongolia, in which Inner Mongolia's counsel stated that Inner Mongolia would not be participating in this administrative review any further as it was canceling operations, and that counsel was no longer representing Inner Mongolia. *See* Memorandum to the File from Steve Williams dated July 1, 2004 (''Shanghai Shinomiel and Inner Mongolia Memo'').

Shanghai Xiuwei

We received timely responses from Shanghai Xiuwei to Sections A, C, and D, and petitioners submitted comments on these responses. We issued a supplemental questionnaire to Shanghai Xiuwei and received an incomplete response. The Department issued a letter to Shanghai Xiuwei, requesting for a second time that Shanghai Xiuwei respond completely to the Department's supplemental questionnaire as requested, or risk application of facts available. Shanghai Xiuwei requested that the review be rescinded, as it had been unable to collect certain data from its board or its importers to respond to the Department's questionnaire. On August 27, 2004, the Department issued another letter to Shanghai Xiuwei rejecting its withdrawal request, noting that petitioners had not withdrawn their request for review. We received no response from Shanghai Xiuwei.

Shanghai Shinomeil

The Department received no response from Shanghai Shinomiel to its original questionnaire. The Department subsequently issued a letter to shanghai Shinomeil requesting that it respond to the Department's questionnaire as requested, or risk application of adverse facts available. In addition, the Department spoke with counsel for Shanghai Shinomeil, and Shanghai Shinomeil's counsel informed the Department that Shanghai Shinomiel would not be participating in this administrative review. *See* Shanghai Shinomiel and Inner Mongolia Memo.

Kunshan

The Department received no response from Kunshan to its original questionnaire by the deadlines. The Department issued a second request to Kunshan to respond to the Department's antidumping questionnaire. *See* Letter from Abdelali Elouaradia to Kunshan Foreign Trade Company, dated March 10, 2004. Kunshan notified the Department that it made no shipments to the United States during the POR, and requested that the Department rescind this administrative review for Kunshan. See Letter from Kunshan, to Abdelali Elouaradia (undated). We received no comments from any interested parties regarding Kunshan's request for rescission. Therefore, because Kunshan had no shipments to the United States during the POR, the Department is preliminarily rescinding this administrative review for Kunshan. *See* ''Preliminary partial Rescission of Administrative Review'' section, below.

On June 1, 2004, the Department published an extension of the time limits to complete these preliminary results. *See* Honey from the People's Republic of China: Extension of Time Limit of Preliminary Results of Second Antidumping Duty Administrative Review, 69 FR 30879 (June 1, 2004).

On August 12, 2004, petitioners submitted a letter requesting that the Department apply adverse facts available (''AFA'') to Shanghai Xiuwei, Inner Mongolia, and Shanghai Shinomiel for the preliminary results.

On October 1, 2004, the Department published an additional extension of the time limits to complete these preliminary results. *See* Honey from the People's Republic of China: Extension of time Limit of Preliminary Results of Second Antidumping Duty Administrative Review, 69 FR 58893 (October 1, 2004).

On November 18, 2004, petitioners submitted comments on the valuation of the hone surrogate value and surrogate financial ratios. On December 3, 3004, Eswell, Wuhan Bee, and Zhejiang submitted comments on the surrogate financial ratios.

Extension of Final Results

In accordance with section 751(a)(3)(A) of the Act, as amended, we determine that it is not practicable to complete this review within the original time frame because of the Department's decision to verify certain respondents in this review (*see* ''Verification'' section of this notice for further discussion). We are currently unable to conduct verification or allow sufficient opportunity for the submission of interested party comments, prior to the current final results deadline. Thus, in accordance with section 751(a)(3)(A) of the Act and section 351.213(h)(2) of the Department's regulations, the Department is extending the time limit for completion of the final results of this review until no later than 150 days from the date of publication of this notice.

Scope of the Antidumping Duty Order

The products covered by this order are natural honey, artificial honey containing more than 50 percent natural honey by weight, preparations of natural honey containing more than 50 percent natural honey by weight, and flavored honey. The subject merchandise includes all grades and colors of honey whether in liquid, creamed, comb, cut comb, or chunk form, and whether packaged for retail or in bulk form.

The merchandise subject to this order is currently classifiable under subheadings 0409.00.00, 1702.90.90, and 2106.90.99 of the Harmonized Tariff Schedule of the United States (''HTSUS''). Although the HTSUS subheadings are provided for convenience and customs purposes, the Department's written description of the merchandise under order is dispositive.

Verification

As provided in section 782(i)(2) of the Act and 19 CFR 351.307, we intend to verify certain information relied upon in making our final results. On May 3, 2004, petitioners submitted a request that the Department conduct verifications of Inner Mongolia, Jinfu, Eswell, Shanghai Xiuwei, Dubao, Wuhan Bee, and Zhejiang. Petitioners noted that Inner Mongolia's questionnaire responses have not been verified in any of the immediately

preceding new shipper reviews, and that Eswell has never had its information verified. Petitioners state that the remaining respondents should be verified pursuant to 19 CFR 351.307(b)(1)(iv), and submitted information regarding ''good cause'' related to Jinfu, Shanghai Xiuwei, Dubao, Wuhan Bee, and Zhejiang. We intend to verify Dubao and Wuhan Bee. However, we do not intend to verify Jinfu, Eswell, and Zhejiang because we have not been provided with a sufficient basis to conclude that there is ''good cause'' for verification within the meaning of 19 CFR 351.307(b)(1)(iv), and there have not been two administrative reviews without verification within the meaning of 19 CFR 351.307(b)(1)(v)(B). Additionally, because Shanghai Xiuwei and Inner Mongolia have declined to participate in this administrative review, we are unable to verify information submitted on the record by these two companies. *See* ''The PRC-wide Rate and Use of Facts Otherwise Available'' section below.

Preliminary Partial Rescission of Administrative Review

Pursuant to 19 CFR 351.213(d)(3), we have preliminarily determined that Kunshan made no shipments of subject merchandise to the United States during the POR. In making this determination, the Department examined PRC honey shipment data maintained by U.S. Customs and Border Protection (''CBP''). Based on the information obtained from CBP, we found no entries of subject merchandise during the POR manufactured or exported by Kunshan to the United States. *See also* Memorandum to the File regarding Entries by Kunshan Foreign Trade Company, dated December 15, 2004.

Therefore, based on the results of our CBO query, demonstrating no shipments of subject merchandise by Kunshan during the POR, as well as Kunshan's claim that it had no subject shipments, we are preliminarily rescinding the administrative review, in accordance with 19 CFR 351.213(d)(3) with respect to Kunshan because we found no evidence that Kunshan made shipments of the subject merchandise during the POR.

Separate Rates

In proceedings involving non-market economy (''NME'') countries, the Department begins with a rebuttable presumption that all companies within the country are subject to government control and, thus, should be assigned a single antidumping duty rate unless an exporter can affirmatively demonstrate an absence of government control, both in law (*de jure*) and in fact (*de facto*), with respect to its export activities. In this review Dubao, Eswell, Jinfu, Wuhan Bee, Zhejiang, Inner Mongolia, and Shanghai Xiuwei requested separate company-specific rates.[2]

Accordingly, we have considered whether each of the companies is independent from government control, and therefore eligible for a separate rate. The Department's separate-rate test to determine whether the exporters are independent from government control does not consider, in general, macroeconomic/border-type controls, *e.g.,* export licenses, quotas, and minimum export prices, particularly if these controls are imposed to prevent dumping. The test focuses, rather, on controls over the investment, pricing, and output decision-making process at the individual firm level. *See* Certain Cut-to-Length Carbon Steel Plate from Ukraine: Final Determination of Sales at Less than Fair Value, 62 FR 61754, 61757 (November 19, 1997), and Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 62 FR 61276, 61279 (November 17, 1997).

To establish whether a firm is sufficiently independent from government control of its export activities to be entitled to a separate rate, the Department analyzes each entity exporting the subject merchandise under a test arising from the Notice of Final Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China, 56 FR 20588 (May 6, 1991) (''Sparklers''), as amplified by Notice of Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China, 59 FR 22585 (May 2, 1994) (''Silicon Carbide''). In accordance with the separate-rates criteria, the Department assigns separate rates in NME cases only if respondents can demonstrate the absence of both *de jure* and *de facto* government control over export activities.

Dubao, Eswell, Jinfu, Wuhan Bee, Zhejiang (collectively ''fully responsive companies'') provided complete separate-rate information in their responses to our original and supplemental questionnaires. Accordingly, we performed a separate-rates analysis to determine whether these exporters are independent from government control.

[2] Shanghai Shinomiel did not request a separate rate.

As stated above in the ''Background'' section, Inner Mongolia, Shanghai Xiuwei, and Shanghai Shinomiel (collectively ''non-responsive companies'' did not respond in a complete and timely manner to the Department's requests for information and therefore are subject to adverse facts available, and no separate-rates analysis is necessary. Because these three non-responsive companies did not provide complete and verifiable responses to our requests for information regarding separate rates, we preliminarily determine that these companies do not merit separate rates. *See, e.g.,* Natural Bristle Paint Brushes and Brush Heads from the People's Republic of China; Preliminary Results of Antidumping Duty Administrative Review, 61 FR 57389 (November 6, 1996). Consequently, consistent with the statement in our notice of initiation, we find that, because these companies do not qualify for separate rates, they are deemed to be part of the PRC-entity. *See* Review Initiation. *See also* ''The Use of Facts Otherwise Available and PRC-wide Rate'' section below.

Absence of De Jure Control

The Department considers the following *de jure* criteria in determining whether an individual company may be granted a separate rate: (1) An absence of restrictive stipulations associated with an individual exporter's business and export licenses; (2) any legislative enactment decentralizing control of companies; and (3) other formal measures by the government centralizing control of companies. *See* Sparklers, 56 FR at 20589. As discussed below, our analysis shows that the evidence on the record supports a preliminary finding of *de jure* absence of government control for the five fully responsive companies based on each of these factors.

Dubao

Dubao has placed on the record a number of documents to demonstrate absence of *de jure* control, including the ''Regulations of the People's Republic of China for Controlling the Registration of Enterprises as Legal Persons,'' and the ''Foreign Trade Law of the People's Republic of China'' (May 12, 1994) (''Foreign Trade Law ''). *See* Exhibit 3 of Dubao's March 15, 2004, submission (''Dubao Section A''). Dubao also submitted a copy of its business license in Exhibit 2 of Dubao Section A. This license was issued by the Chengdu Municipal Industrial and Commercial Administration. Dubao explains that its business license is necessary to register the company. Dubao affirms that its

business operations are limited to the scope of the license, and that the license may be revoked if the company engages in illegal activities or if the company is found to have insufficient capital.

Eswell

Eswell has placed on the record a number of documents to demonstrate absence of *de jure* control, including the ''Company Law of the People's Republic of China'' (December 29, 1993) (''Company Law''), Foreign Trade Law, and the ''Administrative Regulations of the People's Republic of China Governing the Registration of Legal Corporations'' (June 3, 1998) (''*Legal Corporations Regulations*''). *See* Exhibit 3 of Eswell's March 11, 2004, submission (''Eswell Section A''). In addition, Eswell placed on the record in Exhibit 6 of its October 29, 2004, submission the Certificate of Approval for Enterprises with Foreign Trade rights in the People's Republic of China (''Foreign Trade Rights''). Eswell also submitted a copy of its business license in Exhibit 4 of Eswell Section A. This license was issued by the Shanghai Industry and Commerce Administrative Bureau. Eswell explains that its business license is necessary to register the company. Eswell affirms that its business operations are limited to the scope of the license, and that the license may be revoked if the company engaged in illegal activities or if the company is found to have insufficient capital.

Jinfu

Jinfu has placed on the record a number of documents to demonstrate absence of *de jure* control, the Company Law, Foreign Trade Law, and the Legal Corporations Regulations. *See* Exhibit 2 of Jinfu's March 11, 2004, submission (''Jinfu Section A''). Jinfu also submitted a copy of its business license in Exhibit 3 of Jinfu Section A. The Suzhou Kunshan Industry and Commerce Administrative Bureau issued this license. Jinfu explains that the business license defines its business scope. Jinfu also affirms that its business operations are limited to the scope of the license, and that the license may be revoked if the company engages in illegal activities or if the company conducts activities outside of the business scope described on its business license.

Wuhan Bee

Wuhan Bee has placed on the record a number of documents to demonstrate absence of *de jure* control, including the Foreign Trade Law, the Legal Corporations Regulations, The Law of the People's Republic of China: On Chinese-Foreign Joint Ventures (April 13, 1998) and the Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures (April 4, 1990). *See* Exhibit 2 of Wuhan Bee's March 11, 2004, submission (''Wuhan Bee Section A''). Wuhan Bee also submitted a copy of its business license in Exhibit 3 of Wuhan Bee Section A. The Industrial and Commercial Administrative Bureau of Wuhan City issued this license. Wuhan Bee explains that its business license is necessary to register the company and that the license defines the scope of the company's business activities and ensures that the company has sufficient capital to continue its business operations. Wuhan Bee affirms that its business operations are limited to the scope of the license, unless amended, and that the license may be revoked if the company is found to have insufficient capital or if the company engages in activities outside the scope of its business license.

Zhejiang

Zhejiang has placed on the record a number of documents to demonstrate absence of *de jure* control, including the Company Law, Foreign Trade Law, and the Legal Corporations Regulations. *See* Exhibit 2 of Zhejiang's March 11, 2004, submission (''Zhejiang Section A''). Zhejiang also submitted a copy of its business license in Exhibit 3 of Zhejiang Section A. This license was issued by the Industrial and Commercial Administrative Bureau of Zhejiang Province on May 17, 2001. Zhejiang explains that its business license is necessary to register the company. Zhejiang affirms that its business operations are limited to the scope of the license, and that the license may be revoked if the company engages in illegal activities or if the company is found to have insufficient capital.

We note that three of the five fully responsive companies have stated that they are governed by the Company Law, which they claim governs the establishment of limited liability companies, and provides that such a company shall operate independently and be responsible for its own profits and losses. All of the fully responsive companies have placed on the record the Foreign Trade Law, and stated that this law allows them full autonomy from the central authority in governing their business operations. We have reviewed Article 11 of Chapter II of the Foreign Trade Law, which states ''foreign trade dealers shall enjoy full autonomy in their business operation and be responsible for their own profits and losses in accordance with the law.'' As in prior cases, we have analyzed such PRC laws and found that they establish an absence of *de jure* control. *See, e.g.,* Pure Magnesium from the People's Republic of China: Final Results of New Shipper Review, 63 FR 3085, 3086 (January 21, 1998) and Preliminary Results of New Shipper Review: Certain Preserved Mushrooms From the People's Republic of China, 66 FR 30695, 30696 (June 7, 2001). Therefore, we preliminarily determine that there is an absence of *de jure* control over the export activities of Dubao, Eswell, Jinfu, Wuhan Bee, and Zhejiang.

Absence of De Facto Control

Typically, the Department considers four factors in evaluating whether a respondent is subject to *de facto* government control of its export functions: (1) Whether the export prices are set by, or subject to, the approval of a government authority; (2) whether the respondent has authority to negotiate and sign contracts, and other agreements; (3) whether the respondent has autonomy from the government in making decisions regarding the selection of its management; and (4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses. *See* Silicon Carbide at 22587.

As stated in previous cases, there is some evidence that certain enactments of the PRC central government have not been implemented uniformly among different sectors and/or jurisdictions in the PRC. *See* Silicon Carbide at 22586–22587. Therefore, the Department has determined that an analysis of *de facto* control is critical in determining whether respondents are, in fact, subject to a degree of government control, which would preclude the Department from assigning separate rates.

Dubao has asserted the following: (1) It is a privately owned company; (2) there is no government participation in its setting of export prices; (3) its sales manager has the authority to bind sales contracts; (4) it does not have to notify any government authorities of its management selection; (5) there are no restrictions on the use of its export revenue; and (6) it is responsible for financing its own losses. We have examined the documentation provided and note that it does not suggest that pricing is coordinated among exporters of PRC honey.

Eswell has asserted the following: (1) It is a privately owned limited liability company; (2) there is no government participation in its setting of export prices; (3) the president of its affiliated company in the United States or its designated sales agents have the

authority to bind sales contracts; (4) its management is selected by its board of directors and it does not have to notify any government authorities of its management selection; (5) there are no restrictions on the use of its export revenue; and (6) it is responsible for financing its own losses. We have examined the documentation provided and note that it does not suggest that pricing is coordinated among exporters of PRC honey.

Jinfu has asserted the following: (1) It is a privately owned company; (2) there is no government participation in its setting of export prices; (3) its chief executive officer and authorized employee have the authority to bind sales contacts; (4) it does not have to notify any government authorities of its management selection; (5) there are no restrictions on the use of its export revenue; and (6) its board of directors decides how profits will be used. We have examined the documentation provided and note that it does not suggest that pricing is coordinated among exporters of PRC honey.

Wuhan Bee has asserted the following: (1) It is a joint-venture corporation; (2) there is no government participation in its setting of export prices; (3) its general manager and its U.S.-based affiliate have the authority to bind sales contracts; (4) it does not have to notify any government authorities of its management selection; (5) there are no restrictions on the use of its export revenue; and (6) its board of directors decides how profits will be used. We have examined the documentation provided and note that it does not suggest that pricing is coordinated among exporters of PRC honey.

Zhejiang has asserted the following: (1) It is a publicly owned company; (2) there is no government participation in its setting of export prices; (3) the Manager of the Bee products Department has the authority to bind sales contracts; (4) it does not have to notify any government authorities of its management selection; (5) there are no restrictions on the use of its export revenue; and (6) it is responsible for financing its own losses. We have examined the documentation provided and note that it does not suggest that pricing is coordinated among exporters of PRC honey.

Consequently, because evidence on the record indicates an absence of government control, both in law and in fact, over each respondent's export activities, we preliminarily determine that each fully responsive company has met the criteria for the application of a separate rate.

Use of Facts Otherwise Available and the PRC-Wide Rate

Dubao, Eswell, Jinfu, Wuhan Bee, Zhejiang, Kunshan, Shanghai Xiuwei, Inner Mongolia, and Shanghai Shinomiel were given the opportunity to respond to the Department's questionnaire. As explained above, we received complete questionnaire responses from Dubao, Eswell, Jinfu, Wuhan Bee, and Zhejiang, and we have calculated a separate rate for these companies (collectively ''fully responsive companies''). The PRC-wide rate applies to all entries of subject merchandise except for entries from PRC producers/exporters that have their own calculated rate. *See* ''Separate Rates'' section above.[3]

As discussed above, Shanghai Xiuwei, Inner Mongolia, and Shanghai Shinomiel (collectively ''non-responsive companies'') are appropriately considered to be part of the PRC-wide entity because they failed to establish their eligibility for a separate rate. Furthermore, because the PRC-wide entity did not provide information necessary to the instant proceeding, it is necessary that we review the PRC-wide entity. In doing so, we note that Section 776(a)(1) of the Act mandates that the Department use the facts available if necessary information is not available on the record of an antidumping proceeding. In addition, section 776(a)(2) of the Act provides that if an interested party or any other person: (a) Withholds information that has been requested by the administering authority; (b) fails to provide such information by the deadlines for the submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 782; (C) significantly impedes a proceeding under this title; or (D) provides such information but the information cannot be verified as provided in section 782(i), the Department shall, subject to section 782(d) of the Act, use the facts otherwise available in reaching the applicable determination under this title. Where the Department determines that a response to a request for information does not comply with the request, section 782(d) of the Act provides that the Department shall promptly inform the party submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that party with an opportunity to remedy or explain the deficiency. Section 782(d) further states that if the party submits further information that is unsatisfactory or untimely, the administering authority may, subject to subsection (e), disregard all or part of the original and subsequent responses. Section 782(e) of the Act provides that the Department shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the administering authority if (1) the information is submitted by the deadline established for its submission, (2) the information can be verified, (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination, (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the administering authority with respect to the information, and (5) the information can be used without undue difficulties.

As addressed below separately for each non-responsive company, we find that the PRC-wide entity did not respond to our request for information, and necessary information either was not provided, or the information provided cannot be verified and is not sufficiently complete to enable the Department to use it for these preliminary results. Therefore, we find it necessary, under section 776(a)(2) of the Act, to use facts otherwise available as the basis for the preliminary results of this review for the PRC-wide entity.

Shanghai Shinomiel

As stated above in the ''Background'' section, Shanghai Shinomiel did not respond to the Department's antidumping questionnaire. Rather, as noted above, Shanghai Shinomiel informed the Department that it would not be participating in this proceeding, and failed to respond to the Department's repeated requests for information. *See* Shanghai Shinomiel and Inner Mongolia Memo. The Department has no information on the record for Shanghai Shinomiel with which to calculate a dumping margin in this proceeding; therefore, we find that Shanghai Shinomiel has significantly impeded the proceeding, pursuant to sections 776(a)(2)(A) and 776(a)(2)(B) of the Act. Because Shanghai Shinomiel did not respond to the Department's questionnaires, sections 782(d) and (e) of the Act are not applicable.

[3] Kunshan did not reply to the Department's questionnaire; however, based on its request dated march 24, 2004, and the Department's analysis of CDP data, we have determined that Kunshan had no shipments during the POR and therefore we are preliminarily rescinding this review for Kunshan. *See* ''Partial Rescission'' section of this notice.

Inner Mongolia

As stated above in the ''Background'' section, Inner Mongolia responded to the Department's antidumping questionnaire. The Department subsequently requested additional information from Inner Mongolia in a supplemental questionnaire. *See* Supplemental A, C, and D questionnaire, dated April 19, 2004. On May 14, 2004, the Department received a partial response to this supplemental questionnaire that was seriously deficient. Inner Mongolia stated that it would provide additional information subsequent to this response, but failed to do so. We note that the information omitted included details on Inner Mongolia's and its producers' board members, information critical to the Department's separate-rates analysis (*see* ''Separate Rates'' section above), as well as information on its U.S. affiliate.[4] The Department gave Inner Mongolia an additional opportunity to provide the information the Department had requested on April 19, 2004. The Department explained to Inner Mongolia that it must comply with its requests for information or be subject to facts available for the preliminary results. *See* Letter from Edward Yang to Inner Mongolia dated June 23, 2004. In response to this additional request for information, Inner Mongolia's counsel informed the Department that Inner Mongolia is out of business and would no longer participate in this review. *See* Shanghai Shinomiel and Inner Mongolia Memo.

The Department provided Inner Mongolia with several opportunities to comply with its requests for information and to submit complete and accurate information. However, Inner Mongolia failed to provide the Department with the requested information.

Due to these serious deficiencies, we preliminarily find that Inner Mongolia has failed to provide the information requested, thereby significantly impeding the proceeding. Therefore, pursuant to section 776(a)(2)(A), (B), and (C) of the Act, the Department preliminarily finds that the application of facts available is appropriate for these preliminarily results.

Shanghai Xiuwei

Shanghai Xiuwei responded to the Department's original questionnaire. However, as stated in the ''Background'' section of this notice, the Department requested additional information from Shanghai Xiuwei on April 19, 2004. This supplemental questionnaire included 73 questions that addressed serious deficiencies in Shanghai Xiuwei's response regarding affiliation of importers, sales process, and factors of production. Despite providing Shanghai Xiuwei with ample time to collect the requested information (*see* memorandum to the File from Brandon Farlander, dated April 23, 2004), the Department did not receive any of the requested information from Shanghai Xiuwei. The Department provided Shanghai Xiuwei with an additional opportunity to respond to the Department's request for information on June 23, 2004. Shanghai Xiuwei again failed to provide the information requested and stated that it was unable to supply any of the requested information.[5] The Department supplied Shanghai Xiuwei with numerous opportunities to respond to the Department's requests for information. However, Shanghai Xiuwei refused to submit any information in response. The Department preliminarily finds, pursuant to section 776(a)(2)(A),(B),(C), and (D) of the Act, that Shanghai Xiuwei has repeatedly withheld information requested by the Department, thereby significantly impeding the Department's ability to conduct this proceeding. Therefore, the application of facts available is warranted with respect to Shanghai Xiuwei.

Application of Adverse Inference

Section 776(b) of the Act provides that, in selecting from among the facts available, the Department may use an inference that is adverse to the interests of the respondent if it determines that a party has failed to cooperate to the best of its ability. Adverse inferences are appropriate ''to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.'' *See* Statement of Administrative Act (''SAA'') accompanying the URAA, H. Doc. No. 316, 103d Cong., 2d Session at 870 (1994). In determining whether a respondent has failed to cooperate to the best of its ability, the Department need not make a determination regarding the willfulness of a respondent's conduct. *See Nippon Steel Corp.* v. *United States,* 337 F. 3rd 1373, 1382–1393 (Fed. Cir. 2003). Furthermore, ''an affirmative finding of bad faith on the part of the respondent is not required before the Department may make an adverse inference.'' Antidumping Duties; Countervailing Duties: Final Rule, 62 FR 27296, 27340 (May 19, 1997). Instead, the courts have made clear that the Department must articulate its reasons for concluding that a party failed to cooperate to the best of its ability, and explain why the missing information is significant to the review. *Id.*

In determining whether a party failed to cooperate to the best of its ability, the Department considers whether a party could comply with the request for information, and whether a party paid insufficient attention to its statutory duties. *See Tung Mung Dev. Co.* v. *United States,* 223 F. Supp 2d 1336, 1342 (August 6, 2002). Furthermore, the Department also considers the accuracy and completeness of submitted information, and whether the respondent has hindered the calculation of accurate dumping margins. *See* Certain Welded Carbon Steel Pipes and Tubes from Thailand: Final Results of Antidumping Duty Administrative Review, 62 FR 53808, 53819–53820 (October 16, 1997).

Pursuant to section 776(b) of the Act, we find that the PRC-wide entity failed to cooperate by not acting to the best of its ability to comply with requests for information. As noted above, the PRC-wide entity informed the Department that it would not participate in this review, or otherwise, did not provide any of the requested information, despite repeated requests that it do so. This information was the sole possession of the respondents, and could not be obtained otherwise. Thus, because the PRC-wide entity refused to participate fully in this proceeding, we find it appropriate to use an inference that is adverse to the interests of the PRC-wide entity in selecting from among the facts otherwise available. By doing so, we ensure that the companies that are part of the PRC-wide entity will not obtain a more favorable result by failing to cooperate than had they cooperated fully in this review.

An adverse inference may include reliance on information derived from the petition, the final determination in the investigation, any previous review, or any other information placed on the record. *See* section 776(b) of the Act. It is the Department's practice to assign the highest rate from any segment of a proceeding as total adverse facts

[4] Prior to the Department sending out an additional supplemental questionnaire to Inner Mongolia, on May 24, 2004, Inner Mongolia submitted a letter to the Department, which included a request for withdrawal from this administrative review. Inner Mongolia further stated that the company is canceling its operations and liquidating its assets, and no longer has personnel available to complete this administrative review.

[5] Shanghai Xiuwei requested that it be allowed to withdraw from the review, well after the time limit had passed for making such a request. Moreover, as the Department informed Shanghai Xiuwei, petitioners did not withdraw their request for review, and the Department was therefore required to continue with the review.

available when a respondent fails to cooperate to the best of its ability. *See, e.g.,* Stainless Steel Plate in Coils form Taiwan; Preliminary Results and Rescission in Part of Antidumping Duty Administrative Review, 67 FR 5789 (February 7, 2002) (''Consistent with Department practice in cases where a respondent fails to cooperate to the best of its ability, and in keeping with section 776(b)(3) of the Act, as adverse facts available, we have applied a margin based on the highest margin from any prior segment of the proceeding.'').

In accordance with the Department's practice, we have preliminarily assigned to the PRC-wide entity (including Shanghai Xiuwei, Inner Mongolia, and Shjanghai Shinomiel) the rate of 183.80 percent as adverse facts available. *See, e.g.,* Rescission of Second New Shipper Review and Final Results and Partial Rescission of First Antidumping Duty Administrative Review: Brake Rotors from the People's Republic of China, 64 FR 61581, 61584 (November 12, 1999). This rate is the highest dumping margin from any segment of this proceeding and was established in the less-than-fair-value (''LTFV'') investigation based on information contained in the petition. *See* Notice of Final Determination of Sales at Less Than Fair Value; Honey from the PRC, 66 FR 50608 (October 4, 2001) and accompanying Issues and Decision Memorandum (''Final Determination''). In selecting a rate for adverse facts available, the Department selects a rate that is sufficiently adverse ''as to effectuate the purpose of the facts available rule to induce respondents to provide the Department with complete and accurate information in a timely manner.'' *See* Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors from Taiwan, 63 FR 8909, 8932 (February 23, 1998).

Corroboration

We note that information from a prior segment of this proceeding constitutes ''secondary information,'' and section 776(c) of the Act provides that, when the Department relies on such secondary information rather than on information obtained in the course of a review, the Department shall, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal.[6] The SAA state that the independent sources may include published price lists, official import statistics and customs data, and information obtained from interested parties during the particular investigation or review. The SAA also clarifies that ''corroborate'' means that the Department will satisfy itself that the secondary information to be used has probative value. *See* SAA at 870. As noted in Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, from Japan; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews, 61 FR 57391, 57392 (November 6, 1996) (''TRBs''), to corroborate secondary information, the Department will, to the extent practicable, examine the reliability and relevance of the information used.

We note that in the LTFV investigation, the Department corroborated the information in the petition that formed the basis of the 183.80 percent PRC-wide rate, *See* Final Determination. Specifically, in the LTFV investigation, the Department compared the prices in the petition to the prices submitted by individual respondents for comparable merchandise. For normal value (''NV''), we compared petitioners' factor-consumption data to data reported by respondents. *See* Notice of Preliminary Determination of Sales at Less Than Fair Value: Honey from the People's Republic of China, 66 FR 24101 (May11, 2001) (''Investigation Prelim'').

In order to satisfy the corroboration requirements under section 776(c) of the Act, in the instant review, we reviewed the Department's corroboration of the petition rates from the LTFV investigation and in the first administrative review. *See, e.g.,* Investigation Prelim; Honey from the People's Republic of China: Preliminary Results of First Antidumping Duty Administrative Review, 68 FR 69988 (December 16, 2003) (''First Admin Review''); and reinforced in Honey from the People's Republic of China: Final Results of First Antidumping Duty Administrative Review, 69 FR 24128 (May 3, 2004). Because the secondary information from the LTFV investigation was recently corroborated in the first administrative review, and no information has been presented to call into question the reliability of the information from the LTFV investigation or the first administrative review, we find that the petition information is reliable. For a further discussion, *see e.g.,* Memorandum to the File from Kristina Boughton through James Doyle, Office Director regarding the Corroboration of the Petition Rate, dated December 15, 2004 (''Corroboration Memo'').

We further note that, with respect to the relevance aspect of corroboration, the Department stated in TRBs that it will consider information reasonably at its disposal as to whether there are circumstances that would render a margin irrelevant. Where circumstances indicate that the selected margin is not appropriate as adverse facts available, the Department will disregard the margin and determine an appropriate margin.'' *See* TRBs at 61 FR 57392. *See also* Fresh Cut Flowers from Mexico; Final Results of Antidumping Duty Administrative Review, 61 FR 6812, 6814 (February 22, 1996) (disregarding the highest margin in the case as best information available because the margin was based on another company's uncharacteristic business expense resulting in an extremely high margin). The rate applied in this review is the rate currently applicable to all exporters subject to the PRC-wide rate. Further, as noted above and in the Corroboration Memo, there is no information on the record that the application of this rate would be inappropriate in this administrative review or that the margin is not relevant. Thus, we find that the information is relevant. Therefore, the Department preliminarily determines that the PRC-wide rate of 183.80 is still reliable, relevant, and has probative value within the meaning of section 776(c) of the Act.

Affiliation

Jinfu has claimed that it is affiliated with Jinfu Trading (USA) Inc., (''Jinfu USA'') within the meaning of section 771(33) of the Act. Section 771(33) of the Act states that affiliated persons include: (A) Members of a family, including brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants, (B) any officer or director of an organization and such organization, (C) partners, (D) employer and employee, (E) any person directly or indirectly owning, controlling, or holding with power to vote, five percent or more of the outstanding voting stock or shares of any organization and such organization, (F) two or more persons directly or indirectly controlling, controlled by, or under common control with, any person, (G) any person who controls any other person and such other person. For purposes of this paragraph, a person

[6] Secondary information is described in the SAA as ''information derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 concerning the subject merchandise.'' *See* SAA at 870.

shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person. In order to find affiliation between companies, the Department must find that at least one of the criteria listed above is applicable to the respondents.

Though no party in this case is questioning whether or not Jinfu was in fact affiliated with Jinfu USA at some point during the POR within the meaning of Section 771(33), we note that the effective date of this affiliation is in question ,and is significant to this proceeding for purposes of determining whether Jinfu's U.S. sales should be reported as ''export price'' sales or ''constructed export price'' sales. *See* discussion below under ''United States Price'' section of this notice. in this regard, Jinfu claims that it was affiliated with Jinfu USA as of October 25, 2002, which means the two firms were affiliated throughout the entire POR. In support of this contention, Jinfu has provided documentation it claims establishes that it acquired ownership of Jinfu USA on October 25, 2002.

Nevertheless, in the most recently completed segment of these PRC honey proceedings, the Department determined that Jinfu was not affiliated with Jinfu USA at the time of its first sale to the United States, which occurred on November 2, 2002. *See* Final Results and Final Rescission, In Part, of Antidumping Duty New Shipper Review, 69 FR 64029 (November 3, 2004) (''NSR Chengdu Final Results'') and accompanying Issues and Decision Memorandum at Comment 2. In making this finding in NSR Chengdu Final Results, the Department further noted that evidence on the record suggested that Jinfu did not actually own Jinfu USA until after the new shipper POR, ending May 31, 2003. *See, id.*

In considering for purposes of these preliminary results whether Jinfu was affiliated with Jinfu USA under section 771(33) of the Act, we analyzed all information on the record regarding possible affiliation between Jinfu and Jinfu USA. In particular, we considered whether Jinfu's purchase/investment in Jinfu USA, as delineated in a stock ownership transfer agreement, resulted in a common control relationship between Jinfu USA and Jinfu at any time during the POR.

Based on all of the information on the record, the Department has preliminarily determined that Jinfu and Jinfu USA were not affiliated with the meaning of section 771(33) of the Act until October 25, 2003, which is the date the above-referenced stock transfer agreement was executed. We note that this decision is consistent with our findings in NSR Chengdu Final Results. Moreover, in reaching this decision, the Department considered all the additional information submitted by Jinfu in this proceeding, but determined such additional information did not have sufficient probative value to call into question the decision in NSR Chengdu Final Results. For a further discussion of this issue, see Proprietary Administrative Review of the Antidumping Duty Order on Honey from the People's Republic of China (PRC): Analysis of the Relationship and Treatment of Sales between Jinfu Trading, Co., Ltd. and Jinfu Trading (USA) Inc. from Kristina Boughton, Case Analyst, to James Doyle, Office Director, dated December 15, 2004.

Normal Value Comparisons

To determine whether the respondents' sales of the subject merchandise to the United States were made at prices below normal value, we compared their United States prices to normal values, as described in the ''United States Price'' and ''Normal Value'' sections of this notice.

United States Price

Export Price

For Dubao and Jinfu, and certain sales by Wuhan Bee and Zhejiang, we based United States price on export price (''EP'') in accordance with section 772(a) of the Act, because the first sale to an unaffiliated purchaser was made prior to importation, and constructed export price (''CEP'') was not otherwise warranted by the facts on the record. We calculated EP based on the packed price from the exporter to the first unaffiliated customer in the United States. Where applicable, we deducted foreign inland freight, foreign brokerage and handling expenses, international freight, marine insurance, U.S. inland freight expenses from port to warehouse, and U.S. import duties and brokerage and handling from the starting price (gross unit price), in accordance with section 772(c) of the Act.

Certain information regarding the sales made from Dubao to its unaffiliated customers raises concerns regarding the status of Dubao's relationship with its customers, the status of its customers as legitimate importers of record, and when and how Dubao received payment for its sales. Therefore, the Department intends to further examine this information for the final results of review. Moreover, the Department intends to further examine this information for the final results of review. Moreover, the Department will issue an additional supplemental questionnaire following the preliminary results of review. Due to the proprietary nature of this information, the specific issues are identified in the Proprietary Analysis Memorandum to the File from Anya Naschak, Case Analyst, dated December 15, 2004. For purposes of these preliminary results, the Department has determined to rely on the U.S. sales data submitted by Dubao. For these preliminary results for Dubao, we deducted foreign inland freight and foreign brokerage and handling expenses from the starting price (gross unit price), in accordance with section 772(c) of the Act. For Wuhan Bee, we added billing and quantity adjustments and freight revenue to the starting price and deducted discounts, foreign inland freight, and foreign brokerage and handling expenses from the starting price (gross unit price), in accordance with section 772(c) of the Act. And for Zhejiang, where applicable, we deducted foreign inland freight and international freight from the starting price (gross unit price), in accordance with section 772(c) of the Act.

Based on the Department's preliminary decision on affiliation between Jinfu and Jinfu USA, the Department requested that Jinfu supply EP sales information for all of its sales to the United States during the POR. Therefore, we calculated EP and deducted foreign inland freight and foreign brokerage and handling expenses from the starting price (gross unit price), in accordance with section 772(c) of the Act.

Where foreign inland freight, foreign brokerage and handling, or marine insurance were provided by PRC service providers or paid for in renminbi, we valued these services using Indian surrogate values (*see* ''Factors of Production'' section below for further discussion). For those expenses that were provided by a market-economy provider and paid for in market-economy currency, we used the reported expense.

Constructed Export Price

For Eswell and certain sales by Wuhan Bee and Zhejiang, we calculated CEP in accordance with section 772(b) of the Act, because certain sales were made on behalf of the PRC-based company by its U.S. affiliate to unaffiliated purchasers. We based CEP on packed, delivered or ex-warehouse prices to the first unaffiliated purchaser in the United States. Where appropriate, we made deductions from the starting price (gross unit price) for movement expenses in accordance with section

772(c)(2)(A) of the Act; these included foreign inland freight, foreign brokerage and handling charges, international freight, marine insurance, U.S. brokerage and handling, U.S. import duties, and U.S. inland freight expenses.

In accordance with section 772(c)(1) of the Act, we also deducted those selling expenses associated with economic activities occurring in the United States, including direct selling expenses and indirect selling expenses. We also made an adjustment for profit in accordance with section 772(d)(3) of the Act.

Specifically, for Eswell we deducted (where applicable) foreign inland freight, international freight, marine insurance, U.S. brokerage, U.S. customs duties, U.S. inland freight from the port to warehouse, U.S. inland freight from the warehouse to the customer, commissions, credit expenses, other direct selling expenses (lab tests), indirect selling expenses, CEP profit, and added (where applicable) freight revenue.

For Zhejiang we deducted (where applicable) foreign inland freight, international freight, marine insurance, U.S. brokerage, U.S. customs duties, U.S. inland freight from the port to warehouse, U.S. inland freight from the warehouse to the customer, commissions, credit expenses, indirect selling expenses, as well as CEP profit.

Wuhan Bee reported to the Department further manufacturing costs associated with blending subject merchandise with non-subject merchandise in the United States. On December 3, 2004, Wuhan Bee submitted comments on the appropriate methodology for assessing further manufacturing costs for these preliminary results. The Department has examined these comments and determined, for these preliminary results, the appropriate methodology for calculating a further manufacturing cost. Because of the proprietary nature of this information, further discussion of this issue can be found in the Memorandum to the File from Kristina Boughton: Wuhan Bee Healthy Co. Ltd. Analysis Memorandum for the Preliminary Results of Review, dated December 15, 2004. For Wuhan Bee, to calculate CEP we added (where applicable) billing and quantity adjustments and freight revenue to the gross unit price. Then we deducted (where applicable) discounts, foreign inland freight, foreign brokerage and handling charges, international freight, marine insurance, U.S. brokerage, U.S. customs duties, U.S. inland freight from the port to warehouse, U.S. inland freight from the warehouse to the customer, further manufacturing, credit expenses, commissions, inventory carrying costs, indirect selling expenses, and CEP profit.

Where foreign inland freight, foreign brokerage and handling, or marine insurance, were provided by PRC service providers or paid for in renminbi, we valued these services using Indian surrogate values (*see* ''Factors of Production'' section below for further discussion). For those expenses that were provided by a market-economy provider and paid for in market-economy currency, we used the reported expense.

Normal Value

Non-Market-Economy Status

In every case conducted by the Department involving the PRC, the PRC has been treated as an NME country. Pursuant to section 771(18)(C)(i) of the Act, any determination that a foreign country is an NME country shall remain in effect until revoked by the administering authority. *See* Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China: Preliminary Results 2001–2002 Administrative Review and Partial Rescission of Review, 68 FR 7500 (February 14, 2003). None of the parties to these reviews have contested such treatment. Accordingly, we calculated NV in accordance with section 773(c) of the Act, which applies to NME countries.

Surrogate Country

Section 773(c)(4) of the Act requires the Department to value an NME producer's factors of production, to the extent possible, in one or more market-economy countries that (1) are at a level of economic development comparable to that of the NME country, and (2) are significant producers of comparable merchandise. India is among the countries comparable to the PRC in terms of overall economic development, as identified in the February 24, 2004, Memorandum from the Office of Policy to Abdelali Elouaradia.[7] In addition, based on publicly available information placed on the record (*e.g.,* world production data), India is a significant producer of the subject merchandise. Accordingly, we considered India the surrogate country for purposes of valuing the factors of production because it meets the Department's criteria for surrogate-country selection. *See* Memorandum to the file from Anya Naschak through James Doyle entitled, ''Selection of a Surrogate Country,'' dated December 15, 2004 (''Surrogate Country Memo'').

Factors of Production

In accordance with section 773(c) of the Act, we calculated NV based on the factors of production which included, but we were not limited to: (A) Hours of labor required; (B) quantities of raw materials employed; (C) amounts of energy and other utilities consumed; and (D) representative capital costs, including depreciation. We used factors of production reported by the producer or exporter for materials, energy, labor, and packing. To calculate NV, we multiplied the reported unit factor quantities by publicly available Indian values.

In selecting the surrogate values, we considered the quality, specificity, and contemporaneity of the data, in accordance with our practice. When we used publicly available import data from the Ministry of Commerce of India (''Indian Import Statistics'') for December 2002 through November 2003 to value inputs sourced domestically by PRC suppliers, we added to the Indian surrogate values a surrogate freight cost calculated using the shorter of the reported distance from the domestic supplier to the factory or the distance from the nearest port of export to the factory This adjustment is in accordance with the Court of Appeals for the Federal Circuit's decision in *Sigma Corp* v. *United States,* 117 F. 3d 1401, 1408 (Fed. Cir. 1997). When we used non-import surrogate values for factors sourced domestically by PRC suppliers, we based freight for inputs on the actual distance from the input supplier to the site at which the input was used. In instances where we relied on Indian import data to value inputs, in accordance with the Department's practice, we excluded imports from both NME countries and countries deemed to maintain broadly available, non-industry-specific subsidies which may benefit all exporters to all export markets (*i.e.*, Indonesia, South Korea, and Thailand) from our surrogate value calculations. *See, e.g., Final Determination of Sales at Less Than Fair Value Certain Automotive Replacement Glass Windshields from the People's Republic of China,* 67 FR 6482 (February 12, 2002) and accompanying Issues and Decisions Memorandum at Comment 1. *See, also, Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Affirmative Preliminary Determination of Critical*

[7] This memorandum is attached to the letters sent to interested parties to this proceeding requesting comments on surrogate country and surrogate value information, dated March 25, 2004.

Circumstances: Certain Color Television Receivers From the People's Republic of China, 68 FR 66800, 66808 (November 28, 2003), unchanged in the Department's final results at 69 FR 20594 (April 16, 2004). Also consistent with our policy, we excluded, in a few instances, import data that appeared to be aberrational when compared to the average import value of all countries not excluded. *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Color Television Receivers From the People's Republic of China,* 69 FR 20594, April 16, 2004, and accompanying issues and Decision Memorandum at Comment 5. *See* Memorandum to the File, through James Doyle, Office Director, entitled, ''Factors of Production Valuation Memorandum for the Preliminary Results of the Second Antidumping Duty Review of Honey from the People's Republic of China,'' dated December 15, 2004 (''Factor Valuation Memo''), for a complete discussion of the import data what we excluded from our calculation of surrogate values. This memorandum is on file in the Central Records Unit (''CRU'') located in room B–099 of the Main Commerce Building.

Where we could not obtain publicly available information contemporaneous with the POR to value factors, we adjusted the surrogate values using the Indian Wholesale Price Index (''WPI'') as published in the International Financial Statistics (''IFS'') of the International Monetary Fund (''IMF''), for those surrogate values in Indian rupees. We made currency conversions, where necessary, pursuant to section 351.415 of the Department's regulations to U.S. dollars using the applicable average exchange rate for the POR. We based the average exchange rates on exchange rate data from the Import Administration Web site at *http://ia.ita.doc.gov/exchange/index.html. See* Factor Valuation Memo. We valued the factors of production as follows:

To value raw honey, we used the average of two raw honey prices, provided in an article published in The Tribune (of India) on December 15, 2003, entitled, ''Honey sweet despite price fall.'' A copy of the original article, which was submitted by petitioners, is attached at Attachment 3 of the Factor Valuation Memo. The respondents in this review submitted other news articles to be used as potential sources for the surrogate value data for raw honey, including an article from the Hindu Business Line dated April 2003 and an article from IndiaInfoline.com dated September 2003. We have not used either of these alternate sources proposed by respondents in the preliminary results, as discussed in the Factor Valuation Memo.

In selecting the raw honey values from The Tribune (of India) article as the best available information with which to value raw honey in this proceeding, we note that the Department has conducted extensive research on potential raw honey surrogate values for this administrative review. The relevant research is included as Attachment 17 of the Factor Valuation Memo. Additionally, the Department contacted U.S. Foreign Agriculture Service (''FAS'') officers in India to conduct research on its behalf (*see* Memorandum to the File from Anya Naschak, dated November 19, 2004). The information obtained from these FAS officers included price quotes from the North India Beekeepers Society (''NIBS''). The Department also evaluated the reasonableness of using Mahabaleshwar Honey Producers Cooperative Society, Ltd.'s (''MHPC'') cost of raw honey from its financial statements. None of these other sources of information are as reliable as the raw honey values appearing in The Tribune (of India) article. Specifically, the Department cannot confirm the quality or reliability of the NBS values, and the MHPC price is that a single producer. In addition, we note ''the Department's preference is to use industry-wide values, rather than the values of a single producer, wherever possible, because industry-wide values are more representative of prices/costs of all producers in the surrogate country.'' *See* Notice of Final Determination of Sales at Less Than Fair Value: Honey From the People's Republic of China, 66 FR 50608 (October 4, 2001), and accompanying Issues and Decision Memorandum at Comment 2 (''Final Determination''). *See also* Final Results of the First Administrative Review of the Antidumping Duty Order on Honey from the People's Republic of China, 69 FR 25060 (May 5, 2004), and accompanying Issues and Decision Memorandum at Comment 3.

The use of The Tribune (of India) article is also consistent with the Department's recent decision in the third new shipper review of this order. *See* NSR Chengdu Final Results and accompanying Issues and Decision Memorandum at Comment 4. For a further discussion of this issue, see Factor Valuation Memo, as well as the preliminary results of the new shipper reviews that are contemporaneous with the instant review. *See* Honey from the People's Republic of China: Notice of Preliminary Results of Antidumping Duty New Shipper Reviews, 69 FR 69350 (November 29, 2004) (''NSR Anhui Prelim Results'').

To value water, we used the water tariff rate, as reported on the Municipal Corporation of Greater Mumbai's Web site. *See http://www.mcgm.gov.in/Stat%20&%20Fig/Revenue.htm.* Because this data is not contemporaneous with the POR, an adjustment has been made for inflation using WPI data.

To value diesel fuel for autos, we used the rate published in International Energy Agency, Energy Prices and Taxes—Quarterly Statistics (Fourth Quarter 2003), under ''Automotive Diesel for Commercial Use.'' *See* Factor Valuation Memo.

To value beeswax, scrap honey, coal, paint, and labels, we used Indian Import Statistics, contemporaneous with the POR, removing data from certain countries as discussed in the Factor Valuation Memo. We also adjusted the surrogate values to include freight costs incurred between the shorter of the two reported distances from either (1) the closet PRC seaport to the location producing the subject merchandise, or (2) the PRC domestic materials supplier to the location where the subject merchandise is produced. See Factor Valuation Memo.

We valued electricity using the Annual Report (2001–2002) on The Working of State Electricity Boards & Electricity Departments of the Planning Commission (Power and Energy Division) of the Government of India (May 2002), as submitted by respondents in their May 10, 2004, submission at Exhibit 5. We inflated the value for electricity using the POR average WPI rate. See Factor Valuation Memo.

To value drums, we relied upon a price quote from an Indian steel drum manufacturer from September 2000, as provided by Petitioners in their May 10, 2004, submission at Exhibit 9. We inflated the value for drums using the POR average WPI rate. *See* Factor Valuation Memo.

To value factory overhead, selling, general, and administrative expenses (''SG&A''), and profit, we relied upon publicly available information in the 2002–2003 annual report of MHPC, a producer of the subject merchandise in India, upon which both petitioners and respondents have argued that the Department should rely upon. Petitioners aver in their November 18, 2004, submission that the Department should continue to rely on the methodology used in NSR Chengdu Final Results. Respondents argued in their December 3, 2004, submission that the Department should exclude the line

item for ''Honey Sale Commission'' from the calculation of SG&A. However, we preliminarily find that the Department's calculation in NSR Chengdu Final Results was appropriate. Therefore, for these preliminary results we are continuing to include ''Honey Sale Commission'' in our calculation of the SG&A ratio and have applied the resulting ratios to the calculated cost of manufacture and cost of production using the same methodology established in NSR Chengdu Final Results and accompanying Issues and Decision Memorandum at Comment 5 and reinforced in NSR Anhui Prelim Results. For a further discussion of this issue, see Factor Valuation Memo.

Because of the variability of wage rates in countries with similar levels of per capita gross domestic product, section 351.408(c)(3) of the Department's regulations requires the use of regression-based wage rate. Therefore, to value the labor input, we used the PRC's regression-based wage rate published by Import Administration on its Web site. The source of the wage rate data on the Import Administration Web site is the Yearbook of Labor Statistics 2002, International Labor Organization (''ILO''), (Geneva: 2002), and gross national income (GNI'') data as reported in World Development Indicators, The World Bank, (Washington, DC: 2003 and 2004). *See* Factor Valuation Memo.

To value truck freight, we used an average truck freight cost based on Indian truck freight rates on a per-metric-ton basis published in the Iron and Steel Newsletter, April 2002, which we adjusted for inflation. *See* Factor Valuation Memo.

We valued marine insurance, where necessary, based on publicly available price quotes from a marine insurance provider at *http://www.rjgconsultants.com/insurance.html.* We also valued brokerage and handling using the source, dated November 12, 1999, that petitioners provided in their May 10, 2004, submission. Since the brokerage rate was not contemporaneous with the POR, we adjusted the rate for inflation. See Factor Valuation Memo.

In accordance with section 351.301(c)(3)(ii) of the Department's regulations, for the final results of this administrative review, interested parties may submit publicly available information to value the factors of production until 20 days following the date of publication of these preliminary results.

Preliminary Results of Review

We preliminarily determine that the following antidumping duty margins exist:

Exporter	Margin (percent)
Sichuan-Dujiangyan Dubao Bee Industrial Co., Ltd.	41.99
Shanghai Eswell Enterprise Co., Ltd.	38.25
Jinfu Trading Co., Ltd.	73.67
Wuhan Bee Healthy Company, Ltd.	5.69
Zhejian Native Produce and Animal By-Products Import & Export Group Corp.	44.98
Shanghai Xiuwei International Trading Co., Ltd.	183.80
Inner Mongolia Autonomous Region Native Produce and Animal By-Products Import & Export Corp.	183.80
Shanghai Shinomiel International Trade Corporation	183.80
PRC-Wide Rate	183.80

For details on the calculation of the antidumping duty weighted-average margin for each company, *see* the respective company's Analysis Memorandum for the Preliminary Results of the Second Administrative Review of the Antidumping Duty Order on Honey from the People's Republic of China, dated December 15, 2004. Public Versions of these memoranda are on file in the CRU.

Assessment Rates

Pursuant to section 351.212(b) of the Department's regulations, the Department calculates an assessment rate for each importer of the subject merchandise. Upon issuance of the final results of this review, if any importer-specific assessment rates calculated in the final results are above *de minimis* (*i.e.,* at or above 0.50 percent), the Department will issue appraisement instructions directly to CBP to assess antidumping duties on appropriate entries by applying the assessment rate to the entered quantity or value of the merchandise. For assessment purposes, we calculated importer-specific assessment rates for the subject merchandise by aggregating the dumping duties due for all U.S. sales to each importer and dividing the amount by the total quantity or entered value of the sales to that importer.[8] If these preliminary results are adopted in our final results of review, we will direct CBP to assess the resulting rate against the total quantity or entered value for the subject merchandise on each of the respondents' importer's/customer's entries during the POR.

Cash-Deposit Requirements

The following cash-deposit rates will be effective upon publication of the final results of this review for all shipments of honey from the PRC entered, or withdrawn from warehouse, for consumption on or after publication date, as provided for by section 751(a)(2)(C) of the Act: (1) For subject merchandise exported by Dubao, Eswell, Jinfu, Wuhan Bee, and Zhejiang, the cash-deposit rate will be that established in the final results of this review, except if the rate is less than 0.50 percent and, therefore, *de minimis* within the meaning of 19 CFR 351.106(c)(1), in which case the cash deposit rate will be zero; (2) for previously investigated or reviewed companies not listed above that have separate rates, the cash-deposit rate will continue to be the company-specific rate published for the most recent period (except for Inner Mongolia and Shanghai Xiuwei, whose cash-deposit rates have changed in their review to the PRC-wide entity rate as noted below); (3) the cash-deposit rate for all other PRC exporters (including Inner Mongolia, Shanghai Xiuwei, and Shanghai Shinomiel) will be the PRC-wide rate established in the final results of this review; and (4) the cash deposit rate for all other non-PRC exporters will be the rate applicable to the PRC exporter that supplied that exporter.

These deposit requirements, when imposed, shall remain in effect until publication of the final results of the next administrative review.

Schedule for Final Results of Review

The Department will disclose calculations performed in connection with the preliminary results of this review within five days of the date of publication of this notice in accordance with section 351.224(b) of the Department's regulations. Any interested party may request a hearing within 30 days of publication of this notice is accordance with section 351.310(c) of the Department's regulations. Any hearing would normally be held 37 days after the publication of this notice, or the first workday thereafter, at the U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Individuals who wish to request a hearing must submit a written request within 30 days of the publication of this notice in the **Federal Register** to the Assistant Secretary for Import Administration, U.S. Department of Commerce, Room 1870, 14th Street

[8] Where entered value was not reported, we relied on the quantity of subject merchandise.

and Constitution Avenue, NW., Washington, DC 20230. Requests for a public hearing should contain: (1) The party's name, address, and telephone number; (2) the number of participants; and (3) to the extent practicable, an identification of the arguments to be raised at the hearing.

Unless otherwise notified by the Department, interested parties may submit case briefs within 30 days of the date of publication of this notice is accordance with section 351.309(c)(ii) of the Department's regulations. As part of the case brief, parties are encouraged to provide a summary of the arguments not to exceed five pages and a table of statutes, regulations, and cases cited. Rebuttal briefs, which must be limited to issues raised in the case briefs, must be filed within five days after the case brief is filed. If a hearing is held, an interested party may make an affirmative presentation only on arguments included in that party's case brief and may make a rebuttal presentation only on arguments include in that party's rebuttal brief. Parties should confirm by telephone the time, date, and place of the hearing within 48 hours before the scheduled time. The Department will issue the final results of this review, which will include the results of its analysis of issues raised in the briefs, not later than 150 days after the date of publication of this notice (*see* ''Extension of Final Results'' section above).

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under section 351.402(f) of the Department's regulations to file a certificate regarding the reimbursement of antidumping prior to liquidation of the relevant entries during these review periods. 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 administrative review and this notice are published in accordance with sections 751(a)(2)(B) and 777(i)(1) of the Act.

Dated: December 15, 2004.

James J. Jochum,

Assistant Secretary for Import Administration.

[FR Doc. 04–28119 Filed 12–23–04; 8:45 am]

BILLING CODE 3510–DS–M

DEPARTMENT OF COMMERCE

International Trade Administration

[A–357–812]

Honey From Argentina: Preliminary Results of Antidumping Duty Administrative Review

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

SUMMARY: In response to requests by interested parties, the Department of Commerce (the Department) is conducting an administrative review of the antidumping order of honey from Argentina. The review covers seven firms. The period of review (POR) is December 1, 2002 through November 30, 2003.

We preliminarily determine that sales of honey from Argentina have been made below the normal value (NV) in the case of Nutrin S.A (Nutrin). In the case of the other six respondents, Asociacion de Cooperativas Argentinas (ACA), Compania Apicola Argentina (CAA), HoneyMax S.A. (HoneyMax), Seylinco S.A. (Seylinco), TransHoney S.A. (TransHoney), and Nexco S.A. (Nexco), we preliminary determine a zero or *de minimis* margin. If these preliminary results are adopted in our final results of administrative review, we will instruct Customs and Border Protection (CBP) to assess antidumping duties based on the difference between the export price (EP) or constructed export price (CEP) and NV. Interested parties are invited to comment on these preliminary results. Parties who submit argument in these proceedings are requested to submit with the argument: (1) A statement of the issues, (2) a brief summary of the argument, and (3) a table of authorities.

EFFECTIVE DATE: December 27, 2004.

FOR FURTHER INFORMATION CONTACT: David Cordell for TransHoney and for CAA, Brian Sheba for HoneyMax and Seylinco, Angela Strom for ACA, Nexco and Nutrin, or Robert James, AD/CVD Operations, Office 7, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Room 7866, Washington, DC 20230; telephone (202) 482–0649 OR (202) 482–0408.

SUPPLEMENTARY INFORMATION:

Background

On December 10, 2001, the Department published the antidumping duty order on Honey from Argentina. *See Notice of Antidumping Duty Order: Honey from Argentina,* 66 FR 63672. On December 31, 2003, the American Honey Producers Association and the Sioux Honey Association (collectively, petitioners) requested an administrative review of the antidumping duty order on honey from Argentina in response to the Department's notice of opportunity to request a review published in the **Federal Register**. Petitioners requested the Department review entries of subject merchandise made by 13 Argentine producers/exporters. In addition, the Department received requests for review from five Argentine exporters. On January 15, 2004, petitioners withdrew four of their 13 requests. The Department initiated the review for the remaining nine companies. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 69 FR 3117–3119 (January 22, 2004).

On February 18, 2004, petitioners withdrew their requests for review for a further two companies. The Department subsequently rescinded the review with respect to these two companies Compania Europea Americana, S.A. and Radix S.r.L. *See Honey from Argentina: Notice of Partial Rescission of Antidumping Duty Administrative Review*, 69 FR 12121 (March 15, 2004).

On February 11, 2004, the Department issued sections A, B, and C of the antidumping questionnaire to all exporters subject to review. We received responses on March 22 and April 6, 2004, (ACA); March 3 and March 29, 2004, (HoneyMax); March 19 and April 2, 2004, (Nexco); March 10 and April 2, 2004, (Seylinco); March 17, and April 2, 2004, (TransHoney); March 18 and April 2, 2004, (CAA). We received no response from Nutrin. After numerous attempts to contact counsel for Nutrin, on June 24, 2004, Nutrin's counsel stated Nutrin would not be responding to the Department's requests for information. *See* Memoranda to the File dated April 7, 2004, and June 24, 2004. We received no comments from petitioners.

The Department issued additional supplemental questionnaires on April 16 (TransHoney); March 30, May 6, July 26, and August 20 (CAA); April 15 and May 4 (ACA); April 15 and July 30 (Nexco); May 6 and August 2 (Honeymax) and May 6 (Seylinco). We received responses to these additional supplemental questionnaires on May 3 (TransHoney); May 6, May 20, August 16, September 3, September 20, September 27, and September 29 (CAA); April 28 and May 12 (ACA); May 7 and August 13 (Nexco); May 20 (Seylinco); and May 27 and August 23 (HoneyMax). On June 30, 2004, the Department

determined a ''particular market situation'' existed in Argentina during the POR. *See* the discussion of ''Selection of Comparison Market'' under ''Normal Value'' below.

Consequently on June 30, 2004, the Department issued a supplemental questionnaire to CAA's affiliate, Mielar S.A. (Mielar), requesting a Section B sales database covering sales by Mielar to Germany, Mielar's largest third-country market. Mielar filed its Section B sales database on July 21, 2004.

On November 5, 2004, CAA responded to the Department's request for audited financial statements for the 2003 fiscal year for Mielar. On November 16, 2004, the Department rejected an untimely submission purporting to describe the adjustments made to reconcile the unaudited financial statements to the audited financial report.

On August 11, 2004, the Department extended the time limit for issuance of the preliminary results of the administrative review to December 20, 2004. *See Honey from Argentina; Extension of Time Limit for Preliminary Results of Administrative Review*, 69 FR 48843 (August 11, 2004).

Because the Department disregarded certain ACA sales at prices below the cost of production (COP) in the most recently completed segment of the proceeding at the time of initiation of this review, namely the investigation, the Department initiated a cost investigation and selected six of ACA's unaffiliated suppliers to serve as cost respondents. On April 29, 2004, the Department issued Section D questionnaires to four honey suppliers (three beekeepers and one middleman). On May 5, 2004, the Department selected a new beekeeper to replace one of the original cost respondents. On May 10, 2004, the Department issued its Section D questionnaire to the final two beekeepers. On June 17, 2004, the Department excused the middleman for ACA from responding to Section D. On June 22, 2004, the Department received responses from the five beekeepers serving as the cost respondents. Supplemental questionnaires were issued on August 5, 2004, to two beekeepers and on August 10, 2004, to the three other beekeepers. Responses to these supplemental questionnaires were received on September 9, 2004.

Scope of the Review

The merchandise covered by this order is honey from Argentina. The products covered are natural honey, artificial honey containing more than 50 percent natural honey by weight, preparations of natural honey containing more than 50 percent natural honey by weight, and flavored honey. The subject merchandise includes all grades and colors of honey whether in liquid, creamed, comb, cut comb, or chunk form, and whether packaged for retail or in bulk form.

The merchandise covered by this order is currently classifiable under subheadings 0409.00.00, 1702.90.90, and 2106.90.99 of the *Harmonized Tariff Schedule of the United States* (HTSUS). Although the HTSUS subheadings are provided for convenience and customs purposes, the Department's written description of the merchandise under this order is dispositive.

Verification

As provided in section 782(i) of the Tariff Act of 1930, as amended (the Act), we verified sales information provided by CAA and cost information provided by ACA, using standard verification procedures such as the examination of relevant sales and financial records. Our verification results are outlined in the public and proprietary versions of our verification reports, which are on file in the Central Records Unit (CRU) in room B–099 of the main Department building. *See* CAA's Sales Verification Report, dated December 20, 2004, and Verification of ACA and selected beekeepers, dated November 26, 2004, on file in the CRU.

Product Comparison

In accordance with section 771(16) of the Act, we considered all sales of honey covered by the description in the ''Scope of the Review'' section of this notice, *supra,* which were sold in the respective third-country markets during the POR to be the foreign like product for the purpose of determining appropriate product comparisons to honey sold in the United States. We matched products based on the physical characteristics reported by CAA, ACA, HoneyMax, Nexco, Seylinco, and TransHoney. Where there were no sales of identical merchandise in the third-country market to compare to U.S. sales, we compared U.S. sales to the next most similar foreign like product on the basis of the characteristics and reporting instructions listed in the antidumping duty questionnaire and instructions, or to constructed value (CV), as appropriate.

Level of Trade

In accordance with section 773(a)(1)(B)(i) of the Act, to the extent practicable, we determine NV based on sales in the home market at the same level of trade (LOT) as EP or the CEP. The NV LOT is that of the starting-price sales in the home market or, when NV is based on CV, that of the sales from which we derive selling, general and administrative (SG&A) expenses and profit. For CEP, it is the level of the constructed sale from the exporter to an affiliated importer after the deductions required under section 772(d) of the Act.

To determine whether NV sales are at a different LOT than CEP, 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 LOT 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 LOT of the export transaction, we make an LOT adjustment under section 773(a)(7)(A) of the Act. Finally, for CEP sales, if the NV level is more remote from the factory than the CEP level and there is no basis for determining whether the difference in the levels between NV and CEP affects price comparability, we adjust NV under section 773(a)(7)(B) of the Act (the CEP-offset provision). *See Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate from South Africa*, 62 FR 61731, 61732–33 (November 19, 1997).

ACA reported two LOTs in the third-country market corresponding to differing channels of distribution: (1) Sales to packers and (2) sales to importers. The Department has determined that differing channels of distribution, alone, do not qualify as separate LOTs when selling functions performed for each customer class are sufficiently similar. *See* 19 CFR 351412(c)(2). We found that the selling functions ACA provided to its reported channels of distribution in the third-country and U.S. markets were virtually the same, varying only by the degree to which warranty services were provided. We do not find the varying degree of warranty services alone sufficient to determine the existence of different marketing stages. *See Final Determination of Honey from Argentina* 66 FR 50611 (Comment 18); *Preliminary Results; Honey from Argentina*, 69 FR 62168 (January 6, 2004). Thus, we have determined there is only one LOT for ACA's sales to all markets. *See ACA's Analysis Memorandum*, dated December 20, 2004.

CAA, HoneyMax, Nexco, Seylinco, and TransHoney reported a single LOT for all U.S. and third-country sales. Each

company claimed that its selling activities in both markets are identical, although we note Seylinco sold to two general classes of customers in both the U.S. and Germany. For CAA, HoneyMax, Nexco, Seylinco, and TransHoney, we determine that all reported sales are made at the same LOT, and we have no need to make an LOT adjustment. *See* Analysis Memoranda for CAA, HoneyMax, Nexco, Seylinco, and TransHoney, dated December 20, 2004.

Comparisons

To determine whether sales of subject merchandise made by CAA, ACA, HoneyMax, Nexco, Seylinco, and TransHoney to the United States were made at less than fair value, we compared the EP or CEP, to the NV, as described below. Pursuant to section 777A(d)(2) of the Act, we compared the EP or CEP of individual U.S. transactions to the monthly weight-averaged NV of the foreign like product where there were sales at prices above the COP, as discussed in the ''Cost of Production Analysis'' section below.

Transactions Investigated

Section 351.401(i) of the Department's regulations states that the Department normally will use date of invoice, as recorded in the exporter's or producer's records kept in the ordinary course of business, as the date of sale, but may use a date other than the date of invoice if it better reflects the date on which material terms of sale are established. For ACA, the Department, consistent with its practice, used the reported shipment date as the date of sale for both its third-country and U.S. markets since shipment occurred prior to invoice date. *See Notice of Final Determinations of Sales at Less than Fair Value: Certain Durum Wheat and Hard Red Spring Wheat from Canada*, 68 FR 52741 (September 5, 2003), and accompanying Decision Memo at Comment 3.[1] CAA, TransHoney, and Nexco reported the earlier of either shipment date or invoice date as the date of sale for both markets. Seylinco reported the invoice date as the date of sale for both markets. HoneyMax reported the shipment date as the date of sale for U.S. sales; however, we used the invoice date for its third-country market sales.

[1] *See* page 16 of the Decision Memorandum, which is available on the Web at *http://ia.ita.doc.gov/frn/summary/canada/03–22661–1.pdf* or in the Import Administration's CRU located at Room B–099, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230.

Export Price and Constructed Export Price

Section 772(a) of the Act defines EP as ''the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of subject merchandise 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 (c). Section 772(b) of the Act defines CEP as ''the price at which the subject merchandise is first sold (or agreed to be 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 (c) and (d). For purposes of this administrative review, HoneyMax classified all of its U.S. sales as CEP because all of its U.S. sales were made through its wholly owned U.S. affiliate to unaffiliated purchasers in the United States. ACA, CAA, Nexco, Seylinco, and TransHoney have classified their U.S. sales as EP because all of their sales were made before the date of importation directly to unaffiliated purchasers in the U.S. market. For purposes of these preliminary results, we have accepted these classifications.

Affiliation

On June 30, 2004, the Department determined that CAA, Mielar, and El Chelibo (Chelibo) are affiliated within the meaning of section 771(3)(B) of the Act, and that the Department should treat the three companies as a single entity for the purposes of this administrative review. *See* Decision Memorandum of Relationship of CAA, Chelibo and Mielar in the 2002–2003 Administrative Review of AD Order on Honey from Argentina from David Cordell through Robert James to Richard Weible, dated June 30, 2004.

Normal Value

1. Selection of Comparison Market

In accordance with section 773(a)(1)(C) of the Act, to determine whether there was a sufficient volume of sales in the home market to serve as a viable basis for calculating NV (*i.e.*, the aggregate volume of home market sales of the foreign like product is greater than or equal to five percent of the aggregate volume of U.S. sales), we compare each company's aggregate volume of home market sales of the foreign like product to its aggregate volume of U.S. sales of subject merchandise. For HoneyMax, Nexco, Seylinco, and TransHoney, the aggregate volume of sales in the home market of the foreign like product was less than five percent of the aggregate volume of U.S. sales of the subject merchandise. Therefore, we determined for these companies that sales in the home market did not provide a viable basis for calculating NV.

In addition, section 773(a)(1)(C)(iii) provides that the Department may determine that home market sales are inappropriate as a basis for determining NV if the particular market situation would not permit a proper comparison with EP or CEP. During the first review of this order, the Department found a particular market situation rendered the Argentine market inappropriate for the calculation of NV because of, among other reasons, the export-oriented nature of the Argentine honey industry. *See Honey from Argentina-Preliminary Results of Anti-Dumping Duty Administrative Review*, 69 FR 621 (January 6, 2004) *Honey From Argentina: Final Results of Antidumping Duty Administrative Review (No Changes)* 69 FR 30283 (May 27, 2004). On May 4 and May 12, 2004, the Department asked ACA and CAA, respectively, to provide further information in order to evaluate the market situation in Argentina with respect to honey, and on May 12 and May 20, 2004, respectively, ACA and CAA responded to the Department's request. ACA states the circumstances in this review are the same as in the first review, while CAA argues the honey sold in the home market is identical or similar to the honey sold in the United States and in the third-country markets, arguing against finding a ''particular market situation'' in Argentina.

On June 30, 2004, the Department determined that a particular market situation does, in fact, exist with respect to ACA's and CAA's sales of honey in Argentina, rendering the Argentine market inappropriate for purposes of determining NV. *See* Decision Memorandum ''Analysis of Particular Market Place Situation'' from Angela Strom through Robert James to Richard Weible, dated June 30, 2004.

When sales in the home market are not suitable to serve as the basis for NV, section 773(a)(1)(B)(ii) of the Act provides that sales to a third-country market may be utilized if (i) the prices in such market are representative; (ii) the aggregate quantity of the foreign like product sold by the producer or exporter in the third-country market is five percent or more of the aggregate quantity of the subject merchandise sold

in or to the United States; and (iii) the Department does not determine that a particular market situation in the third-country market prevents a proper comparison with the U.S. price. CAA, Nexco, TransHoney, and Seylinco reported Germany as their largest third-country market during the POR, in terms of volume of sales (and with five percent or more of sales, by quantity, to the United States). ACA reported the United Kingdom as its largest third-country market during the POR, in terms of volume of sales (and with five percent or more of sales to the United States). Honeymax reported Australia as its largest third-country market during the POR, in terms of volume of sales (and with five percent or more of sales to the United States). *See, e.g., Notice of Preliminary Results of Antidumping Duty Administrative Review, Preliminary Determination To Revoke the Order in Part, and Partial Rescission of Antidumping Duty Administrative Review: Fresh Atlantic Salmon From Chile,* 67 FR 51186 (August 7, 2002) (selecting the largest third-country market as the basis for NV). The Department preliminarily determines that the prices in Germany, the United Kingdom, and Australia are representative and no particular market situation exists that would prevent a proper comparison to EP or CEP. As a result, for Nexco, TransHoney, CAA, and Seylinco, NV is based on sales to Germany. For HoneyMax, NV is based on sales to Australia. Finally, for ACA, NV is based on sales to the United Kingdom.

In summary, therefore, NV for all companies is based on third-country market sales to unaffiliated purchasers made in commercial quantities and in the ordinary course of trade. For NV, we used the prices at which the foreign like product was first sold for consumption in the usual commercial quantities, in the ordinary course of trade, and, to the extent possible, at the same LOT as the EP or CEP, as appropriate. We calculated NV as noted in the ''Price-to-CV Comparisons'' and ''Price-to-Price Comparisons'' sections of this notice.

Background

2. Cost of Production

The Department disregarded certain sales made by ACA to its comparison market at prices below the cost of producing the subject merchandise in the investigation of this antidumping duty order. *See Notice of Final Determination of Sales at Less Than Fair Value; Honey from Argentina,* 66 FR 50611 (October 4, 2001) and *Notice of Amended Final Determination of Sales at Less Than Fair Value; Honey from Argentina,* 66 FR 58434 (Nov 21, 2001) (Final Determination). Because the investigation was the most recently completed segment of this proceeding upon initiation of this administrative review, the Department determined there are reasonable grounds to believe or suspect that ACA made sales in the comparison market at prices below the cost of producing the merchandise in this review. *See* section 773(b)(2)(A) of the Act. Therefore, we initiated a COP inquiry for ACA to determine whether ACA made sales in the comparison market at prices below the respective COP.

A. Cost of Production Analysis

We initiated a company-specific sales-below-cost investigation with respect to ACA. As previously stated in this proceeding, ACA again indicated that it is an exporter, not a producer, of subject merchandise in this review. On March 22, 2004, ACA submitted a list of its unaffiliated honey suppliers, which identified companies, individuals, and cooperatives operating as either producers (beekeepers) or intermediaries (middlemen) in ACA's honey purchases. To calculate a representative COP and CV for the merchandise under consideration, the Department followed the same methodology relied upon in the first administrative review. The Department selected five beekeepers and one middleman from ACA's list of suppliers. *See* Memorandum to the File: ''Cost Respondents,'' dated April 23, 2004. On June 17, 2004, the Department notified ACA that it would excuse the selected middleman from responding to the Department's cost questionnaire. The cost information placed on the record by the beekeepers in the current administrative review obviated the need to obtain the middleman costs for purposes of our cost analysis. Thus, as in the previous review, the COP information for ACA was based upon the cost data provided by its five largest beekeeper suppliers.

B. Calculation of COP

In accordance with section 773(b)(3) of the Act, we calculated a COP for each beekeeper supplier based on the sum of the cost of materials and fabrication for the foreign like product, plus amounts for general and administrative (G&A) expenses. We then added the associated selling expenses that ACA incurred to calculate the final COP figure.

(1) Common and Individual Cost Respondent Adjustments

We relied on the COP data submitted by each beekeeper in its cost questionnaire response, except for the adjustments as discussed below.

We adjusted the reported labor costs for all beekeepers. Virtually all of the labor provided was performed by either the owners or by a small number of hired laborers. For reporting purposes, the majority of the cost respondents relied on estimated labor hours and rates for the tasks performed by owners and their employees. Two of the five beekeeper suppliers could not provide any type of supporting documentation for the reported salaries and labor costs reported for their employees. In addition, none of the beekeepers were able to provide support for the reported owners' labor costs. Therefore, to calculate employee labor costs for each of the beekeepers, we relied on the salaries reported for employees from three beekeepers who maintained and provided supporting documentation. For these three beekeepers, we calculated a weighted-average labor cost using the labor costs reported for employees and the quantity of honey produced in kilograms. We then compared this calculated labor cost to the reported labor cost, and used the higher of the two amounts. For the owner's labor costs, we imputed a labor cost retrieved from the Argentine Government's Bulletin For Agricultural Workers.[2] We indexed the owner's salary from the 1995 publication to the November 2003 Argentine Peso Value using the wholesale price index (IPIM).[3] See Cost of Production Adjustments for the Preliminary Results—Associacion de Cooperativas Argentinas (''ACA'') Beekeeper Respondents, dated December 20, 2004, (ACA Cost Memorandum).

With respect to feed for their hives, the beekeepers did not keep formal records on consumption rates or inventory. Similar to the previous review, we calculated a per-kilogram feed cost for each beekeeper based on the cost studies from the petition. For each beekeeper, we compared the calculated per-unit feed cost figures to those reported by the beekeeper, and relied on the higher of the two.

(2) Individual Cost Respondent Adjustments

For two of the beekeeper cost respondents, we made minor cost adjustments based on information

[2] *See http://ww.trabajo.gov.ar/ legislacion/ resolucion/ files__rural/ res0033–1994.dot.*

[3] *See http://www.indec.mecon.gov.ar/.*

provided in a supplemental questionnaire response and our findings at verification. *See* (ACA Cost Memorandum).

C. Test of Third-Country Prices and Results of the Cost of Prodcution Test

In determining whether to disregard third country market sales made at prices below the COP, in accordance with sections 773(b)(1)(A) and (B) of the Act, we examined: (1) Whether, within an extended period of time, such sales were made in substantial quantities; and (2) whether such sales were made at prices which permitted the recovery of all costs within a reasonable period of time in the normal course of trade. Where less than 20 percent of the respondent's home market sales of a given model (*i.e.,* CONNUM) were at prices below the COP, we did not disregard any below-cost sales of that model because we determined that the below-cost sales were not made within an extended period of time and in ''substantial quantities.'' Where 20 percent or more of the respondent's home market sales of a given model were at prices less than COP, we disregarded the below-cost sales because: (1) They 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 our comparison of prices to the weighted-average COPs for the POR, they were at prices which would not permit the recovery of all costs within a reasonable period of time, in accordance with section 773(b)(2)(D) of the Act. Therefore, for purposes of this administrative review, we disregarded below-cost sales made by ACA where 20 percent or more of the respondent's home market sales of a given model were at prices less than COP, and used the remaining sales as the basis for determining NV, in accordance with section 773(b)(1) of the Act.

Price-to-Price Comparisons

ACA

For those product comparisons for which there were sales at prices above the COP, we based NV on the third-country market prices to unaffiliated purchasers. In accordance with section 773(a)(6)(B) of the Act, we made adjustments, where applicable, for movement expenses. In accordance with section 773(a)(6)(C) of the Act, we made circumstance-of-sale adjustments for credit and other direct selling expenses where appropriate. We note that for certain claimed direct expenses in the third-country market, the Department has re-classified them as indirect for the reasons outlined in the accompanying Analysis Memorandum. *See* ACA's Sales Analysis Memorandum, dated December 20, 2004.

CAA

In accordance with section 773(a)(6)(B) of the Act, we based NV on the third-country prices to unaffiliated purchasers. We made adjustments, where applicable, for movement expenses. In accordance with section 773(a)(6)(C) of the Act, we made circumstance-of-sale adjustments for credit and other direct selling expenses, where appropriate. We note that for certain claimed direct expenses in the third country market, the Department has re-classified these expenses as indirect for the reasons outlined in the accompanying Analysis Memorandum. *See* CAA's Analysis Memorandum, dated December 20, 2004.

HoneyMax

In accordance with section 773(a)(6)(B) of the Act, we based NV on the third country market prices to unaffiliated purchasers. We made adjustments, where applicable, for movement expenses. We made circumstance-of-sale adjustments for credit, where appropriate, in accordance with section 773(a)(6)(C). We also made adjustments, where applicable, for other direct selling expenses pursuant to section 773(a)(6)(C) of the Act. During the POR, HoneyMax stored honey at a warehouse owned by an affiliate. Although a contract stipulated a monthly rental fee for the warehouse, in fact, HoneyMax compensated its affiliate for use of the warehouse space by means of improvements made to the warehouse itself. Because no warehouse rent expenses are included in HoneyMax's income statement or part of warehouse expenses in HoneyMax's sales database, we have imputed warehouse rent expenses using the monthly rental fee set forth in the lease between HoneyMax and its affiliate. These changes included a warehouse improvement amortization expense made during the POR from HoneyMax's financial statements as part of HoneyMax's overall warehouse expenses. *See* HoneyMax Analysis Memorandum, dated December 20, 2004, at 4.

Nexco

We based NV on the third-country prices to unaffiliated purchasers. In accordance with section 773(a)(6)(B) of the Act, we made adjustments, where applicable, for movement expenses. We made circumstance-of-sale adjustments for credit and other direct selling expenses where appropriate, in accordance with section 773(a)(6)(C) of the Act. *See* Nexco's Analysis Memorandum, dated December 20, 2004.

Seylinco

We based NV on the third-country prices to unaffiliated purchasers. We made adjustments, where applicable, for movement expenses in accordance with section 773(a)(6)(B) of the Act. Where appropriate, we made circumstance-of-sale adjustments for credit pursuant to section 773(a)(6)(C) of the Act. We also made adjustments, where applicable, for other direct selling expenses, in accordance with section 773(a)(6)(C) of the Act. *See* Seylinco's Analysis Memorandum, dated December 20, 2004.

TransHoney

We based NV on the third-country prices to unaffiliated purchasers. We made adjustments, where applicable, for movement expenses in accordance with section 773(a)(6)(B) of the Act. We made circumstance-of-sale adjustments for credit and other direct selling expenses, where appropriate, in accordance with section 773(a)(6)C of the Act. *See* TransHoney's Analysis Memorandum, dated December 20, 2004.

Nutrin

Use of Facts Otherwise Available

We determine that the use of total adverse facts available is appropriate for the preliminary results with respect to Nutrin. Section 776(a)(1) of the Act mandates that the Department use facts available if necessary information is not available on the record of the proceeding. Section 776(a)(2) of the Act provides that, if an interested party withholds information that has been requested by the Department, fails to provide such information in a timely manner or in the form or manner requested, significantly impedes a proceeding under the antidumping statute, or provides such information but the information cannot be verified, the Department shall, subject to sections 782(d) and (e) of the Act, use facts otherwise available in reaching the applicable determination. In applying facts otherwise available, section 776(b) of the Act further provides that the Department may use an inference that is adverse to the interests of that party, if the Department finds an interested party ''has failed to cooperate by not acting to the best of its ability to comply with a request for information.''

Nutrin did not respond to the Department's antidumping

questionnaire; thus, it has failed to supply the information necessary for the Department to conduct a margin analysis for purposes of this review. After requesting this review, Nutrin did not comply with the Department's information requests, neglected to return phone calls from the Department, and failed to place any information on the record throughout the entire course of this review. Nutrin failed to participate in this administrative review and, thus, failed to cooperate to the best of its ability. *See* Memorandum to the File from Angela Strom (documenting phone calls and Nutrin's failure to respond to the Department's requests), dated April 7, 2004, and Memorandum to the File from Angela Strom (Nutrin's counsel confirming Nutrin would not participate in this review), dated June 24, 2004.

Because Nutrin failed to cooperate by not acting to the best of its ability, we have determined that the application of adverse facts available (AFA) is warranted within the meaning of section 776(b) of the Act. When making adverse inferences, the Department has the authority to consider the extent to which a party may benefit from its own lack of cooperation, deeming adverse inferences appropriate ''to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.'' *See* Statement of Administrative Action (SAA) accompanying the Uruguay Round Agreements Act, H. Doc. No. 103–316, at 870 (1994). Section 776(b) of the Act authorizes the Department to use as adverse facts available (AFA) information derived from the petition, the final determination from the less-than-fair-value (LTFV) investigation, a previous administrative review, or any other information placed on the record.

Because no information was placed on the record with respect to Nutrin in this review, the Department was unable to calculate a dumping margin for Nutrin. Consequently, we relied on information from the petition and final determination. Specifically, we are applying to Nutrin the highest margin determined in any segment of this proceeding, 55.15 percent, which was applied to a non-cooperative respondent during the investigation. This is the highest estimated dumping margin, adjusted for export subsidies, set forth in the LTFV investigation. *See Final Determination,* 66 FR 5834; *Notice of Order,* 66 FR 63672 (December 10, 2001).

We note that information from the petition constitutes ''secondary information.'' *See* SAA at 870. Section 776(c) of the Act provides that the Department shall, to the extent practicable, corroborate secondary information used for facts available by reviewing independent sources reasonably at its disposal. The SAA further provides that the word ''corroborate'' means the Department will satisfy itself that the secondary information used has probative value. As explained in *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from Japan, and Tapered Roller Bearings Four Inches or Less in Outside Diameter, and Components Thereof, from Japan: Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Review,* 61 FR 57391, 57392 (November 6, 1996) (TRBs), in order to corroborate secondary information the Department will examine, to the extent practicable, the reliability and relevance of the information used. Where circumstances indicate the selected margin is not appropriate as AFA, the Department will disregard the margin and determine an appropriate margin. *See* TRBs at 61 FR 57392; *see also Fresh Cut Flowers from Mexico; Final Results of Antidumping Duty Administrative Review,* 61 FR 6812, 6814 (February 22, 1996).

The implementing regulation for section 776 of the Act, at 19 CFR 351.308(d), states ''{t}he fact that corroboration may not be practicable in a given circumstance will not prevent the Secretary from applying an adverse inference as appropriate and using the secondary information in question.'' The SAA also recognizes that the corroboration process must be flexible enough to induce future cooperation from respondents. Specifically, section (b) of the SAA states the fact that corroboration may not be practicable in a given circumstance will not prevent the Department from applying an adverse inference. *See Fresh Garlic from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Rescission in Part,* 69 FR 70638 (December 7, 2004).

Because the data used to calculate CV in the petition (*i.e.*, COP figures, exporter's selling and general expenses (SG&A), and profit rates) were based upon independent sources, foreign market research, and financial statements from the relevant parties involved, the Department believes this information has probative value. In deriving the margin, the Department used the calculated CV and compared it to sales prices derived from foreign market research and U.S. import statistics. The margin of 60.67 percent, adjusted downwardly for export subsidies in the order, ultimately yielded 55.15 percent. *See Antidumping Duty Order.*

In addition, because Nutrin currently is subject to the ''All Others'' rate of 30.24 percent, the Department determines that assigning a rate of 55.15 percent will prevent Nutrin from benefitting from its failure to respond to the Department's requests for information. *See* ''The Use of Facts Available for Nutrin S.A. and Corroboration of Secondary Information,'' from Richard Weible, Office Director, to Barbara E. Tillman, Acting Deputy Assistant Secretary for Import Administration, dated December 20, 2004 (Corroboration Memorandum). Further, throughout this proceeding, the highest rate, 55.15 percent, was applied to an uncooperative respondent, Conagra, in the antidumping duty investigation, and this rate continues to apply to the firm. *See Notice of Antidumping Order: Honey From Argentina,* 66 FR 63672 (December 10, 2001).

This margin was derived from information in the petition, which was corroborated in the investigation stage of this proceeding. *See Initiation of Antidumping Duty Investigations: Honey from Argentina and the People's Republic of China,* 65 FR 65831 (November 2, 2000) and *Notice of Final Determination of Sales at Less than Fair Value; Honey From Argentina,* 66 FR 50611 (October 4, 2001). Because Nutrin failed to cooperate, no additional information has been presented in the current review that would call into question the reliability or relevance of the margin, or the calculation on which it was based. Because there is no information on the record of this review that would render the application of this rate inappropriate or the margin irrelevant, we are applying the highest dumping margin from this proceeding, 55.15 percent, to Nutrin and have satisfied the corroboration requirements under section 776(c) of the Act. *See e.g., Garlic From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and New Shipper Reviews,* 68 FR 68868 (December 10, 2003); (Results Unchanged) *Final Results,* 69 FR 33626 (June 16, 2004).

Currency Conversion

The Department's preferred source for daily exchange rates is the Federal Reserve Bank. *See Preliminary Results of Antidumping Duty Administrative Review: Stainless Steel Sheet and Strip in Coins from France,* 68 FR 47049 (August 7, 2003). However, the Federal

Reserve Bank does not track or publish exchange rates for the Argentine Peso. Therefore, we made currency conversions based on the daily exchange rates from Factiva, a Dow Jones & Reuters Retrieval Service. Factiva publishes exchange rates for Monday through Friday only. We used the rate of exchange on the most recent Friday for conversion dates involving Saturday through Sunday where necessary.

Preliminary Results of Review

As a result of our review, we preliminarily determine the following weighted-average dumping margins exist for the period December 1, 2002, through November 30, 2003:

Manufacturer/exporter	Weighted-average margin (percentage)
Asociacion de Cooperativas Argentinas	0
Compania Apicola Argentina	0
HoneyMax S.A.	0
Nexco S.A.	0.38
Nutrin S.A.	55.15
Seylinco S.A.	0
TransHoney S.A.	0

The Department will disclose calculations performed within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b). An interested party may request a hearing within thirty days of publication. *See* 19 CFR 351.310(c). Any hearing, if requested, will be held 37 days after the date of publication, or the first business day thereafter, unless the Department alters the date pursuant to 19 CFR 351.310(d). Interested parties may submit case briefs or written comments no later than 30 days after the date of publication of these preliminary results of review. Rebuttal briefs and rebuttals to written comments, limited to issues raised in the case briefs and comments, may be filed no later than 35 days after the date of publication of this notice. Parties who submit arguments in these proceedings 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, we would appreciate it if parties submitting case briefs, rebuttal briefs, and written comments would provide the Department with an additional copy of the public version of any such argument on diskette. The Department will issue final results of this administrative review, including the results of our analysis of the issues in any such case briefs, rebuttal briefs, and written comments or at a hearing, within 120 days of publication of these preliminary results.

The Department shall determine, and CBP shall assess, antidumping duties on all appropriate entries. In accordance with 19 CFR 351.212(b)(1), we calculated importer-specific ad valorem assessment rates for the merchandise based on the ratio of the total amount of antidumping duties calculated for the examined sales made during the POR to the total customs value of the sales used to calculate those duties. This rate will be assessed uniformly on all entries of that particular importer made during the POR. The Department will issue appropriate appraisement instructions directly to CBP upon completion of the review.

Furthermore, the following deposit requirements will be effective upon completion of the final results of this administrative review for all shipments of honey from Argentina entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(1) of the Act:

(1) The cash deposit rates for all companies reviewed will be the rates established in the final results of review;

(2) For any previously reviewed or investigated company not listed above, the cash deposit rate will continue to be the company-specific rate published in the most recent period;

(3) If the exporter is not a firm covered in this review or the 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 the ''all others'' rate from the investigation (30.24 percent). *See Notice of Final Determination of Sales at Less Than Fair Value; Honey From Argentina,* 66 FR 50611 (Oct. 4, 2001), *Notice of Amended Final Determination of Sales at Less Than Fair Value; Honey From Argentina,* 66 FR 58434 (Nov. 21, 2001) (Final Determination), and *Notice of Antidumping Duty Order; Honey From Argentina,* 66 FR 63672 (Dec. 10, 2001) (Notice of AD Order).

This notice also 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 entries 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.

We are issuing and publishing this notice in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: December 20, 2004.

James J. Jochum,

Assistant Secretary for Import Administration.

[FR Doc. 04–28220 Filed 12–23–04; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–201–834]

Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Purified Carboxymethylcellulose From Mexico

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

EFFECTIVE DATES: December 27, 2004.

FOR FURTHER INFORMATION CONTACT: Mark Flessner at (202) 482–6312 or Robert James at (202) 482–0649, AD/CVD Operations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230.

Preliminary Determination

We preliminarily determine that certain purified carboxymethylcellulose (CMC) from Mexico is being sold, or is likely to be sold, in the United States at less than fair value (LTFV), as provided in section 733 of the Tariff Act of 1930, as amended (the Act). The estimated margins of sales at LTFV are shown in the ''Suspension of Liquidation'' section of this notice.

Case History

On June 9, 2004, the Department of Commerce (the Department) received a petition for the imposition of antidumping duties on purified CMC from Finland, Mexico, the Netherlands, and Sweden, filed in the proper form by Aqualon Company (Aqualon or petitioner), a division of Hercules Incorporated. *See* Petition for the Imposition of Antidumping Duties on Imports of Purified Carboxymethylcellulose (CMC) from Finland, Mexico, the Netherlands, and Sweden (Petition). The Department initiated the antidumping investigation of purified CMC from Finland, Mexico,

the Netherlands, and Sweden on June 29, 2004. *See Notice of Initiation of Antidumping Investigations: Purified Carboxymethylcellulose (CMC) from Finland, Mexico, the Netherlands, and Sweden,* 69 FR 40617 (July 6, 2004) (*Initiation Notice*). Since the initiation of this investigation, the following events have occurred.

On July 23, 2004, the International Trade Commission (the Commission) preliminarily determined that there is a reasonable indication that an industry in the United States is materially injured by reason of imports of purified CMC from Finland, Mexico, the Netherlands, and Sweden that are alleged to be sold in the United States at LTFV. *See Purified Caarboxymethylcellulose from Finland, Mexico, the Netherlands, and Sweden,* 69 FR 45851 (July 30, 2004).

On July 29, 2004, the Department issued sections A, B, and C of the antidumping questionnaire [1] to Quimica Amtex S.A. de C.V. of Mexico (Amtex), noting that appendix V concerning model match criteria was not enclosed. The Department stated that it would serve all parties with a copy of the proposed model match criteria in the near future. We did so on August 18, 2004.

Petitioner filed comments on the Department's proposed model match criteria on August 19, 2004.[2] The Department issued appendix V to the questionnaire on August 30, 2004.

On September 1, 2004, the Department received the section A questionnaire response from Amtex). Responses to sections B and C were received on September 22, 2004.

On September 21, 2004, the Department issued a supplemental section A questionnaire. A response was received on September 29, 2004.

On October 8, 2004, the Department issued a supplemental questionnaire; this questionnaire contained a second set of questions concerning the section A response and a set of questions concerning the section B and C responses. Responses were received on October 21, 2004.

On October 25, 2004, petitioner requested a 30-day postponement of the preliminary determination. In response to petitioner's request and pursuant to section 733(c)(1)(B) of the Act, on October 28, 2004, the Department postponed the preliminary determination of the antidumping duty investigation on purified CMC from Mexico until not later than December 16, 2004. *See Postponement of Preliminary Determinations of Anitdumping Duty Investigations: Purified Carboxymethylcellulose from Finland, Mexico, the Netherlands and Sweden,* 69 FR 64030 (November 3, 2004).

Postponement of Final Determination and Extension of Provisional Measures

Section 735(a)(2) of the Act provides that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination if, in the event of an affirmative preliminary determination, a request for such postponement is made by exporters who account for a significant proportion of exports of the subject merchandise, or in the event of a negative preliminary determination, a request for such postponement is made by petitioner. 19 CFR 351.210(e)(2) requires that requests by exporters for postponement of a final determination be accompanied by a request for an extension of the provisional measures from a four-month period to not more than six months.

On November 23, 2004, amtex requested that, in the event of an affirmative preliminary determination in this investigation, the Department postpone its final determination until a date not later than 135 days after the date on which the Department publishes its notice of preliminary determination. amtex also included a request to extend the provisional measures by an additional 60 days. Such extension is permitted by section 733(d) of the Act. In addition, on November 19, 2004, petitioner requested that, in the event of a negative preliminary determination, the Department postpone the deadline for its final determination until a date not later than 135 days after the date on which the Department publishes its notice of preliminary determination.

Accordingly, because we have made an affirmative preliminary determination in this case, the request for postponement was made by an exporter that accounts for a significant portion of exports of the subject merchandise, and there is no compelling reason to deny the respondent's request, we are postponing the final determination until not later than 135 days after the date of publication of this notice and are extending the provisional measures six months.

Period of Investigation (POI)

The POI is April 1, 2003, through March 31, 2004. This period corresponds to the four most recent fiscal quarters prior to the month of the filing of the petition, *i.e.*, June 2004.

Scope of Investigation

For purposes of this investigation, the products covered are all purified CMC, sometimes also referred to as purified sodium CMC, polyanionic cellulose, or cellulose gum, which is a white to off-white, non-toxic, odorless, biodegradable power, comprising sodium carboxymethylcellulose that has been refined and purified to a minimum assay of 90 percent. Purified CMC does not include unpurified or crude CMC, CMC Fluidized Polymer Suspensions, and CMC that is cross-linked through heat treatment. Purified CMC is CMC that has undergone one or more purification operations which, at a minimum, reduce the remaining salt and other by-product portion of the product to less than ten percent.

The merchandise subject to this investigation is classified in the Harmonized Schedule of the United States (HTSUS) at subheading 3912.31.00. This tariff classification is provided for convenience and customs purposes; however, the written description of the scope of this investigation is dispositive.

Product Comparisons

In accordance with section 771(16) of the Act, we considered all CMC produced and sold by the respondent in Mexico during the POI fitting the description in the ''Scope of Investigations'' section of this notice to be foreign like product for purposes of determining appropriate product comparisons to U.S. sales. We compared U.S. sales to sales made in the home market. Where there were no sales of identical merchandise in the home market in the ordinary course of trade to compare to U.S. sales, we compared U.S. sales to sales of the most similar foreign like product made in the ordinary course of trade.

In making the product comparisons, we matched foreign like products based on the physical characteristics reported by the respondent in the following order

[1] Section A of the questionnaire requests information concerning a company's corporate structure and business practices, the merchandise under investigation, and the manner in which it sells that merchandise in all of its markets. Section B requests a complete listing of all of the company's home market sales of foreign like product or, if the home market is not viable, of sales of the foreign like product 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 the company's U.S. sales of subject merchandise. Section D requests information on the cost of production of the foreign like product and the constructed value of the merchandise under investigation. Section E requests information on further manufacturing.

[2] Comments were also received from Noviant OY, Noviant BV, Noviant AB, and Noviant Inc., respondents in the companion investigations involving Finland, the Netherlands, and Sweden, on August 25, 2004.

of importance: grade, viscosity, degree of substitution, particle size, and solution characteristics. Petitioner's model match comments listed the criteria in descending order of importance: grade, viscosity, degree of substitution, particle size, and solution characteristics, and provided subfields for each criterion. Petitioner agreed that the addition of one subfield for oil drilling and an extra viscosity range to reflect more meaningful distinctions in the market was justified.

Fair Value Comparisons

To determine whether sales of purified CMC from Mexico to the United States were made at LTFV, we compared the export price (EP) to Normal Value (NV), as described in the ''Export Price'' and ''Normal Value'' sections of this notice. In accordance with section 777A(d)(1)(A)(i) of the Act, we compared POI weighted-average EPs to NVs.

As discussed below under ''Home Market Viability and Comparison Market Selection,'' we determined that Amtex had a viable home market during the POI.

Export Price

Section 772(a) of the Act defines EP as the price at which the subject merchandise is first sold (or agreed to be 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 772(c) of the Act.

We used EP methodology for Amtex, in accordance with section 772(c) of the Act, because the subject merchandise was sold directly to the first unaffiliated purchaser in the United States before importation. We based EP on the packed price to unaffiliated purchasers in the United States. In accordance with section 772(c)(2)(A) of the Act, we made deductions for movement expenses, where appropriate, for foreign inland freight from the plant to the distribution warehouse, warehousing, foreign inland freight from the plant/warehouse to the port of exportation, foreign inland insurance, foreign brokerage and handling, U.S. brokerage and handling, international freight, and U.S. inland freight from the port to the warehouse. In addition, we deducted billing adjustments and other discounts from EP, where appropriate.

Normal Value

A. Home Market Viability and Comparison Market Selection

In order to determine whether there is a sufficient volume of sales in the home market to serve as a viable basis for calculating NV (*i.e.*, the aggregate volume of home market sales of the foreign like product is equal to or greater than five percent of the aggregate volume of U.S. sales), we compared respondent's volume of home market sales of the foreign like product to the volume of U.S. sales of the subject merchandise, in accordance with section 773(a)(1)(C) of the Act.

In this investigation, we determined Amtex's aggregate volume of home market sales of the foreign like product was greater than five percent of the aggregate volume of U.S. sales of the subject merchandise. Therefore, we used home market sales as the basis for NV in accordance with section 773(a)(1)(B) of the Act.

B. Level of Trade

In accordance with section 773(a)(1)(B)(i) of the Act, to the extent practicable, we determine NV based on sales in the comparison market at the same level of trade (LOT) as the EP transaction. *See also* 19 CFR 351.412. The NV LOT is the level of the starting-price sales in the comparison market. For EP sales, the U.S. LOT is the level of the starting-price sale, which is usually from the exporter to the importer.

To determine whether NV sales are at a different LOT than EP, we examine stages in the marketing process and selling functions along the chain of distribution between the producer and the unaffiliated customer. In analyzing differences in selling functions, we determine whether the LOTs identified by the respondent are meaningful. *See Antidumping Duties; Countervailing Duties, Final Rule,* 62 FR 27296, 27371 (May 19, 1997). If the claimed LOTs are the same, we expect the functions and activities of the seller should be similar. Conversely, if a party claims that LOTs are different for different groups of sales, the functions and activities of the seller should be dissimilar. *See Porcelain-on-Steel Cookware from Mexico: Final Results of Administrative Review,* 65 FR 30068 (May 10, 2000). If the NV transactions are at a different LOT than EP transactions, and the difference affects price comparability, as manifested in a pattern of consistent price differences between the sales on which NV is based and the U.S. sales at the LOT of the export transactions, we make an LOT adjustment under section 773(a)(7)(A) of the Act.

In this investigation, we obtained information from Amtex regarding the marketing stages involved in its selling activities for its reported home market and U.S. sales, including a description of the selling activities performed by the respondent for each channel of distribution it claimed (*see* Amtex Section B & C Response, September 22, 2004, at page C–15).

Analysis

Amtex provided a Selling Functions Chart (*see* Amtex's Section A Response, September 1, 2004, at Exhibit A–14) in which there is a division between four categories: (1) Home market sales to end-users; (2) Home market sales to distributors; (3) U.S. sales to end-users; and (4) U.S. sales to distributors. None of the selling activity entries under any of these four categories are properly quantified; they are only reported as ''performed'' or ''not performed.'' No distinctions such as ''heavy'' or ''medium'' or ''slight'' are attributed to any function. Further, the Selling Functions Chart lists several functions as not being performed when the narrative descriptions would indicate otherwise. One example would be the selling activity ''pay commissions,'' which Amtex clearly states occurs in the home market (*see* Amtex's Section B Response, September 22, 2004, at B–20). Another example would be the selling activity ''order input/processing,'' which Amtex states occurs in the U.S. market (*see* Amtex's Section A Response, September 1, 2004, at A–12). Since these selling activities are not properly quantified or analyzed, the Department has no means of comparison.

Level of Trade in the Home Market

Amtex reported on LOT in the Mexican market with one channel of distribution to two classes of customers: (1) Direct sales from the mill to end-users, and (2) direct sales from the mill to distributors.[3] Generally, Amtex

[3] In addition, Amtex reported a subset of this channel of distribution for the local market in which a *pro forma* invoice was issued by Amtex's wholly owned affiliate, Aquasol S.A. de C.V. (Aquasol), via a tolling arrangement; Aquasol has no production facility of its own and all functions of Aquasol are performed by Amtex personnel. This arrangement is a book-keeping expediency not rising to the level of a separate channel of distribution (*see* Amtex's Section A Response, September 1, 2004, at Exhibits A–2 and A–3). Nothing indicates the two classes of customers, end-users and distributors, are different for Aquasol transactions; the only difference appears to be geographical. We conclude that this is not a different channel of distribution and its activities are included in the considerations below.

claims a higher number of selling activities performed for sales to end-users than for sales to distributors. As discussed above, whoever, the selling functions are not properly quantified or analyzed in Amtex's response. Therefore, based on our review of evidence on the record, we find home market sales to both customer categories were substantially similar with respect to selling functions and stages of marketing. Accordingly, we preliminarily find that Amtex had only one LOT for its home market sales.

Level of Trade in the U.S. Market

We also reviewed the selling functions and services performed by Amtex in the U.S. market for EP sales. Amtex reported one LOT in the U.S. market with one channel of distribution to two classes of customers: (1) Direct sales from the mill to end-users, and (2) direct sales from the mill to distributors (*see* Amtex's Section A Response, September 1, 2004, at Exhibit A–3). Amtex's Selling Function Chart indicated the same three selling activities for both categories of sales: (1) Inventory Maintenance; (2) Warranty Services; and (3) Freight and Delivery. Therefore, there is no difference between these two classes of customers in the U.S. market. As with the home market sales, some functions are reported as not having any activity when the narrative descriptions would indicate otherwise; an example would be the selling activity ''order input/processing,'' which Amtex states occurs in the U.S. market (*see* Amtex's Section A Response, September 1, 2004, at A–12). Also, as with the home market entries, Amtex did not quantify the extent to which it performs these functions. Accordingly, we preliminarily determine there is one EP LOT in the U.S. market.

Comparison of Levels of Trade Between Markets

Amtex states that due to the smaller type of customer in the home market and the greater need of support there, there is greater activity in the home market (*see* Amtex's Section A Response, September 1, 2004, at page A–9). We find the selling functions and services performed by Amtex on direct sales for the one U.S. channel of distribution relating to the EP LOT (*i.e.*, sales of merchandise produced to order for unaffiliated end-users or distributors and sales or merchandise from stock to unaffiliated end-users and distributors) have not been shown to be substantially different from those provided for home market sales. As discussed above, none of the selling activity entries are properly quantified, nor is the Selling Function Chart consistent with the narrative descriptions. Since the selling activities are not properly quantified or analyzed, the Department has no means of comparison. Therefore, we preliminarily determine the EP LOT is the same as the LOT in the home market.

C. Calculation of Normal Value Based on Home Market Prices

We calculated Amtex's NV based on delivered prices to unaffiliated customers. We made deductions for movement expenses, including inland freight from the plant to the distribution warehouse, warehousing, inland freight from the plant/warehouse to the customer, and inland insurance, under section 773(a)(6)(B)(ii) of the Act. In addition, we made adjustments under section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410 for differences in circumstances of sale for direct selling expenses, including commissions and inventory carrying costs. We also deducted home market packing costs and added U.S. packing costs to the starting price in accordance with section 773(a)(6)(A) and (B) of the Act. Furthermore, we made an adjustment for differences in costs attributable to differences in the physical characteristics of the merchandise in accordance with section 773(a)(6)(C)(ii) of the Act and 19 CFR 351.411.

Currency Conversion

We made currency conversions into U.S. dollars, in accordance with section 773A(a) of the Act, based on exchange rates in effect on the dates of the U.S. sales as certified by the Federal Reserve Bank.

Verification

As provided in section 782(i) of the Act, we will verify the information relied upon in making our final determination.

Suspension of Liquidation

In accordance with section 733(d)(2) of the Act, we are directing U.S. Customs and Border Protection (CBP) to suspend liquidation of all imports of subject merchandise that are entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**. We will instruct CBP to require a cash deposit or the posting of a bond equal to the weighted-average amount by which NV exceeds EP, as indicated in the chart below. These suspension-of-liquidation instructions will remain in effect until further notice. The weighted-average dumping margins are as follows:

Manufacturer/exporter	Weighted-average margin (percent)
Quimica Amtex, S.A. de C.V. ...	12.18
All Others	12.18

See Memorandum to the File, ''Preliminary Determination Analysis for Amtex,'' December 16, 2004. Public versions of our analysis memoranda are on file in the Central Records Unit (CRU), room B–099 of the Herbert C. Hoover Department of Commerce building, 14th Street and Pennsylvania Avenue, NW., Washington, DC.

International Trade Commission Notification

In accordance with section 733(f) of the Act, we have notified the Commission of our preliminary affirmative determination. If our final determination is affirmative, the Commission will determine before the later of 120 days after the date of this preliminary determination or 45 days after our final determination whether these imports are materially injuring, or threaten material injury to, the U.S. industry. Because we have postponed the deadline for our final determination to 135 days from the date of the publication of this preliminary determination, the Commission will make its final determination within 45 days of our final determination.

Disclosure

We will disclose the calculations used in our analysis to parties in this proceeding in accordance with 19 CFR 351.224(b).

Public Comment

Case briefs for this investigation must be submitted to the Department by the later of 30 days after publication of this preliminary determination or seven days after the date the final verification report is issued in this proceeding. Rebuttal briefs must be filed five days from the deadline date for case briefs. A list of authorities used, a table of contents, and an executive summary of issues should accompany any briefs submitted to the Department. Executive summaries should be limited to five pages total, including footnotes. Section 774 of the Act provides that the Department will hold a public hearing to afford interested parties an opportunity to comment on arguments raised in case or rebuttal briefs, provided that such a hearing is requested by an interested party. If a

request for a hearing is made in this investigation, the hearing will tentatively be held two days after the rebuttal brief deadline date at the U.S. Department of Commerce, 14th Street and Pennsylvania Avenue, NW., Washington, DC. Parties should confirm by telephone the time, date, and place of the hearing 48 hours before the scheduled time.

Interested parties who wish to request a hearing, or to participate if one is requested, must submit a written request to the Assistant Secretary for Import Administration, U.S. Department of Commerce, Room 1870, within 30 days of the publication of this notice. Requests should contain: (1) The party's name, address, and telephone number; (2) the number of participants; and (3) a list of the issues to be discussed. Oral presentations will be limited to issues raised in the briefs.

We will make our final determination not later than 135 days after the publication of this notice in the **Federal Register**.

This determination is published pursuant to sections 733(f) and 777(i) of the Act.

Dated: December 16, 2004.

James J. Jochum,

Assistant Secretary for Import Administration.

[FR Doc. 04–28117 Filed 12–23–04; 8:45 am]

BILLING CODE 3510–DS–M

DEPARTMENT OF COMMERCE

International Trade Administration

[A–421–811]

Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Purified Carboxymethylcellulose From the Netherlands

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

SUMMARY: The U.S. Department of Commerce (''the Department'') preliminarily determines that purified carboxymethylcellulose (''CMC'') from the Netherlands is being, or is likely to be, sold in the United States at less than fair value, as provided in section 733(b) of the Tariff Act of 1930, as amended (''the Act''). Interested parties are invited to comment on this preliminary determination. Pursuant to requests from interested parties we are postponing the final determination for this case and extending the provisional measures from a four-month period to not more than six months. Accordingly, we will make our final determination not later than 135 days after the preliminary determination.

EFFECTIVE DATE: December 27, 2004.

FOR FURTHER INFORMATION CONTACT: John Drury at (202) 482–0195, Angelica Mendoza at (202) 482–3019, David Kurt Kraus at (202) 482–7871 or Judy Lao at (202) 482–7924, Import Administration, AD/CVD Operations, Office 7, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230.

Preliminary Determination

We preliminarily determine that certain purified CMC from the Netherlands is being sold, or is likely to be sold, in the United States at less than fair value (''LTFV''), as provided in section 733 of the Act. The estimated margins of sales at LTFV are shown in the ''Suspension of Liquidation'' section of this notice.

Case History

On June 26, 2004, the Department initiated antidumping investigations of purified CMC from the Netherlands. See Certain Purified Carboxymethylcellulose from Finland, Mexico, the Netherlands, and Sweden; Initiation of Antidumping Duty Investigations, 69 FR 40617 (July 6, 2004) (''Initiation Notice''). The petitioner in this investigation is Aqualon Company, a division of Hercules Incorporated. Since the initiation of these investigations the following events have occurred.

In accordance with the preamble to our regulations, the Department set aside a period of time for parties to raise issues regarding product coverage and encouraged all parties to submit comments within 20 calendar days of publication of the Initiation Notice. See Antidumping Duties; Countervailing Duties; Final Rule, 62 FR 27296, 27323 (May 19, 1997) and Initiation Notice. The Department did not receive any comments from any interested party regarding product coverage.

On July 27, 2004, the United States International Trade Commission (''ITC'') preliminarily determined that there is reasonable indication that imports of CMC from Finland, Mexico, the Netherlands, and Sweden are materially injuring the U.S. industry and the ITC notified the Department of its findings. The ITC's notice was published on July 30, 2004, in the **Federal Register**. See ITC Investigation Nos. 731–TA–1073–1087 (Publication No. 45851).

On September 3, 2004 and September 9, 2004, the Department received section A questionnaire responses from Akzo Nobel Surface Chemistry B.V. (''ANSC'') and Noviant B.V. (''Noviant''), respectively. In its section A response, Noviant stated that its home market sales were less than five percent of U.S. sales. Therefore, as the home market was not viable for the purposes of calculating normal value (''NV''), Noviant intended to report third country sales to Mexico for the calculation of NV. On September 15, 2004, petitioner filed a comment with the Department stating that Noviant's selection of Mexico as the appropriate third country market for determining NV was flawed. Petitioner contended that Taiwan should have been the appropriate market because Noviant's sales volume to Taiwan was second only to that of the United States. Petitioner requested that the Department obtain full sales data (section B responses) for Noviant's sales to each of its indicated three largest non-U.S. export markets. On September 24, 2004, after considering record evidence and all factors enumerated in section 19 CFR 351.404(e) of its regulations, the Department determined that Taiwan, and not Mexico, was the most appropriate third country market to be used for the purposes of calculating Noviant's NV. See Memorandum to Richard O. Weible, Director, Selection of Third Country Market for Noviant BV (Noviant), dated September 24, 2004 (''Third Country Market Memo'').

Also, on September 24, 2004, the Department received both companies' section B and C questionnaire responses. On October 1, 2004, petitioner submitted comments on Noviant's section B and C responses. In particular, petitioner alleged that certain sales of purified CMC sold in the United States by Noviant and/or its U.S. affiliates had no identical or similar sales in the third country market (*i.e.*, Taiwan). Therefore, in its October 12, 2004, supplemental questionnaire, the Department requested that Noviant respond to the constructed value (''CV'') portion of section D of the antidumping questionnaire for those models sold in the United States for which there were no identical or similar sales in Taiwan. For a discussion of the Department's calculation of CV, see the ''Constructed Value'' section below.

The Department issued a supplemental questionnaire to ANSC for sections A, B, and C on October 8, 2004, and a supplemental questionnaire for sections A, B and C to Noviant on October 12, 2004. The Department received questionnaire responses from ANSC on October 25, 2004, and October 27, 2004. The Department received

Noviant's questionnaire response on October 27, 2004.

On October 28, 2004, due to the complexity of this case and pursuant to section 733(c)(1)(B) of the Act, the Department postponed the preliminary determination of the antidumping duty investigation on purified CMC from the Netherlands until no later than December 16, 2004. See Postponement of Preliminary Determinations of Antidumping Duty Investigations: Purified Carboxymethylcellulose from Finland, Mexico, the Netherlands and Sweden, 69 FR 64030 (November 3, 2004).

On November 5, 2004, the Department issued Noviant a supplemental section D questionnaire. On November 10, 2004, the Department issued supplemental questionnaires for deficiencies remaining in the aforementioned responses of ANSC and Noviant. The Department received the supplemental section D response from Noviant on November 19, 2004, and supplemental questionnaire responses from Noviant and ANSC on November 23, 2004.

Postponement of Final Determination and Extension of Provisional Measures

Section 735(a)(2) of the Act provides that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination if, in the event of an affirmative preliminary determination, a request for such postponement is made by exporters who account for a significant proportion of exports of the subject merchandise, or in the event of a negative preliminary determination, a request for such postponement is made by the petitioners. Section 351.210(e)(2) of the Department's regulations requires that requests by respondents for postponement of a final determination be accompanied by a request for an extension of the provisional measures from a four-month period to not more than six months.

On November 19, 2004, and November 23, 2004, Noviant and ANSC respectively requested that, in the event of an affirmative preliminary determination in this investigation, the Department postpone the deadline for its final determination until a date not later than the 135th day after the date on which the Department will have published its notice of preliminary determination. Both Noviant and ANSC also included a request to extend the provisional measures from a four-month period to not more than six months. In addition, on November 19, 2004, petitioners requested that, in the event of a negative determination or *de minimis* margins, that the Department postpone the deadline for its final determination until a date not later than the 135th day after the date on which the Department will have published its notice of preliminary determination.

Accordingly, because we have made an affirmative preliminary determination in this case, and the requesting parties account for a significant portion of exports of the subject merchandise, we are postponing the final determination until not later than 135 days after the date of the publication of the preliminary determination.

Period of Investigation (''POI'')

The POI is April 1, 2003, through March 31, 2004. This period corresponds to the four most recent fiscal quarters prior to the month of the filing of the petition, *i.e.*, June 2004.

Scope of Investigation

For purposes of this investigation, the products covered are all purified CMC, sometimes also referred to as purified sodium CMC, polyanionic cellulose, or cellulose gum, which is a white to off-white, non-toxic, odorless, biodegradable powder, comprising sodium CMC that has been refined and purified to a minimum assay of 90 percent. Purified CMC does not include unpurified or crude CMC, CMC Fluidized Polymer Suspensions, and CMC that is cross-linked through heat treatment. Purified CMC is CMC that has undergone one or more purification operations which, at a minimum, reduce the remaining salt and other by-product portion of the product to less than ten percent.

The merchandise subject to this investigation is classified in the Harmonized Tariff Schedule of the United States (''HTSUS'') at subheading 3912.31.00. This tariff classification is provided for convenience and customs purposes; however, the written description of the scope of this investigation is dispositive.

Product Comparisons

In accordance with section 771(16) of the Act, we considered all CMC produced and sold by the respondents in the Netherlands during the POI that fit the description in the ''Scope of Investigation'' section of this notice to be foreign like products for purposes of determining appropriate product comparisons to U.S. sales. We compared U.S. sales to sales made in the home market or third country market, where appropriate. Where there were no sales of identical merchandise in the home market or third country market in the ordinary course of trade to compare to U.S. sales, we compared U.S. sales to sales of the most similar foreign like product made in the ordinary course of trade. Where there were no sales of identical or similar merchandise made in the ordinary course of trade, we made product comparisons using CV.

In making the product comparisons, we matched to the foreign like product based on the physical characteristics reported by the respondents in the following order of importance: grade, viscosity, degree of substitution, particle size, and solution characteristics.

On July, 29, 2004, the Department issued the antidumping questionnaire to both ANSC and Noviant, noting that Appendix V was not enclosed. The Department stated that it would serve all parties with a copy of the proposed model match criteria in the near future. The Department also noted that there would be a period of comment and review before the Department issued the final model match hierarchy to all parties. On July 30, 2004, petitioner submitted its proposed model match criteria. Petitioner listed the criteria in descending order of importance: grade level, viscosity, degree of substitution, particle size, and solution characteristics, and provided sub-fields for each criterion.

On August 9, 2004, Noviant submitted comments regarding petitioner's July 30, 2004, proposed model match criteria. Noviant had no objection to the basic structure of the proposed model match nor with the ranking of the product characteristics. However, Noviant proposed adding sub-fields to grade and viscosity, while refining the definitions of degree of substitution, particle size, and solution characteristics. On August 11, 2004, petitioner commented on Noviant's August 9, 2004, comments, agreeing that the addition of one sub-field for oil drilling, and an extra viscosity range to reflect more meaningful distinctions was justified, while rebutting Noviant's breakout of production and sales variables.

On August 18, 2004, the Department issued a draft questionnaire Appendix V for model match criteria to all interested parties. On August 19, 2004, petitioner filed comments on the Department's draft model match criteria. Petitioner stated that it agreed with the Department in almost all respects with the exception of two typographical errors. On August 25, 2004, Noviant filed comments to the Department's draft model match criteria and petitioner's August 19, 2004, comments thereto. Noviant argued that the model match criteria proposed by the Department did not ensure accurate

comparisons of products or prices. After soliciting further comments from both interested parties on August 30, 2004, the Department issued its final questionnaire Appendix V model match criteria. See Letter to All Interested Parties from Robert James, Program Manager, dated August 30, 2004. The Department added sub-fields for some criteria and adjusted ranges for others in its final Appendix V, taking into account all comments submitted on behalf of both parties prior to making the final determination.

Date of Sale

Section 351.401(i) of the Department's regulations states that the Department will normally use the date of invoice, as recorded in the producer's or exporter's records kept in the ordinary course of business, as the date of sale. However, the Department may use a date other than the date of invoice if the alternative better reflects the date on which the material terms of sale (*e.g.*, price and quantity) are established.

Noviant

For both third country market and U.S. sales, Noviant reported the date of invoice as the date of sale, in keeping with the Department's stated preference for using the invoice date as the date of sale. Noviant stated that invoicing is coincident with shipment, and therefore shipment date and invoice date are identical and are also the date of sale.

The Department is preliminarily using the invoice date as the date of sale for both third-country market and U.S. sales. We intend to examine this issue at verification, and will incorporate our findings in our analysis for the final determination, if we determine that order confirmation, or another date other than invoice date, is the appropriate date of sale.

ANSC

ANSC reported the date of invoice as the date of sale for both home and U.S. markets, reflecting the Department's stated preference. ANSC reported that the invoice date is indicative of the date on which material terms of sale are established and that it is possible for the quantity, price, or other terms of sale to be modified between order date and invoice date.

The Department is preliminarily using the invoice date as the date of sale for home market sales and all U.S. sales with the exception of those sales that occurred within distribution channel 2. For sales in U.S. market channel 2, ANSC stated that the invoice is generated after the shipment date. *See also* ANSC's October 25, 2004, supplemental questionnaire response at 6. In keeping with the Department's preferred practice, we have used the date of shipment as the date of sale for U.S. market channel 2 sales. For all other sales, we used the invoice date as the date of sale.

Fair Value Comparisons

To determine whether sales of purified CMC from the Netherlands to the United States were made at LTFV, we compared the export price (''EP'') or constructed export price (''CEP'') to NV, as described in the ''Export Price and Constructed Export Price'' and ''Normal Value'' sections of this notice. In accordance with section 777A(d)(1)(A)(i) of the Act, we compared POI weighted-average EPs and CEPs to NVs, and where there were no similar product matches, we compared EP or CEP to CV.

As discussed below under ''Home Market Viability and Comparison Market Selection,'' we determined that ANSC had a viable home market during the POI. However, Noviant did not have a viable home market. Therefore, the Department used third country sales from Taiwan for NV. *See* discussion below.

Export Price and Constructed Export Price

Section 772(a) of the Act defines EP as the price at which the subject merchandise is first sold (or agreed to be 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 772(c) of the Act. In accordance with section 772(b) of the Act, CEP is the price at which the subject merchandise is first sold (or agreed to be 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 (c) and (d).

1. ANSC

During the POI, ANSC made direct sales to unaffiliated customers in the United States and sales through its affiliate, Akzo Nobel Inc. (''AN–US''). After reviewing the evidence on the record of this investigation, we have preliminarily determined that ANSC's transactions through its affiliate are classified properly as CEP sales because these sales occurred in the United States and were made through its U.S. affiliate(s) to an unaffiliated buyer. Such a determination is consistent with section 772(b) of the Act and the U.S. Court of Appeals for the Federal Circuit's decision in *AK Steel Corp. et al* v. *United States*, 226 F.3d 1361, 1374 (Fed. Cir. 2000) (''AK Steel'').

Export Price

We used EP methodology, in accordance with section 772(a) of the Act, for sales that were produced and exported by ANSC from the Netherlands to the first unaffiliated purchaser in the United States prior to importation. We based EP on the packed price to unaffiliated purchasers in the United States. In accordance with section 772(c)(2)(A) of the Act, we made deductions for movement expenses, where appropriate, for foreign inland freight from the plant to distribution warehouse, warehousing, foreign inland freight from plant/warehouse to the port of exportation, foreign inland insurance, foreign brokerage and handling, U.S. brokerage and handling, international freight, and U.S. inland freight from port to warehouse. In addition, we deducted billing adjustments and discounts from EP, where appropriate.

Constructed Export Price

For sales of merchandise produced by ANSC and sold by AN–US to unaffiliated purchasers in the United States, we calculated CEP in accordance with section 772(c) of the Act. We based CEP on the packed duty paid prices to unaffiliated purchasers in the United States. We made adjustments to the starting price (gross unit price) for billing adjustments. In accordance with section 772(c)(2)(A) of the Act, we deducted the following movement expenses, where appropriate, from the starting price: foreign inland freight from the plant to distribution warehouse, warehousing, foreign inland freight from plant/warehouse to the port of exportation, foreign inland insurance, foreign brokerage and handling, U.S. brokerage and handling, international freight, marine insurance, U.S. inland freight from port to warehouse, U.S. warehousing expense, other U.S. transportation expenses, and U.S. customs duty. See also 19 CFR 351.401(e). Pursuant to section 772(d)(1) of the Act, we deducted from the starting price selling expenses associated with economic activities that occurred in the United States during the POI, including direct U.S. selling expenses (*i.e.*, imputed credit expenses), U.S. inventory carrying costs, and other indirect selling expenses. Pursuant to section 772(d)(3) of the Act, where

applicable, we made an adjustment for CEP profit.

2. Noviant

Based on a review of evidence on the record, Noviant made direct sales to unaffiliated customers in the United States and sales through its U.S. affiliates, Noviant Inc. and Huber Engineered Materials (''HEM''). After reviewing the evidence on the record of this investigation, we have preliminarily determined that Noviant's transactions through its affiliates are classified properly as CEP sales because these sales occurred in the United States and were made through its U.S. affiliate(s) to an unaffiliated buyer. Such a determination is consistent with sections 772(a) and 772(b) of the Act, respectively, and the U.S. Court of Appeals for the Federal Circuit's decision in AK Steel.

Export Price

We used EP methodology, in accordance with section 772(a) of the Act, for sales that were produced and exported by Noviant from the Netherlands to the first unaffiliated purchaser in the United States prior to importation. We based EP on the packed price to unaffiliated purchasers in the United States. In accordance with section 772(c)(2)(A) of the Act, we made deductions, where appropriate, for movement expenses including foreign inland freight from the plant to the port of exportation, U.S. brokerage and handling expenses, and marine insurance.

Constructed Export Price

For sales of merchandise produced by Noviant and sold by Noviant Inc. and HEM to unaffiliated purchasers in the United States, we calculated CEP in accordance with section 772(c) of the Act. We based CEP on the packed duty paid prices to unaffiliated purchasers in the United States. We made adjustments to the starting price (gross unit price) for billing adjustments, rebates, and freight revenue. In accordance with section 772(c)(2)(A) of the Act, we deducted the following movement expenses, where appropriate, from the starting price: foreign inland freight from the plant to the port of exportation, foreign inland insurance, foreign brokerage and handling expenses, international freight, marine insurance, U.S. brokerage and handling expenses, U.S. customs duties, U.S. warehousing expenses, and U.S. inland freight from warehouse to unaffiliated customers. See also 19 CFR 351.401(e). Pursuant to section 772(d)(1) of the Act, we deducted from the starting price selling expenses associated with economic activities that occurred in the United States during the POI, including direct U.S. selling expenses (*i.e.*, imputed credit expenses), U.S. inventory carrying costs, and other indirect selling expenses. Pursuant to section 772(d)(3) of the Act, where applicable, we made an adjustment for CEP profit.

Noviant reported the short-term interest rate for loans extended to its U.S. affiliates, Noviant Inc. and HEM, by an affiliated lender, JMH Finance Corp. (''JMHF''), and by an unaffiliated lender, respectively. See Noviant's second supplemental questionnaire response (''SSQR'') dated November 24, 2004, at 22 and Exhibit C–35. We note that Noviant Inc.'s reported short-term dollar interest rate for loans from its affiliate, JMHF, is significantly lower than HEM's borrowing rate from an unaffiliated lender. Therefore, we preliminarily determine that Noviant Inc.'s reported short-term dollar interest rate is not at arm's length. Accordingly, we used HEM's interest rate for short-term borrowings from an unaffiliated lender during the POI to calculate Noviant Inc.'s imputed credit expenses and inventory carrying costs on CEP sales.

Normal Value

A. Home Market Viability and Comparison Market Selection

In order to determine whether there is a sufficient volume of sales in the home market to serve as a viable basis for calculating NV (*i.e.*, the aggregate volume of home market sales of the foreign like product is equal to or greater than five percent of the aggregate volume of U.S. sales), we compared respondent's volume of home market sales of the foreign like product to the volume of U.S. sales of the subject merchandise, in accordance with section 773(a)(1)(C) of the Act.

Section 773(a)(1)(C)(iii) of the Act provides that the Department may determine that home market sales are inappropriate as a basis for determining NV if the particular market situation would not permit a proper comparison. When sales in the home market are not viable, section 773(a)(1)(B)(ii) of the Act provides that sales to a particular third country market may be utilized if (I) the prices in such market are representative; (II) the aggregate quantity of the foreign like product sold by the producer or exporter in the third country market is five percent or more of the aggregate quantity of the subject merchandise sold in or to the United States; and (III) the Department does not determine that a particular market situation in the third country market prevents a proper comparison with the U.S. price.

In this investigation, we determined that ANSC's aggregate volume of home market sales of the foreign like product was greater than five percent of the aggregate volume of U.S. sales of the subject merchandise. Therefore, for ANSC, we used home market sales as the basis for NV in accordance with section 773(a)(1)(B)(i) of the Act.

However, we determined that Noviant's aggregate volume of home market sales of the foreign like product was not greater than five percent of the aggregate volume of U.S. sales of subject merchandise. Therefore, we relied on sales to a third country as the basis for NV in accordance with section 773(a)(1)(B)(ii) of the Act. The following is a description of the Department's procedure in selecting the third country sales used to calculate NV for sales of the foreign like product made by Noviant.

On September 9, 2004, Noviant reported in its section A questionnaire response that its home market sales of the foreign like product were less than five percent of the aggregate quantity of its sales to the United States. Therefore, we determined that Noviant's sales in the home market did not provide a viable basis for calculating NV.

In its section A response, Noviant asserted that Mexico was the most appropriate third country market for purposes of determining NV, because of the comparability of merchandise, similarities in channels of distribution and levels of trade, and concentration of sales. On September 15, 2004, petitioner argued that the information provided by Noviant was not adequate for the Department to exercise its regulatory responsibility, set forth under section 351.404(e) of the Department's regulations, to determine the most appropriate third country market upon which to base NV. In addition, petitioner requested that the Department review Noviant's sales of foreign like product for each of its three largest third country markets, *i.e.* Taiwan, Germany and Mexico, as reported in Noviant's section A response. Upon review of the information provided by Noviant, in accordance with section 773(a)(1)(c)(ii) of the Act, the Department selected Taiwan as the appropriate comparison market. The Department found that exports of the foreign like products to Taiwan were adequately similar to those exported to the United States, and that exports to Taiwan were substantially larger than exports either to Mexico or to Germany. In addition, the Department did not find any evidence on the record suggesting that Taiwan would be an

inappropriate third country market to select as a comparison market. Accordingly, on September 16, 2004, the Department requested that Noviant report its sales of foreign like product sold to Taiwan during the POI. See Memorandum to the File from Angelica L. Mendoza, Noviant BV's Section B Response (Third-Country Market), dated September 20, 2004. See also Third Country Market Memo.

For Noviant, we also used CV as the basis for calculating NV, in accordance with section 773(a)(4) of the Act, for those sales that did not have identical or similar product matches.

B. Level of Trade

In accordance with section 773(a)(1)(B)(i) of the Act, to the extent practicable, we determine NV based on sales in the comparison market at the same level of trade (''LOT'') as the EP or CEP transaction. See also section 351.412 of the Department's regulations. The NV LOT is the level of the starting-price sales in the comparison market or, when NV is based on CV, the level of the sales from which we derive selling, general and administrative (''SG&A'') expenses and profits. For EP sales, the U.S. LOT is also the level of the starting-price sale, which is usually from the exporter to the importer. For CEP sales, the U.S. LOT is the level of the constructed sale from the exporter to the affiliated importer. See section 351.412(c)(1) of the Department's regulations. As noted in the ''Export Price and Constructed Export Price'' section above, we preliminarily find that all of Noviant's and ANSC's sales through their U.S. affiliates are appropriately classified as CEP sales, while all direct sales to unrelated customers are properly classified as EP sales.

To determine whether NV sales are at a different LOT than EP or CEP sales, 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 LOT than EP or CEP sales, and the difference affects price comparability, as manifested in a pattern of consistent price differences between sales on which NV is based and comparison market sales at the LOT of the export transaction, we make a LOT adjustment under section 773(a)(7)(A) of the Act. For CEP sales, if the NV level is more remote from the factory than the CEP level and there is no basis for determining whether the difference in levels between NV and CEP affects price comparability, we adjust NV under section 773(a)(7)(B) of the Act (the CEP offset provision). *See* Final Determination of Sales at Less Than Fair Value: Greenhouse Tomatoes from Canada, 67 FR 8781 (February 26, 2002); see also Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate from South Africa, 62 FR 61731, 61732 (November 19, 1997).

In analyzing differences in selling functions, we determine whether the LOTs identified by the respondent are meaningful. *See* Antidumping Duties; Countervailing Duties, Final Rule, 62 FR 27296, 27371 (May 19, 1997). If the claimed LOTs are the same, we expect that the functions and activities of the seller should be similar. Conversely, if a party claims that LOTs are different for different groups of sales, the functions and activities of the seller should be dissimilar. *See* Porcelain-on-Steel Cookware from Mexico: Final Results of Administrative Review, 65 FR 30068 (May 10, 2000).

In order to determine whether the comparison market sales were at different stages in the marketing process than the U.S. sales, we reviewed the distribution system in each market (*i.e.*, the ''chain of distribution''),[1] including selling functions, class of customer (''customer category''), and the level of selling expenses for each type of sale.

Noviant

In this investigation, we obtained information from Noviant regarding the marketing stages involved in sales to the reported third country and U.S. markets. Noviant reported that it sells to unaffiliated distributors and end users in the third country market (*i.e.*, Taiwan), and to U.S. affiliates, Noviant Inc. and HEM, in the United States, and directly to unaffiliated U.S. customers.

Noviant reported one LOT in the third country market, Taiwan, with one channel of distribution to two classes of customers: (1) Direct sales from the plant to end users, and (2) direct sales from the plant to distributors. In reviewing Noviant's questionnaire responses, we preliminarily find that Noviant, in fact, had the following two channels of distribution in Taiwan: (1) Direct sales from the plant to end users and distributors, and (2) sales from warehouse to distributors. Specifically, in its supplemental questionnaire response dated October 27, 2004 (''SQR''), Noviant stated that for its sales to distributors in Taiwan, it either produces to order or takes material from stock. *See* Noviant's SQR at 7. Further, based on our review of evidence on the record, we find that third country market sales to both customer categories and through both channels of distribution were substantially similar with respect to selling functions and stages of marketing. For example, Noviant employed an affiliated selling agent to assist with negotiation, customer inquires, and to participate in industry trade shows in Asia, for which Noviant paid it a commission, for all sales to Taiwan. *See* Noviant's SQR at 4–5 and 7–8. Noviant performed the same selling functions for sales in both third country market channels of distribution, including sales forecasting, order input/processing, advertising, warranty service, freight and delivery services, etc. *See* Noviant's section A questionnaire response dated September 9, 2004, (''AQR'') at Exhibit A–5. Accordingly, we preliminarily find that Noviant had only one LOT for its third country market sales.

Noviant reported one EP LOT and one CEP LOT each with one channel of distribution in the United States, and with two classes of customers for CEP sales: (1) Direct sales to end users of merchandise produced to order, and (2) sales through U.S. affiliates to end users and distributors of merchandise produced to order. However, in reviewing Noviant's questionnaire responses, we preliminarily find that there are two additional channels of distribution for U.S. sales, *i.e.*, (1) Noviant made direct sales to end users from inventory, and (2) Noviant Inc. and HEM sold purified CMC from warehouse stock maintained by each company to unaffiliated end users and distributors (the latter by Noviant Inc. only). Therefore, we preliminarily find that there are two channels of distribution for EP sales, and two channels of distribution for CEP sales. *See* Noviant's AQR at A–21–A–26.

We reviewed the selling functions and services performed by Noviant in the U.S. market for EP sales, as described by Noviant in its questionnaire responses. We find that the selling functions and services performed by Noviant on direct sales for both U.S. channels of distribution relating to the EP LOT (*i.e.*, sales of merchandise produced to order to unaffiliated end users and sales of merchandise from stock to unaffiliated end users) are similar. In particular, for sales produced to order and pulled from stock, Noviant's customer care personnel process all orders and its

[1] The marketing process in the United States and third country market begins with the producer and extends to the sale to the final user or customer. The chain of distribution between the two may have many or few links, and the respondents' sales occur somewhere along this chain. In performing this evaluation, we considered each respondent's narrative response to properly determine where in the chain of distribution the sale occurs.

logistics department arranges for freight and delivery to Noviant's unaffiliated U.S. customers. *See* Noviant's AQR at A–27–A–28. Accordingly, because these selling functions are substantially similar for these two channels of distribution, we preliminarily determine that there is one EP LOT in the U.S. market.

For CEP sales, we consider only the selling activities reflected in the price after the deduction of expenses and CEP profit under section 772(d) of the Act. *See Micron Technology Inc.* v. *United States*, 243 F.3d 1301, 1314–1315 (Fed. Cir. 2001). We reviewed the selling functions and services performed by Noviant on CEP sales for both channels of distribution relating to the CEP LOT, as described by Noviant in its questionnaire responses, after these deductions. We have determined that the selling functions performed by Noviant on all CEP sales are similar because Noviant provides almost no selling functions to either U.S. affiliate in support of either channel of distribution. Noviant reported that the only services it provided for the CEP sales were packaging, order input/processing services, and very limited freight and delivery and sales/marketing support services. *See* Noviant's SQR at Exhibit A–19. Accordingly, because the selling functions provided by Noviant on sales to affiliates in the United States are substantially similar, we preliminarily determine that there is one CEP LOT in the U.S. market.

We then examined the selling functions performed by Noviant on its EP sales in comparison with the selling functions performed on CEP sales (after deductions). We found that Noviant performs an additional layer of selling functions on its direct sales to unaffiliated U.S. customers which are not performed on its sales to affiliates (*e.g.*, sales forecasting, strategic/economic planning, advertising, sales promotion, inventory maintenance, market research, after-sales support services, etc.). See Noviant's SQR at Exhibit A–19. Because these additional selling functions are significant, we find that Noviant's direct sales to unaffiliated U.S. customers (EP sales) are at a different LOT than its CEP sales.

Next, we examined the third country market and EP sales. Noviant's third country market and EP sales were both made to end users and distributors. In both cases, the selling functions performed by Noviant were almost identical for both markets. Other than commissions, which were only paid to selling agents for third country sales, and re-packing services, which were mainly provided on U.S. sales, in both markets Noviant provided the following services: strategic and economic planning, sales forecasting, sales promotion, procurement/sourcing services, order/input processing, technical assistance, provide after-sales services, etc. *See* Noviant's SQR at Exhibit A–19. Because the selling functions and channels of distribution are substantially similar, we preliminarily determine that the third country market LOT is the same as the EP LOT. It was therefore unnecessary to make an LOT adjustment for comparison of third country market and EP prices.

According to section 773(a)(7)(B) of the Act, a CEP offset is appropriate when the LOT in the home market or third country market is at a more advanced stage than the LOT of the CEP sales. Noviant reported that it provided minimal selling functions and services for the CEP LOT and that, therefore, the third country market LOT is more advanced than the CEP LOT. Based on our analysis of the channels of distribution and selling functions performed by Noviant for sales in the third country market and CEP sales in the U.S. market (*i.e.*, sales support and activities provided by Noviant on sales to its U.S. affiliates), we preliminarily find that the third country market LOT is at a more advanced stage of distribution when compared to CEP sales because Noviant provides many selling functions in the third country market at a higher level of service (*i.e.*, sales forecasting, strategic/economic planning, sales promotion, inventory maintenance, direct sales personnel, market research, technical assistance, etc.) as compared to selling functions performed for its CEP sales (*i.e.*, very limited freight and delivery, sales forecasting, and inventory maintenance services). See Noviant's SQR at Exhibit A–19. Thus, we find that Noviant's third country market sales are at a more advanced LOT than its CEP sales. There was only one LOT in the third country market, there was no data available to determine the existence of a pattern of price differences, and we do not have any other information that provides an appropriate basis for determining a LOT adjustment. Therefore, we applied a CEP offset to NV for CEP comparisons.

To calculate the CEP offset, we deducted the third country market indirect selling expenses from NV for third country market sales that were compared to U.S. CEP sales. As such, we limited the third country market indirect selling expense deduction by the amount of the indirect selling expenses deducted in calculating the CEP as required under section 772(d)(1)(D) of the Act.

ANSC

In this investigation, we obtained information from ANSC regarding the marketing stages involved in sales to the reported home and U.S. markets. ANSC reported that it sells to unaffiliated distributors and end users in the home market (*i.e.*, the Netherlands), and to a U.S. affiliate, AN–US, in the United States, and directly to unaffiliated U.S. customers.

ANSC reported one LOT in the home market, the Netherlands, with one channel of distribution to two classes of customers: (1) Direct sales from the plant to end users, and (2) direct sales from the plant to distributors. *See* ANSC's section A questionnaire response dated September 3, 2004 (''ANSC's AQR'') at Appendix 7A. Based on our review of evidence on the record, we find that home market sales to both customer categories were substantially similar with respect to selling functions and stages of marketing. ANSC performed the same selling functions at the same level for sales to both home market customer categories, including sales forecasting, strategic planning, packing, warehousing, inventory management, order processing, freight and delivery arrangements, etc. *See* ANSC's AQR at Appendix 7A. Accordingly, we preliminarily find that ANSC had only one LOT for its home market sales.

ANSC reported one EP LOT and one CEP LOT with three total channels of distribution in the United States: (1) Direct sales to end users and distributors, (2) direct sales by the U.S. affiliate to end users and distributors using existing inventory in the United States, and (3) direct sales by the U.S. affiliate to end users and distributors with merchandise shipped directly from the Netherlands. *See* ANSC's AQR at A–16.

We reviewed the selling functions and services performed by ANSC in the U.S. market for EP sales, as described by ANSC in its questionnaire responses. We find that the selling functions and services performed by ANSC on direct sales for both U.S. channels of distribution relating to the EP LOT (*i.e.*, sales of merchandise produced to order to unaffiliated end users or distributors and sales of merchandise from stock to unaffiliated end users and distributors) are similar. In particular, for both U.S. channels of distribution, ANSC provided similar levels of service with respect to sales forecasting, strategic planning, packing, warehousing, inventory management, order

processing, freight and delivery arrangements, etc. *See* ANSC's AQR at Appendix 7A. Accordingly, because these selling functions are substantially similar for these two channels of distribution, we preliminarily determine that there is one EP LOT in the U.S. market.

For CEP sales, we consider only the selling activities reflected in the price after the deduction of expenses and CEP profit under section 772(d) of the Act. *See Micron Technology Inc.* v. *United States*, 243 F.3d 1301, 1314–1315 (Fed. Cir. 2001). We reviewed the selling functions and services performed by ANSC on CEP sales, as described by ANSC in its questionnaire responses, after these deductions. We have determined that the selling functions performed by ANSC on all CEP sales were identical. In particular, ANSC performed the following services for both CEP channels of distribution: strategic planning, packing, warehousing, inventory management, order processing, technical assistance, etc. See ANSC's AQR at Appendix 7A. Accordingly, because the selling functions provided by ANSC on all sales to its affiliate in the United States are identical, we preliminarily determine that there is one CEP LOT in the U.S. market.

We then examined the selling functions performed by ANSC on its EP sales in comparison with the selling functions performed on CEP sales (after deductions). We found that ANSC performs an additional layer of selling functions on its direct sales to unaffiliated U.S. customers, which are not performed on its sales to its affiliate (*e.g.*, sales forecasting, warehousing, inventory maintenance, direct sales staff, market research, technical assistance, after-sales support services, etc.). *See* ANSC's AQR at Appendix 7A. Because these additional selling functions are significant, we find that ANSC's direct sales to unaffiliated U.S. customers (EP sales) are at a different LOT than its CEP sales.

Next, we compared the home market and EP sales. ANSC's home market sales and EP sales were both made to end users and distributors. The selling functions performed by ANSC were identical for both markets, with the limited exceptions of advertising and distributor training. In both markets, ANSC provided the following services: sales forecasting, strategic planning, packing, warehousing, inventory management, order processing, direct sales crew, market research, technical assistance, sales/marketing support, provide guarantees, provide after-sales service, provide freight and delivery, and invoicing. *See* ANSC's AQR at Appendix 7A. Because the selling functions and channels of distribution are substantially similar, we preliminarily determine that the home market LOT is the same as the EP LOT. It was therefore unnecessary to make a LOT adjustment for comparison of home market and EP prices.

According to section 773(a)(7)(B) of the Act, a CEP offset is appropriate when the LOT in the home market or third country market is at a more advanced stage than the LOT of the CEP sales. ANSC reported that it provided minimal selling functions and services for the CEP LOT and that, therefore, the home market LOT is more advanced than the CEP LOT. Based on our analysis of the channels of distribution and selling functions performed by ANSC for sales in the home market and CEP sales in the U.S. market (*i.e.*, sales support and activities provided by ANSC on sales to its U.S. affiliate), we preliminarily find that the home market LOT is at a more advanced stage of distribution when compared to CEP sales because ANSC provides many selling functions in the home market at a higher level of service (*i.e.*, sales forecasting, strategic/economic planning, sales promotion, inventory maintenance, invoicing, market research, technical assistance, etc.) as compared to selling functions performed for its CEP sales (*i.e.*, very limited sales forecasting, warehousing, inventory maintenance services, technical assistance, etc.). *See* ANSC's AQR at Appendix 7A. Thus, we find that ANSC's home market sales are at a more advanced LOT than its CEP sales. There was only one LOT in the home market, there was no data available to determine the existence of a pattern of price differences, and we do not have any other information that provides an appropriate basis for determining a LOT adjustment. Therefore, we applied a CEP offset to NV for CEP comparisons.

To calculate the CEP offset, we deducted the home market indirect selling expenses from NV for home market sales that were compared to U.S. CEP sales. As such, we limited the home market indirect selling expense deduction by the amount of the indirect selling expenses deducted in calculating the CEP as required under section 772(d)(1)(D) of the Act.

C. Calculation of Normal Value Based on Comparison Market Prices

ANSC

We calculated ANSC's NV based on delivered prices to unaffiliated customers. We made deductions for movement expenses, including inland freight from plant to distribution warehouse, warehousing, inland freight from plant/warehouse to customer and inland insurance. In addition, we made adjustments under section 773(a)(6)(C)(iii) of the Act and section 351.410 of the Department's regulations for differences in circumstances of sale for discounts and rebates and other direct selling expenses. We also deducted home market packing costs and added U.S. packing costs to the starting price in accordance with section 773(a)(6)(A) and (B) of the Act. Furthermore, we made an adjustment for differences in costs attributable to differences in the physical characteristics of the merchandise in accordance with section 773(a)(6)(C)(ii) of the Act and section 351.411 of the Department's regulations. We also deducted third country packing costs and added U.S. packing costs in accordance with section 773(a)(6)(A) and (B) of the Act.

Noviant

For Noviant's sales of the foreign like product, we calculated NV based on cost insurance and freight (''CIF'') prices to unaffiliated customers in the third country market. We made deductions, where appropriate, from the starting price for movement expenses, including inland freight, international freight, and marine insurance, under section 773(a)(6)(B)(ii) of the Act. In addition, we made adjustments under section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410 for differences in circumstances of sale for imputed credit expenses. We also made an adjustment to NV to account for commissions paid in the third country (*i.e.*, Taiwan) but not in the U.S. market, in accordance with section 351.410(e) of our regulations. As the offset for third country commissions, we applied the lesser of third country commissions or U.S. indirect selling expenses.

Furthermore, we made an adjustment for differences in costs attributable to differences in the physical characteristics of the merchandise in accordance with section 773(a)(6)(C)(ii) of the Act and section 351.411 of our regulations. We also deducted third country packing costs and added U.S. packing costs in accordance with section 773(a)(6)(A) and (B) of the Act.

Noviant reported that, during the POI, it paid an affiliated selling agent, Noviant Pte., commissions for their handling of all purified CMC sales in Taiwan. See Noviant's section B response dated September 27, 2004, at B–24–B25. During the course of this proceeding, the Department requested

that Noviant provide evidence for the record showing that these transactions were made at arm's-length. With respect to commissions paid for sales of purified CMC made in the third country market, Noviant reported commissions paid to its affiliated selling agent and the actual selling expenses incurred by Noviant Pte. In order to determine whether the commissions paid by Noviant to its affiliate were arm's-length transactions, we compared the commissions paid to the affiliated selling agents to those paid by Noviant to an unaffiliated selling agent on sales of purified CMC in Taiwan. We preliminarily find that Noviant has not sufficiently demonstrated that the reported commissions it paid to its affiliated selling agent were made at arm's-length. Therefore, we did not make adjustments for commissions paid to Noviant Pte. on sales of purified CMC in Taiwan. Instead, we adjusted the starting price for the actual selling expenses incurred by Noviant Pte. related to Taiwanese sales of purified CMC produced by Noviant.

In its section A questionnaire response, Noviant explained that all of its short-term borrowings from its affiliated lender, JMHF, have to be conducted on a fully arm's-length basis as this is a criterion for International Financial Service Center (''IFSC'') status. See Noviant's AQR at A–15–A–16. Noviant stated that independent auditors must certify annually to JMHF's IFSC status as required by Irish law. See Noviant's AQR at Exhibit A–4. In its second supplemental questionnaire, the Department requested that Noviant provide evidence in support of its assertion that the short-term borrowing rates offered by JMHF were made at arm's-length. See November 10, 2004, letter to Noviant BV from Abdelali Elouaradia, Program Manager.[2] In its response to the Department's request, Noviant reiterated that the lending rates applicable to loans extended by JMHF were at arm's-length rates pursuant to Irish law. *See* Noviant's SSQR dated November 24, 2004, at 26 and Exhibit A–27. Because Noviant did not submit any data to support its arm's-length claim, in accordance with our practice, we have not assumed that they are arm's-length transactions. *See* Industrial Phosphoric Acid From Belgium; Preliminary Results of Antidumping Duty Administrative Review, 64 FR 24574 (May 7, 1999). Therefore, we have disregarded the third country market credit expenses and inventory costs reported by Noviant. Instead, we utilized the weighted-average short-term dollar commercial and industrial lending rate based on loans made by all commercial banks during the POI reported by the Federal Reserve in calculating Noviant's imputed credit expenses on third country market sales denominated in U.S. dollars. *See* Import Administration Policy Bulletin 98–2. In calculating Noviant's credit expenses and inventory carrying costs on third country market sales denominated in Euros, we utilized the weighted-average short-term Euro monetary financial institution lending rate from the European Central Bank (''ECB'') based on loans extended to non-financial corporations during the POI. Because Noviant's manufacturing costs are incurred in Euros, we used the ECB weighted-average short-term Euro lending rate to calculate Noviant's inventory carrying costs for its third country market sales.

D. Calculation of Normal Value Based on Constructed Value

In accordance with section 773(a)(4) of the Act, we based Noviant's NV on CV where there were no comparable sales in the third country market made in the ordinary course of trade. In accordance with section 773(e) of the Act, we calculated CV based on the sum of Noviant's cost of materials and fabrication for the foreign like product, plus amounts for SG&A, profit, and U.S. packing costs. We calculated the cost of materials and fabrication and interest based on the methodology based on the CV information provided by Noviant in its section D response. We have recalculated Noviant's general and administrative (''G&A'') expense ratio based on G&A expenses for the year ended December 31, 2003, incurred by Noviant only and not those of the Noviant Group. In doing so, we have deducted rental and sundry income from Noviant's total reported G&A expenses. We also added sundry expenses to our calculation of the G&A expense ratio. *See* Memorandum to Neal Halper, Director, Office of Accounting, Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Determination—Noviant BV, dated December 16, 2004 (''COP/CV Memo'').

Currency Conversion

We made currency conversions into U.S. dollars in accordance with section 773A(a) of the Act based on exchange rates in effect on the dates of the U.S. sales as certified by the Federal Reserve Bank.

Verification

As provided in section 782(i) of the Act, we will verify the information relied upon in making our final determination.

Suspension of Liquidation

In accordance with section 733(d)(2) of the Act, we are directing U.S. Customs and Border Protection (''CBP'') to suspend liquidation of all imports of subject merchandise that are entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**. We will instruct CBP to require a cash deposit or the posting of a bond equal to the weighted-average amount by which NV exceeds EP or CEP, as indicated in the chart below. These suspension-of-liquidation instructions will remain in effect until further notice.

The weighted-average dumping margins are as follows:

Manufacturer/exporter	POI	Weighted-average margin (percent)
Akzo Nobel Surface Chemistry	04/01/03–03/31/04	12.04
Noviant BV	04/01/03–03/31/04	27.11
All Others	04/01/03–03/31/04	22.21

See Memoranda to the File, Preliminary Determination Analysis for ANSC and Noviant, respectively, dated December 16, 2004. Public versions of our analysis memoranda are on file in the CRU.

[2] A public version of this document is on file in the Central Records Unit (''CRU''), room B–099 of the Herbert C. Hoover Department of Commerce building, 1401 Constitution Avenue, NW., Washington, DC.

The ''All Others'' rate is derived exclusive of all *de minimis* margins and margins based entirely on facts available. See Memorandum to the File, Calculation of All Others Rate, dated December 16, 2004. A public version of this memorandum is on file in the CRU.

ITC Notification

In accordance with section 733(f) of the Act, we have notified the ITC of our preliminary affirmative determination. If our final determination is affirmative, the ITC will determine before the later of 120 days after the date of this preliminary determination or 45 days after our final determination whether these imports are materially injuring, or threaten material injury to, the U.S. industry. Because we have postponed the deadline for our final determination to 135 days from the date of the publication of this preliminary determination, the ITC will make its final determination within 45 days of our final determination.

Disclosure

We will disclose the calculations used in our analysis to parties in this proceeding in accordance with section 351.224(b) of the Department's regulations.

Public Comment

Case briefs for this investigation must be submitted to the Department no later than seven days after the date of the final verification report is issued in this proceeding. Rebuttal briefs must be filed five days from the deadline date for case briefs. A list of authorities used, a table of contents, and an executive summary of issues should accompany any briefs submitted to the Department. Executive summaries should be limited to five pages total, including footnotes. Section 774 of the Act provides that the Department will hold a public hearing to afford interested parties an opportunity to comment on arguments raised in case or rebuttal briefs, provided that such a hearing is requested by an interested party. If a request for a hearing is made in this investigation, the hearing will tentatively be held two days after the rebuttal brief deadline date at the U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Parties should confirm by telephone the time, date, and place of the hearing 48 hours before the scheduled time.

Interested parties who wish to request a hearing, or to participate if one is requested, must submit a written request to the Assistant Secretary for Import Administration, U.S. Department of Commerce, Room 1870, within 30 days of the publication of this notice. Requests should contain: (1) The party's name, address, and telephone number; (2) the number of participants; and (3) a list of the issues to be discussed. Oral presentations will be limited to issues raised in the briefs.

We will make our final determination no later than 135 days after the publication of this notice in the **Federal Register**.

This determination is published pursuant to sections 733(f) and 777(i) of the Act.

Dated: December 16, 2004.

James J. Jochum,

Assistant Secretary for Import Administration.

[FR Doc. 04–28118 Filed 12–23–04; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–401–808]

Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Purified Carboxymethylcellulose From Sweden

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

SUMMARY: The Department of Commerce (the Department) preliminarily determines that purified carboxymethylcellulose (CMC) from Sweden is being sold, or is likely to be sold, in the United States at less than fair value (LTFV), as provided in section 733 of the Tariff Act of 1930, as amended (the Act). The estimated margins of sales at LTFV are shown in the Suspension of Liquidation section of this notice.

EFFECTIVE DATE: December 27, 2004.

FOR FURTHER INFORMATION CONTACT: Helen M. Kramer at 202–482–0405 or Abdelali Elouaradia at 202–482–1374, AD/CVD Operations, Office 7, Import Administration, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue, NW., Washington, DC 20230.

Case History

On June 9, 2004, the Department received a petition for the imposition of antidumping duties on purified CMC from Finland, Mexico, the Netherlands, and Sweden, filed in the proper form by Aqualon Company (Aqualon or petitioner), a division of Hercules Incorporated. *See* Letter from petitioner to Secretary Evans of the Department, ''Petition for the Imposition of Antidumping Duties on Imports of Purified Carboxymethylcellulose (CMC) from Finland, Mexico, the Netherlands, and Sweden'' (Petition). The Department initiated the antidumping investigations of purified CMC from Finland, Mexico, the Netherlands, and Sweden on June 29, 2004. *See Notice of Initiation of Antidumping Investigations: Purified Carboxymethylcellulose (CMC) from Finland, Mexico, the Netherlands, and Sweden*, 69 FR 40617 (July 6, 2004) (Initiation Notice). Since the initiation of this investigation, the following events have occurred.

On July 23, 2004, the International Trade Commission (the Commission) preliminarily determined that there is a reasonable indication that an industry in the United States is materially injured by reason of imports of purified CMC from Finland, Mexico, the Netherlands, and Sweden that are alleged to be sold in the United States at LTFV. *See Purified Carboxymethylcellulose from Finland, Mexico, the Netherlands, and Sweden*, 69 FR 45851 (July 30, 2004).

On July 29, 2004, the Department issued Sections A, B, and C of the antidumping questionnaire [1] to Noviant CMC Oy of Finland, Quimica Amtex S.A. of Mexico, Noviant Holdings B.V. of the Netherlands, Akzo Nobel Specialty Chemicals of the Netherlands, and Noviant AB of Sweden.

On July 30, 2004, petitioner submitted suggested model match criteria. On August 3, 2004, John Drury, Mark Flessner, Robert James, and Brian Sheba of the Department traveled to petitioner's Hopewell, Virginia production facility for a plant tour. *See* Memorandum to The File from Robert James, Program Manager, ''Purified Carboxymethylcellulose from Finland, Mexico, the Netherlands, and Sweden; Tour of Aqualon's Hopewell Plant'' (August 5, 2004).

On August 9, 2004, respondents Noviant OY (Finland), Noviant BV (the

[1] Section A of the questionnaire requests general information concerning a company's corporate structure and business practices, the merchandise under investigation, and the manner in which it sells that merchandise in all of its markets. Section B requests a complete listing of all of the company's home market sales of foreign like product or, if the home market is not viable, of sales of the foreign like product 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 the company's U.S. sales of subject merchandise. Section D requests information on the cost of production of the foreign like product and the constructed value of the merchandise under investigation. Section E requests information on further manufacturing.

Netherlands), and Noviant AB (Sweden) submitted comments on petitioner's July 30, 2004, suggested model match criteria. On August 11, 2004, petitioner rebutted Noviant's August 9, 2004, comments. On August 18, 2004, the Department issued proposed questionnaire Appendix V model match criteria to all interested parties. On August 19, 2004, petitioner filed comments on the Department's proposed model match criteria. On August 25, 2004, Noviant OY, Noviant BV, Noviant AB, and Noviant Inc. (United States) (collectively, Noviant Group Companies) filed comments to the Department's proposed model match and petitioner's August 19, 2004, comments thereto. On August 30, 2004, the Department issued its final questionnaire Appendix V model match criteria.

On August 17, 2004, the Noviant Group Companies requested a three-week extension to file their questionnaire responses. On August 19, 2004, the Department granted the Noviant Group Companies a two-week extension. On September 3, 2004, the Noviant Group Companies requested a one-week extension to file their Section A questionnaire responses. On September 3, 2004, the Department granted the Noviant Group Companies a five-day extension. On September 9, 2004, the Noviant Group Companies submitted Section A questionnaire responses. On September 15, 2004, the Noviant Group Companies requested a one-week extension to file questionnaire Sections B and C. On September 17, 2004, the Department granted the Noviant Group Companies' request.

On September 24, 2004, the Noviant Group Companies notified the Department that Noviant OY and Noviant AB would not be submitting responses to Sections B and C of the Department's questionnaire. The Noviant Group Companies cited resource and staff limitations as the reason they could not participate in each parallel proceeding. As such, the Noviant Group Companies will only participate in the Noviant BV (the Netherlands) proceeding.

On October 25, 2004, the petitioner requested a postponement of the preliminary determination in this investigation. On November 3, 2004, the Department published a **Federal Register** notice postponing the deadline for the preliminary determination until December 16, 2004. *See Purified Carboxymethylcellulose from Finland (A–405–803), Mexico (A–201–834), the Netherlands (A–421–811), and Sweden (A–401–808): Notice of Postponement of Preliminary Determinations of Antidumping Investigations*, 69 FR 64030.

Postponement of Final Determination and Extension of Provisional Measures

Section 735(a)(2) of the Act provides that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination if, in the event of an affirmative preliminary determination, a request for such postponement is made by exporters who account for a significant proportion of exports of the subject merchandise, or in the event of a negative preliminary determination, a request for such postponement is made by the petitioners. Section 351.210(e)(2) of the Department's regulations requires that requests by respondents for postponement of a final determination be accompanied by a request for an extension of the provisional measures from a four-month period to not more than six months.

On November 19, 2004, on behalf of Noviant OY, Noviant BV and Noviant AB, the Noviant Group Companies requested that, in the event of an affirmative preliminary determination in this investigation, the Department postpone its final determination. Noviant also included a request to extend the provisional measures from a four-month period to not more than six months. In addition, on November 19, 2004, petitioners requested that, in the event of a negative determination or *de minimis* against respondents' imports, that the Department postpone the deadline for its final determination until a date not later than the 135th day after the date on which the Department will have published its notice of preliminary determination.

Accordingly, because we have made an affirmative preliminary determination in this case, and the requesting parties account for a significant portion of exports of the subject merchandise, we are postponing the final determination until not later than 135 days after the date of the publication of the preliminary determination and are extending the provisional measures accordingly.

Period of Investigation

The period of investigation (POI) is April 1, 2003, through March 31, 2004. *See* 19 CFR 351.204(b)(1).

Scope Comments

In accordance with the preamble to the Department's regulations (*see Antidumping Duties; Countervailing Duties,* 62 FR 27296, 27323 (May 19, 1997)), we set aside a period of time for parties to raise issues regarding product coverage under the scope of the investigation and encouraged all parties to submit comments on product coverage within 20 calendar days of publication of the Initiation Notice (*see* 68 FR 40618). Comments were not submitted to the record of this investigation.

Scope of Investigation

For purposes of this investigation, the products covered are all purified carboxymethylcellulose (CMC), sometimes also referred to as purified sodium CMC, polyanionic cellulose, or cellulose gum, which is a white to off-white, non-toxic, odorless, biodegradable powder, comprising sodium carboxymethylcellulose that has been refined and purified to a minimum assay of 90 percent. Purified CMC does not include unpurified or crude CMC, CMC Fluidized Polymer Suspensions, and CMC that is cross-linked through heat treatment. Purified CMC is CMC that has undergone one or more purification operations which, at a minimum, reduce the remaining salt and other by-product portion of the product to less than ten percent.

The merchandise subject to this investigation is classified in the Harmonized Tariff Schedule of the United States (HTSUS) at subheading 3912.31.00. This tariff classification is provided for convenience and customs purposes; however, the written description of the scope of this investigation is dispositive.

Facts Available

For the reasons discussed below, we determine that the use of adverse facts available is appropriate for the preliminary determination with respect to Noviant AB.

A. Use of Facts Available

Section 776(a)(2) of the Act provides that, if an interested party withholds information requested by the Department, fails to provide such information by the deadline or in the form or manner requested, significantly impedes a proceeding, or provides information which cannot be verified, the Department shall use, subject to section 782(d) and (e) of the Act, facts otherwise available in reaching the applicable determination. Section 782(d) of the Act provides that if the Department determines that a response to a request for information does not comply with the Department's request, the Department shall promptly inform the responding party and provide an opportunity to remedy the deficient submission. Section 782(e) of the Act

further states that the Department shall not decline to consider submitted information if all of the following requirements are met: (1) The information is submitted by the established deadline; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability; and (5) the information can be used without undue difficulties.

In this case, Noviant AB has failed to provide pertinent information requested by the Department that is necessary to calculate the dumping margin for this preliminary determination. On September 24, 2004, Noviant AB submitted a letter stating that it would not respond to Sections B and C of the Department's questionnaire. Specifically, Noviant AB failed to provide the following requested information, all of which is necessary to complete the Department's calculations: (1) Department questionnaire Section B, related to home market sales and expenses and (2) Department questionnaire Section C, related to U.S. market sales and expenses. Thus, in reaching our preliminary determination, pursuant to sections 776(a)(2)(A), (B), and (C) of the Act, we have based Noviant AB's dumping margin on facts available.

B. Application of Adverse Inferences for Facts Available

In applying facts otherwise available, section 776(b) of the Act provides that the Department may use an inference adverse to the interests of a party that has failed to cooperate by not acting to the best of its ability to comply with the Department's requests for information. *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value and Final Negative Critical Circumstances: Carbon and Certain Alloy Steel Wire Rod from Brazil,* 67 FR 55792, 55794–96 (August 30, 2002), *Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Bottle-Grade Polyethylene Terephthalate (PET) Resin From Thailand,* 69 FR 62850 (October 28, 2004), *Notice of Final Determination of Sales at Less Than Fair Value: Polyethylene Retail Carrier Bags From Thailand,* 69 FR 34122 (June 18, 2004), *Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Circular Welded Carbon-Quality Line Pipe From Mexico,* 69 FR 59892 (October 6, 2004). Adverse inferences are appropriate ''to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.'' *See Statement of Administrative Action Accompanying the Uruguay Round Agreements Act,* H.R. Rep. No. 103–316, at 870 (1994) (SAA). Furthermore, ''affirmative evidence of bad faith on the part of a respondent is not required before the Department may make an adverse inference.'' *See Antidumping Duties; Countervailing Duties,* 62 FR 27355 (May 19, 1997). Although the Department provided respondents with notice of the consequences of failure to respond adequately to the questionnaires in this case, Noviant AB has failed to respond to sections B and C of the questionnaire. This constitutes a failure on the part of Noviant AB to cooperate to the best of its ability to comply with a request for information by the Department within the meaning of section 776 of the Act. Therefore, the Department has preliminarily determined that in selecting from among the facts otherwise available, an adverse inference is warranted. *See, e.g., Notice of Final Determination of Sales at Less than Fair Value: Circular Seamless Stainless Steel Hollow Products from Japan,* 65 FR 42985, 42986 (July 12, 2000) (the Department applied total adverse facts available (AFA) where respondent failed to respond to the antidumping questionnaires).

C. Selection and Corroboration of Information Used as Facts Available

Where the Department applies AFA because a respondent failed to cooperate by not acting to the best of its ability to comply with a request for information, section 776(b) of the Act authorizes the Department to rely on information derived from the petition, a final determination, a previous administrative review, or other information placed on the record. *See* also 19 CFR 351.308(c); SAA at 829–831. In this case, because we are unable to calculate margins based on Noviant AB's own data and because an adverse inference is warranted, we have assigned to Noviant AB the margin alleged for Sweden in the petition, as recalculated in the initiation and described in detail below. *See* Initiation Notice.

When using facts otherwise available, section 776(c) of the Act provides that, when the Department relies on secondary information (such as the petition), it must, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal.

The SAA clarifies that ''corroborate'' means the Department will satisfy itself that the secondary information to be used has probative value. *See* SAA at 870. The Department's regulations state that independent sources used to corroborate such evidence may include, for example, published price lists, official import statistics and customs data, and information obtained from interested parties during the particular investigation. *See* 19 CFR 351.308(d) and SAA at 870. To corroborate secondary information, the Department will, to the extent practicable, examine the reliability and relevance of the information used.

For the purposes of this investigation, to the extent appropriate information was available, we reviewed the adequacy and accuracy of the information in the petition during our pre-initiation analysis. *See* Import Administration Investigation AD Initiation Checklist, at 6 (June 29, 2004) (Initiation Checklist).

For this preliminary determination, we examined evidence supporting the calculations in the petition to determine the probative value of the margins in the petition for use as AFA. In accordance with section 776(c) of the Act, to the extent practicable, we examined the key elements of the export price (EP) and NV calculations on which the margins in the petition were based. We find that the estimated margin set forth in the initiation has probative value. *See* Memorandum to the File from Helen M. Kramer, International Trade Compliance Analyst, Re: Preliminary Determination in the Antidumping Investigation of Purified Carboxymethylcellulose (CMC) from Sweden: Total Facts Available Corroboration Memorandum, dated December 16, 2004 (Corroboration Memo). Therefore, in selecting AFA with respect to Noviant AB, we have applied the margin rate of 25.29 percent, the highest estimated dumping margin set forth in the notice of initiation, which is the margin alleged in the petition adjusted by the Department for currency conversion. *See Initiation Notice,* 68 FR 57667.

All Others Rate

Section 735(c)(5)(B) of the Act provides that, where the estimated weighted-average dumping margins established for all exporters and producers individually investigated are zero or *de minimis* margins, or are determined entirely under section 776 of the Act, the Department may use any reasonable method to establish the estimated ''all others'' rate for exporters and producers not individually investigated. This provision contemplates that the Department may weight-average margins other than the

zero, *de minimis*, or facts available margins to establish the ''all others'' rate. When the data do not permit weight-averaging such other margins, the Statement of Administrative Action (SAA) provides that the Department may use any other reasonable methods. *See* the SAA accompanying the URAA, H.R. Rep. No. 103–316 at 873 (1994). Because the petition contained only one estimated dumping margin, there are no additional estimated margins available with which to create the ''all others'' rate. Therefore, we are using the initiation margin of 25.29 percent as the ''all others'' rate. *See Notice of Final Determination of Sales at Less Than Fair Value: Ferrovanadium from the Republic of South Africa,* 67 FR 71136 (November 29, 2002).

Suspension of Liquidation

In accordance with section 733(d) of the Act, we are directing U.S. Customs and Border Protection (CBP) to suspend liquidation of all entries of purified CMC from Sweden that are entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**. We will instruct CBP to require a cash deposit or the posting of a bond equal to the weighted-average amount by which the NV exceeds the U.S. price, as indicated in the chart below. These suspension-of-liquidation instructions will remain in effect until further notice. The weighted-average dumping margins are as follows:

Manufacturer/exporter	Weighted-average margin (percent)
Noviant AB	25.29
All Others	25.29

International Trade Commission Notification

In accordance with section 733(f) of the Act, we have notified the Commission of our preliminary determination of sales at LTFV. If our final antidumping determination is affirmative, the Commission will determine whether the imports covered by that determination are materially injuring, or threatening material injury to, the U.S. industry. The deadline for that determination would be the later of 120 days after the date of this preliminary determination or 45 days after the date of our final determination.

Public Comment

Case briefs for this investigation must be submitted no later than 30 days after the publication of this notice. Rebuttal briefs must be filed within five days after the deadline for submission of case briefs. A list of authorities used, a table of contents, and an executive summary of issues should accompany any briefs submitted to the Department. Executive summaries should be limited to five pages total, including footnotes. Further, the Department respectfully requests that all parties submitting written comments also provide the Department with an additional copy of the public version of any such comments on diskette.

Section 774 of the Act provides that the Department will hold a hearing to afford interested parties an opportunity to comment on arguments raised in case or rebuttal briefs, provided that such a hearing is requested by an interested party. If a request for a hearing is made in an investigation, the hearing normally will be held two days after the deadline for submission of the rebuttal briefs, at the U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Parties should confirm by telephone the time, date, and place of the hearing 48 hours before the scheduled time.

Interested parties who wish to request a hearing, or to participate if one is requested, must submit a written request within 30 days of the publication of this notice. Requests should specify the number of participants and provide a list of the issues to be discussed. Oral presentations will be limited to issues raised in the briefs. As noted above, the Department will make its final determination within 135 days after the date of the publication of the preliminary determination.

This determination is issued and published pursuant to sections 733(f) and 777(i)(1) of the Act.

Dated: December 16, 2004.

James J. Jochum,

Assistant Secretary for Import Administration.

[FR Doc. E4–3802 Filed 12–23–04; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–405–803]

Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Purified Carboxymethylcellulose From Finland

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

SUMMARY: The Department of Commerce (the Department) preliminarily determines that purified carboxymethylcellulose (CMC) from Finland is being sold, or is likely to be sold, in the United States at less than fair value (LTFV), as provided in section 733 of the Tariff Act of 1930, as amended (the Tariff Act). The estimated margins of sales at LTFV are shown in the Suspension of Liquidation section of this notice.

EFFECTIVE DATE: December 27, 2004.

FOR FURTHER INFORMATION CONTACT: Brian J. Sheba at (202) 482–0145 or Robert M. James at (202) 482–0649, AD/CVD Operations, Office 7, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Background

On June 9, 2004, the Department of Commerce (the Department) received a petition for the imposition of antidumping duties on purified CMC from Finland, Mexico, the Netherlands, and Sweden, filed in the proper form by Aqualon Company (Aqualon or petitioner), a division of Hercules Incorporated. *See* Petition for the Imposition of Antidumping Duties on Imports of Purified Carboxymethylcellulose (CMC) from Finland, Mexico, the Netherlands, and Sweden (Petition). The Department initiated the antidumping investigation of purified CMC from Finland, Mexico, the Netherlands, and Sweden on June 29, 2004. *See Notice of Initiation of Antidumping Investigations: Purified Carboxymethylcellulose (CMC) from Finland, Mexico, the Netherlands, and Sweden,* 69 FR 40617 (July 6, 2004) (*Initiation Notice*). Since the initiation of this investigation, the following events have occurred.

On July 23, 2004, the International Trade Commission (the Commission) preliminarily determined that there is a reasonable indication that an industry in the United States is materially injured by reason of imports of purified CMC from Finland, Mexico, the Netherlands, and Sweden that are alleged to be sold in the United States at LTFV. *See Purified Carboxymethylcellulose from Finland, Mexico, the Netherlands, and Sweden,* 69 FR 45851 (July 30, 2004).

On July 29, 2004, the Department issued Sections A, B, and C of the antidumping questionnaire [1] to Noviant

[1] Section A of the questionnaire requests general information concerning a company's corporate

CMC OY of Finland (Noviant OY), the sole respondent in this investigation, noting that Appendix V concerning model match criteria was not enclosed. The Department stated that it would serve all parties with a copy of the proposed model match criteria in the near future. We did so on August 18, 2004.

Petitioner filed comments on the Department's proposed model match criteria on July 30, 2004, August, 11, 2004, and August 19, 2004. The respondent submitted rebuttal comments on August 9, 2004 and August 25, 2004. The Department issued its final Appendix V to the questionnaire (model match criteria) on August 30, 2004.

On September 9, 2004, Noviant OY submitted its Section A questionnaire response. On September 15, 2004, Noviant OY, Noviant BV (the Netherlands), and Noviant AB (Sweden) (collectively, the Noviant Group Companies) requested a one-week extension to file the Section B and C responses. On September 17, 2004, the Department granted the Noviant Group Companies' request. On September 24, 2004, Noviant OY notified the Department that it would not be submitting a response to Sections B and C of the Department's questionnaire. Noviant OY cited resource and staff limitations as the reason they could not participate in each parallel proceeding.

On October 25, 2004, the petitioner requested a postponement of the preliminary determination in this investigation. On November 3, 2004, the Department published a **Federal Register** notice postponing the deadline for the preliminary determination until December 16, 2004. *See Purified Carboxymethylcellulose from Finland: Notice of Postponement of Preliminary Determinations of Antidumping Investigations*, 69 FR 64030 (November 3, 2004).

On October 12, 2004, the petitioner requested that the Department impose total adverse facts available (AFA) based on the respondent's failure to cooperate fully with the Department in this proceeding. The petitioner filed amended AFA calculations and arguments on November 2, 2004, and December 2, 2004. On November 24, 2004, and December 13, 2004, the respondent filed arguments opposing the use of the petitioner's AFA methodology and, as an alternative argument, proffered its own calculations. *See* the Application of Adverse Inferences for Facts Available Section of this notice.

Postponement of Final Determination and Extension of Provisional Measures

Section 735(a)(2) of the Act provides that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination if, in the event of an affirmative preliminary determination, a request for such postponement is made by exporters who account for a significant proportion of exports of the subject merchandise, or in the event of a negative preliminary determination, a request for such postponement is made by the petitioners. Section 351.210(e)(2) of the Department's regulations requires that requests by respondents for postponement of a final determination be accompanied by a request for an extension of the provisional measures from a four-month period to not more than six months.

On November 19, 2004, on behalf of Noviant OY, Noviant BV and Noviant AB, the Noviant Group Companies requested that, in the event of an affirmative preliminary determination in this investigation, the Department postpone its final determination. Noviant also included a request to extend the provisional measures from a four-month period to not more than six months. In addition, on November 19, 2004, petitioners requested that, in the event of a negative determination or *de minimis* against respondents' imports, that the Department postpone the deadline for its final determination until a date not later than the 135th day after the date on which the Department will have published its notice of preliminary determination.

Accordingly, because we have made an affirmative preliminary determination in this case, and the requesting parties account for a significant portion of exports of the subject merchandise, we are postponing the final determination until not later than 135 days after the date of the publication of the preliminary determination and are extending the provisional measures accordingly.

Period of Investigation

The POI is April 1, 2003, through March 31, 2004. *See* 19 CFR 351.204(b)(1).

Scope Comments

In accordance with the preamble to the Department's regulations (*see Antidumping Duties; Countervailing Duties*, 62 FR 27296, 27323 (May 19, 1997)), we set aside a period of time for parties to raise issues regarding product coverage of the scope of the investigation and encouraged all parties to submit comments on product coverage within 20 calendar days of publication of the Initiation Notice (*See* 68 FR 40618). Comments were not submitted for the record of this investigation.

Scope of Investigations

For purposes of these investigations, the products covered are all purified carboxymethylcellulose (CMC), sometimes also referred to as purified sodium CMC, polyanionic cellulose, or cellulose gum, which is a white to off-white, non-toxic, odorless, biodegradable powder, comprising sodium carboxymethylcellulose that has been refined and purified to a minimum assay of 90 percent. Purified CMC does not include unpurified or crude CMC, CMC Fluidized Polymer Suspensions, and CMC that is cross-linked through heat treatment. Purified CMC is CMC that has undergone one or more purification operations which, at a minimum, reduce the remaining salt and other by-product portion of the product to less than ten percent.

The merchandise subject to these investigations is classified in the Harmonized Tariff Schedule of the United States (HTSUS) at subheading 3912.31.00. This tariff classification is provided for convenience and customs purposes; however, the written description of the scope of these investigations is dispositive.

Facts Available

For the reasons discussed below, we determine that the use of adverse facts available is appropriate for the preliminary determination with respect to Noviant OY.

A. Use of Facts Available

Section 776(a)(2) of the Tariff Act provides that, if an interested party withholds information requested by the Department, fails to provide such information by the deadline or in the form or manner requested, significantly impedes a proceeding, or provides information which cannot be verified, the Department shall use, subject to

structure and business practices, the merchandise under investigation, and the manner in which it sells that merchandise in all of its markets. Section B requests a complete listing of all of the company's home market sales of foreign like product or, if the home market is not viable, of sales of the foreign like product 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 the company's U.S. sales of subject merchandise. Section D requests information on the cost of production of the foreign like product and the constructed value of the merchandise under investigation. Section E requests information on further manufacturing.

sections 782(d) and (e) of the Tariff Act, facts otherwise available in reaching the applicable determination. Section 782(d) of the Tariff Act provides that if the Department determines that a response to a request for information does not comply with the Department's request, the Department shall promptly inform the responding party and provide an opportunity to remedy the deficient submission. Section 782(e) of the Tariff Act further states that the Department shall not decline to consider submitted information if all of the following requirements are met: (1) The information is submitted by the established deadline; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability; and (5) the information can be used without undue difficulties.

In this case, Noviant OY has failed to provide pertinent information requested by the Department that is necessary to properly calculate antidumping margin for its preliminary determination. Specifically, Noviant OY failed to provide the following requested information, all of which is necessary to complete the Department's calculations: (1) Department questionnaire Section B, related to home market sales and expenses, and (2) Department questionnaire Section C, related to U.S. market sales and expenses.

Thus, in reaching our preliminary determination, pursuant to sections 776(a)(2)(A), (B), and (C) of the Tariff Act, we have based Noviant OY's dumping margin on facts otherwise available.

B. Application of Adverse Inferences for Facts Available

In applying the facts otherwise available, section 776(b) of the Tariff Act provides that the Department may use an inference adverse to the interests of a party that has failed to cooperate by not acting to the best of its ability to comply with the Department's requests for information. *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value and Final Negative Critical Circumstances: Carbon and Certain Alloy Steel Wire Rod from Brazil*, 67 FR 55792, 55794–96 (August 30, 2002). *Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Bottle-Grade Polyethylene Terephthalate(PET) Resin From Thailand*, 69 FR 62850 (October 28, 2004), *Notice of Final Determination of Sales at Less Than Fair Value: Polyethylene Retail Carrier Bags From Thailand*, 69 FR 34122 (June 18, 2004), *Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Circular Welded Carbon-Quality Line Pipe From Mexico,* 69 FR 59892 (October 6, 2004). Adverse inferences are appropriate ''to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.'' *See Statement of Administrative Action* accompanying the Uruguay Round Agreements Act, H. Doc. No. 103–316, at 870 (1994) (SAA). Affirmative evidence of bad faith, or willfulness, on the part of a respondent is not required before the Department may make an adverse inference. *See Nippon Steel Corp.* v. *United States*, 337 F.3d 1373, 1383–84 (Fed. Cir. 2003). Although the Department provided the respondent with notice of the consequences of failure to adequately respond to the questionnaires in this case, Noviant OY failed to respond to Sections B and C of the questionnaire. This constitutes a failure on the part of Noviant OY to cooperate to the best of its ability to comply with a request for information by the Department within the meaning of section 776(b) of the Tariff Act. Therefore, the Department has preliminarily determined that in selecting from among the facts otherwise available, an adverse inference is warranted. *See,* e.g., *Notice of Final Determination of Sales at Less than Fair Value: Circular Seamless Stainless Steel Hollow Products from Japan,* 65 FR 42985, 42986 (July 12, 2000) (the Department applied total adverse facts available (AFA) where the respondent failed to respond to the antidumping questionnaires).

C. Selection and Corroboration of Information Used as Facts Available

Where the Department applies AFA because a respondent failed to cooperate by not acting to the best of its ability to comply with a request for information, section 776(b) of the Tariff Act authorizes the Department to rely on information derived from the petition, a final determination, a previous administrative review, or other information placed on the record. *See also* 19 CFR 351.308(c); SAA at 829–831. In this case, because we are unable to calculate margins based on Noviant OY's own data and because an adverse inference is warranted, we have assigned to Noviant OY the margin alleged for Finland in the petition, as recalculated in the initiation and described in detail below. *See* Initiation Notice.

When using facts otherwise available, section 776(c) of the Tariff Act provides that, when the Department relies on secondary information (such as the petition), it must, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal.

The SAA clarifies that ''corroborate'' means the Department will satisfy itself that the secondary information to be used has probative value. *See* SAA at 870. The Department's regulations state independent sources used to corroborate such evidence may include, for example, published price lists, official import statistics and customs data, and information obtained from interested parties during the particular investigation. *See* 19 CFR 351.308(d) and SAA at 870.

It is the Department's practice to use the highest calculated rate from the petition in an investigation when a respondent fails to act to the best of its ability to provide the necessary information and there are no other respondents. As discussed in *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, from Japan; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews,* 61 FR 57391, 57392 (November 6, 1996) (TRBs), to corroborate secondary information, the Department will, to the extent practicable, examine the reliability and relevance of the information used.

As noted above in the case history, the petitioner filed comments for an alternative AFA methodology. Noting the initiation rate for Noviant OY was conservative, the petitioner proposed an AFA margin based on cost of production (COP) and constructed value (CV) information gathered from the Noviant OY's financial statements which were included in its Section A questionnaire response.

The respondent argued that the petitioner's alternative AFA calculations were without merit. In a submission filed just three days before the signature date for this preliminary determination, respondent proposed its own alternative AFA calculation based on the COP and CV information available on the record.

The Department intends to evaluate all of the parties' comments on this issue in light of the information and argument placed recently on the record. Therefore, for purposes of this preliminary determination, and consistent with our normal practice, we are relying on the initiation margin for

purposes of AFA. Should we choose an alternative basis for AFA subsequent to this preliminary determination, we will provide the parties an opportunity to comment prior to the final determination.

For the purposes of this investigation, to the extent appropriate information was available, we reviewed the adequacy and accuracy of the information in the petition during our pre-initiation analysis and for this preliminary determination. *See* ''Import Administration Investigation AD Initiation Checklist,'' at 6 (June 29, 2004) (Initiation Checklist). Also, as discussed below, we examined evidence supporting the calculations in the petition to determine the probative value of the margins in the petition for use as AFA for this preliminary determination. In accordance with section 776(c) of the Tariff Act, to the extent practicable, we examined the key elements of the export price (EP) and normal value (NV) calculations on which the margins in the petition were based. *See* Memorandum from Brian Sheba to Richard Weible, Re: Corroboration of Data Contained in the Petition for Assigning Facts Available Rates, dated December 16, 2004 (Corroboration Memo).

1. Corroboration of Export Price

The petitioner based EP on a price obtained from a potential U.S. customer of purified CMC produced by Noviant OY's plant in Finland. The petitioner calculated net U.S. price by deducting U.S. inland freight expense, ocean freight and marine insurance, documentation fees, port fees, U.S. customs duties, intra-European freight, and foreign inland freight expense. We compared the U.S. market price quotes with official U.S. import statistics and found the prices used by the petitioner to have probative value. *See id.*

2. Corroboration of Normal Value

To calculate home market NV, the petitioner met with representatives of a Finnish customer during the POI. During the course of that meeting, the customer stated the current Noviant OY price on a delivered basis. The petitioner's only adjustment to NV is foreign inland freight expense to account for the shipment of the subject merchandise from Noviant OY's plant in Aanekoski, Finland to the customer's plant in Finland. The petitioner obtained this freight expense through a price quote from an independent shipper. To corroborate the petitioner's NV calculations, we compared the prices and expenses used to the source documents upon which the petitioner's methodology was based as well as information submitted in Noviant OY's questionnaire response.

Therefore, based on our efforts, described above, to corroborate information contained in the petition, and in accordance with section 776(c) of the Tariff Act, we consider the highest margin in the petition to be corroborated, to the extent practicable, for purposes of this preliminary determination.

Accordingly, in selecting AFA with respect to Noviant OY, we have applied the margin rate of 6.65 percent, which is the margin alleged in the petition as adjusted by the Department for currency conversion. *See Initiation Notice,* 68 FR 57667.

All Others Rate

Section 735(c)(5)(B) of the Tariff Act provides that, where the estimated weighted-average dumping margins established for all exporters and producers individually investigated are zero or *de minimis* margins, or are determined entirely under section 776 of the Tariff Act, the Department may use any reasonable method to establish the estimated ''all others'' rate for exporters and producers not individually investigated. This provision contemplates that the Department may weight-average margins other than the zero, *de minimis*, or facts available margins to establish the ''all others'' rate. When the data do not permit weight-averaging such other margins, the Statement of Administrative Action (SAA) provides that the Department may use any other reasonable methods. *See* SAA at 873 (1994). Because the petition contained only one estimated dumping margin, there are no additional estimated margins available with which to calculate the ''all others'' rate. Therefore, we are using the initiation margin of 6.65 percent as the ''all others'' rate. *See Notice of Final Determination of Sales at Less Than Fair Value: Ferrovanadium from the Republic of South Africa,* 67 FR 71136 (November 29, 2002).

Suspension of Liquidation

In accordance with section 733(d) of the Tariff Act, we are directing U.S. Customs and Border Protection (CBP) to suspend liquidation of all entries of purified CMC from Finland that are entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**. We will instruct CBP to require a cash deposit or the posting of a bond equal to the weighted-average amount by which the NV exceeds the U.S. price, as indicated in the chart below. These suspension-of-liquidation instructions will remain in effect until further notice. The weighted-average dumping margins are as follows:

Manufacturer/exporter	Weighted-average margin (percent)
Noviant OY	6.65
All Others	6.65

International Trade Commission Notification

In accordance with section 733(f) of the Tariff Act, we have notified the Commission of our preliminary determination of sales at less than fair value. If our final antidumping determination is affirmative, the Commission will determine whether the imports covered by that determination are materially injuring, or threatening material injury to, the U.S. industry. The deadline for the Commission's determination would be the later of 120 days after the date of this preliminary determination or 45 days after the date of our final determination.

Public Comment

Case briefs for this investigation must be submitted no later than 30 days after the publication of this notice. Rebuttal briefs must be filed within five days after the deadline for submission of case briefs. A list of authorities used, a table of contents, and an executive summary of issues should accompany any briefs submitted to the Department. Executive summaries should be limited to five pages total, including footnotes. Further, the Department respectfully requests that all parties submitting written comments also provide the Department with an additional copy of the public version of any such comments on diskette.

Section 774 of the Act provides that the Department will hold a hearing to afford interested parties an opportunity to comment on arguments raised in case or rebuttal briefs, provided that such a hearing is requested by an interested party. If a request for a hearing is made in an investigation, the hearing normally will be held two days after the deadline for submission of the rebuttal briefs, at the U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Parties should confirm by telephone the time, date, and place of the hearing 48 hours before the scheduled time.

Interested parties who wish to request a hearing, or to participate if one is requested, must submit a written

request within 30 days of the publication of this notice. Requests should specify the number of participants and provide a list of the issues to be discussed. Oral presentations will be limited to issues raised in the briefs. As noted above, the Department will make its final determination within 135 days after the date of the publication of the preliminary determination.

This determination is issued and published pursuant to sections 733(f) and 777(i)(1) of the Act.

Dated: December 16, 2004.

James J. Jochum,

Assistant Secretary for Import Administration.

[FR Doc. E4–3803 Filed 12–22–04; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

(A–122–838; C–122–839)

Notice of Correction to Notice of Final Results of Antidumping Duty Administrative Review and Notice of Final Results of Antidumping Duty Changed Circumstances Review; and Notice of Correction to Notice of Final Results of Countervailing Duty Administrative Review and Rescission of Certain Company–Specific Reviews: Certain Softwood Lumber Products from Canada

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

EFFECTIVE DATE: December 13, 2004

FOR FURTHER INFORMATION CONTACT: James Terpstra (for CVD) or Constance Handley (for AD) at (202) 482–3965 and (202) 482–0631, respectively, AD/CVD Operations, Import Administration, International Trade Administration, U.S. Department of Commerce, Room 4012, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230.

CORRECTION:

On December 13, 2004, the Department of Commerce (the Department) issued its final results of both the antidumping (AD) and countervailing duty (CVD) administrative reviews of the orders of certain softwood lumber products (subject merchandise) from Canada for the period May 22, 2002, through March 31, 2003 in the CVD review and May 22, 2002, through April 30, 2003, in the AD review. Subsequent to the issuance of the final results, we identified an inadvertent error in both Notices.

In the ''Assessment'' section of the AD review Notice, the Department indicated that it would ''issue appropriate assessment instructions directly to CBP within 15 days of publication of these final results of review.'' In the ''Final Results of Review ''section of the CVD review Notice, the Department indicated that it would ''instruct CBP, within 15 days of publication of the final results of this review, to liquidate shipments of certain softwood lumber products from Canada entered, or withdrawn from warehouse ... .'' The ''within 15 days of publication'' description is incorrect in both Notices. Section19 CFR 356.8 of the applicable regulations provides that the Department shall not order liquidation until the ''forty–first day after the date of publication of the notice ...'' following an administrative review of merchandise exported from Canada or Mexico. Accordingly, both notices should be corrected to indicate that the Department will send assessment instructions to CBP ''on or after the 41st day after publication.''

These corrections are issued and published in accordance with sections 751(h) and 777(i) of the Tariff Act of 1930, as amended.

Dated: December 17, 2004.

James J. Jochum

Assistant Secretary for Import Administration.

[FR Doc. E4–3823 Filed 12–23–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF COMMERCE

International Trade Administration

(C–408–046, A–423–077, A–427–078, A–428–082)

Sugar from the European Union, Belgium, France and Germany; Extension of Time Limits for the Preliminary and Final Results of Sunset Reviews of Countervailing and Antidumping Duty Orders

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

EFFECTIVE DATE: December 27, 2004.

FOR FURTHER INFORMATION CONTACT: Martha Douthit or Hilary Sadler, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street & Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–5050 and (202) 482–4340, respectively.

Background:

Based on adequate responses from the domestic and respondent interested parties, the Department of Commerce (''the Department'') is conducting a full sunset review, with respect to the countervailing duty (''CVD'') order on sugar from the European Union (''EU''), to determine whether revocation of the CVD order would lead to continuation or recurrence of a countervailing net subsidy. Based on adequate domestic interest, and inadequate respondent responses, the Department is conducting expedited sunset reviews of the antidumping duty (''AD'') orders on sugar from Belgium, France and Germany. The preliminary results of the full sunset review of the CVD order on sugar from the EU is currently scheduled for

December 20, 2004. The final results of the expedited sunset reviews of the AD orders on sugar from Belgium, France, and Germany are currently scheduled for December 30, 2004.

Extension of Preliminary and Final Results of Reviews:

In accordance with section 751(c)(5)(B) of the Tariff Act of 1930, as amended (''the

Act''), the Department may extend the period of time for making its determination by not more than 90 days, if it determines that the review is extraordinarily complicated. As set forth in 751(c)(5)(C)(v) of the Act, the Department may treat a sunset review as extraordinarily complicated if it is a review of a transition order, as is the case in these proceedings. Therefore, the Department has determined, pursuant to section 751(c)(5)(C)(v) of the Act, that the second sunset review of the CVD order on sugar from the EU and the second sunset reviews of the AD orders on sugar from Belgium, France and Germany are extraordinarily complicated and require additional time for the Department to complete its analysis. As a result, the Department will extend the deadlines in these proceedings and intends to issue the preliminary results of the full sunset review of the CVD order on sugar from the EU on or about March 20, 2005, and the final results of the expedited sunset reviews of the AD orders on sugar from Belgium, France and Germany on or about March 30, 2005, in accordance with section 751(c)(5)(B).

Dated: December 17, 2004.

Barbara E. Tillman,

Acting Deputy Assistant Secretary for Import Administration.

[FR Doc. E4–3820 Filed 12–23–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

[Docket No.: 041213349–4349–01]

Precision Measurement Grants Program; Availability of Funds

AGENCY: National Institute of Standards and Technology, Commerce.

ACTION: Notice.

SUMMARY: The National Institute of Standards and Technology (NIST) announces that the Precision Measurement Grants Program is soliciting applications for financial assistance for FY 2005. The Precision Measurement Grants Program is seeking proposals for significant research in the field of fundamental measurement or the determination of fundamental constants.

DATES: Abbreviated proposals must be received at the address listed below no later than 5 p.m. Eastern Standard Time on February 4, 2005. Proposals received after this deadline will be returned with no further consideration. Finalists will be selected by approximately March 24, 2005, and will be requested to submit full proposals to NIST. All full proposals, paper and electronic, must be received no later than 5 p.m. Eastern Standard Time on May 6, 2005.

ADDRESSES: Abbreviated proposals and paper applications must be submitted to: Dr. Peter J. Mohr; Manager, NIST Precision Measurement Grants Program; National Institute of Standards and Technology; 100 Bureau Drive, Stop 8420; Gaithersburg, MD 20899–8420.

FOR FURTHER INFORMATION CONTACT: For complete information about this program and instructions for applying by paper or electronically, read the Federal Funding Opportunity (FFO) Notice at *http://www.grants.gov.* A paper copy of the FFO may be obtained by calling (301) 975–6328. Technical questions should be addressed to: Dr. Peter J. Mohr at the address listed in the Addresses section above, or at Tel: (301) 975–3217; E-mail: *mohr@nist.gov.* Grants Administration questions should be addressed to: Grants and Agreements Management Division; National Institute of Standards and Technology; 100 Bureau Drive, Stop 3580; Gaithersburg, MD 20899–3580; Tel: (301) 975–6328. For assistance with using Grants.gov contact *support@grants.gov.*

SUPPLEMENTARY INFORMATION:

Catalog of Federal Domestic Assistance Name and Number: Measurement and Engineering Research and Standards—11.609.

Program Description: As part of its research program, since 1970 NIST has awarded Precision Measurement Grants primarily to universities and colleges so that faculty may conduct significant research in the field of fundamental measurement or the determination of fundamental constants. NIST sponsors these grants and cooperative agreements primarily to encourage basic, measurement-related research in universities and colleges and other research laboratories and to foster contacts between NIST scientists and those faculty members of academic institutions and other researchers who are actively engaged in such work. The Precision Measurement Grants are also intended to make it possible for researchers to pursue new ideas for which other sources of support may be difficult to find. There is some latitude in research topics that will be considered under the Precision Measurement Grants Program. The key requirement is that the proposed project support NIST's ongoing work in the field of basic measurement science.

Funding Availability: Applicants should propose multi-year projects for up to three years at no more than $50,000 per year. NIST anticipates spending $100,000 this year for two new grants at $50,000 each for the first year of the research projects. NIST may award both, one, or neither of these new awards. Second and third year funding will be at the discretion of NIST, based on satisfactory performance, continuing relevance to program objectives, and the availability of funds.

Statutory Authority: The authority for the Precision Measurement Grants Program is as follows: As authorized by 15 U.S.C. 272 (b) and (c), NIST conducts directly, and supports through grants, a basic and applied research program in the general area of fundamental measurement and the determination of fundamental constants of nature.

Eligibility: Eligible applicants are institutions of higher education; hospitals; non-profit organizations; commercial organizations; state, local and Indian tribal governments; foreign governments; organizations under the jurisdiction of foreign governments; international organizations; and Federal agencies with appropriate legal authority.

Review and Selection Process: All abbreviated proposals and full applications received in response to this announcement will be reviewed to determine whether or not they are complete and responsive to the scope of the stated objectives for each program. Incomplete or non-responsive abbreviated proposals and full applications will not be reviewed for technical merit. The Program will retain one copy of each non-responsive abbreviated proposal and full application for three years for record keeping purposes. The remaining copies will be destroyed.

To simplify the proposal writing and evaluation process, the following selection procedure will be used:

Applicants will initially submit abbreviated proposals, containing a description of the proposed project, including sufficient information to address the evaluation criteria, with a total length of no more than five (5) double spaced pages, to the mailing address given above in the **ADDRESSES** section. These proposals will be screened to determine whether they address the requirements outlined in this notice. Proposals that do not meet those requirements will not be considered further. Eight independent, objective individuals, at least half of whom are NIST employees, and who are knowledgeable about the scientific areas that the program addresses will conduct a technical review of each proposal, based on the evaluation criteria described in the Evaluation Criteria section for this program. The proposals will then be ranked based on the average of the reviewers' rankings. If non-Federal reviewers are used, the reviewers may discuss the proposals with each other, but the ranking will be determined on an individual basis, not as a consensus.

The Chief of the Atomic Physics Division of the Physics Laboratory, the selecting official, will then select approximately four to eight finalists. In selecting finalists, the selecting official will take into consideration the results of the reviewers'evaluations, including rank, and relevance to the program objectives described above in the Program Description section. Applicants not selected as finalists will be notified in writing.

Finalists will then be asked to submit full proposals containing a description of the proposed project, including sufficient information to address the evaluation criteria, with a length of no more than ten (10) double spaced pages in addition to the federally mandated forms and certifications, to the mailing address given above in the **ADDRESSES** section. The same independent reviewers will then evaluate the detailed proposals based on the same evaluation criteria, and the proposals will be ranked as previously described. In selecting proposals that will be recommended for funding, the selecting official will take into consideration the results of the reviewers' evaluations,

including rank, and relevance to the program objectives described in the Program Description and Objectives section for this program.

The final approval of selected applications and award of grants will be made by the NIST Grants Officer based on compliance with application requirements as published in this notice, compliance with applicable legal and regulatory requirements, compliance with Federal policies that best further the objectives of the Department of Commerce, and whether the recommended applicants appear to be responsible.

Applicants may be asked to modify objectives, work plans, or budgets and provide supplemental information required by the agency prior to award.

The decision of the Grants Officer is final.

Unsuccessful applicants will be notified in writing. The Program will retain one copy of each unsuccessful application for three years for record keeping purposes. The remaining copies will be destroyed.

Evaluation Criteria: The evaluation criteria to be used in evaluating the abbreviated application proposals and full proposals are:

1. The importance of the proposed research—Does it have the potential of answering some currently pressing question or of opening up a whole new area of activity?

2. The relationship of the proposed research to NIST's ongoing work—Will it support one of NIST's current efforts to develop a new or improved fundamental measurement method or physical standard, test the basic laws of physics, or provide an improved value for a fundamental constant?

3. The feasibility of the research and the potential impact of the grant—Is it likely that significant progress can be made in a three year time period with the funds and personnel available and that the funding will enable work that would otherwise not be done with existing or potential funding?

4. The qualifications of the applicant—Does the educational and employment background and the quality of the research, based on recent publications, of the applicant indicate that there is a high probability that the proposed research will be carried out successfully?

Each of these factors is given equal weight in the evaluation process.

Cost Share Requirements: The Precision Measurement Grants Program does not require any matching funds.

The Department of Commerce Pre-Award Notification Requirements for Grants and Cooperative Agreements: The Department of Commerce Pre-Award Notification Requirements for Grants and Cooperative Agreements contained in the **Federal Register** notice of October 1, 2001 (66 FR 49917), as amended by the **Federal Register** notice published on October 30, 2002 (67 FR 66109), are applicable to this announcement. On the form SF–424, the applicant's 9-digit Dun and Bradstreet Data Universal Numbering System (DUNS) number must be entered in the Applicant Identifier block (68 FR 38402).

Collaborations with NIST Employees: All applications should include a description of any work proposed to be performed by an entity other than the applicant, and the cost of such work should ordinarily be included in the budget.

If an applicant proposes collaboration with NIST, the statement of work should include a statement of this intention, a description of the collaboration, and prominently identify the NIST employee(s) involved, if known. Any collaboration by a NIST employee must be approved by appropriate NIST management and is at the sole discretion of NIST. Prior to beginning the merit review process, NIST will verify the approval of the proposed collaboration. Any unapproved collaboration will be stricken from the proposal prior to the merit review.

Use of NIST Intellectual Property: If the applicant anticipates using any NIST-owned intellectual property to carry out the work proposed, the applicant should identify such intellectual property. This information will be used to ensure that no NIST employee involved in the development of the intellectual property will participate in the review process for that competition. In addition, if the applicant intends to use NIST-owned intellectual property, the applicant must comply with all statutes and regulations governing the licensing of Federal government patents and inventions, described at 35 U.S.C. sec. 200–212, 37 CFR part 401, 15 CFR 14.36, and in section 20 of the Department of Commerce Pre-Award Notification Requirements, 66 FR 49917 (2001), as amended by the **Federal Register** notice published on October 30, 2002 (67 FR 66109). Questions about these requirements may be directed to the Counsel for NIST, 301–975–2803.

Any use of NIST-owned intellectual property by a proposer is at the sole discretion of NIST and will be negotiated on a case-by-case basis if a project is deemed meritorious. The applicant should indicate within the statement of work whether it already has a license to use such intellectual property or whether it intends to seek one.

If any inventions made in whole or in part by a NIST employee arise in the course of an award made pursuant to this notice, the United States government may retain its ownership rights in any such invention. Licensing or other disposition of NIST's rights in such inventions will be determined solely by NIST, and include the possibility of NIST putting the intellectual property into the public domain.

Paperwork Reduction Act: The standard forms in the application kit involve a collection of information subject to the Paperwork Reduction Act. The use of Standard Forms 424, 424A, 424B, SF–LLL, and CD–346 have been approved by OMB under the respective Control Numbers 0348–0043, 0348–0044, 0348–0040, 0348–0046, and 0605–0001.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection subject to the requirements of the Paperwork Reduction Act, unless that collection of information displays a currently valid OMB Control Number.

Research Projects Involving Human Subjects, Human Tissue, Data or Recordings Involving Human Subjects: Any proposal that includes research involving human subjects, human tissue, data or recordings involving human subjects must meet the requirements of the Common Rule for the Protection of Human Subjects, codified for the Department of Commerce at 15 CFR part 27. In addition, any proposal that includes research on these topics must be in compliance with any statutory requirements imposed upon the Department of Health and Human Services (DHHS) and other federal agencies regarding these topics, all regulatory policies and guidance adopted by DHHS, FDA, and other Federal agencies on these topics, and all Presidential statements of policy on these topics.

On December 3, 2000, the U.S. Department of Health and Human Services (DHHS) introduced a new Federal-wide Assurance of Protection of Human Subjects (FWA). The FWA covers all of an institution's Federally supported human subjects research, and eliminates the need for other types of Assurance documents. The Office for Human Research Protections (OHRP) has suspended processing of multiple

project assurance (MPA) renewals. All existing MPAs will remain in force until further notice. For information about FWAs, please see the OHRP Web site at *http://ohrp.osophs.dhhs.gov/humansubjects/assurance/fwas.htm.*

In accordance with the DHHS change, NIST will continue to accept the submission of human subjects protocols that have been approved by Institutional Review Boards (IRBs) possessing a current, valid MPA from DHHS. NIST also will accept the submission of human subjects protocols that have been approved by IRBs possessing a current, valid FWA from DHHS. NIST will not issue a single project assurance (SPA) for any IRB reviewing any human subjects protocol proposed to NIST.

On August 9, 2001, the President announced his decision to allow Federal funds to be used for research on existing human embryonic stem cell lines as long as prior to his announcement (1) the derivation process (which commences with the removal of the inner cell mass from the blastocyst) had already been initiated and (2) the embryo from which the stem cell line was derived no longer had the possibility of development as a human being. NIST will follow guidance issued by the National Institutes of Health at *http://ohrp.osophs.dhhs.gov/humansubjects/guidance/stemcell.pdf* for funding such research.

Research Projects Involving Vertebrate Animals: Any proposal that includes research involving vertebrate animals must be in compliance with the National Research Council's ''Guide for the Care and Use of Laboratory Animals'' which can be obtained from National Academy Press, 2101 Constitution Avenue, NW., Washington, DC 20055. In addition, such proposals must meet the requirements of the Animal Welfare Act (7 U.S.C. 2131 *et seq.*), 9 CFR parts 1, 2, and 3, and if appropriate, 21 CFR part 58. These regulations do not apply to proposed research using pre-existing images of animals or to research plans that do not include live animals that are being cared for, euthanized, or used by the project participants to accomplish research goals, teaching, or testing. These regulations also do not apply to obtaining animal materials from commercial processors of animal products or to animal cell lines or tissues from tissue banks.

Limitation of Liability: In no event will the Department of Commerce be responsible for proposal preparation costs if these programs fail to receive funding or are cancelled because of other agency priorities. Publication of this announcement does not oblige the agency to award any specific project or to obligate any available funds.

Executive Order 12866: This funding notice was determined to be not significant for purposes of Executive Order 12866.

Executive Order 13132 (Federalism): It has been determined that this notice does not contain policies with federalism implications as that term is defined in Executive Order 13132.

Executive Order 12372: Applications under this program are not subject to Executive Order 12372, ''Intergovernmental Review of Federal Programs.''

Administrative Procedure Act/Regulatory Flexibility Act: Notice and comment are not required under the Administrative Procedure Act (5 U.S.C. 553) or any other law, for rules relating to public property, loans, grants, benefits or contracts (5 U.S.C. 553 (a)). Because notice and comment are not required under 5 U.S.C. 553, or any other law, for notices relating to public property, loans, grants, benefits or contracts (5 U.S.C. 553(a)), a Regulatory Flexibility Analysis is not required and has not been prepared for this notice, 5 U.S.C. 601 *et seq.*

Dated: December 17, 2004.

Hratch G. Semerjian,

Acting Director, NIST.

[FR Doc. 04–28238 Filed 12–23–04; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

[Docket No.: 041213350–4350–01]

Summer Undergraduate Research Fellowships (SURF) Gaithersburg and Boulder Programs; Availability of Funds

AGENCY: National Institute of Standards and Technology, Commerce.

ACTION: Notice.

SUMMARY: The National Institute of Standards and Technology (NIST) announces that the 2005 Summer Undergraduate Research Fellowships (SURF) Gaithersburg and Boulder programs are soliciting applications for financial assistance for FY 2005.

SUPPLEMENTARY INFORMATION: *CFDA Name and Number:* Measurement and Engineering Research and Standards—11.609.

Program Description: The SURF Gaithersburg program is soliciting applications in the areas of Electronics and Electrical Engineering, Manufacturing Engineering, Chemical Science and Technology, Physics, Materials Science and Engineering, Building and Fire Research, and Information Technology.

The SURF Boulder program is soliciting applications in the areas of Electronics and Electrical Engineering, Chemical Science and Technology, Physics, Materials Science and Engineering, and Information Technology.

Applications for the Gaithersburg and Boulder programs are separate. Application to one program does not constitute application to the other, and applications will not be exchanged between the Gaithersburg and Boulder programs. If applicants wish to be considered at both sites, two separate applications must be submitted.

Both SURF programs will provide an opportunity for the NIST laboratories and the National Science Foundation (NSF) to join in a partnership to encourage outstanding undergraduate students to pursue careers in science and engineering. The programs will provide research opportunities for students to work with internationally known NIST scientists, to expose them to cutting-edge research and promote the pursuit of graduate degrees in science and engineering.

The NIST SURF Gaithersburg and Boulder Program Directors will work with appropriate department chairs, outreach coordinators, and directors of multi-disciplinary academic organizations to identify outstanding undergraduates (including graduating seniors) who would benefit from off-campus summer research in a world-class scientific environment.

EEEL, MEL, CSTL, PL, MSEL, BFRL, and ITL SURF Gaithersburg Programs

DATES: All SURF Gaithersburg Program applications, paper and electronic, must be received no later than 5 p.m. Eastern Standard Time on February 15, 2005.

ADDRESSES: For all SURF Gaithersburg Programs, paper applications must be submitted to: Ms. Anita Sweigert, Administrative Coordinator, National Institute of Standards and Technology, 100 Bureau Drive, Stop 8400, Gaithersburg, MD 20899–8400. Tel: (301) 975–4200, E-mail: *anita.sweigert@nist.gov.* Web site: *http://www.surf.nist.gov/surf2.htm.*

FOR FURTHER INFORMATION CONTACT: For complete information about this program and instructions for applying by paper or electronically, read the Federal Funding Opportunity Notice (FFO) at *http://www.grants.gov.* A paper copy of the FFO may be obtained by

calling (301) 975–6328. The Gaithersburg and Boulder SURF programs will publish separate FFOs on *http://www.grants.gov.* Program questions should be addressed to Ms. Anita Sweigert, Administrative Coordinator, National Institute of Standards and Technology, 100 Bureau Drive, Stop 8400, Gaithersburg, MD 20899–8400, Tel: (301) 975–4200, E-mail: *anita.sweigert@nist.gov.* The SURF Gaithersburg program Web site is: *http://www.surf.nist.gov/surf2.htm.* All grants related administration questions concerning this program should be directed to Joyce Brigham, NIST Grants and Agreements Management Division at (301) 975–6328 or *joyce.brigham@nist.gov,* or for assistance with using Grants.gov contact *support@grants.gov.*

Funding Availability

Funds budgeted for payment to students under these programs are stipends, not salary. The SURF Gaithersburg Programs will not authorize funds for indirect costs or fringe benefits. The table below summarizes the anticipated annual funding levels from the NSF to operate our REU (Research Experience for Undergraduates) programs, subject to program renewals and availability of funds. In some programs, anticipated NIST co-funding will supplement the number of awards supported. Program funding will be available to provide for the costs of stipends ($333.33 per week per student), travel, and lodging (up to $2800 per student).

Program	Anticipated NSF funding	Anticipated NIST funding	Total program funding	Anticipated No. of awards
EEEL	$73,000	$30,000	$103,000	~16
MEL	82,000	24,000	106,000	~14
CSTL	41,000	57,000	98,000	~15
PL	95,000	50,000	145,000	~23
MSEL	80,000	0	80,000	~12
BFRL	65,000	30,000	95,000	~14
ITL	60,000	40,000	100,000	~17

The actual number of awards made under this announcement will depend on the proposed budgets and the availability of funding. For all SURF Gaithersburg Programs described in this notice, it is expected that individual awards to institutions will range from approximately $3,000 to $70,000. Funding for student housing will be included in cooperative agreements awarded as a result of this notice.

The SURF Gaithersburg Programs are anticipated to run from May 23, 2005 through August 12, 2005; adjustments may be made to accommodate specific academic schedules (e.g., a limited number of 9-week cooperative agreements).

Statutory Authority: 15 U.S.C. 278g–l authorizes NIST to fund financial assistance awards to students at institutions of higher learning within the United States. These students must show promise as present or future contributors to the missions of NIST.

Eligibility: NIST's SURF Gaithersburg Programs are open to colleges and universities in the United States and its territories with degree granting programs in materials science, chemistry, engineering, computer science, mathematics, or physics. Participating students must be U.S. citizens or permanent U.S. residents. The SURF Gaithersburg Programs do not require any matching funds.

Review and Selection Process: All SURF Gaithersburg Program proposals are submitted to the Administrative Coordinator. Each proposal is examined for completeness and responsiveness. Incomplete or non-responsive proposals will not be considered for funding, and the applicant will be notified in writing. The Program will retain one copy of each non-responsive application for three years for record keeping purposes. The remaining copies will be destroyed. Proposals should include the following:

(A) Student Information:

(1) Student application information cover sheet;

(2) Academic transcript for each student nominated for participation (it is recommended that students have a G.P.A. of 3.0 or better, out of a possible 4.0);

(3) A statement of motivation and commitment from each student to participate in the 2005 SURF program, including a description of the student's prioritized research interests;

(4) A resume for each student;

(5) Two letters of recommendation for each student;

(6) Verification of U.S. citizenship or permanent legal resident status for each student; and

(7) Verification of health coverage for each student.

(B) Information About the Applicant Institution:

(1) Description of the institution's education and research programs; and

(2) A summary list of the student(s) being nominated.

Institution proposals will be separated into student/institution packets. Each student/institution packet will be comprised of the required application forms, including a complete copy of the student information and a complete copy of the institution information. The student/institution packets will be directed to the SURF Gaithersburg Program designated by the student as his/her first choice. Each SURF Gaithersburg Program will have three independent, objective NIST employees, who are knowledgeable in the scientific areas of the program, conduct a technical review of each student/institution packet based on the Evaluation Criteria for the SURF Gaithersburg Programs described in this notice. Each technical reviewer will recommend that each student/institution packet be placed into one of three categories: Priority Funding; Fund if Possible; and Do Not Fund. Each student/institution packet will then be placed into one of the three categories by the Program's Director, who will take into consideration the reviewers' recommendations, the relevance of the student's course of study to the program objectives of the NIST laboratory in which that SURF Gaithersburg Program resides as described in the Program Description section of this notice, the relevance of the student's statement of commitment to the goals of the SURF Gaithersburg Program, and the availability of funding.

Student/institution packets placed in the Priority Funding category will be selected for funding in that SURF Gaithersburg Program. Student/institution packets placed in the Do Not Fund category will not be considered for funding.

Student/institution packets placed in the Fund if Possible Category will be considered for funding by the SURF Gaithersburg Program designated by the student as his/her second choice. In making selections for funding, the

Director of the student's second choice SURF Gaithersburg Program will take into consideration the recommendations of the reviewers who conducted the technical reviews for the student's first choice SURF Gaithersburg Program, the program objectives of the NIST laboratory in which the student's second choice SURF Gaithersburg Program resides as described in the Program Description and Objectives section of this notice, the relevance of the student's statement of commitment to the goals of the SURF Gaithersburg Program, and the availability of funding.

Students not selected for funding by their first or second choice SURF Gaithersburg Program, and students who did not designate a second choice, will then be considered for funding from all SURF Gaithersburg Programs that still have slots available. In making selections for funding, the SURF Gaithersburg Program Directors will take into consideration the recommendations of the reviewers who conducted the technical reviews for the student's first choice SURF Gaithersburg Program, the program objectives of the NIST laboratory in which their SURF Gaithersburg Program resides as described in the Program Description and Objectives section of this notice, the relevance to the goals of the SURF Gaithersburg Program, and the availability of funding.

Student/institution packets placed in the Fund if Possible category, but not selected through the process described above, will not be funded.

The final approval of selected applications and award of cooperative agreements will be made by the NIST Grants Officer based on compliance with application requirements as published in this notice, compliance with applicable legal and regulatory requirements, compliance with Federal policies that best further the objectives of the Department of Commerce, and whether the recommended applicants appear to be responsible. Applicants may be asked to modify objectives, work plans, or budgets and provide supplemental information required by the agency prior to award. The decision of the Grants Officer is final.

The SURF Gaithersburg Program will retain one copy of each unsuccessful application for three years for record keeping purposes, and unsuccessful applicants will be notified in writing. The remaining copies will be destroyed.

Evaluation Criteria: For the SURF Gaithersburg Programs, the evaluation criteria are:

(A) Evaluation of Student's Academic Ability and Commitment to Program Goals: Includes evaluation of completed course work; expressed research interest; compatibility of the expressed research interest with SURF Gaithersburg Program research areas; research skills; grade point average in courses relevant to the SURF Gaithersburg Program; career goals; honors and activities.

(B) Evaluation of Applicant Institution's Commitment to Program Goals: Includes evaluation of the institution's academic department(s) relevant to the discipline(s) of the student(s). Each of these factors is given equal weight in the evaluation process.

SURF NIST Boulder Program

DATES: All SURF NIST Boulder Program applications, paper and electronic, must be received no later than 5 p.m. Mountain Standard Time on February 15, 2005.

ADDRESSES: Paper applications for the SURF NIST Boulder Program must be submitted to: Ms. Phyllis Wright, Administrative Coordinator, National Institute of Standards and Technology, 325 Broadway, Mail Stop 104, Boulder, CO 80305–3328.

FOR FURTHER INFORMATION CONTACT: For complete information about this program and instructions for applying by paper or electronically, read the Federal Funding Opportunity Notice (FFO) at *http://www.grants.gov.* A paper copy of the FFO may be obtained by calling (301) 975–6328. The Gaithersburg and Boulder SURF programs will publish separate FFOs on *www.grants.gov.* Program questions should be addressed to Ms. Phyllis Wright, Administrative Coordinator, National Institute of Standards and Technology, 325 Broadway, Mail Stop 104, Boulder, CO 80305–3328, Tel: (303) 497–3244, E-mail: *pkwright@boulder.nist.gov,* Web site: *http://surf.boulder.nist.gov/.* All grants related administration questions concerning this program should be directed to Joyce Brigham, NIST Grants and Agreements Management Division at (301) 975–6328 or *joyce.brigham@nist.gov,* or for assistance with using Grants.gov contact *support@grants.gov.*

Additional Information

Funding Availability

Funds budgeted for payment to students under these programs are stipends, not salary. The SURF NIST Boulder Program will not authorize funds for indirect costs or fringe benefits. The table below summarizes the anticipated annual funding levels from the NSF to operate the SURF NIST Boulder program, broken out by Laboratory, subject to program approval and availability of funds. In some Laboratories, anticipated NIST co-funding will supplement the number of awards supported. Program funding will be available to provide for the costs of stipends ($4000 per student for 12 weeks), travel, and lodging (approximately $1800 per student for 12 weeks).

Laboratory	Anticipated NSF funding	Anticipated NIST funding	Total program funding	Anticipated number of awards
EEEL	$58,400	$5600	$64,000	8
PL	36,500	3500	40,000	5
CSTL	21,900	2100	24,000	3
MSEL	14,600	1400	16,000	2
ITL	14,600	1400	16,000	2

The actual number of awards made under this announcement will depend on the proposed budgets and the availability of funding. For the SURF NIST Boulder Program described in this notice, it is expected that individual awards to institutions will range from approximately $4,000 to $70,000. Funding for student housing will be included in cooperative agreements awarded as a result of this notice.

The SURF NIST Boulder Program is anticipated to run from May 23, 2005 through August 12, 2005; adjustments may be made to accommodate specific academic schedules (*e.g.*, a limited number of 12 week cooperative agreements shifted to begin 3 weeks after the regular start in order to accommodate institutions operating on quarter systems).

Statutory Authority: 15 U.S.C. 278g–1.

Eligibility: The SURF NIST Boulder Program is open to colleges and universities in the United States and its territories with degree granting programs in materials science, chemistry, engineering, computer science, mathematics, or physics. Participating students must be U.S. citizens or permanent U.S. residents. The SURF NIST Boulder Programs do not require any matching funds.

Review and Selection Process: All SURF NIST Boulder Program proposals are submitted to the Administrative Coordinator. Each proposal is examined for completeness and responsiveness. Incomplete or non-responsive proposals will not be considered for funding, and the applicant will be so notified. The Program will retain one copy of each non-responsive application for three years for record keeping purposes. The remaining copies will be destroyed. Proposals should include the following:

(A) Student Information:

(1) Student application information cover sheet;

(2) Academic transcript for each student nominated for participation (it is recommended that students have a G.P.A. of 3.0 or better, out of a possible 4.0);

(3) A statement of motivation and commitment from each student to participate in the SURF NIST Boulder program, including a description of the student's prioritized research interests;

(4) A resume for each student;

(5) Two letters of recommendation for each student;

(6) Verification of U.S. citizenship or permanent legal resident status for each student; and

(7) Verification of health insurance coverage for each student.

(B) Information About the Applicant Institution:

(1) Description of the institution's education and research programs; and

(2) A summary list of the student(s) being nominated.

Institution proposals will be separated into student/institution packets. Each student/institution packet will be comprised of the required application forms, including a complete copy of the student information and a complete copy of the institution information. The student/institution packets will be directed to a review committee of NIST staff appointed by the SURF NIST Boulder Program Directors. Each SURF Program packet will be reviewed by three independent, objective NIST employees, who are knowledgeable in the scientific areas of the program and are able to conduct a technical review of each student/institution packet based on the Evaluation Criteria for the SURF NIST Boulder Program described in this notice. Each technical reviewer will recommend that each student/institution packet be placed into one of three categories: Priority Funding; Fund if Possible; and Do Not Fund. Each student/institution packet will then be placed into one of the three categories by the SURF NIST Boulder Program Directors, who will take into consideration the reviewers' recommendations, the relevance of the student's course of study to the program objectives of the NIST Boulder Laboratories as described in the Program Description section of this notice, the relevance of the student's statement of commitment to the goals of the SURF NIST Boulder Program, and the availability of funding.

Student/institution packets placed in the Priority Funding category will be selected for funding in the SURF NIST Boulder Program. Student/institution packets placed in the Do Not Fund category will not be considered for funding.

Student/institution packets placed in the Fund if Possible Category will be considered for funding by the SURF NIST Boulder Program when possible. For example, when an award has been declined by another applicant, a back-up will be selected from student/institution packets in this category. In this case, it is likely that either the student's second or third choice of research opportunity would be assigned. In making selections for funding, the SURF NIST Boulder Program Directors will take into consideration the recommendations of the reviewers who conducted the technical reviews, the program objectives of the NIST Boulder laboratory in which the student's requested research opportunity resides as described in the Program Description and Objectives section of this notice, the relevance of the student's statement of commitment to the goals of the SURF NIST Boulder Program, and the availability of funding.

Students not selected for funding for either their first, second or third choice of research opportunities, and students who did not designate a second or third choice, will then be considered for funding from all Boulder Laboratories that still have slots available. In making selections for funding, the SURF NIST Boulder Program Directors will take into consideration the recommendations of the reviewers who conducted the technical reviews, the program objectives of the NIST Laboratory in which their SURF NIST Boulder SURF Program research opportunity resides as described in the Program Description and Objectives section of this notice, the relevance to the goals of the SURF NIST Boulder Program, and the availability of funding.

Student/institution packets placed in the Fund if Possible category, but not selected through the process described above, will not be funded.

The final approval of selected applications and award of cooperative agreements will be made by the NIST Grants Officer based on compliance with application requirements as published in this notice, compliance with applicable legal and regulatory requirements, and compliance with Federal policies that best further the objectives of the Department of Commerce. Applicants may be asked to modify objectives, work plans, or budgets and provide supplemental information required by the agency prior to award. The decision of the Grants Officer is final.

The SURF NIST Boulder Program will retain one copy of each unsuccessful application for three years for record keeping purposes, and unsuccessful applicants will be notified in writing. The remaining copies will be destroyed.

Evaluation Criteria: For the SURF NIST Boulder Program, the evaluation criteria are: (A) Evaluation of Student's Academic Ability and Commitment to Program Goals: Includes evaluation of completed course work; expressed research interest; compatibility of the expressed research interest with SURF NIST Boulder Program research areas; research skills; grade point average in courses relevant to the SURF NIST Boulder Program; career goals; honors and activities;

(B) Evaluation of Applicant Institution's Commitment to Program Goals: Includes evaluation of the institution's academic department(s) relevant to the discipline(s) of the student(s). Each of these factors is given equal weight in the evaluation process.

The following information applies to both the SURF Gaithersburg Programs and the SURF NIST Boulder Program:

The Department of Commerce Pre-Award Notification Requirements for Grants and Cooperative Agreements

The Department of Commerce Pre-Award Notification Requirements for Grants and Cooperative Agreements contained in the **Federal Register** notice of October 1, 2001 (66 FR 49917), as amended by the **Federal Register** notice published on October 30, 2002 (67 FR 66109), are applicable to this announcement. On the form SF–424, the applicant's 9-digit Dun and Bradstreet Data Universal Numbering System (DUNS) number must be entered in the

Applicant Identifier block (68 FR 38402).

Collaborations With NIST Employees

All applications should include a description of any work proposed to be performed by an entity other than the applicant, and the cost of such work should ordinarily be included in the budget.

If an applicant proposes collaboration with NIST, the statement of work should include a statement of this intention, a description of the collaboration, and prominently identify the NIST employee(s) involved, if known. Any collaboration by a NIST employee must be approved by appropriate NIST management and is at the sole discretion of NIST. Prior to beginning the merit review process, NIST will verify the approval of the proposed collaboration. Any unapproved collaboration will be stricken from the proposal prior to the merit review.

Use of NIST Intellectual Property

If the applicant anticipates using any NIST-owned intellectual property to carry out the work proposed, the applicant should identify such intellectual property. This information will be used to ensure that no NIST employee involved in the development of the intellectual property will participate in the review process for that competition. In addition, if the applicant intends to use NIST-owned intellectual property, the applicant must comply with all statutes and regulations governing the licensing of Federal government patents and inventions, described at 35 U.S.C. sec. 200–212, 37 CFR part 401, 15 CFR 14.36, and in section 20 of the Department of Commerce Pre-Award Notification Requirements, 66 FR 49917 (2001), as amended by the **Federal Register** notice published on October 30, 2002 (67 FR 66109). Questions about these requirements may be directed to the Counsel for NIST, 301–975–2803.

Any use of NIST-owned intellectual property by a proposer is at the sole discretion of NIST and will be negotiated on a case-by-case basis if a project is deemed meritorious. The applicant should indicate within the statement of work whether it already has a license to use such intellectual property or whether it intends to seek one.

If any inventions made in whole or in part by a NIST employee arise in the course of an award made pursuant to this notice, the United States government may retain its ownership rights in any such invention. Licensing or other disposition of NIST's rights in such inventions will be determined solely by NIST, and include the possibility of NIST putting the intellectual property into the public domain.

Initial Screening of All Applications

All applications received in response to this announcement will be reviewed to determine whether or not they are complete and responsive to the scope of the stated objectives for each program. Incomplete or non-responsive applications will not be reviewed for technical merit. The Program will retain one copy of each non-responsive application for three years for record keeping purposes. The remaining copies will be destroyed.

Paperwork Reduction Act

The standard forms in the application kit involve a collection of information subject to the Paperwork Reduction Act. The use of Standard Forms 424, 424A, 424B, SF–LLL, and CD–346 have been approved by OMB under the respective Control Numbers 0348–0043, 0348–0044, 0348–0040, 0348–0046, and 0605–0001. The use of the Student Application Information sheet has been approved by OMB under Control Number 0693–0042. Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection subject to the requirements of the Paperwork Reduction Act, unless that collection of information displays a currently valid OMB Control Number.

Research Projects Involving Human Subjects, Human Tissue, Data or Recordings Involving Human Subjects

Any proposal that includes research involving human subjects, human tissue, data or recordings involving human subjects must meet the requirements of the Common Rule for the Protection of Human Subjects, codified for the Department of Commerce at 15 CFR part 27. In addition, any proposal that includes research on these topics must be in compliance with any statutory requirements imposed upon the Department of Health and Human Services (DHHS) and other federal agencies regarding these topics, all regulatory policies and guidance adopted by DHHS, FDA, and other Federal agencies on these topics, and all Presidential statements of policy on these topics.

On December 3, 2000, the U.S. Department of Health and Human Services (DHHS) introduced a new Federal-wide Assurance of Protection of Human Subjects (FWA). The FWA covers all of an institution's Federally supported human subjects research, and eliminates the need for other types of Assurance documents. The Office for Human Research Protections (OHRP) has suspended processing of multiple project assurance (MPA) renewals. All existing MPAs will remain in force until further notice. For information about FWAs, please see the OHRP Web site at *http://ohrp.osophs.dhhs.gov/humansubjects/assurance/fwas.htm.*

In accordance with the DHHS change, NIST will continue to accept the submission of human subjects protocols that have been approved by Institutional Review Boards (IRBs) possessing a current, valid MPA from DHHS. NIST also will accept the submission of human subjects protocols that have been approved by IRBs possessing a current, valid FWA from DHHS. NIST will not issue a single project assurance (SPA) for any IRB reviewing any human subjects protocol proposed to NIST.

On August 9, 2001, the President announced his decision to allow Federal funds to be used for research on existing human embryonic stem cell lines as long as prior to his announcement (1) the derivation process (which commences with the removal of the inner cell mass from the blastocyst) had already been initiated and (2) the embryo from which the stem cell line was derived no longer had the possibility of development as a human being. NIST will follow guidance issued by the National Institutes of Health at *http://ohrp.osophs.dhhs.gov/humansubjects/guidance/stemcell.pdf* for funding such research.

Research Projects Involving Vertebrate Animals

Any proposal that includes research involving vertebrate animals must be in compliance with the National Research Council's ''Guide for the Care and Use of Laboratory Animals'' which can be obtained from National Academy Press, 2101 Constitution Avenue, NW., Washington, DC 20055. In addition, such proposals must meet the requirements of the Animal Welfare Act (7 U.S.C. 2131 *et seq.*), 9 CFR parts 1, 2, and 3, and if appropriate, 21 CFR part 58. These regulations do not apply to proposed research using pre-existing images of animals or to research plans that do not include live animals that are being cared for, euthanized, or used by the project participants to accomplish research goals, teaching, or testing. These regulations also do not apply to obtaining animal materials from commercial processors of animal

products or to animal cell lines or tissues from tissue banks.

Executive Order 12866

This funding notice was determined to be not significant for purposes of Executive Order 12866.

Executive Order 13132 (Federalism)

It has been determined that this notice does not contain policies with federalism implications as that term is defined in Executive Order 13132.

Executive Order 12372

Applications under this program are not subject to Executive Order 12372, ''Intergovernmental Review of Federal Programs.''

Administrative Procedure Act/ Regulatory Flexibility Act

Notice and comment are not required under the Administrative Procedure Act (5 U.S.C. 553) or any other law, for rules relating to public property, loans, grants, benefits or contracts (5 U.S.C. 553 (a)). Because notice and comment are not required under 5 U.S.C. 553, or any other law, for rules relating to public property, loans, grants, benefits or contracts (5 U.S.C. 553(a)), a Regulatory Flexibility Analysis is not required and has not been prepared for this notice, 5 U.S.C. 601 *et seq.*

Dated: December 15, 2004.

Hratch G. Semerjian,

Acting Director, NIST.

[FR Doc. 04–28239 Filed 12–23–04; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF DEFENSE

DEPARTMENT OF ENERGY

DEPARTMENT OF HOMELAND SECURITY

ENVIRONMENTAL PROTECTION AGENCY

NUCLEAR REGULATORY COMMISSION

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

DEPARTMENT OF INTERIOR

Geological Survey

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. OAR–2004–0096; FRL–7851–8]

Multi-Agency Radiological Laboratory Analytical Protocols Manual

AGENCIES: Department of Defense; Department of Energy; Department of Homeland Security; Environmental Protection Agency; Nuclear Regulatory Commission; National Institute of Standards and Technology, Commerce; United States Geological Survey, Interior; and Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The participating agencies are announcing the availability of the ''Multi-Agency Radiological Laboratory Analytical Protocols'' (MARLAP) Manual. The MARLAP Manual provides guidance for the planning, implementation, and assessment phases of projects that require the laboratory analysis of radionuclides. MARLAP's basic goal is to provide guidance for project planners, managers, and laboratory personnel to ensure that radioanalytical laboratory data will meet a project's or a program's data requirements. The manual offers a framework for a performance-based approach to achieving data requirements that is both scientifically rigorous and flexible enough to be applied to diverse projects and programs. This framework will promote national consistency in the generation of radioanalytical data of known quality that are appropriate for its intended use. Examples of radiological data collection activities that MARLAP supports include: site characterization, site cleanup and compliance demonstration, decommissioning of nuclear facilities, emergency response, remedial and removal actions, decontamination activities, effluent monitoring of licensed facilities, environmental site monitoring, background studies, and waste management activities. The MARLAP Manual, now finalized, is a multi-agency consensus document. The agencies previously sought public comment in order to receive feedback from the widest range of interested parties and to ensure that all information relevant to developing the document was received and addressed to the extent possible. The interagency MARLAP work group reviewed all public comments received as well as comments from a concurrent, independent technical peer review. Suggested changes were incorporated, where appropriate, in response to those comments.

ADDRESSES: Copies of the draft and the final MARLAP Manual, along with public and technical peer review comments received, may be examined or copied for a fee at the EPA Public Reading Room, Room B102, EPA West Building, 1301 Constitution Avenue, NW., Washington, DC 20004. The room is open to the public on all Federal Government work days from 8:30 a.m. to 4:30 p.m.

Printed and CD–ROM versions of MARLAP (NTIS PB2004–105421) may be purchased from the National Technical Information Service (NTIS). NTIS may be accessed online at *http://www.ntis.gov.* The NTIS Sales Desk can be reached between 8:30 a.m. and 6 p.m. Eastern Time, Monday through Friday, at 1–800–553–6847; TDD (hearing impaired only) at 703–487–4639 between 8:30 a.m. and 5 p.m. Eastern Time, Monday through Friday; or fax at 703–605–6900.

The manual is also available through the Internet at *http://www.epa.gov/radiation/marlap* or *http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1576/.* The NRC document number is NUREG–1576, and the EPA document number is EPA 402–B–04–001A–C (in three volumes).

FOR FURTHER INFORMATION CONTACT: *EPA:* John Griggs, U.S. Environmental Protection Agency, Office of Radiation and Indoor Air, NAREL, 540 South Morris Avenue, Montgomery, AL 36115–2601, (334) 270–3450, *griggs.john@epa.gov;* Eric Reynolds, U.S. Environmental Protection Agency, Office of Superfund Remediation and Technology Innovation (5204G), 1200 Pennsylvania Avenue, NW.,

Washington, DC 20460, (703) 603–9928, *reynolds.eric@epa.gov. DoD/Air Force:* Dale Thomas, Detachment 1, Human Systems Center/OEBA, 2402 E. Drive, Brooks AFB, TX 78235–5114, (210) 536–5816, *dale.thomas@brooks.af.mil. DoD/Army:* Ronald Swatski, U.S. Army Center for Health Promotion and Preventive Medicine, Attn: MCHB–TS–LRD, 5158 Blackhawk Road APG, MD 21010–5403, (410) 436–3983, *ronald.swatski@amedd.army.mil. DoD/Navy:* Commander William Adams, Navy Sea Systems Command, SEA 04N, 1333 Isaac Hull Ave., SE., Washington, DC 20376–4120, (202) 781–2414, *AdamsWJ@navsea.navy.mil. Army Corps of Engineers:* Jan Dunker, U.S. Army Corps of Engineers, (Attn: CENWO–HX–C), 12565 West Center Road, Omaha, NE 68144–3869, (402) 697–2566, *jan.w.dunker@usace.army.mil. DHS:* Carl V. Gogolak, U.S. Department of Homeland Security, Environmental Measurements Laboratory, 201 Varick Street, 5th Floor, New York, NY 10014, (212) 620–3635, *cvg@eml.doe.gov. DOE:* Mary Verwolf, U.S. Department of Energy, National Analytical Management Program, MS4149, 850 Energy Drive, Idaho Falls, ID 83402, (208) 526–7001, *verwolmc@id.doe.gov;* Emile Boulos, U.S. Department of Energy, Office of Air, Water and Radiation Policy and Guidance (EH–41), Room 3G–089, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586–1306, *emile.boulos@eh.doe.gov. NRC:* Rateb (Boby) Abu Eid, U.S. Nuclear Regulatory Commission, Mail Stop T–7J8, Washington, DC 20555, (301) 415–5811, *bae@nrc.gov. NIST:* Kenneth Inn, National Institute of Standards and Technology, Building 245, Room C114, MS 8462, Gaithersburg, MD 20899–8462, (301) 975–5541, *kenneth.inn@nist.gov. USGS:* Ann Mullin, U.S. Geological Survey, National Water Quality Laboratory, PO Box 25046, Denver Federal Center, Bldg. 95 Ent E3, Mail Stop 407, Denver, CO 80225–0046, (303) 236–3480, *ahmullin@usgs.gov. FDA:* Edmond Baratta, U.S. Food and Drug Administration, Winchester Engineering and Analytical Center, 109 Holton Street, Winchester, MA 01890, (781) 729–5700 (x728), *edmond.baratta@fda.gov.*

SUPPLEMENTARY INFORMATION: The MARLAP Manual provides guidance for the planning, implementation, and assessment phases of those projects that require the laboratory analysis of radionuclides. This guidance is intended for project planners, managers, and laboratory personnel. MARLAP was developed collaboratively over the past eight years by the technical staffs of eight Federal agencies. State participation in the development of the manual involved contributions from representatives from the Commonwealth of Kentucky and the State of California. Contractors of the DOE, EPA, and NRC, and members of the public, have been present during the open meetings of the MARLAP work group and were provided opportunities for input.

MARLAP is organized into two parts. Part I, intended primarily for project planners and managers, provides the basic framework of the directed planning process as it applies to projects requiring radioanalytical data for decision making. Part II is intended primarily for laboratory personnel. Seven appendices provide complementary information and additional details on specific topics.

Because of its length, the printed version of MARLAP is bound in three volumes. Volume I (Chapters 1 through 9 and Appendices A through E) contains Part I. Part II is split between Volumes II and III. Volume II (Chapters 10 through 17 and Appendix F) covers most of the activities performed at radioanalytical laboratories, from field and sampling issues that affect laboratory measurements through waste management. Volume III (Chapters 18 through 20 and Appendix G) covers laboratory quality control, measurement uncertainty and detection and quantification capability. Each volume includes a table of contents, list of acronyms and abbreviations, and a complete glossary of terms.

The MARLAP Manual benefitted from extensive internal, public, and technical peer reviews. Before the publication of the draft version for public comment, the participating agencies conducted internal reviews. These internal review comments were addressed before public comments were requested. The public review was a necessary and important step in the development of the final multi-agency consensus document. The document also received formal technical peer review under the auspices of the EPA Science Advisory Board (SAB). SAB's comments and EPA's responses are available at *http://www.epa.gov/science1/fiscal03.htm.*

In addition to commenting on individual chapters and appendices, reviewers were requested to address the following questions while reviewing the MARLAP Manual:

(1) Is the performance-based approach for the planning, implementation, and assessment phases of projects technically sound, and is the approach reasonable in terms of ease of implementation by project managers and laboratories? Does the approach effectively link the three phases of a project, and is the guidance on quality control appropriate and supportive of a performance-based approach?

(2) Is the guidance on laboratory operations in Part II technically accurate and useful?

(3) Are the concepts covered under measurement statistics, specifically measurement uncertainty and detection and quantification capability, presented accurately and appropriately?

(4) Is the information understandable and presented in a logical sequence? How can the presentation of material be modified to improve the manual?

The participating agencies continue to solicit comments arising from review and use of the final MARLAP Manual. Comments will be reviewed periodically by the participating agencies, resolved as appropriate, and incorporated into future revisions of the manual. Members of the public are invited to submit written comments to: U.S. Environmental Protection Agency, EPA Docket Center (EPA/DC), Air and Radiation Docket and Information Center, Docket No. OAR–2004–0096, MC 6102T, 1200 Pennsylvania Avenue, NW, Washington, DC 20460. Comments may be submitted electronically at *http://www.epa.gov/radiation/marlap.*

Compliance With the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 601 et seq.)

NRC has determined that this action is not a major rule and has verified this determination with the Office of Information and Regulatory Affairs, Office of Management and Budget.

For the Department of Defense, dated this 10th day of December, 2004.

Alex A. Beehler,

Assistant Deputy Under Secretary of Defense (Environment, Safety and Occupational Health).

For the Department of Energy, dated this 17th day of August, 2004.

Andy Lawrence, Deputy

Assistant Secretary for Environment.

For the Department of Homeland Security, dated this 11th day of August, 2004.

Bert M. Coursey,

Director, Office of Standards, DHS/S&T Directorate.

For the Environmental Protection Agency, dated this 11th day of August, 2004.

Elizabeth Cotsworth,

Director, Office of Radiation and Indoor Air.

For the National Institute of Standards and Technology, dated this 6th day of August, 2004.

Lisa R. Karam,

Chief, Ionizing Radiation Division.

For the Nuclear Regulatory Commission, dated this 6th day of August, 2004.

John T. Greeves,

Director, Division of Waste Management and Environmental Protection, Office of Nuclear Material Safety and Safeguards.

For the U.S. Geological Survey, dated this 16th day of August, 2004.

Robert M. Hirsch,

Associate Director for Water, U.S. Geological Survey.

For the Food and Drug Administration, dated this 29th day of September, 2004.

Thomas S. Savage,

Acting Director, Division of Field Science, Office of Regulatory Affairs.

[FR Doc. 04–28201 Filed 12–23–04; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D.121604B]

Marine Fisheries Advisory Committee; Public Meetings

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). This will be the first of two annual meetings to be held in fiscal year (FY) 2005 to review and advise on management policies for living marine resources. Agenda topics can found in the **SUPPLEMENTARY INFORMATION** section of this notice.

DATES: The meetings will be held in January 2005. See **SUPPLEMENTARY INFORMATION** for specific dates and times.

ADDRESSES: The meetings will be held at the Hilton Hawaiian Village Beach Resort & Spa, 2005 Kalia Road, Honolulu, HI 96815.

Requests for special accommodations may be directed to MAFAC, Constituent Services, National Marine Fisheries Service, 1315 East-West Highway #9508, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Laurel Bryant, MAFAC Executive Director; telephone: (301) 713–2379 x171.

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 (Secretary) on February 17, 1972, to advise the Secretary on all living marine resource matters that are the responsibility of the Department of Commerce. This Committee advises and reviews the adequacy of living marine resource policies and programs to meet the needs of commercial and recreational fisheries, and environmental, state, consumer, academic, tribal, and other national interests.

Meeting Dates and Times

1. January 11, 2005, 9:15 a.m.–5 p.m.
2. January 12, 2005, 8:30 a.m.–5 p.m.
3. January 13, 2005, 8:30 a.m.–11:30 a.m.
4. January 14, 2005, 1 p.m.–3 p.m.

Matters to be Considered

January 11, 2005

General overview and full committee discussion regarding NOAA's ecosystem management initiatives and how they relate to fisheries management, and review and status of the Magnuson-Stevens Fishery Conservation and Management Act reauthorization.

January 12, 2005

Overview and full committee discussion of cold water coral management initiatives, FY 2005 budget review, recreational fisheries strategic plan and program initiative, and review of newly revised Office of Constituent Services and programs.

January 13, 2005

The MAFAC will meet for a morning overview and discussion of aquaculture legislative initiatives and status of regional research programs.

January 14, 2005

The full committee of MAFAC will meet in the afternoon to receive reports and take final action. Committee will adjourn sine day on completion of business.

Time will be set aside for public comment on agenda items.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to MAFAC (see **ADDRESSES**).

Dated: December 17, 2004.

William T. Hogarth,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

[FR Doc. 04–28131 Filed 12–23–04; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 102504E]

Endangered Species; File No. 1494

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

ACTION: Issuance of permit.

SUMMARY: Notice is hereby given that St. George's School, P.O. Box 1910, Newport, RI 02840 has been issued a permit to take loggerhead (*Caretta caretta*), green (*Chelonia mydas*), hawksbill (*Eretmochelys imbricata*) and Kemp's ridley (*Lepidochelys kempii*) sea turtles for purposes of scientific research.

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

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301)713–2289; fax (301)713–0376;

Northeast Region, NMFS, One Blackburn Drive, Gloucester, MA 01930–2298; phone (978)281–9200; fax (978)281–9371; and

Southeast Region, NMFS, 9721 Executive Center Drive North, St. Petersburg, FL 33702–2432; phone (727)570–5301; fax (727)570–5320.

FOR FURTHER INFORMATION CONTACT: Patrick Opay or Jennifer Skidmore, (301)713–2289.

SUPPLEMENTARY INFORMATION: On August 20, 2004, notice was published in the **Federal Register** (69 FR 51637) that a request for a scientific research permit to take sea turtles had been submitted by the above-named organization. The requested permit has been issued under the authority of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*) and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222–226).

Permit No. 1494 is a five-year permit authorizing St. George's School to annually capture 50 loggerhead, 5 green, 5 hawksbill and 5 Kemp's ridley sea turtles by hand or dip net. Animals will be weighed, measured, flipper tagged and released. The applicant will also collect tissue samples from the loggerhead, green and hawksbill species and import the samples to the U.S. The purpose of the research is to study habitat utilization and migratory behavior of these species.

Issuance of this permit, as required by the ESA, was based on a finding that such permit (1) was applied for in good faith, (2) will not operate to the disadvantage of the endangered and threatened species which are the subject of this permit, and (3) is consistent with the purposes and policies set forth in section 2 of the ESA.

Dated: December 17, 2004.

Stephen L. Leathery,

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

[FR Doc. 04–28132 Filed 12–23–04; 8:45 am]

BILLING CODE 3510–22–S

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Designations under the Textile and Apparel Commercial Availability Provisions of the United States-Caribbean Basin Trade Partnership Act (CBTPA)

December 21, 2004.

AGENCY: The Committee for the Implementation of Textile Agreements (The Committee).

ACTION: Designation

SUMMARY: The Committee for the Implementation of Textile Agreements (CITA) has determined that certain woven, 100 percent cotton, napped fabrics, of the specifications detailed below, classified in the indicated subheadings of the Harmonized Tariff Schedule of the United States (HTSUS), for use in products covered by textile categories 340, 341, 347, 348, 350, 351, and woven underwear in category 352, cannot be supplied by the domestic industry in commercial quantities in a timely manner. The CITA hereby designates such apparel articles, that are both cut and sewn or otherwise assembled in an eligible CBTPA beneficiary country, from these fabrics as eligible for quota-free and duty-free treatment under the textile and apparel commercial availability provisions of the CBTPA and eligible under HTSUS subheadings 9820.11.27, to enter free of quota and duties, provided that all other fabrics are wholly formed in the United States from yarns wholly formed in the United States.

EFFECTIVE DATE: December 27, 2004.

FOR FURTHER INFORMATION CONTACT: Janet Heinzen, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482-3400.

SUPPLEMENTARY INFORMATION:

Authority: Section 211 of the CBTPA, amending Section 213(b)(2)(A)(v)(II) of the Caribbean Basin Economic Recovery Act (CBERA); Presidential Proclamation 7351 of October 2, 2000; Executive Order No. 13191 of January 17, 2001.

BACKGROUND:

The commercial availability provision of the CBTPA provides for duty-free and quota-free treatment for apparel articles that are both cut (or knit-to-shape) and sewn or otherwise assembled in one or more beneficiary CBTPA country from fabric or yarn that is not formed in the United States if it has been determined that such yarns or fabrics cannot be supplied by the domestic industry in commercial quantities in a timely manner and certain procedural requirements have been met. In Presidential Proclamation 7351, the President proclaimed that this treatment would apply to apparel articles from fabrics or yarn designated by the appropriate U.S. government authority in the **Federal Register**. In Executive Order 13191, the President authorized CITA to determine whether yarns or fabrics cannot be supplied by the domestic industry in commercial quantities in a timely manner.

On August 12, 2004, the Chairman of CITA received a petition from Sandler, Travis, and Rosenberg, P.A., on behalf of Picacho, S.A., alleging that certain woven, 100 percent cotton, napped fabrics, of detailed specifications, classified in indicated HTSUS subheadings, for use in shirts, trousers, nightwear, robes, dressing gowns, and woven underwear, cannot be supplied by the domestic industry in commercial quantities in a timely manner and requesting quota- and duty-free treatment under the CBTPA for such apparel articles that are both cut and sewn in one or more CBTPA beneficiary countries from such fabrics. On August 18, 2004, CITA requested public comment on the petition. See Request for Public Comment on Commercial Availability Petition under the United States - Caribbean Basin Trade Partnership Act (CBTPA) (69 FR 51269). On September 3, 2004, CITA and the U.S. Trade Representative (USTR) sought the advice of the Industry Trade Advisory Committee for Textiles and Clothing and the Industry Trade Advisory Committee for Distribution Services. On September 3, CITA and USTR offered to hold consultations with the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate (collectively, the Congressional Committees). On August 25, 2004, the U.S. International Trade Commission provided advice on the petitions.

Based on the information and advice received and its understanding of the industry, CITA determined that the fabrics set forth in the petition cannot be supplied by the domestic industry in commercial quantities in a timely manner. On October 5, 2004, CITA and USTR submitted a report to the Congressional Committees that set forth the action proposed, the reasons for such action, and advice obtained. A period of 60 calendar days since this report was submitted has expired.

CITA hereby designates as eligible for preferential treatment under HTSUS subheading 9820.11.27, products covered by textile categories 340, 341, 347, 348, 350, 351, and woven underwear in category 352, that are both cut and sewn or otherwise assembled in one or more eligible CBTPA beneficiary countries, from certain woven, 100 percent cotton, napped fabrics, of the specifications detailed below, classified in the indicated HSTUS subheadings, not formed in the United States, provided that all other fabrics are wholly formed in the United States from yarns wholly formed in the United States, subject to the special rules for findings and trimmings, certain interlinings and de minimis fibers and yarns under section 112(d) of the CBTPA, and that such articles are imported directly into the customs territory of the United States from an eligible CBTPA beneficiary country.

Specifications:

Fabric 1:

Petitioner Style No:	62BU1600240A
HTS Subheading:	5209.31.60.50
Fiber Content:	100% Cotton
Weight:	291.5 g/m2
Width:	160 centimeters cuttable
Thread Count:	24.41 warp ends per centimeter; 16.53 filling picks per centimeter; total: 40.94 threads per square centimeter
Yarn Number:	Warp: 25.4 metric, ring spun; filling: 10.16 metric, open end spun; overall average yarn number: 14.04 metric
Finish:	(Piece) dyed; napped on both sides, sanforized

Fabric 2:

Petitioner Style No:	62BU1600240B
HTS Subheading:	5209.31.60.50
Fiber Content:	100% Cotton
Weight:	305 g/m2
Width:	160 centimeters cuttable
Thread Count:	24.41 warp ends per centimeter; 18.11 filling picks per centimeter; total: 42.52 threads per square centimeter
Yarn Number:	Warp: 25.4 metric, ring spun; filling: 10.16 metric, open end spun; overall average yarn number: 13.95 metric
Finish:	(Piece) dyed; napped on both sides, sanforized

An ''eligible CBTPA beneficiary country'' means a country which the President has designated as a CBTPA beneficiary country under section 213(b)(5)(B) of the CBERA (19 U.S.C. 2703(b)(5)(B)) and which has been the subject of a finding, published in the **Federal Register** , that the country has satisfied the requirements of section 213(b)(4)(A)(ii) of the CBERA (19 U.S.C. 2703(b)(4)(A)(ii)) and resulting in the enumeration of such country in U.S. note 1 to subchapter XX of Chapter 98 of the HTSUS.

D. Michael Hutchinson,

Acting Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. E4–3822 Filed 12–23–04; 8:45 am]

BILLING CODE 6717–01–S

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Solicitation of Public Comments on Request for Textile and Apparel Safeguard Action on Imports From China

December 16, 2004.

AGENCY: The Committee for the Implementation of Textile Agreements (the Committee).

ACTION: Solicitation of public comments concerning a request for safeguard action on imports from China of dressing gowns and robes (Category 350/650).

SUMMARY: The Committee has received a request from the National Council of Textile Organizations, the National Textile Association, the American Manufacturing Trade Action Coalition, SEAMS, and UNITE HERE! (Requestors) asking the Committee to reapply the limit on imports from China of dressing gowns and robes in accordance with the textile and apparel safeguard provision of the Working Party on the Accession of China to the World Trade Organization (the Accession Agreement). On December 24, 2003 the Committee established an Accession Agreement limit on imports from China of dressing gowns and robes, which will expire on December 23, 2004. The Committee hereby solicits public comments on this request.

FOR FURTHER INFORMATION CONTACT: Jay Dowling, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–4058.

SUPPLEMENTARY INFORMATION:

Authority: Section 204 of the Agriculture Act of 1956, as amended; Executive Order 11651, as amended.

Background

The textile and apparel safeguard provision of the Accession Agreement provides for the United States and other members of the World Trade Organization that believe imports of Chinese origin textile and apparel products are, due to market disruption, threatening to impede the orderly development of trade in these products to request consultations with China with a view to easing or avoiding the disruption. Pursuant to this provision, if the United States requests consultations with China, it must, at the time of the request, provide China with a detailed factual statement showing ''(1) the existence or threat of market disruption; and (2) the role of products of Chinese origin in that disruption.'' Beginning on the date that it receives such a request, China must restrict its shipments to the United States to a level no greater than 7.5 percent (6 percent for wool product categories) above the amount entered during the first 12 months of the most recent 14 months preceding the request. If exports from China exceed that amount, the United States may enforce the restriction.

The Committee has published procedures (the Procedures) it follows in considering requests for Accession Agreement textile and apparel safeguard actions (68 FR 27787, May 21, 2003; 68 FR 49440, August 18, 2003), including the information that must be included in such requests in order for the Committee to consider them.

On November 24, 2004, the Requestors asked the Committee to reapply an Accession Agreement textile and apparel safeguard action on imports from China of dressing gowns and robes (Category 350/650) on the ground that an anticipated increase in imports of dressing gowns and robes after December 23, 2004, threatens to disrupt the U.S. market for dressing gowns and robes. The request is available at *http://otexa.ita.doc.gov/Safeguard_intro.htm.* In light of the considerations set forth in the Procedures, the Committee has determined that the Requestors have provided the information necessary for the Committee to consider the request.

The Committee is soliciting public comments on the request, in particular with regard to whether there is a threat of disruption to the U.S. market for dressing gowns and robes and, if so, the role of Chinese-origin dressing gowns and robes in that disruption. To this end, the Committee seeks relevant information addressing factors such as the following, which may be relevant in the particular circumstances of this case, involving a product under a quota that will expire on December 23, 2004: (1) Whether imports of dressing gowns and robes from China are entering, or are expected to enter, the United States at prices that are substantially below prices of the like or directly competitive U.S. product, and whether those imports are likely to have a significant depressing or suppressing effect on domestic prices of the like or directly competitive U.S. product or are likely to increase demand for further imports from China; (2) whether exports of Chinese-origin dressing gowns and robes to the United States are likely to increase substantially and imminently (due to existing unused production capacity, to capacity that can easily be shifted from the production of other products to the production of dressing gowns and robes, or to an imminent and substantial increase in production capacity or investment in production capacity), taking into account the availability of other markets to absorb any additional exports; (3) whether Chinese-origin dressing gowns and robes that are presently sold in the Chinese market or in third-country markets will be diverted to the U.S. market in the imminent future (for example, due to more favorable pricing in the U.S. market or to existing or imminent import restraints into third country markets); (4) the level and the extent of any recent change in inventories of dressing gowns and robes in China or in U.S. bonded warehouses;

(5) whether conditions of the domestic industry of the like or directly competitive product demonstrate that market disruption is likely (as may be evident from any anticipated factory closures or decline in investment in the production of dressing gowns and robes, and whether actual or anticipated imports of Chinese-origin dressing gowns and robes are likely to affect the development and production efforts of the U.S. dressing gowns and robes industry; and (6) whether U.S. managers, retailers, purchasers, importers, or other market participants have recognized Chinese producers of dressing gowns and robes as potential suppliers (for example, through pre-qualification procedures or framework agreements).

Comments may be submitted by any interested person. Comments must be received no later than January 26, 2005. Interested persons are invited to submit ten copies of such comments to the Chairman, Committee for the Implementation of Textile Agreements, Room 3001A, U.S. Department of Commerce, 14th and Constitution Avenue, NW., Washington, DC 20230.

The Committee will protect any business confidential information that is marked business confidential from disclosure to the full extent permitted by law. To the extent that business confidential information is provided, two copies of a non-confidential version must also be provided in which business confidential information is summarized or, if necessary, deleted. Comments received, with the exception of information marked ''business confidential'', will be available for inspection between Monday and Friday, 8:30 a.m and 5:30 p.m in the Trade Reference and Assistance Center Help Desk, Suite 800M, USA Trade Information Center, Ronald Reagan Building, 1300 Pennsylvania Avenue, NW., Washington, DC, (202) 482–3433.

The Committee will make a determination within 60 calendar days of the close of the comment period as to whether the United States will request consultations with China. If the Committee is unable to make a determination within 60 calendar days, it will cause to be published a notice in the **Federal Register**, including the date by which it will make a determination. If the Committee makes a negative determination, it will cause this determination and the reasons therefore to be published in the **Federal Register**. If the Committee makes an affirmative determination that imports of Chinese-origin dressing gowns and robes threaten to disrupt the U.S. market, the United States will request consultations with China with a view to easing or avoiding the disruption.

James C. Leonard, III,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 04–28257 Filed 12–23–04; 8:45 am]

BILLING CODE 3510–DS–P

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Commodity Futures Trading Commission.

TIME AND DATE: 11 a.m. Friday, January 7, 2005.

PLACE: 1155 21st St., NW., Washington, DC, 9th Floor Commission Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Surveillance matters.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 202–418–5100.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 04–28411 Filed 12–22–04; 3:38 pm]

BILLING CODE 6351–01–M

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Commodity Futures Trading Commission.

TIME AND DATE: 11 a.m., Friday, January 14, 2005.

PLACE: 1155 21st St., NW., Washington, DC, 9th Floor Commission Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Surveillance matters.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 202–418–5100.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 04–28412 Filed 12–22–04; 3:38 pm]

BILLING CODE 6351–01–M

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Commodity Futures Trading Commission.

TIME AND DATE: 11 a.m., Friday, January 21, 2005.

PLACE: 1155 21st St., NW., Washington, DC, 9th Floor Commission Conference Room

STATUS: Closed.

MATTERS TO BE CONSIDERED: Surveillance matters.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 202–418–5100.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 04–28413 Filed 12–22–04; 3:38 pm]

BILLING CODE 6351–01–M

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Commodity Futures Trading Commission.

TIME AND DATE: 11 a.m., Friday, January 28, 2005.

PLACE: 1155 21st St., NW., Washington, DC, 9th Floor Commission Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Surveillance matters.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 202–418–5100.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 04–28414 Filed 12–22–04; 3:38 pm]

BILLING CODE 6351–01–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Submission for OMB Review; Comment Request

ACTION: Notice.

The Department of defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C Chapter 35).

DATES: Consideration will be given to all comments received by January 26, 2005.

Title, Form, and OMB Number: Personnel Security Investigation Projection for Industry Survey; DSS Form 232; OMB Control Number 0704–0417.

Type of Request: Extension.

Number of Respondents: 12,117.

Responses Per Respondent: 1.

Annual Responses: 12,117.

Average Burden Per Response: 75 minutes.

Annual Burden Hours: 15,146.

Needs and Uses: Executive Order (EO) 12829, ''National Industrial Security Program (NISP),'' stipulates that the Secretary of Defense shall serve as the Executive Agent for inspecting and monitoring the contractors, licensees, and grantees who require or will require access to classified information; and for determining the eligibility for access to classified information of contractors, licensees, and grantees and their respective employees. EO 12829 also authorizes the Executive Agent to issue, after consultation with affected agencies, standard forms that will promote the implementation of the NISP.

Under the NISP, the Defense Security Service is responsible for conducting personnel security investigation of employees of those cleared contractor entities under its security cognizance. In the past, DSS has relied on historical data for agency budget projections regarding the numbers of personnel security investigations required by cleared contractor entities; however, historical data did not provide a particularly accurate or credible estimate of such workload. In this collection of information, DSS requests the voluntary assistance of the Facility Security Officers of cleared contractor entities to provide projections of the numbers and types of personnel security investigation required. The data will be incorporated into DDS' budget submissions.

The Assistant Secretary of Defense assigned DSS responsibility for the following types of investigation within industry:

a. A Single Scope Background Investigation (SSBI).

b. National Agency Check with Local Agency Check and Credit Check (NACLC).

c. SSBI Periodic Reinvestigation (SSBI–PR or TS–PR).

In accordance with 5200.2–R, DSS is also responsible for conducting TS–PRs every 5 years, SECRET–PRs every 10 years and CONFIDENTIAL–PRs every 15 years. In addition, under specified circumstances, DSS is required to conduct SSBIs, NACLCs and National Agency Checks (NACs) for sensitive positions that do not require personnel security clearances.

Representative of various industry associations, the National Industrial Security Program Policy Advisory Committee (NISPPAC), the Military Services, various elements of the Department of Defense and other Federal Government Agencies are aware of the annual survey.

Affected Public: Business or other for profit and not-for-profit institutions.

Frequency: Annually.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Mr. Lewis Oleinick.

Written comments and recommendations on the proposed information collection should be sent to Mr. Oleinick at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

DOD Clearance Officer: Ms. Patricia Toppings.

Written requests for copies of the information collection proposal should be sent to Ms. Toppings, WHS/ESCD/ Information Management Division, 1225 South Clark Street, Suite 504, Arlington, VA 22202–4326.

Dated: December 15, 2004.

Patricia L. Toppings,

Alternate OSD Federal Register, Liaison Officer, Department of Defense.

[FR Doc. 04–28124 Filed 12–23–04; 8:45 am]

BILLING CODE 5001–06–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Submission for OMB Review; Comment Request

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

DATES: Consideration will be given to all comments received by January 26, 2005.

Title and OMB number: Defense Logistics Agency Readership Survey for Loglines Magazine; OMB Control Number 0704–TBD.

Type of request: New.

Number of respondents: 4,200.

Responses per respondent: 1.

Annual responses: 4,200.

Average burden per response: 10 minutes.

Annual burden hours: 546.

Needs and uses: The Defense Logistics Agency (DLA) is evaluating its public affairs practices to include requesting feedback from readers of its publications. DLA needs to learn how we can better serve our readers and how we are already succeeding. The survey information will be used by DLA to help us improve the customer focus of our publications.

Affected public: Individuals or households; Business or other for-profit; Not-for-profit institutions; Federal government; State, local, or tribal government.

Frequency: On occasion.

Respondent's obligation: Voluntary.

OMB desk officer: Mr. Lewis Oleinick.

Written comments and recommendations on the proposed information collection should be sent to Mr. Oleinick at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

DOD clearance officer: Ms. Patricia Toppings.

Written requests for copies of the information collection proposal should be sent to Ms. Toppings, WHS/ESCD/ Information Management Division, 1225 South Clark Street, Suite 504, Arlington, VA 22202–4326.

Dated: December 17, 2004.

Patricia L. Toppings,

Alternate OSD Federal Register, Liaison Officer, Department of Defense.

[FR Doc. 04–28125 Filed 12–23–04; 8:45 am]

BILLING CODE 5001–06–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Submission for OMB review; comment request

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

DATES: Consideration will be given to all comments received by January 26, 2005.

Title and OMB Number: West Point Engineering Graduates Survey; OMB Control Number 0702–0116.

Type of Request: Extension.

Number of Respondents: 350.

Responses Per Respondent: 1.

Annual Responses: 350.

Average Burden Per Response: 35 minutes.

Annual Burden Hours: 203.

Needs and Uses: An assessment of perceptions of graduates on the effectiveness of the U.S. Military Academy programs and curricula is needed for periodic accreditation by the Accreditation Board for Engineering and Technology. The information collected will be used to evaluate programs/ curricula and make changes deemed advisable.

Affected Public: Individuals or household.

Frequency: On occasion (every three years).

Respondent's Obligation: Voluntary.

OMB Desk Officer: Mr. Lewis Oleinick.

Written comments and recommendations on the proposed information collection should be sent to Mr. Oleinick at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

DOD Clearance Officer: Ms. Patricia Toppings.

Written requests for copies of the information collection proposal should be sent to Ms. Toppings, WHS/ESCD/Information Management Division, 1225 South Clark Street, Suite 504, Arlington, VA 22202–4326.

Dated: December 17, 2004.

Patricia L. Toppings,

Alternate OSD Federal Register, Liaison Officer, Department of Defense.

[FR Doc. 04–28126 Filed 12—–23–04; 8:45 am]

BILLING CODE 5001–06–M

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0065]

Federal Acquisition Regulation; Information Collection; Overtime

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for public comments regarding an extension to an existing OMB clearance (9000–0065).

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Federal Acquisition Regulation (FAR) Secretariat will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a currently approved information collection requirement concerning overtime. The clearance currently expires on April 30, 2005.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the FAR, and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

DATES: Submit comments on or before February 25, 2005.

ADDRESSES: Submit comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to the General Services Administration, FAR Secretariat (VIR), 1800 F Streets, NW, Room 4035, Washington, DC 20405. Please cite OMB Control No. 9000–0065, Overtime, in all correspondence.

FOR FURTHER INFORMATION CONTACT: Craig Goral, Contract Policy Division, GSA (202) 501–3856.

SUPPLEMENTARY INFORMATION:

A. Purpose

Federal solicitations normally do not specify delivery schedules that will require overtime at the Government's expense. However, when overtime is required under a contract and it exceeds the dollar ceiling established during negotiations, the contractor must request approval from the contracting officer for overtime. With the request, the contractor must provide information regarding the need for overtime.

B. Annual Reporting Burden

Respondents: 1,270.

Responses Per Respondent: 1.

Total Responses: 1,270.

Hours Per Response: .25.

Total Burden Hours: 318.

Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, FAR Secretariat (VIR), Room 4035, 1800 F Street, NW, Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control No. 9000–0065, Overtime, in all correspondence.

Dated: December 15, 2004

Laura Auletta

Director, Contract Policy Division.

[FR Doc. 04–28116 Filed 12–23–04; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

Department of the Army

Proposed Collection; Comment Request

AGENCY: Department of the Army, DoD.

ACTION: Notice

SUMMARY: In compliance with section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Department of the Army announces a 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 February 25, 2005.

ADDRESSES: Written comments and recommendations on the proposed information collection should be sent to the Department of the Army, Military Surface Deployment and Distribution Command (SDDC), 200 Stovall Street, Alexandria, VA 22332–5000, ATTN: Leonell C. Strong, III.

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 Department of the Army Reports Clearance Officer at (703) 325–8433.

Title and OMB Number: Industry Partnership Survey; OMB Number 0702–TBD.

Needs and Uses: SDDC will use the survey information to improve the efficiency, quality, and timeliness of its processes, as well as to strengthen its partnership with industry. Although the survey instruments are brief, with only basic information requested to measure satisfaction and to obtain feedback on areas that may require improvement, SDDC expects the data, comments, and suggestions offered by the respondents to help improve the performance of its systems and contain costs. Because the survey asks about the roles of SDDC employees, the responses will also help improve the SDDC exercise of project oversight responsibilities.

Affected Public: Business or other for profit.

Annual Burden Hours: 343.

Number of Respondents: 1,371.

Responses Per Respondent: 1.

Average Burden Per Response: 15 minutes.

Frequency: On occasion (14 month cycle).

SUPPLEMENTARY INFORMATION:

Summary of Information Collection

The SDDC provides global surface deployment command and control and distribution operations to meet National Security objectives in peace and war. To carry out its mission, SDDC works with industry partners in several program areas: Freight Domestic Distribution Program; Freight Global Distribution Program; Passenger Traffic Management Program; Personal Property Traffic Management Program. Most industry partners only provide services in one or two of the program areas, so the survey design provides for transparently skipping respondents only to the sections that are relevant to them. These voluntary partnership surveys will continue to be a collaborative effort to obtain feedback for improving the SDDC business processes.

Dated: December 17, 2004.

Patricia L. Toppings,

Alternate OSD Federal Register, Liaison Officer, Department of Defense.

[FR Doc. 04–28127 Filed 12–23–04; 8:45 am]

BILLING CODE 5001–06–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RT04–2–008; ER04–116–008; Docket No. ER04–157–010; and Docket No. EL01–39–008]

ISO New England Inc., et al. Bangor Hydro-Electric Company, et al. Consumers of New England v. New England Power Pool; Notice of Compliance Filing

December 17, 2004.

Take notice that on December 10, 2004, the New England Power Pool (NEPOOL), through the NEPOOL Participants Committee, ISO New England Inc. (ISO–NE) and the New England transmission owners (collectively, the Settling Parties) submitted a compliance filing to explain how a review board process will operate under the regional transmission organization arrangements for New England. NEPOOL states that the filing is in response to the requirements of the Commission's order issued on November 3, 2004.

NEPOOL states that the copies of the compliance filing were sent to the NEPOOL Participants and the New England state governors and regulatory commissions, as well as all parties on the official service lists in the above-captioned proceedings.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all the parties in this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. eastern time on January 3, 2005.

Magalie R. Salas,

Secretary.

[FR Doc. E4–3818 Filed 12–23–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. OR05–2–000]

State of Alaska v. BP Pipelines (Alaska) Inc., Exxon Mobil Pipeline Co; Conoco Phillips Transportation Alaska, Inc; Phillip Transportation Alaska; Unocal Pipeline Co., Koch Alaska Pipeline Co.; Notice of Complaint

December 17, 2004.

Take notice that on December 15, 2004, the State of Alaska (Alaska) tendered for filing a Complaint against Exxon Mobil Pipeline Co; Conoco Phillips Transportation Alaska, Inc; Phillip Transportation Alaska; Unocal Pipeline Co.; and Koch Alaska Pipeline Co. (collectively, TAPS Carriers).

Alaska files this complaint pursuant to section III–11 of the Interstate Settlement Agreement and alleges that the TAPS Carriers' 2003 and 2004 interstate tariffs violate the Interstate Commerce Act, are inconsistent with the terms of the Interstate Settlement Agreement, and are otherwise unlawful. Specifically, Alaska seeks relief from the inclusion of: (1) Non-jurisdictional intrastate costs; and (2) dismantling and removal costs that do not constitute operating expenses in the TAPS Carriers' 2003 and 2004 interstate tariffs under the Interstate Settlement Agreement.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. The Respondent's answer and all interventions, or protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainants.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for

review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: January 6, 2005.

Magalie R. Salas,

Secretary.

[FR Doc. E4–3808 Filed 12–23–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. OR05–3–000]

Anadarko Petroleum Corporation v. BP Pipelines (Alaska) Inc., ConocoPhillips Transportation Alaska, Inc., ExxonMobile Pipeline Company, Koch Alaska Pipeline Company LLC, Unocal Pipeline Company; Notice of Complaint

December 17, 2004.

Take notice that on December 16, 2004, Anadarko Petroleum Corporation (Anadarko), tendered for filing a Complaint against BP Pipelines (Alaska) Inc.; ConocoPhillips Transportation Alaska, Inc.; ExxonMobile Pipeline Company; Koch Alaska Pipeline Company LLC; and Unocal Pipeline Company (TAPS Carriers). Anadarko alleges that the rates filed by TAPS Carriers for oil transportation on the Trans Alaska Pipeline System are unjust and unreasonable under the Interstate Commerce Act, are inconsistent with the terms of the Interstate Settlement Agreement and are otherwise unlawful. Anadarko request the Commission grant refunds, reparations, damages and other appropriate relief.

Anadarko states that copies of the complaint were served on the contacts for the TAPS Carriers.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. The Respondent's answer and all interventions, or protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainants.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: January 5, 2004.

Magalie R. Salas,

Secretary.

[FR Doc. E4–3809 Filed 12–23–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. RT04–2–009 and ER04–116–009, ER04–157–011, and EL01–39–009]

ISO New England Inc., et al., Bangor Hydro-Electric Company, et al., the Consumers of New England v. New England Power Pool; Notice of Filing

December 17, 2004.

Take notice that on December 10, 2004, ISO New England Inc., (ISO) and the New England transmission owners New England transmission owners consist of Bangor Hydro-Electric Company; Central Maine Power Company; New England Power Company; Northeast Utilities Service Company on behalf of its operating companies: The Connecticut Light and Power Company, Western Massachusetts Electric Company, Public Service Company of New Hampshire, Holyoke Power and Electric Company, and Holyoke Water Power Company; NSTAR Electric & Gas Corporation on behalf of its operating affiliates: Boston Edison Company, Commonwealth Electric Company, Canal Electric Company, and Cambridge Electric Light Company; The United Illuminating Company; Vermont Electric Power Company, Inc.; Fitchburg Gas and Electric Light Company; and Unitil Energy Systems, Inc., submitted a report in response to the Commission's order issued November 3, 2004, 109 FERC ¶ 61,147 (2004).

ISO states that copies of said filing have been served upon all parties to this proceeding, upon all NEPOOL Participants (electronically), non-participant transmission customers, and the governors and regulatory agencies of the six New England states.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all the parties in this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. eastern time on January 3, 2005.

Magalie R. Salas,

Secretary.

[FR Doc. E4–3807 Filed 12–23–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. CP04–395–000, CP04–405–000]

Vista del Sol LNG Terminal LP, Vista del Sol Pipeline LP; Notice of Availability of the Draft Environmental Impact Statement for the Proposed Vista del Sol LNG Terminal Project

December 17, 2004.

The staff of the Federal Energy Regulatory Commission has prepared this draft Environmental Impact Statement (EIS) on the liquefied natural gas (LNG) import terminal and natural gas pipeline facilities proposed by Vista del Sol LNG Terminal LP and Vista del Sol Pipeline LP (collectively referred to as Vista del Sol) in the above-referenced dockets.

The draft EIS was prepared to satisfy the requirements of the National Environmental Policy Act (NEPA). The staff concludes that approval of the proposed project with appropriate mitigating measures as recommended, would have limited adverse environmental impact. The draft EIS also evaluates alternatives to the proposal, including system alternatives, alternative sites for the LNG import terminal, and pipeline alternatives; and requests comments on them.

Vista del Sol's proposed facilities would transport up to 1.4 billion cubic feet per day (Bcfd) of imported natural gas to the U.S. market. In order to provide LNG import, storage, and pipeline transportation services, Vista del Sol requests Commission authorization to construct, install, and operate an LNG terminal and natural gas pipeline facilities.

The draft EIS addresses the potential environmental effects of the construction and operation of the following LNG terminal and natural gas pipeline facilities:

- A ship unloading facility with berthing capabilities for two LNG ships with cargo capacities of up to 250,000 cubic meters (m^3);
- Three 155,000 m^3 full containment LNG storage tanks;
- Vaporization equipment capable of an average sendout capacity of 1.1 Bcfd and a maximum sendout capacity of 1.4 Bcfd;
- Ancillary utilities, buildings, and service facilities;
- One 25.3 mile-long, 36-inch-diameter natural gas sendout pipeline; and
- Associated pipeline support facilities, including six meter stations at interconnects with nine existing pipeline systems, one pig [1] launcher, and one pig receiver.

Comment Procedures and Public Meetings

Any person wishing to comment on the draft EIS may do so. To ensure consideration prior to a Commission decision on the proposal, it is important that we receive your comments before the date specified below. Please carefully follow these instructions to ensure that your comments are received in time and properly recorded:

- Send an original and two copies of your comments to: Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First St., NE., Room 1A, Washington, DC 20426;
- Reference Docket No. CP04–395–000 and/or CP04–405–000;
- Label one copy of your comments for the attention of Gas Branch 3, PJ11.3; and
- Mail your comments so that they will be received in Washington, DC on or before *February 7, 2005.*

Please note that we are continuing to experience delays in mail deliveries from the U.S. Postal Service. As a result, we will include all comments that we receive within a reasonable time frame in our environmental analysis of the project. However, the Commission strongly encourages electronic filing of any comments or interventions to this proceeding. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov* under the ''e-Filing'' link and the link to the User's Guide. Before you can file comments you will need to create a free account which can be created online.

In addition to or in lieu of sending written comments, we invite you to attend the public comment meeting we will conduct in the project area. The location and time for this meeting is listed below: Tuesday, January 11, 2005, 7 p.m. (CST), Portland Community Center, 2000 Billy G Webb, Portland, Texas 78374, Telephone: (361) 777–3301.

This meeting will be posted on the Commission's calendar located at *http://www.ferc.gov/EventCalendar/EventsList.aspx* along with other related information. Interested groups and individuals are encouraged to attend and present oral comments on the draft EIS. A transcript of the meeting will be prepared.

After these comments are reviewed, any significant new issues are investigated, and modifications are made to the draft EIS, a final EIS will be published and distributed by the staff. The final EIS will contain the staff's responses to timely comments received on the draft EIS.

Comments will be considered by the Commission but will not serve to make the commentor a party to the proceeding. Any person seeking to become a party to the proceeding must file a motion to intervene pursuant to Rule 214 of the Commission's Rules of Practice and Procedures (18 CFR 385.214).

Anyone may intervene in this proceeding based on this draft EIS. You must file your request to intervene as specified above.[2] You do not need intervenor status to have your comments considered.

The draft EIS has been placed in the public files of the FERC and is available for distribution and public inspection at: Federal Energy Regulatory Commission, Public Reference Room, 888 First Street, NE., Room 2A, Washington, DC 20426, (202) 502–8371.

A limited number of copies are available from the Public Reference Room identified above. In addition, copies of the draft EIS have been mailed to federal, state, and local agencies; public interest groups; individuals and affected landowners who requested a copy of the draft EIS; libraries; newspapers; and parties to this proceeding.

Additional information about the project is available from the Commission's Office of External Affairs, at 1–866–208–FERC or on the FERC Internet Web site (*http://www.ferc.gov*) using the eLibrary link. Click on the eLibrary link, click on ''General Search'' and enter the docket number excluding the last three digits in the Docket Number field. Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, contact (202) 502–8659. The eLibrary link on the FERC Internet Web site also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission now offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching

[1] A pig is an internal tool that can be used to clean and dry a pipeline and/or inspect it for damage or corrosion.

[2] Interventions may also be filed electronically via the Internet in lieu of paper. See the previous discussion on filing comments electronically.

proceedings by automatically providing you with notification of these filings, document summaries and direct links to the documents. Go to the eSubscription link on the FERC Internet Web site.

Magalie R. Salas,

Secretary.

[FR Doc. E4–3819 Filed 12–23–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Application Accepted for Filing and Soliciting Motions To Intervene, Protests, and Comments

December 17, 2004.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Preliminary permit.

b. *Project No.:* 12510–000.

c. *Date filed:* June 1, 2004.

d. *Applicant:* Woodruff Narrows, LLC.

e. *Name of Project:* Woodruff Narrows Dam Project.

f. *Location:* On the Bear River, in Uinta County, Wyoming. The existing dam is owned by the Woodruff Narrows Reservoir Company.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r)

h. *Applicant Contact:* Mr. Brent L. Smith, President, Northwest Power Services, Inc., P.O. Box 535, Rigby, ID 83442, (208) 745–0834.

i. *FERC Contact:* Robert Bell, (202) 502–6062.

j. *Deadline for filing comments, protests, and motions to intervene:* 60 days from the issuance date of this notice.

The Commission's Rules of Practice and Procedure require all interveners filing documents with the Commission to serve a copy of that document on each person in the official service list for the project. Further, if an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. *Description of Project:* The proposed project would consist of: (1) An existing 620-foot-long, 68-foot-high earthfill dam; (2) an existing reservoir having a surface area of 2,312 acres with a storage capacity of 57,300 acre-feet and normal water surface elevation of 6,440 feet mean sea level; (3) a proposed 75-foot-long, 60-inch-diameter steel penstock; (4) a proposed powerhouse containing a generating unit having an installed capacity of 700 kW; and (5) appurtenant facilities. The project would have an annual generation of 2.1 GWh that would be sold to a local utility.

l. *Locations of Applications:* A copy of the application is available for inspection and reproduction at the Commission in the Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676 for TTY, (202) 502–8659. A copy is also available for inspection and reproduction at the address in item h. above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Competing Preliminary Permit*—Anyone desiring to file a competing application for preliminary permit for a proposed project must submit the competing application itself, or a notice of intent to file such an application, to the Commission on or before the specified comment date for the particular application (*see* 18 CFR 4.36). Submission of a timely notice of intent allows an interested person to file the competing preliminary permit application no later than 30 days after the specified comment date for the particular application. A competing preliminary permit application must conform with 18 CFR 4.30(b) and 4.36.

o. *Competing Development Application*—Any qualified development applicant desiring to file a competing development application must submit to the Commission, on or before a specified comment date for the particular application, either a competing development application or a notice of intent to file such an application. Submission of a timely notice of intent to file a development application allows an interested person to file the competing application no later than 120 days after the specified comment date for the particular application. A competing license application must conform with18 CFR 4.30(b) and 4.36.

p. *Notice of Intent*—A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, and must include an unequivocal statement of intent to submit, if such an application may be filed, either a preliminary permit application or a development application (specify which type of application). A notice of intent must be served on the applicant(s) named in this public notice.

q. *Proposed Scope of Studies Under Permit*—A preliminary permit, if issued, does not authorize construction. The term of the proposed preliminary permit would be 36 months. The work proposed under the preliminary permit would include economic analysis, preparation of preliminary engineering plans, and a study of environmental impacts. Based on the results of these studies, the Applicant would decide whether to proceed with the preparation of a development application to construct and operate the project.

r. *Comments, Protests, or Motions To Intervene*—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

Comments, protests and interventions may be filed electronically via the Internet in lieu of paper; *see* 18 CFR 385.2001 (a)(1)(iii) and the instructions on the Commission's Web site under ''e-filing'' link. The Commission strongly encourages electronic filing.

s. *Filing and Service of Responsive Documents*—Any filings must bear in all capital letters the title ''COMMENTS'', ''RECOMMENDATIONS FOR TERMS AND CONDITIONS'', ''PROTEST'', or ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

t. *Agency Comments*—Federal, State, and local agencies are invited to file comments on the described application.

A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

Magalie R. Salas,

Secretary.

[FR Doc. E4–3810 Filed 12–23–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Application Accepted for Filing and Soliciting Motions To Intervene, Protests, and Comments

December 17, 2004.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Preliminary permit.

b. *Project No.:* 12515–000.

c. *Date Filed:* July 1, 2004.

d. *Applicant:* Corbett Diversion Hydro, LLC.

e. *Name of Project:* Corbett Diversion Project.

f. *Location:* On the Shoshone River, in Park County, Wyoming. Will utilize the existing U.S. Bureau of Reclamation's Corbett Diversion dam.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)—825(r)

h. *Applicant Contact:* Mr. Brent L. Smith, President, Northwest Power Services, Inc., P.O. Box 535, Rigby, ID 83442, (208) 745–0834.

i. *FERC Contact:* Robert Bell, (202) 502–6062.

j. *Deadline for filing comments, protests, and motions to intervene:* 60 days from the issuance date of this notice.

The Commission's Rules of Practice and Procedure require all interveners filing documents with the Commission to serve a copy of that document on each person in the official service list for the project. Further, if an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. Description of Project: The proposed project using the U.S. Bureau of Reclamation's Corbett Diversion and would consist of: (1) A proposed intake structure; (2) a proposed 10-foot-long, 144-inch-diameter steel penstock; (3) a proposed powerhouse containing a generating unit having an installed capacity of 1.4 MW; (4) a proposed 1-mile-long, 15-kV transmission line; and (5) appurtenant facilities. The project would have an annual generation of 6.1 GWh that would be sold to a local utility.

l. *Locations of Applications:* A copy of the application is available for inspection and reproduction at the Commission in the Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov.* or toll free (866) 208–3676, for TTY, (202) 502–8659. A copy is also available for inspection and reproduction at the address in item h. above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Competing Preliminary Permit*—Anyone desiring to file a competing application for preliminary permit for a proposed project must submit the competing application itself, or a notice of intent to file such an application, to the Commission on or before the specified comment date for the particular application (*see* 18 CFR 4.36). Submission of a timely notice of intent allows an interested person to file the competing preliminary permit application no later than 30 days after the specified comment date for the particular application. A competing preliminary permit application must conform with 18 CFR 4.30(b) and 4.36.

o. *Competing Development Application*—Any qualified development applicant desiring to file a competing development application must submit to the Commission, on or before a specified comment date for the particular application, either a competing development application or a notice of intent to file such an application. Submission of a timely notice of intent to file a development application allows an interested person to file the competing application no later than 120 days after the specified comment date for the particular application. A competing license application must conform with18 CFR 4.30(b) and 4.36.

Notice of Intent—A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, and must include an unequivocal statement of intent to submit, if such an application may be filed, either a preliminary permit application or a development application (specify which type of application). A notice of intent must be served on the applicant(s) named in this public notice.

q. *Proposed Scope of Studies Under Permit*—A preliminary permit, if issued, does not authorize construction. The term of the proposed preliminary permit would be 36 months. The work proposed under the preliminary permit would include economic analysis, preparation of preliminary engineering plans, and a study of environmental impacts. Based on the results of these studies, the Applicant would decide whether to proceed with the preparation of a development application to construct and operate the project.

r. *Comments, Protests, or Motions To Intervene*—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

Comments, protests and interventions may be filed electronically via the Internet in lieu of paper; see 18 CFR 385.2001 (a)(1)(iii) and the instructions on the Commission's web site under ''e-filing'' link. The Commission strongly encourages electronic filing.

s. *Filing and Service of Responsive Documents*—Any filings must bear in all capital letters the title ''COMMENTS'', ''RECOMMENDATIONS FOR TERMS AND CONDITIONS'', ''PROTEST'', or ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

t. *Agency Comments*—Federal, State, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

Magalie R. Salas,

Secretary.

[FR Doc. E4–3811 Filed 12–23–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Application Accepted for Filing and Soliciting Motions To Intervene, Protests, and Comments

December 17, 2004.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Preliminary permit.

b. *Project No.:* 12518–000.

c. *Date Filed:* July 1, 2004.

d. *Applicant:* Thief Valley Dam Hydro, LLC.

e. *Name of Project:* Thief Valley Dam Project.

f. *Location:* On the Powder River, in Union and Baker Counties, Oregon. Would utilize the existing U.S. Bureau of Reclamation's Thief Valley Dam.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)—825(r)

h. *Applicant Contact:* Mr. Brent L. Smith, President, Northwest Power Services, Inc., P. O. Box 535, Rigby, ID 83442, (208) 745–0834.

i. *FERC Contact:* Robert Bell, (202) 502–6062.

j. *Deadline for filing comments, protests, and motions to intervene:* 60 days from the issuance date of this notice.

The Commission's Rules of Practice and Procedure require all interveners filing documents with the Commission to serve a copy of that document on each person in the official service list for the project. Further, if an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. *Description of Project:* The proposed project using the U.S. Bureau of Reclamation's Thief Valley Dam and would consist of: (1) A proposed intake structure; (2) a proposed 125-foot-long, 60-inch-diameter steel penstock; (3) a proposed powerhouse containing a generating unit having an installed capacity of 1 MW; (4) a proposed 4-mile-long, 15-kV transmission line; and (5) appurtenant facilities. The project would have an annual generation of 3.3 GWh that would be sold to a local utility.

l. *Locations of Applications:* A copy of the application is available for inspection and reproduction at the Commission in the Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please call FERC Online Support at *FERCOnlineSupport@ferc.gov.* or toll free at (866) 208–3676 or for TTY, (202) 502–8659. A copy is also available for inspection and reproduction at the address in item h. above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Competing Preliminary Permit*—Anyone desiring to file a competing application for preliminary permit for a proposed project must submit the competing application itself, or a notice of intent to file such an application, to the Commission on or before the specified comment date for the particular application (*see* 18 CFR 4.36). Submission of a timely notice of intent allows an interested person to file the competing preliminary permit application no later than 30 days after the specified comment date for the particular application. A competing preliminary permit application must conform with 18 CFR 4.30(b) and 4.36.

o. *Competing Development Application*—Any qualified development applicant desiring to file a competing development application must submit to the Commission, on or before a specified comment date for the particular application, either a competing development application or a notice of intent to file such an application. Submission of a timely notice of intent to file a development application allows an interested person to file the competing application no later than 120 days after the specified comment date for the particular application. A competing license application must conform with 18 CFR 4.30(b) and 4.36.

p. *Notice of Intent*—A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, and must include an unequivocal statement of intent to submit, if such an application may be filed, either a preliminary permit application or a development application (specify which type of application). A notice of intent must be served on the applicant(s) named in this public notice.

q. *Proposed Scope of Studies Under Permit*—A preliminary permit, if issued, does not authorize construction. The term of the proposed preliminary permit would be 36 months. The work proposed under the preliminary permit would include economic analysis, preparation of preliminary engineering plans, and a study of environmental impacts. Based on the results of these studies, the Applicant would decide whether to proceed with the preparation of a development application to construct and operate the project.

r. *Comments, Protests, or Motions To Intervene*—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

Comments, protests and interventions may be filed electronically via the Internet in lieu of paper; *see* 18 CFR 385.2001 (a)(1)(iii) and the instructions on the Commission's Web site under ''e-filing'' link. The Commission strongly encourages electronic filing.

s. *Filing and Service of Responsive Documents*—Any filings must bear in all capital letters the title ''COMMENTS'', ''RECOMMENDATIONS FOR TERMS AND CONDITIONS'', ''PROTEST'', or ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. A copy of any motion to intervene must

also be served upon each representative of the Applicant specified in the particular application.

t. *Agency Comments*—Federal, State, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

Magalie R. Salas,

Secretary.

[FR Doc. E4–3812 Filed 12–23–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Application Accepted for Filing and Soliciting Motions To Intervene, Protests, and Comments

December 17, 2004.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Preliminary permit.

b. *Project No.:* 12534–000.

c. *Date Filed:* September 1, 2004.

d. *Applicant:* Pacific Energy Resources, LLC.

e. *Name of Project:* Wailua Falls Project.

f. *Location:* On the Wailua River, in Kauai County, Hawaii.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r)

h. *Applicant Contact:* Mr. Brent L. Smith, President, Northwest Power Services, Inc., P.O. Box 535, Rigby, ID 83442, (208) 745–0834.

i. *FERC Contact:* Robert Bell, (202) 502–6062.

j. *Deadline for filing comments, protests, and motions to intervene:* 60 days from the issuance date of this notice.

The Commission's Rules of Practice and Procedure require all interveners filing documents with the Commission to serve a copy of that document on each person in the official service list for the project. Further, if an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. *Description of Project:* The proposed project would consist of: (1) A proposed 508-foot-long, 23-foot-high Dam; (2) a proposed reservoir having a surface are of 35 acres with a storage capacity of 430 acre-feet and normal water surface elevation of 278 feet mean sea level; (3) a proposed 4,800-foot-long, 8-foot-diameter steel penstock; (4) a proposed powerhouse containing two generating units having a total installed capacity of 13 MW; (5) a proposed 2-mile-long, 25–kV transmission line; and (6) appurtenant facilities. The project would have an annual generation of 20.7 GWh that would be sold to a local utility.

l. *Locations of Applications:* A copy of the application is available for inspection and reproduction at the Commission in the Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov.* or toll free at (866) 208–3676 or for TTY, contact (202) 502–8659. A copy is also available for inspection and reproduction at the address in item h. above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Competing Preliminary Permit*—Anyone desiring to file a competing application for preliminary permit for a proposed project must submit the competing application itself, or a notice of intent to file such an application, to the Commission on or before the specified comment date for the particular application (*see* 18 CFR 4.36). Submission of a timely notice of intent allows an interested person to file the competing preliminary permit application no later than 30 days after the specified comment date for the particular application. A competing preliminary permit application must conform with 18 CFR 4.30(b) and 4.36.

o. *Competing Development Application*—Any qualified development applicant desiring to file a competing development application must submit to the Commission, on or before a specified comment date for the particular application, either a competing development application or a notice of intent to file such an application. Submission of a timely notice of intent to file a development application allows an interested person to file the competing application no later than 120 days after the specified comment date for the particular application. A competing license application must conform with18 CFR 4.30(b) and 4.36.

p. *Notice of Intent*—A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, and must include an unequivocal statement of intent to submit, if such an application may be filed, either a preliminary permit application or a development application (specify which type of application). A notice of intent must be served on the applicant(s) named in this public notice.

q. *Proposed Scope of Studies Under Permit*—A preliminary permit, if issued, does not authorize construction. The term of the proposed preliminary permit would be 36 months. The work proposed under the preliminary permit would include economic analysis, preparation of preliminary engineering plans, and a study of environmental impacts. Based on the results of these studies, the Applicant would decide whether to proceed with the preparation of a development application to construct and operate the project.

r. *Comments, Protests, or Motions To Intervene*—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

Comments, protests and interventions may be filed electronically via the Internet in lieu of paper; *see* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under ''e-filing'' link. The Commission strongly encourages electronic filing.

s. *Filing and Service of Responsive Documents*—Any filings must bear in all capital letters the title ''COMMENTS'', ''RECOMMENDATIONS FOR TERMS AND CONDITIONS'', ''PROTEST'', or ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies

provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

t. *Agency Comments*—Federal, State, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

Magalie R. Salas,

Secretary.

[FR Doc. E4–3813 Filed 12–23–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Application Accepted for Filing and Soliciting Motions To Intervene, Protests, and Comments

December 17, 2004.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Preliminary permit.

b. *Project No.:* 12535–000.

c. *Date Filed:* September 1, 2004.

d. *Applicant:* Easton Diversion Dam Hydro, LLC.

e. *Name of Project:* Easton Diversion Dam Project.

f. *Location:* On the Yakima River, in Kittitas County, Washington. Will utilize the existing U.S. Bureau of Reclamation's Easton Diversion Dam.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Mr. Brent L. Smith, President, Northwest Power Services, Inc., P.O. Box 535, Rigby, ID 83442, (208) 745–0834.

i. *FERC Contact:* Robert Bell, (202) 502–6062.

j. *Deadline for filing comments, protests, and motions to intervene:* 60 days from the issuance date of this notice.

The Commission's Rules of Practice and Procedure require all interveners filing documents with the Commission to serve a copy of that document on each person in the official service list for the project. Further, if an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. *Description of Project:* The proposed project using the U.S. Bureau of Reclamation's Easton Diversion Dam and would consist of: (1) A proposed intake structure; (2) a proposed 170-foot-long, 66-inch-diameter steel penstock; (3) a proposed powerhouse containing a generating unit having an installed capacity of 1 MW; (4) a proposed 1-mile-long, 15–kV transmission line; and (5) appurtenant facilities. The project would have an annual generation of 6.7 GWh that would be sold to a local utility.

l. *Locations of Applications:* A copy of the application is available for inspection and reproduction at the Commission in the Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov*. or toll free at (866) 208–3676 For TTY call 202) 502–8659. A copy is also available for inspection and reproduction at the address in item h. above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Competing Preliminary Permit*—Anyone desiring to file a competing application for preliminary permit for a proposed project must submit the competing application itself, or a notice of intent to file such an application, to the Commission on or before the specified comment date for the particular application (*see* 18 CFR 4.36). Submission of a timely notice of intent allows an interested person to file the competing preliminary permit application no later than 30 days after the specified comment date for the particular application. A competing preliminary permit application must conform with 18 CFR 4.30(b) and 4.36.

o. *Competing Development Application*—Any qualified development applicant desiring to file a competing development application must submit to the Commission, on or before a specified comment date for the particular application, either a competing development application or a notice of intent to file such an application. Submission of a timely notice of intent to file a development application allows an interested person to file the competing application no later than 120 days after the specified comment date for the particular application. A competing license application must conform with18 CFR 4.30(b) and 4.36.

p. *Notice of Intent*—A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, and must include an unequivocal statement of intent to submit, if such an application may be filed, either a preliminary permit application or a development application (specify which type of application). A notice of intent must be served on the applicant(s) named in this public notice.

q. *Proposed Scope of Studies Under Permit*—A preliminary permit, if issued, does not authorize construction. The term of the proposed preliminary permit would be 36 months. The work proposed under the preliminary permit would include economic analysis, preparation of preliminary engineering plans, and a study of environmental impacts. Based on the results of these studies, the Applicant would decide whether to proceed with the preparation of a development application to construct and operate the project.

r. *Comments, Protests, or Motions To Intervene*—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

Comments, protests and interventions may be filed electronically via the Internet in lieu of paper; *see* 18 CFR 385.2001 (a)(1)(iii) and the instructions on the Commission's Web site under ''e-filing'' link. The Commission strongly encourages electronic filing.

s. *Filing and Service of Responsive Documents*—Any filings must bear in all capital letters the title ''COMMENTS'', ''RECOMMENDATIONS FOR TERMS AND CONDITIONS'', ''PROTEST'', or ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named

documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

t. *Agency Comments*—Federal, State, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

Magalie R. Salas,

Secretary.

[FR Doc. E4–3814 Filed 12–23–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Application Accepted for Filing and Soliciting Motions To Intervene, Protests, and Comments

December 17, 2004.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Preliminary Permit.

b. *Project No.:* 12538–000.

c. *Date filed:* September 10, 2004.

d. *Applicant:* Oologah Lake Dam Hydro, LLC.

e. *Name of Project*: Oologah Lake Dam Project.

f. *Location:* On the Verdigris River, in Rogers County, Oklahoma. Will utilize the existing U.S. Army Corps of Engineers' Oologah Lake Dam.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Mr. Brent L. Smith, President, Northwest Power Services, Inc., P.O. Box 535, Rigby, ID 83442, (208) 745–0834.

i. *FERC Contact:* Robert Bell, (202) 502–6062.

j. *Deadline for filing comments, protests, and motions to intervene:* 60 days from the issuance date of this notice.

The Commission's Rules of Practice and Procedure require all interveners filing documents with the Commission to serve a copy of that document on each person in the official service list for the project. Further, if an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. *Description of Project:* The proposed project using the U.S. Army Corps of Engineers' Oologah Lake Dam and would consist of: (1) A proposed intake structure; (2) a proposed 200-foot-long, 228-inch-diameter steel penstock; (3) a proposed powerhouse containing two generating units having a total installed capacity of 25.7 MW; (4) a proposed 2-mile-long, 46-kV transmission line; and (5) appurtenant facilities. The project would have an annual generation of 71.5 GWh that would be sold to a local utility.

l. *Locations of Applications:* A copy of the application is available for inspection and reproduction at the Commission in the Public Reference Room, located at 888 First Street NE., Room 2A, Washington DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676; for TTY, contact (202) 502–8659. A copy is also available for inspection and reproduction at the address in item h. above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. Competing Preliminary Permit—Anyone desiring to file a competing application for preliminary permit for a proposed project must submit the competing application itself, or a notice of intent to file such an application, to the Commission on or before the specified comment date for the particular application (*see* 18 CFR 4.36). Submission of a timely notice of intent allows an interested person to file the competing preliminary permit application no later than 30 days after the specified comment date for the particular application. A competing preliminary permit application must conform with 18 CFR 4.30(b) and 4.36.

o. Competing Development Application—Any qualified development applicant desiring to file a competing development application must submit to the Commission, on or before a specified comment date for the particular application, either a competing development application or a notice of intent to file such an application. Submission of a timely notice of intent to file a development application allows an interested person to file the competing application no later than 120 days after the specified comment date for the particular application. A competing license application must conform with 18 CFR 4.30(b) and 4.36.

p. Notice of Intent—A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, and must include an unequivocal statement of intent to submit, if such an application may be filed, either a preliminary permit application or a development application (specify which type of application). A notice of intent must be served on the applicant(s) named in this public notice.

q. Proposed Scope of Studies Under Permit—A preliminary permit, if issued, does not authorize construction. The term of the proposed preliminary permit would be 36 months. The work proposed under the preliminary permit would include economic analysis, preparation of preliminary engineering plans, and a study of environmental impacts. Based on the results of these studies, the Applicant would decide whether to proceed with the preparation of a development application to construct and operate the project.

r. Comments, Protests, or Motions To Intervene—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

Comments, protests and interventions may be filed electronically via the Internet in lieu of paper; *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under ''e-filing'' link. The Commission strongly encourages electronic filing.

s. Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title ''COMMENTS'', ''RECOMMENDATIONS FOR TERMS AND CONDITIONS'', ''PROTEST'', or ''MOTION TO INTERVENE'', as applicable, and the Project Number of

the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

t. Agency Comments—Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

Magalie R. Salas,

Secretary.

[FR Doc. E4–3815 Filed 12–23–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project Nos. 2146–090, 82–019, 618–104]

Alabama Power Company; Notice of Draft License Application and Preliminary Draft Environmental Assessment (PDEA) and Request for Preliminary Terms and Conditions

December 17, 2004.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* New major license.

b. *Project No.:* P–2146; P–82; P–618.

c. *Applicant:* Alabama Power Company.

d. *Name of Project:* Coosa River Hydroelectric Project (P–2146) which includes the Weiss, H. Neely Henry, Logan Martin, Lay and Bouldin developments; Mitchell Hydroelectric Project (P–82); Jordan Hydroelectric Project (P–618).

e. *Location:* On the Coosa River, in the states of Alabama and Georgia.

f. *Applicant Contact:* Mr. R.M. Akridge, Hydro General Manager, Alabama Power Company, 600 North 18th Street, P.O. Box 2641, Birmingham, AL 35291–8180.

g. *FERC Contact:* Ronald McKitrick, (770) 452–2272, E-mail: *ronald.mckitrick@ferc.gov.*

h. Alabama Power Company intends to combine all three Projects listed above into one Project number. Alabama Power Company distributed a copy of the Coosa PDEA and Draft License Application to interested parties at a public meeting on December 8, 2004 and mailed copies on December 10, 2004 to those not attending the December 8th meeting. The Commission received a copy of the PDEA and Coosa Draft License Application on December 10, 2004.

i. *Status of Project:* With this notice the Commission is soliciting (1) preliminary terms, conditions, and recommendations on the PDEA, and (2) comments on the PDEA and the Draft Application.

j. *Deadline for Filing:* March 10, 2005.

All comments on the Coosa PDEA and Draft Application should be sent to the addresses noted above in Item (f), with one copy filed with FERC at the following address: Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. All comments must include the project name (Coosa River Hydroelectric Projects) and number and bear the heading ''Preliminary Comments, Preliminary Recommendations, Preliminary Terms and Conditions, or Preliminary Prescriptions.''

Comments and preliminary recommendations, terms and conditions, and prescriptions may be filed electronically via the Internet in lieu of paper. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov*) under the ''e-Filing'' link.

k. A copy of the application is on file with the Commission and is available for public inspection. This filing may also be viewed on the Web at *http://www.ferc.gov* using the ''RIMS'' link—select ''Docket #'' and follow the instructions (call 202–208–2222 for assistance).

Alabama Power Company has mailed a copy of the Coosa Preliminary DEA and Draft Application to interested entities and parties. Copies of these documents are available by contacting Alabama Power Company's relicensing Web site at *http://www.southernco.com/alpower/hydro* or by calling (205) 257–4265 or by e-mailing *JFCREW@southernco.com* or (205) 257–1268 or by e-mailing *BKLOVETT@southernco.com.*

l. With this notice, we are initiating consultation with the Alabama and Georgia STATE HISTORIC PRESERVATION OFFICERS (SHPO), as required by section 106, National Historic Preservation Act, and the regulations of the Advisory Council on Historic Preservation, 36 CFR 800.4.

Magalie R. Salas,

Secretary.

[FR Doc. E4–3816 Filed 12–23–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2165–015]

Alabama Power Company; Notice of Draft License Application and Preliminary Draft Environmental Assessment (PDEA) and Request for Preliminary Terms and Conditions

December 17, 2004.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* New major license.

b. *Project No.:* P–2165–015.

c. *Applicant:* Alabama Power Company.

d. *Name of Project:* Warrior River Hydroelectric Project, which includes the Lewis Smith and Bankhead Developments.

e. *Location:* The Lewis Smith development is located in northwestern Alabama in the headwaters of the Black Warrior River on the Sipsey Fork in Cullman, Walker, and Winston counties. The Bankhead development is located in central Alabama downstream of the Lewis Smith development, on the Black Warrior River in Tuscaloosa County.

f. *Applicant Contact:* Mr. R.M. Akridge, Hydro General Manager, Alabama Power Company, 600 North 18th Street, P.O. Box 2641, Birmingham, AL 35291–8180.

g. *FERC Contact:* Ronald McKitrick, (770) 452–2272, E-mail: *ronald.mckitrick@ferc.gov.*

h. Alabama Power Company distributed a copy of the Warrior PDEA and Draft License Application to interested parties at a public meeting on December 8, 2004 and mailed copies on December 10, 2004 to those not attending the December 8th meeting. The Commission received a copy of the Warrior PDEA and Draft License Application on December 10, 2004.

i. *Status of Project:* With this notice the Commission is soliciting (1) preliminary terms, conditions, and recommendations on the PDEA, and (2) comments on the PDEA and the Draft Application.

j. *Deadline for Filing:* March 10, 2005.

All comments on the Warrior PDEA and Draft Application should be sent to the addresses noted above in Item (f), with one copy filed with FERC at the following address: Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. All comments must include the project name (Warrior River Hydroelectric Project) and number and bear the heading ''Preliminary Comments, Preliminary Recommendations, Preliminary Terms and Conditions, or Preliminary Prescriptions.''

Comments and preliminary recommendations, terms and conditions, and prescriptions may be filed electronically via the Internet in lieu of paper. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov*) under the ''e-Filing'' link.

k. A copy of the application is on file with the Commission and is available for public inspection. This filing may also be viewed on the Web at *http://www.ferc.gov* using the ''RIMS'' link—select ''Docket #'' and follow the instructions (call 202–208–2222 for assistance).

Alabama Power Company has mailed a copy of the Preliminary DEA and Draft Application to interested entities and parties. Copies of these documents are available by contacting Alabama Power Company's relicensing Web site at *http://www.southernco.com/alpower/hydro* or by calling (205) 257–4265 or by e-mailing *JFCREW@southerco.com* or (205) 257–1268 or by e-mailing *BKLOVETT@southernco.com.*

l. With this notice, we are initiating consultation with the Alabama STATE HISTORIC PRESERVATION OFFICER (SHPO), as required by Section 106, National Historic Preservation Act, and the regulations of the Advisory Council on Historic Preservation, 36 CFR 800.4.

Magalie R. Salas,

Secretary.

[FR Doc. E4–3817 Filed 12–23–04; 8:45 am]

BILLING CODE 6717–01–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Submitted to OMB for Review and Approval

December 16, 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, 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 comments should be submitted on or before January 26, 2005. 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: 3060–1043.

Title: Telecommunication Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, CC Docket No. 98–67 and CC Docket No. 90–571 (*Report and Order, Order on Reconsideration*), FCC 04–137.

Form Number: N/A.

Type of Review: Revision of currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents: 7.

Estimated Time per Response: 10 hours.

Frequency of Response: Annual reporting requirement.

Total Annual Burden: 70 hours.

Total Annual Cost: None.

Privacy Impact Assessment: No impact(s).

Needs and Uses: On June 30, 2004, the Commission released the *Report and Order, Order on Reconsideration, (Report and Order)* In the Matter of Telecommunication Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, CC Docket No. 98–67 and CC Docket No. 90–571, FCC 04–137. In the *Report and Order,* the Commission grants Video Relay Service (VRS) waiver requests of the following Telecommunications Relay Services (TRS) mandatory minimum requirements: (1) 47 CFR Section 64.604 (a)(3) types of calls that must be handled; (2) 47 CFR Section 64.604 (a)(3)(iv) pay-per-call services; (3) 47 CFR Section 64.604 (a)(4) emergency call handling; (4) 47 CFR Section 64.604 (b)(2) speed of answer; and (5) 47 CFR Section 64.604 (b)(3) equal access to interexchange carriers. These waivers are granted provided that VRS providers submit an annual report to the Commission, in a narrative form, detailing: (1) The provider's plan or general approach to meet the waived standards; (2) any additional costs that would be required to meet the standards; (3) the development of any new technology that may affect the particular waivers; (4) the progress made by the provider to meet the standards; (5) the specific steps taken to resolve any technical problems that prohibit the provider from meeting the standards; and (6) any other factors relevant to whether the waivers should continue in effect. Further, as requested by the parties and for administrative convenience, VRS providers may combine the reporting requirement established in the *Report and Order* with existing VRS/IP Relay reporting requirements, which are scheduled to be submitted annually on April 16th of each year pursuant to the *IP Relay Order on Reconsideration and Second Improved TRS Order & NPRM.* In the *Order on Reconsideration,* the Commission affirms, except as otherwise specifically provided therein, the cost recovery methodology for VRS established in the June 30, 2003 *Bureau TRS Order.* The Commission adjusts the VRS compensation rate to a per-minute compensation rate of $8.854. On June 30, 2004, the Commission also released a *Further Notice of Proposed Rulemaking,* In the Matter of Telecommunication Relay Services and Speech-to-Speech Services for

Individuals with Hearing and Speech Disabilities, CG Docket No. 03–123, FCC 04–137, that addressed a number of outstanding issues with respect to VRS and IP Relay, none of which have any implications under the Paperwork Reduction Act.

OMB Control Number: 3060–0874.

Title: Slamming Complaint Form, FCC Form 475.

Form Number: FCC 475.

Type of Review: Revision of a currently approved collection.

Respondents: Individuals or households; Business or other for-profit entities; Not-for-profit institutions; Federal government; State, local or Tribal Government.

Number of Respondents: 83,287.

Estimated Time per Response: 30 minutes.

Frequency of Response: On occasion reporting requirement.

Total Annual Burden: 41,644 hours.

Total Annual Cost: None.

Privacy Impact Assessment: Yes.

Needs and Use: FCC Form 475 allows the Commission to collect detailed data from consumers of the practices of common carriers. The information contained in the collection also allows consumers to provide the FCC with the relevant information required to help consumers develop a concise statement outlining the issue in dispute. The Commission uses the information to assist in resolving informal complaints and the collect data required to assess the practices of common carriers. The Commission has revised FCC Form 475, Consumer Complaint Form to consolidate and streamline the data requirements. In particular, consumers using FCC Form 475 need only prepare and submit this single document instead of submitting multiple documents to seek redress of their concerns; thus, the Commission believes that this revised form will significantly improve the complaint process for consumers, common carriers, and the FCC staff.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 04–28179 Filed 12–23–04; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission

December 15, 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 January 26, 2005. 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.: 3060–0798.

Title: FCC Application for Wireless Telecommunications Bureau Radio Service Authorization.

Form No: FCC Form 601.

Type of Review: Revision of a currently approved collection.

Respondents: Individuals or households, business or other for-profit, not-for-profit institutions, and state, local and tribal government.

Number of Respondents: 250,520.

Estimated Time Per Response: .5—1.25 hours.

Frequency of Response: On occasion and every ten year reporting requirements, third party disclosure requirement and recordkeeping requirement.

Total Annual Burden: 219,205 hours.

Total Annual Cost: $50,104,000.

Privacy Act Impact Assessment: Yes.

Needs and Uses: FCC Form 601 is a multi-purpose form used to apply for an authorization to operate radio stations, amend pending applications, modify existing licenses and perform a variety of other miscellaneous tasks in the Public Mobile Services, Personal Communications Services, General Wireless Communications Services, Private Land Mobile Radio Services, Broadcast Auxiliary Services, Fixed Microwave Services, Maritime Services (excluding ships), and Aviation Services (excluding aircraft). The FCC Form 601 has been revised to now include the use of the frequencies in the 764–776 and 794–806 MHz bands pursuant to Part 90, Subpart R (ET Docket No. 97–157); adding an eligibility statement for the specified radio service; an applicant certification for the construction period; and to clarify existing instructions for the general public.

OMB Control No.: 3060–0944.

Title: Review of Commission Consideration of Applications Under the Cable Landing License Act.

Form No: Not Applicable.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit.

Number of Respondents: 25 respondents; 200 responses.

Estimated Time Per Response: 1—40 hours.

Frequency of Response: On occasion and quarterly reporting requirements and third party disclosure requirement.

Total Annual Burden: 1,001 hours.

Total Annual Cost: $402,175.

Privacy Act Impact Assessment: Not Applicable.

Needs and Uses: The Commission is requesting an extension (no change) to this information collection. The increase in costs for outside legal and engineering assistance changed from $150 to $200 per hour. As a result, the OMB 83i and supporting statement reflects an adjustment of +$50,000. Additionally, we recalculated our estimate for the total annual burden hours. In the International E-Filing Notice of Proposed Rulemaking (NPRM), the Commission sought comment on eliminating paper filings and requiring applicants to file electronically all applications and other filings related to international telecommunications services via the International Bureau Filing System (IBFS). Among other proposals, the Commission proposed the development

of several cable landing license forms that impact this information collection. They include, but are not limited to, the following forms: (1) Submarine Cable Landing License (SCL) Amendment—amendment of an application to correct information required for the processing of the original application; (2) SCL Assignment—application to assign a license, or a portion of it, from one entity to another; (3) SCL Landing Point Notification—notification of specific description of the landing stations in the U.S. and foreign countries where the cable will land; and (4) SCL Transfer of Control of License—application to transfer control of a license. The projected completion date for these applications is December 31, 2005. It is anticipated that the Commission will adopt and release a Report and Order in 2005 to implement decisions proposed in the NPRM. The specific decisions are contingent upon comments received from the public and other pertinent factors. After the Report and Order is released by the Commission and the SCL forms are completed, this information collection will be revised to reflect the decisions made in the Report and Order and the implementation of the new forms.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 04–28180 Filed 12–23–04; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center 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 January 21, 2005.

A. Federal Reserve Bank of San Francisco (Tracy Basinger, Director, Regional and Community Bank Group) 101 Market Street, San Francisco, California 94105–1579:

1. Frontier Financial Corporation, Everett, Washington; to acquire 20 percent of the voting shares of Skagit State Bank, Burlington, Washington.

Board of Governors of the Federal Reserve System, December 20, 2004.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 04–28213 Filed 12–23–04; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Federal Open Market Committee; Domestic Policy Directive of November 10, 2004

In accordance with § 271.25 of its rules regarding availability of information (12 CFR part 271), there is set forth below the domestic policy directive issued by the Federal Open Market Committee at its meeting held on November 10, 2004.[1]

The Federal Open Market Committee seeks monetary and financial conditions that will foster price stability and promote sustainable growth in output. To further its long–run objectives, the Committee in the immediate future seeks conditions in reserve markets consistent with increasing the federal funds rate to an average of around 2 percent.

[1] Copies of the Minutes of the Federal Open Market Committee meeting on November 10, 2004, which includes the domestic policy directive issued at the meeting, are available upon request to the Board of Governors of the Federal Reserve System, Washington, D.C. 20551. The minutes are published in the Federal Reserve Bulletin and in the Board's annual report.

By order of the Federal Open Market Committee, December 17, 2004.

Vincent R. Reinhart,

Secretary, Federal Open Market Committee.

[FR Doc. 04–28214 Field 12–23–04; 8:45 am]

BILLING CODE 6210–01–S

GENERAL SERVICES ADMINISTRATION

[OMB Control No. 3090–0043]

Information Collection; GSA Form 3357, Appraisal of Fair Annual Parking Rate Per Space for Standard Level User Charge

AGENCY: Public Buildings Service, GSA.

ACTION: Notice of request for comments regarding a renewal to an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the General Services Administration has submitted to the Office of Management and Budget (OMB) a request to review and approve a renewal of a currently approved information collection requirement regarding appraisal of fair annual parking rate per space for standard level user charge. A request for public comments was published in the **Federal Register** at 69 FR 53070, August 21, 2004. No comments were received.

Public comments are particularly invited on: Whether this collection of information is necessary and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected.

DATES: Submit comments on or before: January 26, 2005.

FOR FURTHER INFORMATION CONTACT: Robert A. Yevoli, Policy and Analysis Division, at telephone (202) 219–1403 or via e-mail to *robert.yevoli@gsa.gov*.

ADDRESSES: Submit comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to Ms. Jeanette Thornton, GSA Desk Officer, OMB, Room 10236, NEOB, Washington, DC 20503, and a copy to the Regulatory Secretariat (V), General Services Administration, Room 4035, 1800 F Street, NW., Washington, DC 20405. Please cite OMB Control No. 3090–0043, Appraisal of Fair Annual Parking Rate Per Space for Standard Level User Charge; GSA Form 3357, in all correspondence.

SUPPLEMENTARY INFORMATION:

A. Purpose

GSA Form 3357 is needed by GSA contract and staff appraisers who use the form for estimating parking rates assessed on Federal agencies occupying space in GSA owned or controlled buildings.

B. Annual Reporting Burden

Respondents: 260.
Responses Per Respondent: 5.
Total Responses: 1300.
Hours Per Response: 1.6.
Total Burden Hours: 2,080.
Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat (V), 1800 F Street, NW., Room 4035, Washington, DC 20405, telephone (202) 208–7312. Please cite OMB Control No. 3090–0043, GSA Form 3357, Appraisal of Fair Annual Parking Rate Per Space for Standard Level User Charge, in all correspondence.

Dated: December 17, 2004.

Michael W. Carleton,

Chief Information Officer.

[FR Doc. 04–28181 Filed 12–23–04; 8:45 am]

BILLING CODE 6820–23–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

[Document Identifier: OS–0990–New]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Office of the Secretary.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Type of Information Collection Request: New Collection, Regular;

Title of Information Collection: Prevention Communication Formative Research;

Form/OMB No.: OS–0990–New;

Use: This information will be used as formative research to develop messages and materials in support of the development of disease prevention and health promotion information, including the 2005 Dietary Guidelines. It is necessary to obtain consumer input to better understand the information needs, attitudes and beliefs of the audience in order to tailor messages, as well as to assist with clarity, understandability and acceptance of prototyped messages and materials. This generic clearance request describes data collection activities involving a limited set of consumer interviews, focus groups, Web concept testing, and usability and effects testing of prevention content.

Frequency: Reporting and on occasion;

Affected Public: Individuals or households;

Annual Number of Respondents: 871;

Total Annual Responses: 871;

Average Burden Per Response: 2.4;

Total Annual Hours: 2,100;

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access the HHS Web site address at *http://www.hhs.gov/oirm/infocollect/pending/* or e-mail your request, including your address, phone number, OMB number, and OS document identifier, to *naomi.cook@hhs.gov,* or call the Reports Clearance Office on (202) 690–6162. Written comments and recommendations for the proposed information collections must be mailed within 60 days of this notice directly to the OS Paperwork Clearance Officer designated at the following address: Department of Health and Human Services, Office of the Secretary, Assistant Secretary for Budget, Technology, and Finance, Office of Information and Resource Management, Attention: Naomi Cook (0990–New), Room 531–H, 200 Independence Avenue, SW., Washington DC 20201.

Dated: December 15, 2004.

Robert E. Polson,

Office of the Secretary, Paperwork Reduction Act Reports Clearance Officer.

[FR Doc. 04–28120 Filed 12–23–04; 8:45 am]

BILLING CODE 4168–17–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

[Document Identifier: OS–0990–New]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Office of the Secretary, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Type of Information Collection Request: New Collection.

Title of Information Collection: Wave 4 Survey of Youth for the Federal Evaluation of Initiatives Funded Under Section 510 of the Maternal and Child Health Block Grant.

Form/OMB No.: OS–0990–New.

Use: This data collection will support the Health and Human Services' effort to document the impact of a select group of programs funded through the abstinence education provisions of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 as part of the Congressionally mandated evaluation of these programs.

Frequency: Reporting.

Affected Public: State, local, or tribal governments, individuals or households, not for profit institutions.

Annual Number of Respondents: 2,569.

Total Annual Responses: 2,569.

Average Burden Per Response: 30 minutes.

Total Annual Hours: 1,285.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access the HHS Web site address at *http://www.hhs.gov/oirm/infocollect/pending/* or e-mail your request, including your address, phone number, OMB number, and OS

document identifier, to *naomi.cook@hhs.gov*, or call the Reports Clearance Office at (202) 690–8356. Written comments and recommendations for the proposed information collections must be mailed within 30 days of this notice directly to the Desk Officer at the address below: OMB Desk Officer: John Kraemer, OMB Human Resources and Housing Branch, Attention: (OMB #0990–New), New Executive Office Building, Room 10235, Washington DC 20201.

Dated: December 15, 2004.

Robert E. Polson,

Office of the Secretary, Paperwork Reduction Act Reports Clearance Officer.

[FR Doc. 04–28121 Filed 12–23–04; 8:45 am]

BILLING CODE 4168–17–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Notice of Meetings

In accordance with section 10(d) of the Federal Advisory Committee Act as amended (5 U.S.C., Appendix 2), the Agency for Healthcare Research and Quality (AHRQ) announces meetings of scientific peer review groups. The subcommittees listed below are part of the Agency's Health Services Research Initial Review Group Committee.

The subcommittee meetings will be closed to the public in accordance with the Federal Advisory Committee Act, section 10(d) of 5 U.S.C., Appendix 2 and 5 U.S.C. 552b(c)(6). Grant applications are to be reviewed and discussed at these meetings. These discussions are likely to involve information concerning individuals associated with the applications, including assessments of their personal qualifications to conduct their proposed projects. This information is exempt from mandatory disclosure under the above-cited statutes.

1. *Name of Subcommittee:* Health Care Research Training.

Date: January 27–28, 2005 (Open from 8 a.m. to 8:15 a.m. on January 27 and closed for remainder of the meeting).

2. *Name of Subcommittee:* Health Care Technology and Decision Sciences.

Date: February 17–18, 2005 (Open from 8 a.m. to 8:15 a.m. on February 17 and closed for remainder of the meeting).

3. *Name of Subcommittee:* Health Research Dissemination and Implemention.

Date: February 24–25, 2005 (Open from 8 a.m. to 8:15 a.m. on February 24 and closed for remainder of the meeting).

4. *Name of Subcommittee:* Health Systems Research.

Date: February 24–25, 2005 (Open from 8 a.m. to 8:15 a.m. on February 24 and closed for remainder of the meeting).

5. *Name of Subcommittee:* Health Care Quality and Effectiveness Research.

Date: February 24–25, 2005 (Open from 8 a.m. to 8:15 a.m. on February 24 and closed for remainder of the meeting).

All the meetings above will take place at: Agency for Healthcare Research and Quality, John Eisenberg Conference Center, 540 Gaither Road, Rockville, Maryland 20850.

Contact Person: Anyone wishing to obtain a roster of members, agenda or minutes of the nonconfidential portions of the meetings should contact Mrs. Bonnie Campbell, Committee Management Officer, Office of Extramural Research, Education and Priority Populations, AHRQ, 540 Gaither Road, Suite 2000, Rockville, Maryland 20850, Telephone (301) 427–1554. Agenda items for these meetings are subject to change as priorities dictate.

Dated: December 20, 2004.

Carolyn M. Clancy,

Director.

[FR Doc. 04–28187 Filed 12–23–04; 8:45 am]

BILLING CODE 4100–90–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Title: Building Strong Families Demonstration and Evaluation—Baseline.

OMB No.: New collection.

Description: The proposed information collection activity is for baseline information during eligibility screening and enrollment in local programs participating in the Building Strong Families (BSF) evaluation. The BSF evaluation is an important opportunity to learn if well-designed interventions can help low-income couples develop the knowledge and relationship skills that research has shown are associated with healthy marriages. BSF programs will provide instruction and support to improve marriage and relationship skills and enhance couples' understanding of marriage. In addition, BSF programs will provide links to a variety of other services that could help couples sustain a healthy relationship (*e.g.,* employment assistance). The evaluation's goal is to include a maximum of six programs that will add a BSF component to existing services and enroll into the evaluation up to 2,000 couples into each program, *e.g.,* 1,000 couples randomly assigned to participate in BSF services and 1,000 couples in the control group, for a maximum total of 12,000 couples (24,000 individuals). The evaluation will assess the net impact of the BSF interventions on these two groups.

Respondents: The respondents for the baseline data collection will be low-income, unmarried, expectant or recent parents who volunteer to participate in the evaluation. (Some couples may have been recently married since the conception of their child.) There will be four forms used in the baseline data collection: (1) The Mother/Father Eligibility Checklist; (2) the Consent to Participate in the BSF Study Form; (3) the Baseline Information Form; and (4) the Contact Information Form. The Mother/Father Eligibility Checklist will be used by program staff to determine if respondents meet the minimum requirements for participating in the BSF program. We estimate that about 25 percent of couples interviewed will meet the eligibility criteria for the program. The Consent to Participate in the BSF Study Form explains in detail the design of the evaluation, the process for selection, and the results of agreeing to participate in the study (e.g., being contacted for follow-up information). The Baseline Information Form collects basic demographic information about respondents, as well as brief information concerning pregnancies and births, family structure, employment and income, and emotional well-being, all of which is relevant for the study. The Contact Information Form gathers information on friends and relatives who can assist in locating respondents based on respondents' agreements to participate in follow-up surveys that will be conducted many months later. All forms will be administered to both members of the couples by BSF program staff members. The forms will be administered in a number of different settings, but we anticipate the two most common will be in hospitals, following the birth of children, and in the mother's/father's home shortly after births.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response: participants + staff	Total burden hours
Mother/Father Elig. Checklist	96,000	1	0.03 + 0.06	8,640
Consent Form	24,000	1	0.08 + 0.12	4,800
Baseline Info Form	24,000	1	0.25 + 0.33	13,920
Contact Info Form	24,000	1	0.03 + 0.06	2,160

Estimated Total Annual Burden Hours: 29,520.

Additional Information: Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. All requests should identified by the title of the information collection. E-mail address: *grjohnson@acf.hhs.gov*.

OMB Comment: OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, Attn: Desk Officer for ACF, E-mail address: *Katherine_T._Astrich@omb.eop.gov*.

Dated: December 20, 2004.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 04–28212 Filed 12–23–04; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families (ACF)

Notice of Public Comment on the Proposed Adoption of ANA Program Policies and Procedures

AGENCY: Administration for Native Americans (ANA).

SUMMARY: Pursuant to section 814 of the Native American Programs Act of 1974; as amended, 42 U.S.C., 2991b–1, the Administration for Native Americans (ANA) herein describes its proposed interpretive rules, general statement of policy and rules of agency procedure or practice in relation to the Social and Economic Development Strategies (SEDS), Language Preservation and Maintenance (hereinafter referred to as Native Language), and Environmental Regulatory Enhancement (hereinafter referred to as Environmental) programs. Under the statute, ANA is required to provide members of the public an opportunity to comment on proposed changes in interpretive rules, statements of general policy, and rule of agency procedure or practice and to give notice of the final adoption of such changes at least 30 days before the changes become effective. The notice also provides additional information about ANA's plan for administering the programs.

DATES: The deadline for receipt of comments is 30 days from date of publication in the **Federal Register**.

ADDRESSES: Comments in response to this notice should be addressed to Sheila Cooper, Director of Programs Operations, Administration for Native Americans, 370 L'Enfant Promenade, SW., Mail Stop: Aerospace 8-West, Washington, DC 20447. Delays may occur in mail delivery to Federal offices; therefore, a copy of comments should be faxed to: (202) 690–7441. Comments will be available for inspection by members of the public at the Administration for Native Americans, Aerospace Center, 901 D Street SW., Washington, DC 20447.

FOR FURTHER INFORMATION CONTACT: Sheila Cooper, toll free at (877) 922–9262.

SUPPLEMENTARY INFORMATION: Section 814 of the Native American Programs Act of 1974 (the Act), as amended, requires ANA to provide notice of its proposed interpretive rules, statements of policy and rule of agency organization, procedure or practice. These proposed clarifications, modifications and new text will appear in the three ANA FY 2005 program announcements: SEDS, Native Language and Environmental. This notice serves to fulfill this requirement.

Additional Information

I. ANA Application Format

ANA has revised Part Two, ''Application Review Criteria'' of the FY 2005 Program Announcement, specifically the Application Submission Requirements. Previously, ANA required applicants to include and count the Objective Work Plan (OWP) form (OMB Control Number 0980–0204), and the Federal and non-Federal share line-item budget and budget justification narrative in the page limitation. In FY 2005, ANA has removed the OWP and the line-item budget and budget justification narrative from the page limitation. With the exemption of the OWP and the budget section from the page limitation, ANA has reduced in the FY 2005 program announcements the Application Submission Requirements to 40 pages. The exemption of the OWP and the budget from the page limitation will enable applicants applying for multi-year awards to provide more information on the proposed project. (Legal authority: Section 803 (a) and (d) and 803C of the Native American Programs Act of 1974, as amended, 42 U.S.C. 2991b and 2991b–3.)

II. Required Forms

The Grant Application Data Summary (GADS) form (OMB Clearance Number 0970 0261 exp. 03/31/2007) is a new ANA form. The Commissioner for the Administration for Native Americans is required to collect and disseminate information related to the social and economic conditions of Native Americans for inclusion in its annual report to Congress. The data collected on the GADS is required to assist in gathering that data. The information is also used to ensure that ANA obtains the proper number of reviewers to review each category of grant applications. Although not included in prior announcements, GADS received OMB approval after the publication of the FY 2004 announcement. It will be included in this announcement and future announcements to be submitted as a part of the application package.

(Legal authority: Section 803B of the Native American Programs Act of 1974, as amended, 42 U.S.C. 2991B–2.)

III. Evaluation Criteria

(a) ANA has modified five evaluation criteria titles and adjusted the point values and weight of three criteria. In ANA's FY 2004 grant competitions, ANA did not rate applications on how closely they followed the prescribed format. This year, ANA is proposing to revise the Evaluation Criteria to provide for the award of points in rating applications based on whether the applicant complied with the requirements in the announcement with regard to the organization of the application. ANA will maintain six evaluation criteria and the titles and merit weight apply to all three ANA program areas. Criterion One was retitled from ''Project Introduction and Summary/Abstract'' to ''Introduction and Project Summary/Application Format'' and modified to add points for the Application Format to clarify the importance of adhering to the application requirements. Criterion Two was retitled from ''Objectives and Need for Assistance'' to ''Need for Assistance''. Criterion Three was retitled for clarity from ''Approach'' to ''Project Approach''. Criterion Four was retitled from ''Organizational Profiles'' to ''Organizational Capacity'' and the point value was reduced to allow for the increase in weight and points awarded under Criterion One. Criterion Five was retitled for clarity from ''Results or Benefits Expected'' to ''Project Impact/Evaluation'' and the point value was reduced to allow for the increase in weight and points awarded under Criterion Six. For FY 2005 program announcements the titles and assigned point criteria values are: Criterion One—Introduction and Project Summary/Application Format (10 pts.); Criterion Two—Need for Assistance (20 pts.); Criterion Three—Project Approach (25 pts.); Criterion Four—Organizational Capacity (15 pts.); Criterion Five—Project Impact/Evaluation (15 pts.); Criterion Six—Budget and Budget Justification/Cost Effectiveness (15 pts.). (Legal authority: Section 803(a) and (d) and 803C of the Native American Programs Act of 1974, as amended, 42 U.S.C. 2991b and 2991b–3.)

(b) In the FY 2004 Program Announcement within the ANA Criterion Five, ANA used the term ''Performance'' Indicator. In the FY 2005 Program Announcement this term will be changed to ''Impact'' Indicator to be consistent with the Native American Programs Act of 1974, as amended. (Legal authority: Section 803(a) and (d) and 803C of the Native American Programs Act of 1974, as amended, 42 U.S.C. 2991b and 2991b–3.)

(c) Standard and Required Impact Indicators: As ANA continues to improve its competitive grant program ANA has modified (through addition or deletion) its collection of impact indicators under each of its programs (SEDS, Native Language and Environmental). The modified impact indicators will continue to be used to inform Congress and the public on the effectiveness, success and impact that ANA programs have in Native American communities and on behalf of Native American families. Two impact indicators will be required across all three program areas to serve as a common baseline of data that is required to be reported in ANA's legislation to demonstrate the diversity of projects and to monitor the impact of projects on the community. The FY 2005 program announcements still require five impact indicators to be submitted by the applicant under Criterion Five. ANA has standardized for consistency and program performance data collection two of the required impact indicators across all three program areas (SEDS, Native Language and Environmental). The two standard required impact indicators are: (1) number of partnerships formed and (2) the amount of dollars leveraged beyond the required NFS match. In addition to the two standard required impact indicators, an applicant must also submit three additional indicators either selected from a suggested list in each program announcement or applicant project-specific impact indicators. (Legal authority: Section 803(a) and (d), 803B and 803C of the Native American Programs Act of 1974, as amended, 42 U.S.C. 2991b, 2991b–2 and 2991b–3.)

The optional impact indicators for SEDS are: (1) Number of infrastructures and administrative systems, including policies and procedures developed and implemented; (2) number of codes or ordinances developed and implemented; (3) number of people to successfully complete a workshop/training; (4) number of children, youth, families or elders assisted or participating; (5) number of volunteer hours; (6) number of faith-based or community-based partnerships; (7) number of jobs created; (8) number of community-based small businesses established or expanded; (9) identification of Tribal or Village government business, industry, energy or financial codes or ordinances that were adopted or enacted; and (10) number of micro-businesses started. The optional impact indicators for Language, Category I are: (1) Number of surveys completed; (2) percent and number of community members assessed; (3) the rate of language loss or gain; (4) number of elders consulted; (5) number of language experts consulted; (6) number of community goals developed to preserve the native language; and (7) number of infrastructure and administrative systems, including policies and procedures developed and implemented. (Legal authority: Section 803(a) and (d), 803B and 803C of the Native American Programs Act of 1974, as amended, 42 U.S.C. 2991b, 2991b–2 and 2991b–3.)

The optional impact indicators for Language, Category II are: (1) Number of people involved in establishment or operation of project; (2) number of training classes or workshops held to teach language; (3) number and type of materials developed; (4) number of media products developed; (5) number of translations achieved; (6) number of individuals who increased in ability to speak the language; (7) number of participants who achieve fluency; (8) number of settings the language is spoken in; and (9) number of infrastructure and administrative systems, including policies and procedures developed and implemented. (Legal authority: Section 803(a) and (d), 803B and 803C of the Native American Programs Act of 1974, as amended, 42 U.S.C. 2991b, 2991b–2 and 2991b–3.)

The optional impact indicators for Environmental are: (1) Number of environmental regulations, codes or ordinances created; (2) number of people to successfully complete a workshop/training; (3) number of workshops/trainings provided; (4) types of capacity building systems created and implemented to support environmental program functions; (5) identification of Tribal or Village government regulations, codes or ordinances that were enacted and adopted; (6) number of regulations, codes or ordinances successfully enforced; and (7) number of infrastructure and administrative systems, including policies and procedures developed and implemented. ANA may add/delete optional impact indicators to program announcements as necessary to support ANA initiatives. (Legal authority: Section 803(a) and (d), 803B and 803C of the Native American Programs Act of 1974, as amended, 42 U.S.C. 2991b, 2991b–2 and 2991b–3.)

(d) ANA corrected the timeframe for use of research data in an application from 48 to 36 months under the Language, Category II program.

IV. ANA Funding Restrictions

In ANA's effort to streamline its program announcements and to clarify Funding Restriction Policies for applicants, ANA has relocated general policy statements from the criterion section of the program announcement text to the Funding Restrictions Policies section. Formerly listed under ''ANA Administrative Policies'', the bullet point on funding requests for feasibility studies, business plans, marketing plans or written materials and the bullet point on proposals from consortia of Tribes were moved to the section entitled ''ANA Funding Restrictions''. These restrictions are already reflected in the ANA eligibility restrictions at 45 CFR 1336.33(b) (2) and (b) (6). The bullet point on the social service delivery programs was inadvertently omitted from previous announcements, but ANA is statutorily required to address these programs. The restriction already appears in the ANA eligibility regulation at 45 CFR 1336.33(b) (3). ANA will include the following funding restrictions in all program announcements in compliance with sections 803(a) and (d) and 803C of the Native American Programs Act of 1974 as amended, 42 U.S.C. 2991b and 2991b–3 and 45 CFR 1336:

- Projects that request funds for feasibility studies, business plans, marketing plans or written materials, such as manuals, that are not an essential part of the applicant's project or SEDS long-range development plan. (Legal authority: Sections 803(a) and (d) and 803C of the Native American Programs Act of 1974 as amended, 42 U.S.C. 2991b and 2991b–3 and 45 CFR 1336.33.)
- The support of ongoing social service delivery programs or the expansion, or continuation, of existing social service delivery programs. (Legal authority: Sections 803(a) and (d) and 803C of the Native American Programs Act of 1974 as amended, 42 U.S.C. 2991b and 2991b–3 and 45 CFR 1336.33.)
- Proposals from consortia of Tribes that are not specific to support from and roles of member Tribes. An application from a consortium must have goals and objectives that will create positive impacts and outcomes in the communities of its members. ANA will not fund activities by a consortium of Tribes that duplicates activities for which member Tribes also receive funding from ANA. (Legal authority: Sections 803(a) and (d) and 803C of the Native American Programs Act of 1974 as amended, 42 U.S.C. 2991b and 2991b–3 and 45 CFR 1336.33.)

V. Initial Screening

Prior to competitive panel review, all applications are pre-screened for completeness. Previously, each application submitted to ANA in response to a program announcement was pre-screened to ensure that (a) The application was received by the program announcement closing date; (b) the application was submitted in accordance with Section IV, ''Application and Submission Information''; (c) the applicant is eligible for funding in accordance with Section III, ''Eligibility Information''; (d) the applicant submitted the proper supporting documentation such as proof of non-profit status, resolutions, and required government forms; (e) an authorized representative has signed the application; and (f) the applicant has a DUNS number. An application that does not meet (a) through (f) immediately above is determined to be incomplete and is excluded from the competitive review process.

In an effort to ensure consistency with the way ACF evaluates competitive discretionary grant applications, ACF has changed its policy to include only two enforceable screen-out criteria: timeliness and compliance with stated funding limitations. Additionally, ACF has approved ANA's request to include two additional screen-out criteria: inclusion of a signed and dated resolution by the governing body and, for applicants that are not Tribes or Alaska Native Village governments, submission of a resolution and proof that a majority of the governing board of directors is representative of the community to be served.

Consequently, ANA will screen applications for completeness prior to the competitive panel review using the following elements: (a) The application is received by ANA on or before the published program announcement closing date; (b) the Federal request does not exceed the ceiling award amount as published in the program announcement; (c) the application includes a signed and dated resolution of the governing body; and (d) if the applicant is not a Tribe or Alaska Native village government, the native non-profit organization submits a resolution and proof that a majority of the governing board of directors is representative of the community to be served. An application that does not contain these elements will be considered incomplete and excluded from the competitive review process.

VI. Administrative Policies

In ANA's effort to streamline its program announcements and to clarify administrative policies for applicants, ANA has relocated general policy statements from the Criterion section of the program announcement text to the Administrative Policies section. ANA has also clarified administrative policies that have historically prompted numerous questions and created application and project development inconsistencies. For example, ANA removed ''Organizational Capacity'' and reworded the first bullet below for clarity. The second bullet below clarifies the administrative policy on the funding of projects versus programs to include the term ''short-term'' to communicate that projects will not be awarded for longer than three years in most program areas. The third and fourth bullets were moved from Definitions to Administrative Policies to establish the policy to determine project progress before additional funding is committed. For the purposes of clarity, the fifth bullet combined and reworded the requirement for community involvement under the definition for ''Community Involvement'' with a similar paragraph under ''Need for Assistance''. The sixth bullet supports the needs of ANA and was reworded for clarity. The seventh bullet was also reworded for clarity. The policy on the treatment of multiple applications and applications from Tribal components has been reworded for clarity and broken into two separate points to ensure application to both Tribes and non-profit organizations. The revised policy is contained in the eighth and ninth bullet points of the list below. The ninth bullet corrects the inadvertent omission of the categories that apply to the board of directors for non-profit applicants. ANA will now include the following administrative policies in each program announcement (Legal authority: Sections 803(a) and (d) and 803C of the Native American Programs Act of 1974, as amended, and 45 U.S.C. 2991b and 2991b–3):

Applicants must comply with the following administrative policies:

- All funded applications will be reviewed to ensure that the applicant has provided a positive statement to give credit to ANA on all material developed using ANA funds.
- ANA funds short-term projects, not programs. Proposed projects must have definitive goals and objectives that will be achieved by the end of the project period. All projects funded by ANA must be completed, or self-sustaining or

supported by other-than-ANA funding at the end of the project period.

• Before funding the second or third year of a multi-year grant, ANA will require verification and support documentation from the grantee that objectives and outcomes proposed in the preceding year were accomplished and that the non-Federal share was met.

• ANA reviews the quarterly and annual reports of grantees to determine if the grantee is meeting its goals, objectives and activities identified in the Objective Work Plan (OWP).

• Applications from national and regional organizations must clearly demonstrate a need for the project, explain how the project originated, discuss the community-based delivery strategy of the project, identify and describe the intended beneficiaries, describe and relate the actual project benefits to the community and organization and describe a community-based delivery system. National and regional organizations must describe their membership, define how the organization operates and demonstrate Native community and/or Tribal government support for the project. The type of community to be served will determine the type of documentation necessary to support the project.

• Applicants proposing an Economic Development project must address the project's viability. A business plan, if applicable, must be included to describe the project's feasibility, cash flow and approach for the implementation and marketing of the business.

• ANA will review proposed projects to ensure applicants have considered all resources available to the community to support the project.

• ANA will not accept applications from Tribal components that are Tribally authorized divisions unless the ANA application includes a Tribal resolution.

• ANA will only accept one application per eligible entity. The first application received by ANA will be the application considered for competition unless ANA is notified in writing which application should be considered for competitive review.

• If the applicant, other than a Tribe or an Alaska Native Village government, is proposing a project benefiting Native Americans, Alaska Natives, or both, the applicant must provide assurance that its duly elected or appointed board of directors is representative of the community to be served. Applicants must provide information that at least a majority of the individuals serving on a non-profit applicant's board fall into one or more of the following categories: (1) A current or past member of the community to be served; (2) a prospective participant or beneficiary of the project to be funded; or (3) have a cultural relationship with the community to be served. (Legal authority: 45 CFR 1336.33(a).)

VII. Funding Thresholds

This is a clarification to the ANA Environmental Regulatory Enhancement program announcement funding threshold. The funding threshold for the Environmental Regulatory Enhancement program will be $50,000.00 (floor amount) to $250,000.00 (ceiling amount) per budget period. Applications exceeding the $250,000.00 threshold will be considered non-responsive and will not be considered for funding under this announcement. (Legal authority: Sections 803(a) and (d) and 803C of the Native American Programs Act of 1974, as amended, 42 U.S.C. 2991b and 2991b–3.)

VIII. Definitions

The following definitions will be used in the appropriate program-specific FY 2005 program announcements. ANA has clarified many areas that applicants have historically found difficult to understand and that have previously prompted numerous questions and created application and project development inconsistencies. The ANA program announcements will now include additional definitions for the following terms:

Consortium/Tribal Village: A group of Tribes or Villages that join together for long-term purposes or for the purpose of an ANA grant.

Impact Indicators: Measurement descriptions used to identify the outcomes or results of the project. Outcomes or results must be quantifiable, measurable, verifiable and related to the outcome of the project to determine that the project has achieved its desired objective and can be independently verified through ANA monitoring and evaluation.

Objective Work Plan (OWP): The project plan the applicant will use in meeting the results and benefits expected for the project. The results and benefits are directly related to the Impact Indicators. The OWP provides detailed descriptions of how, when, where, by whom and why activities are proposed for the project and is complemented and condensed in the OWP. ANA will require separate OWPs for each year of the project. (Form OMB# 0980–0204 exp 10/31/2006.)

Minor Renovation or Alteration: Work required to change the interior arrangements or other physical characteristics of an existing facility, or install equipment so that it may be more effectively used for the project. Minor alteration and renovation may include work referred to as improvements, conversion, rehabilitation, remodeling or modernization, but is distinguished from construction and major renovations. A minor alteration and/or renovation must be incidental and essential for the project (''incidental'' meaning the total alteration and renovation budget must not exceed the lesser of $150,000 or 25 percent of total direct costs approved for the entire project period).

Total Approved Project Costs: The sum of the Federal request plus the non-Federal share. (Legal authority: Section 803(a) and (d) and 803C of the Native American Programs Act of 1974, as amended, 42 U.S.C. 2991b and 2991b–3.)

IX. Application Review Information

To ensure that grantees fulfill their obligations to ANA, ANA is including a review of grantees' past performance when considering the applicant for a new or ongoing award under all three program areas. The inclusion of this item in the application consideration process will assist ANA in making its funding decisions on whether or not to award to a particular grant applicant. Factors that may impact a grantee's past performance are their timeliness to report submission requirements, timely use and proper expenditure of the grant award funds and the administrative ease of closing out the grantee at the end of the award period.

The following statement is included under the Application Consideration for the Review and Selection Process:

Application Consideration: The Commissioner's funding decision is based on an analysis of the application by the review panel, panel review scores and recommendations; an analysis by ANA staff; review of previous ANA grantee's past performance; comments from State and Federal agencies having contract and grant performance-related information; and other interested parties.

X. Native Language Program Area

The title for Native Language Category I grants has been changed from ''Native Language Category I Planning'' to ''Native Language Category I Assessment''. The change clarifies the purpose of the 12-month Category I grant. (Legal authority: Section 803(a) and (d) and 803C of the Native American Programs Act of 1974, as amended, 42 U.S.C. 2991b and 2991b–3.)

The FY 2005 Native Language Program Announcement expands the Category I—Program Area of Interest and the necessary assessment data to be collected. ANA recommends each applicant consider the Program Area of Interest in the development of a project. The Program Area of Interest under Category I is ''A project for data collection and compilation that surveys the current language status through a ''formal'' method (*e.g.*, work performed by a linguist and/or a language survey conducted by community members) or an ''informal'' method (*e.g.*, a community consensus of the language status based on elders, Tribal scholars and/or other community members) with the development of long-range language preservation goals and uses elders in the development of these goals. This assessment data should capture, at a minimum, the following data: number of speakers; age of speakers; gender of speakers; level(s) of fluency; number of first language speakers (native language as the first language acquired); number of second language speakers (native language as the second language acquired); where native language is used (*e.g.*, home, court system, religious ceremonies, church, media, school, governance or cultural activities); source of data (formal and/or informal); and rate of language loss or gain. (Legal authority: Section 803(a) and (d) and 803C of the Native American Programs Act of 1974, as amended, 42 U.S.C. 2991b and 2991b–3.)

Dated: December 17, 2004.

Quanah Crossland Stamps,

Commissioner, Administration for Native Americans

[FR Doc. 04–28216 Filed 12–23–04; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2003D–0497]

Agency Information Collection Activities; Announcement of Office of Management and Budget Approval; Guidance for Industry on Pharmacogenomics Data Submissions

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a collection of information entitled ''Guidance for Industry on Pharmacogenomics Data Submissions'' has been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995.

FOR FURTHER INFORMATION CONTACT: Karen Nelson, Office of Management Programs (HFA–250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–1482.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of August 11, 2004 (69 FR 48876), the agency announced that the proposed information collection had been submitted to OMB for review and clearance under 44 U.S.C. 3507. 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. OMB has now approved the information collection and has assigned OMB control number 0910–0557. The approval expires on December 31, 2007. A copy of the supporting statement for this information collection is available on the Internet at *http://www.fda.gov/ohrms/dockets*.

Dated: December 17, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 04–28134 Filed 12–23–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2004N–0166]

Agency Information Collection Activities; Announcement of Office of Management and Budget Approval; Infant Feeding Practices Study II

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a collection of information entitled ''Infant Feeding Practices Study II'' has been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995.

FOR FURTHER INFORMATION CONTACT: Peggy Robbins, Office of Management Programs (HFA–250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–1223.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of October 1, 2004 (69 FR 58915), the agency announced that the proposed information collection had been submitted to OMB for review and clearance under 44 U.S.C. 3507. 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. OMB has now approved the information collection and has assigned OMB control number 0910–0558. The approval expires on December 31, 2007. A copy of the supporting statement for this information collection is available on the Internet at *http://www.fda.gov/ohrms/dockets*.

Dated: December 17, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 04–28136 Filed 12–23–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2004N–0541]

Agency Information Collection Activities; Proposed Collection; Comment Request; Exports: Notification and Recordkeeping Requirements

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information and to allow 60 days for public comment in response to the notice. This notice solicits comments on the notification and recordkeeping requirements for persons exporting human drugs, biological products, devices, animal drugs, food, and cosmetics that may not be marketed or sold in the United States.

DATES: Submit written or electronic comments on the collection of information by February 25, 2005.

ADDRESSES: Submit electronic comments to *http://www.fda.gov/dockets/ecomments*. Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Jonna Capezzuto, Office of Management Programs (HFA–250), Food and Drug

Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–4659.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Exports: Notification and Recordkeeping Requirements—21 CFR Part 1 (OMB Control Number 0910–0482)—Extension

The total burden estimate of 43,214 is based on the number of notifications received by the relevant FDA centers in fiscal year 2004, or the last year the figures available.

The respondents to this information collection are exporters who have notified FDA of their intent to export unapproved products that may not be sold or marketed in the United States as allowed under section 801(e) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 381). In general, the notification identifies the product being exported (e.g., name, description, and in some cases, country of destination) and specifies where the notification should be sent. These notifications are sent only for an initial export; subsequent exports of the same product to the same destination (or, in the case of certain countries identified in section 802(b) of the act (21 U.S.C. 382), to any of those countries would not result in a notification to FDA.

The recordkeepers to this information collection are exporters who export human drugs, biologics, devices animal drugs, foods and cosmetics that may not be sold in the United States to maintain records demonstrating their compliance with the requirements in section 801(e)(1) of the act.

FDA estimates the burden of this collection of information as follows:

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]

21 CFR Section	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
1.101(d) through (e)	419	2.8	1164	17	19,788

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 2.—ESTIMATED ANNUAL RECORDKEEPING BURDEN[1]

21 CFR Section	No. of Recordkeepers	Annual Frequency of Recordkeeping	Total Annual Records	Hours per Record-keeper	Total Hours
1.101(b) through (c)	324	2.8	901	26	23,426

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Dated: December 17, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 04–28137 Filed 12–23–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2004N–0535]

Agency Information Collection Activities; Proposed Collection; Comment Request; MedWatch: Food and Drug Administration Medical Products Reporting Program

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on revisions to Form FDA 3500 and Form FDA 3500A, (also known as MedWatch reporting forms). These forms are currently used to report to the agency about adverse events, product problems and medication/device use errors that occur with FDA regulated products, including drugs, biologicals, medical devices, special nutritional products, and cosmetics.

DATES: Submit written or electronic comments on the collection of information by February 25, 2005.

ADDRESSES: Submit electronic comments on the collection of information to: *http://www.fda.gov/dockets/ecomments*. Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20857. All comments should be identified with the docket number found in brackets in the heading of this document. Copies of Form FDA 3500 and Form FDA 3500A are available for public examination on

Internet at *http://www.fda.gov/ohrms/dockets* or in the Division of Dockets Management (see **ADDRESSES**) between 9 a.m. and 4 p.m., Monday through Friday. Submit written requests for single copies of the revised reporting forms, Form FDA 3500 and Form FDA 3500A to MedWatch: FDA Safety Information and Adverse Event Reporting Program (HFD–410), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857. Send one self-addressed adhesive label to assist that office in processing your request.

FOR FURTHER INFORMATION CONTACT: Karen L. Nelson, Office of Management Programs (HFA–250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–1482.

SUPPLEMENTARY INFORMATION:

I. Background

Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

MedWatch: FDA Medical Products Reporting Program, Form FDA 3500 and Form FDA 3500A—(OMB Control Number 0910–0291)—Extension

Under sections 505, 512, 513, 515, and 903 of the Federal Food, Drug, and Cosmetic Act (the act); (21 U.S.C. 355, 360b, 360c, 360e, and 393); and section 351 of the Public Health Service Act (42 U.S.C. 262), FDA has the responsibility to ensure the safety and effectiveness of drugs, biologics, and devices. Under section 502(a) of the act (21 U.S.C. 352(a)), a drug or device is misbranded if its labeling is false or misleading. Under section 502(f)(1) of the act it is misbranded if it fails to bear adequate warnings, and under section 502(j), it is misbranded if it is dangerous to health when used as directed in its labeling.

Under section 4 of the Dietary Supplement Health and Education Act of 1994 (the DSHEA) (21 U.S.C. 341), section 402 of the act (21 U.S.C 342) is amended so that FDA must bear the burden of proof to show a dietary supplement is unsafe.

To carry out its responsibilities, the agency needs to be informed whenever an adverse event, product problem or error with use of a medication or device occurs. Only if FDA is provided with such information will the agency be able to evaluate the risk, if any, associated with the product, and take whatever action is necessary to reduce or eliminate the public's exposure to the risk through regulatory action. To ensure the marketing of safe and effective products, certain adverse events must be reported. Requirements regarding mandatory reporting of adverse events or product problems have been codified in parts 310, 314, 600, and 803 (21 CFR parts 310, 314, 600, and 803), specifically §§ 310.305, 314.80, 314.98, 600.80, 803.30, 803.50, 803.53, and 803.56.

To implement these provisions for reporting of adverse events, product problems and medication/device use errors for FDA regulated products such as medications, devices, biologics, special nutritional products, and cosmetics, as well as any other products that are regulated by FDA, two forms are available from the agency. Form FDA 3500 may be used for voluntary (i.e., not mandated by law or regulation) reporting by healthcare professionals and the public. Form FDA 3500A is used for mandatory reporting (i.e., required by law or regulation).

Respondents to this collection of information are healthcare professionals, hospitals and other user-facilities (e.g., nursing homes, etc.), consumers, manufacturers of biological and drug products or medical devices, and importers.

II. Use of Form FDA 3500 (Voluntary Version)

The voluntary version of the form is used to submit all reports not mandated by Federal law or regulation. Individual health professionals are not required by law or regulation to submit reports to the agency or the manufacturer, with the exception of certain adverse reactions following immunization with vaccines as mandated by the National Childhood Vaccine Injury Act of 1986. Those mandatory reports are not submitted to FDA on the 3500 or 3500A form, but are submitted to the joint FDA/Centers for Disease Control and Prevention Vaccines Adverse Event Reporting System (VAERS) on the VAERS–1 form. (See *http://www.vaers.org/pdf/vaers__for.pdf*.)

Hospitals are not required by Federal law or regulation to submit reports associated with drug products, biological products or special nutritional products. However, hospitals and other user facilities are required by Federal law to report medical device-related deaths and serious injuries.

Manufacturers of dietary supplements do not have mandatory requirements for reporting adverse reactions to FDA. The DSHEA puts the responsibility on FDA to prove that a particular product is unsafe. The agency depends on the voluntary reporting by health professionals and consumers of suspected adverse events associated with the use of dietary supplements.

III. Use of Form FDA 3500A (Mandatory Version)

A. Drug and Biologic Products

In sections 505(j) and 704 (21 U.S.C. 374) of the act, Congress has required that important safety information relating to all human prescription drug products be made available to FDA so that it can take appropriate action to protect the public health when necessary. Section 702 of the act authorizes investigational powers to FDA for enforcement of the act. These statutory requirements regarding mandatory reporting have been codified by FDA under parts 310 and 314 (drugs) and 600 (biologics). Parts 310, 314, and 600 mandate the use of FDA Form 3500A form for reporting to FDA on adverse events that occur with drugs and biologics.

B. Medical Device Products

Section 519 of the act (21 U.S.C. 360i) requires manufacturers and importers, of devices intended for human use to

establish and maintain records, make reports, and provide information as the Secretary of Health and Human Services may by regulation reasonably require to assure that such devices are not adulterated or misbranded and to otherwise assure its safety and effectiveness. The Safe Medical Device Act of 1990, signed into law on November 28, 1990, amends section 519 of the act. The amendment requires that user facilities such as hospitals, nursing homes, ambulatory surgical facilities, and outpatient treatment facilities report deaths related to medical devices to FDA and to the manufacturer, if known. Serious illnesses and injuries are to be reported to the manufacturer or to FDA if the manufacturer is not known. These statutory requirements regarding mandatory reporting have been codified by FDA under part 803. Part 803 mandates the use of FDA Form 3500A for reporting to FDA on medical devices.

The Medical Device User Fee and Modernization Act of 2002 (MDUFMA), Public Law 107–250, signed into law October 26, 2002, amended section 519 of the act. The amendment (section 303 of MDUFMA) required FDA to revise the MedWatch forms ''to facilitate the reporting of information . . . relating to reprocessed single-use devices, including the name of the reprocessor and whether the device has been reused.''

IV. Proposed Modifications to Forms

The proposed modifications to Form FDA 3500 and Form FDA 3500A reflect changes that will bring the form into conformation with current regulations, rules, and guidances. Modifications were also made to better reflect the range of reportable products and language was changed slightly to provide clarity. The changes should allow reporters to better utilize available space for data entry and offer voluntary reporters the opportunity to better characterize the suspected adverse event, product problem or error and provide better quality safety-related data for agency evaluation.

In the proposed modification to current section D, Suspect Medical Device, the agency has relettered the form section and modified the formatting slightly, moving two of the data elements (''Device available for evaluation'' and ''Concomitant medical products'') to adjacent lettered sections on the form in order to improve the utilization of available space and allow for information on non-device products to share these data fields. The agency believes that these changes are compatible with the mandatory reporting instructions for devices (§ 803.33) and will allow mandatory reporters to continue to meet their reporting requirements.

FDA estimates the burden for completing the forms for this collection of information as follows:

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN

FDA Center/21 CFR Section	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
CBER/CDER					
Form 3500	22,955	1	22,955	0.6	13,773
Form 3500A (§§ 310.305, 314.80, 314.98, 600.80)	600	579.9	347,940	1.1	382,734
CDRH					
Form 3500	3,433	1	3,433	0.6	2,060
Form 3500A (Part 803)	1,935	33	63,623	1.0	63,623
CFSAN					
Form 3500	847	1	847	0.6	508
Form 3500A (No Mandatory Requirements)	0	0	0	0	0
Total Hours					462,698
Form 3500					16,341
Form 3500A					446,357

(NOTE: CBER = Center for Biologics Evaluation and Research; CDER = Center for Drug Evaluation and Research; CDRH = Center for Devices and Radiological Health; and CFSAN = Center for Food Safety and Applied Nutrition). FDA Form 3500 is for voluntary reporting; FDA Form 3500A is for mandatory reporting).

The figures shown in table 1 of this document are based on actual fiscal year 2003 reports and respondents for each center and type of report.

Dated: December 17, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 04–28138 Filed 12–23–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2004N–0454]

Dietary Supplements; Premarket Notification for New Dietary Ingredient Notifications; Reopening of Comment Period

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; reopening of comment period.

SUMMARY: The Food and Drug Administration (FDA) is reopening to February 1, 2005, the comment period for a notice that appeared in the **Federal Register** of October 20, 2004 (69 FR 61680). In the notice, FDA solicited comments on FDA's premarket notification program for new dietary ingredients (NDIs) and announced a public meeting on that topic. The comment period closed on December 3, 2004. FDA is reopening the comment period in response to a request from trade associations representing firms in the dietary supplement industry for additional time to submit comments.

DATES: Submit written or electronic comments by February 1, 2005.

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*.

FOR FURTHER INFORMATION CONTACT: Kelly Williams-Randolph, Center for Food Safety and Applied Nutrition (HFS–810), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, 301–436–2506, FAX: 301–436–2639, or e-mail: *Kelly.Williams@cfsan.fda.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of October 20, 2004, FDA published a notice announcing a public meeting on November 15, 2004, and soliciting comments on FDA's premarket notification program for NDIs with an opportunity for public comment for 45 days. FDA requested comments from industry, consumers, and other interested members of the public concerning the content and format requirements for NDI notifications made under section 413(a)(2) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 350b(a)(2)). FDA held this meeting to give the public an opportunity to provide information and views on topics outlined in the notice. The agency intends to consider all comments received in the meeting and sent to the docket in determining whether any future action is necessary or appropriate.

The agency has received a request from a number of trade associations for an extension of the comment period to and including February 1, 2005. The request set forth several reasons in support of allowing additional time to submit comments. First, according to the request, the 45-day comment period did not allow sufficient time for interested parties to adequately address the large number of detailed and specific questions put forth by FDA and the significant impact on industry, especially small businesses, of the issues raised in the notice. The request noted that the questions (many of which contained subparts) will require extended industry discussion to ensure broad input from member firms and to organize the information obtained from their member companies. Second, the request noted that the original December 3, 2004, deadline for submitting comments did not provide interested parties enough time to consider the transcript of the November 15, 2004, meeting in developing their comments. The request explained that an extension until February 1, 2005, would allow industry to submit more focused and detailed comments without significantly delaying the agency's consideration of the issues set forth in the meeting notice.

FDA has considered the request and is reopening the comment period for the October 20, 2004, notice until February 1, 2005. The agency agrees that reopening the comment period will allow adequate time for interested persons to submit comments without significantly delaying the agency's consideration of the issues set forth in the October 20, 2004, notice.

II. Request for Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments regarding the issues raised in the October 20, 2004, notice. 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.

Dated: December 17, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 04–28135 Filed 12–23–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HOMELAND SECURITY

Directorate of Information Analysis and Infrastructure Protection (IAIP)

[DHS–2004–0032]

Open Meeting of National Infrastructure Advisory Council (NIAC)

AGENCY: Directorate of Information Analysis and Infrastructure Protection, DHS.

ACTION: Notice of meeting.

SUMMARY: The National Infrastructure Advisory Council (NIAC) will meet on Tuesday, January 11, 2005, from 1 p.m. to 4 p.m. at the Hamilton Crowne Plaza in Washington, DC. The meeting will be open to the public. Limited seating will be available. Reservations are not accepted.

The NIAC advises the President of the United States on the security of critical infrastructures which include banking and finance, transportation, energy, manufacturing, and emergency government services. At this meeting, the NIAC will be briefed on the status of several Working Group activities that the Council undertook at its last meeting.

DATES: The NIAC will meet Tuesday, January 11, 2005, from 1 p.m. to 4 p.m.

ADDRESSES: The NIAC will meet at the Hamilton Crowne Plaza, 14th and K Street, NW., Washington, DC. You may submit comments, identified by DHS Docket DHS–2004–0032 by one of the following methods:

- EPA Federal Partner EDOCKET Web Site: *http://www.epa.gov/feddocket.* Follow the instructions for submitting comments on the Web site.
- Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.
- Mail/Hand Delivery/Courier: Department of Homeland Security, Attn: Ms. Nancy J. Wong, Infrastructure Coordination Division, Directorate of Information Analysis and Infrastructure Protection/703–235–5352, Anacostia Navel Annex, 245 Murray Lane, SW., Building 410, Washington, DC 20528, 7:30 a.m. to 4 p.m.

Instructions: All submissions received must include the DHS–2004–0032. All comments received will be posted without change to *http://www.epa.gov/feddocket,* including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Nancy J. Wong, NIAC Designated Federal Official, telephone 703–235–5352.

SUPPLEMENTARY INFORMATION: Notice of these meetings is given under the Federal Advisory Committee Act, 5 U.S.C. App. 2.

AGENDA OF COMMITTEE MEETING ON JANUARY 11, 2005

I. Opening of Meeting	Nancy J. Wong, U.S. Department of Homeland Security (DHS)/Designated Federal Officer, NIAC.
II. Roll Call of Members	Nancy J. Wong.
III. Opening Remarks and Introductions.	NIAC Chairman, Erle A. Nye, Chairman of the Board, TXU Corporation. NIAC Vice Chairman, John T. Chambers, Chairman and CEO, Cisco Systems, Inc.

AGENDA OF COMMITTEE MEETING ON JANUARY 11, 2005—Continued

	The Honorable Tom Ridge, Secretary, Department of Homeland Security (Invited). Lt. Gen. Frank Libutti, Under Secretary for Information Analysis and Infrastructure Protection (IAIP), DHS (Invited). Robert P. Liscouski, Assistant Secretary for Infrastructure Protection, DHS (Invited). Frances Fragos Townsend, Special Assistant to the President for Critical Infrastructure.
IV. Introduction and Welcome of New NIAC Members.	NIAC Chairman Erle A. Nye.
V. Ethics Briefing	Robert Coyle, DHS Office of Government Ethics.
VI. Approval of October Minutes	NIAC Chairman Erle A. Nye.
VII. Briefing of the New DHS Sector Partnership Model.	Mr. R. James Caverly, Director, Infrastructure Coordination Division, DHS.
VIII. Status Reports on Current Initiatives.	NIAC Chairman Erle A. Nye Presiding.
A. Intelligence Process and Work Products Regarding Critical Infrastructures.	NIAC Vice Chairman John T. Chambers, Chairman & CEO, Cisco Systems, Inc. and Chief Gilbert Gallegos, Police Chief, City of Albuquerque, New Mexico, NIAC Member.
B. Risk Management Approaches Protection.	Thomas E. Noonan, Chairman, President to & CEO, Internet Security Systems, Inc., NIAC Member; Martha Marsh, President & CEO, Stanford Hospital and Clinics, NIAC Member.
C. Assuring Adequate National Intellectual Capital to Secure Cyber-Based Critical Infrastructures.	Alfred R. Berkeley III, e-Xchange Advantage Corp., NIAC Member and Dr. Linwood Rose, President, James Madison University, NIAC Member.
IX. Reports Related to Past NIAC Recommendations.	NIAC Chairman Erle A. Nye Presiding.
A. Summary of NIAC Recommendations by Subject Area.	Nancy J. Wong, U.S. Department of Homeland Security (DHS)/Designated Federal Official, NIAC.
X. Presentation/Discussion of DHS/DOJ Cyber Security Survey.	Presentation by Patrick J. Morrissey, Deputy Director, Law Enforcement and Intelligence, National Cyber Security Division (NCSD), Department of Homeland Security.
XI. New Business	NIAC Chairman Erle A. Nye, NIAC Members.
XII. Adjournment	NIAC Chairman Erle A. Nye.

Procedural

These meetings are open to the public. Please note that the meetings may close early if all business is finished.

Information on Services for Individuals With Disabilities

For information on facilities or services for individuals with disabilities, or to request special assistance at the meeting, telephone the Designated Federal Official as soon as possible.

Dated: December 13, 2004.

Nancy J. Wong,

Designated Federal Official for NIAC.

[FR Doc. 04–28206 Filed 12–23–04; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[USCG–2004–19946]

Random Drug Testing Rate for Covered Crewmembers

AGENCY: Coast Guard, DHS.

ACTION: Notice of minimum random drug testing rate.

SUMMARY: The Coast Guard has set the calendar year 2005 minimum random drug testing rate at 50 percent of covered crewmembers. An evaluation of the 2003 Management Information System (MIS) data collection forms submitted by marine employers determined that random drug testing on covered crewmembers for the calendar year 2003 resulted in positive test results 2.07 percent of the time. Based on this percentage, we will maintain the minimum random drug testing rate at 50 percent of covered crewmembers for the calendar year 2005.

DATES: The minimum random drug testing rate is effective January 1, 2005 through December 31, 2005. You must submit your 2004 MIS reports no later than March 15, 2005.

ADDRESSES: The annual MIS report may by submitted in writing to Commandant (G–MOA), U.S. Coast Guard Headquarters, 2100 Second Street SW., Room 2404, Washington, DC 20593–0001 or by electronic submission to the following Internet address: *http://www.uscg.mil/hq/g-m/moa/dapip.htm*.

FOR FURTHER INFORMATION CONTACT: For questions about this notice, please contact Mr. Robert C. Schoening, Drug and Alcohol Program Manager, Office of Investigations and Analysis (G–MOA), U.S. Coast Guard Headquarters, telephone (202) 267–0684. If you have questions on viewing the docket, call Andrea M. Jenkins, Program Manager, Dockets Operations, Department of Transportation, telephone (202) 366–0271.

SUPPLEMENTARY INFORMATION: Under 46 CFR 16.230, the Coast Guard requires marine employers to establish random drug testing programs for covered crewmembers on inspected and uninspected vessels. All marine employers are required to collect and maintain a record of drug testing program data for each calendar year, January 1 through December 31. You must submit this data by 15 March of the following year to the Coast Guard in an annual MIS report.

You may either submit your own MIS report or have a consortium or other employer representative submit the data in a consolidated MIS report. The chemical drug testing data is essential to analyze our current approach for deterring and detecting illegal drug abuse in the maritime industry.

Since 2003 MIS data indicates that the positive random testing rate is greater than one percent industry-wide (2.07 percent), the Coast Guard announces that the minimum random drug testing rate is set at 50 percent of covered employees for the period of January 1, 2005, through December 31, 2005, in accordance with 46 CFR 16.230(e).

Each year we will publish a notice reporting the results of the previous calendar year's MIS data, and the minimum annual percentage rate for

random drug testing for the next calendar year.

Dated: December 16, 2004.

T.H. Gilmour,

Rear Admiral, U.S. Coast Guard, Assistant Commandant for Marine Safety, Security and Environmental Protection.

[FR Doc. 04–28229 Filed 12–23–04; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4907–N–35]

Notice of Submission of Proposed Information Collection to OMB; Emergency Comment Request; Emergency Capital Repair Program

AGENCY: Office of Housing, HUD.

ACTION: Notice of proposed information collection.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for emergency review and approval, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

This is a request for approval of a revision to the currently approved information collection for selecting applicants for the Assisted Living Conversion Program.

Congress has introduced a new facet to the ALCP Program authorizing Emergency Capital Repair grants for Owners of projects that need emergency repair work. This emergency capital repair grant funding will be for repairs at projects to correct situations that present immediate threats to the life, health and safety of project tenants.

DATES: *Comments Due Date:* January 3, 2005.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments must be received within seven (7) days from the date of this Notice. Comments should refer to the proposal by name/or OMB approval number (2502–0542) and should be sent to: HUD Desk Officer, Office of Management and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Wayne Eddins, Paperwork Reduction Act Compliance 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 or on 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 proposed revision to the currently approved information collection for selecting applicants for the Emergency Capital Repair Program grants.

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: Emergency Capital Repair Program.

Description of Information Collection: This is a revision to the currently approved information collection for selecting applicants for the Assisted Living Conversion Program grants.

Congress has introduced a new facet to the ALCP authorizing Emergency Capital Repair grant funding for Owners of projects that need to correct situations that present immediate threats to the life, health and safety of project tenants. This emergency capital repair grant funding will be used to repair or replace major building and structural components as well as mechanical equipment to the extent they are necessary for health and safety reasons.

OMB Control Number: 2502–0542.

Agency Form Numbers: Standard Forms 424, 424–Supplemental, LLL and HUD forms 424B, 424–C, 2880, 2990, 2991, 96010, 2530, 50080–ALCP, 50080–ECRG, 27300, 92045.

Members of Affected Public: Not-for-profit project owners.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of responses, and hours of response: An estimation of the total number of hours needed to prepare the information collection is 3,360. The estimated number of respondents is 30, and the frequency of response is on occasion.

Status: Revision of a currently approved collection.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: December 17, 2004.

John C. Weicher,

Assistant Secretary for Housing -Federal Housing Commissioner.

[FR Doc. E4–3805 Filed 12–23–04; 8:45 am]

BILLING CODE 4210–08–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Final Comprehensive Conservation Plan for Necedah National Wildlife Refuge

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability.

SUMMARY: The U.S. Fish and Wildlife Service (Service) announces that the final Comprehensive Conservation Plan (CCP) and Environmental Assessment (EA) is available for Necedah National Wildlife Refuge. This CCP is prepared pursuant to the National Wildlife Refuge System Administration Act of 1966, as amended by the National Wildlife Refuge System Improvement Act of 1997, and the National Environmental Policy Act of 1969, and describes how the Service intends to manage this refuge over the next 15 years.

DATES: Implementation of the CCP will not begin sooner than 30 days following the Finding of No Significant Impact (FONSI).

ADDRESSES: Copies of the CCP are available on compact diskette or hard copy, and can be obtained in writing: Necedah National Wildlife Refuge, W7996 20th Street West, Necedah, WI 54646–7531. Copies of the CCP can also be accessed and downloaded at the following Web site address: *http://midwest.fws.gov/planning/Necedah/index.html*.

FOR FURTHER INFORMATION CONTACT: Larry Wargowski at 608–565–2551.

SUPPLEMENTARY INFORMATION: The National Wildlife Refuge System Administration Act of 1966, as amended by the National Wildlife Refuge System Improvement Act of 1997 (16 U.S.C.

668dd–668ee *et seq*) requires a CCP. The purpose in developing CCPs 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 CCPs identify wildlife-dependent recreational opportunities available to the public, including opportunities for hunting, fishing, 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 Wildlife Refuge System Improvement Act of 1997, and the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370d).

Necedah National Wildlife Refuge was established in 1939 as a refuge and breeding ground for migratory birds and for use as an inviolate sanctuary for migratory birds. Located in central Wisconsin, the Refuge includes 43,696 acres consisting of wetlands and open water areas, pine, oak, and aspen forests, grasslands, and rare savannas.

Three alternatives were considered in the EA: (1) No action; (2) follow the course set in the 1979 Master Plan; or (3) follow the course established in the CCP (preferred alternative). Significant issues addressed in the CCP include the proposal to acquire land within the Yellow River Focus Area and management of endangered species that use the Refuge, including the Eastern massassagua rattlesnake, the Karner blue butterfly, and a migratory flock of Whooping Cranes. There was strong public interest in the plan, and the Service provided many opportunities for public comment in meetings in the community. Following a 60-day comment period on the Draft CCP (65 FR 46940, August 1, 2000), a revised Draft CCP was produced and another 60-day comment period was provided (66 FR 52776, October 17, 2001). The plan was revised to address the issues raised by the public, including the decision to reduce the area within the Yellow River Focus Area where land acquisition would be one of the tools available to facilitate restoration and conservation efforts. Assistance to local landowners would remain the priority means of habitat restoration and conservation throughout the Focus Area. It has been determined that the CCP is not a major Federal action that would significantly affect the quality of the human environment, within the meaning of Section 102(2)(c) of the National Environmental Policy Act of 1969.

Dated: March 26, 2003.

Marvin E. Moriarty,

Acting Regional Director.

Editorial Note: This document was received at the Office of the Federal Register December 20, 2004.

[FR Doc. 04–28142 Filed 12–23–04; 8:45 am]

BILLING CODE 4310–55–M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Receipt of Applications for Permit

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of applications for permit.

SUMMARY: The public is invited to comment on the following applications to conduct certain activities with endangered species and/or marine mammals.

DATES: Written data, comments or requests must be received by January 26, 2005.

ADDRESSES: Documents and other information submitted with these applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents within 30 days of the date of publication of this notice to: U.S. Fish and Wildlife Service, Division of Management Authority, 4401 North Fairfax Drive, Room 700, Arlington, Virginia 22203; fax 703/358–2281.

FOR FURTHER INFORMATION CONTACT: Division of Management Authority, telephone 703/358–2104.

SUPPLEMENTARY INFORMATION:

Endangered Species

The public is invited to comment on the following applications for a permit to conduct certain activities with endangered species. This notice is provided pursuant to Section 10(c) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531, *et seq.*). Written data, comments, or requests for copies of these complete applications should be submitted to the Director (address above).

Applicant: John M. Searles, Flint, MI, PRT–093993.

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

Applicant: Nicholas A. Russo, Sr., Allentown, NJ, PRT–094471.

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

Endangered Marine Mammals and Marine Mammals

The public is invited to comment on the following applications for a permit to conduct certain activities with marine mammals. The applications were submitted to satisfy requirements of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361, *et seq.*), and the regulations governing marine mammals (50 CFR Part 18). Written data, comments, or requests for copies of the complete applications or requests for a public hearing on these applications should be submitted to the Director (address above). Anyone requesting a hearing should give specific reasons why a hearing would be appropriate. The holding of such a hearing is at the discretion of the Director.

Applicant: John F. Byrnes, Omaha, NE, PRT–091493.

The applicant requests a permit to import a polar bear (*Ursus maritimus*) sport hunted from the Northern Beaufort Sea polar bear population in Canada for personal use.

Applicant: Mark E. Buchanan, San Diego, CA, PRT–094374.

The applicant requests a permit to import a polar bear (Ursus maritimus) sport hunted from the Lancaster Sound polar bear population in Canada for personal use.

Dated: October 29, 2004.

Michael L. Carpenter,

Senior Permit Biologist, Branch of Permits, Division of Management Authority.

[FR Doc. 04–28223 Filed 12–23–04; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Issuance of Permits

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of issuance of permits for endangered species and/or marine mammals.

SUMMARY: The following permits were issued.

ADDRESSES: Documents and other information submitted with these applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents to: U.S. Fish and Wildlife Service, Division of Management Authority, 4401 North Fairfax Drive, Room 700, Arlington, Virginia 22203; fax 703/358–2281.

FOR FURTHER INFORMATION CONTACT: Division of Management Authority, telephone 703/358–2104.

SUPPLEMENTARY INFORMATION: Notice is hereby given that on the dates below, as authorized by the provisions of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531, *et seq.*), and/or the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361, *et seq.*), the Fish and Wildlife Service issued the requested permits subject to certain conditions set forth therein. For each permit for an endangered species, the Service found that (1) the application was filed in good faith, (2) the granted permit would not operate to the disadvantage of the endangered species, and (3) the granted permit would be consistent with the purposes and policy set forth in Section 2 of the Endangered Species Act of 1973, as amended.

ENDANGERED SPECIES

Permit number	Applicant	Receipt of application FEDERAL REGISTER notice	Permit issuance date
078965	Omaha's Henry Doorly Zoo	69 FR 42764; July 16, 2004	October 20, 2004.
079034	Wildlife Conservation Society	68 FR 70521; December 18, 2003	October 20, 2004.
080013	Cleveland Metroparks Zoo	68 FR 70521; December 18, 2003	October 20, 2004.

ENDANGERED MARINE MAMMALS AND MARINE MAMMALS

Permit number	Applicant	Receipt of application FEDERAL REGISTER notice	Permit issuance date
090925	Clarence T. Clem	69 FR 51702; August 20, 2004	October 19, 2004.
091922	Patrick J. Carroll	69 FR 54149; September 7, 2004	October 26, 2004.

Dated: October 29, 2004.

Michael L. Carpenter,

Senior Permit Biologist, Branch of Permits, Division of Management Authority.

[FR Doc. 04–28224 Filed 12–23–04; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Issuance of Permits

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of issuance of permits for endangered species and marine mammals.

SUMMARY: The following permits were issued.

ADDRESSES: Documents and other information submitted with these applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents to: U.S. Fish and Wildlife Service, Division of Management Authority, 4401 North Fairfax Drive, Room 700, Arlington, Virginia 22203; fax 703/358–2281.

FOR FURTHER INFORMATION CONTACT: Division of Management Authority, telephone 703/358–2104.

SUPPLEMENTARY INFORMATION: Notice is hereby given that on the dates below, as authorized by the provisions of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531, *et seq.*), and/or the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361, *et seq.*), the Fish and Wildlife Service issued the requested permits subject to certain conditions set forth therein. For each permit for an endangered species, the Service found that (1) the application was filed in good faith, (2) the granted permit would not operate to the disadvantage of the endangered species, and (3) the granted permit would be consistent with the purposes and policy set forth in Section 2 of the Endangered Species Act of 1973, as amended.

ENDANGERED SPECIES

Permit number	Applicant	Receipt of application **Federal Register** notice	Permit issuance date
090787, 090788, 090790 to 090803.	Feld Entertainment	69 FR 61261; October 15, 2004	November 24, 2004.
093272	Thomas L. Scott	69 FR 61261; October 15, 2004	November 17, 2004.
093281	George R. Fusner, Jr	69 FR 61261; October 15, 2004	November 17, 2004.

ENDANGERED MARINE MAMMALS AND MARINE MAMMALS

Permit number	Applicant	Receipt of application **Federal Register** notice	Permit issuance date
066878	Georgia Southern University	68 FR 52608; September 4, 2003	November 23, 2004.
091173	William R. Powers	69 FR 51702; August 20, 2004	November 18, 2004.

Dated: December 3, 2004.

Monica Farris,

Senior Permit Biologist, Branch of Permits, Division of Management Authority.

[FR Doc. 04–28222 Filed 12–23–04; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY–920–1320–EL, WYW161763]

Coal Lease Exploration License, WY

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of invitation for coal exploration license.

SUMMARY: Pursuant to section 2(b) of the Mineral Leasing Act of 1920, as amended by section 4 of the Federal Coal Leasing Amendments Act of 1976, 90 Stat. 1083, 30 U.S.C. 201 (b), and to the regulations adopted at 43 CFR part 3410, all interested parties are hereby invited to participate with Powder River Coal Company on a *pro rata* cost sharing basis in its program for the exploration of coal deposits owned by the United States of America in the following-described lands in Campbell County, WY:

T. 48 N., R. 71 W., 6th P.M., Wyoming;
Sec. 7: Lot 12;
Sec. 8: Lots 10;
Sec. 17: Lots 1–4, 6–10, 16; Containing 489.43 acres, more or less.

All of the coal in the above-described land consists of unleased Federal coal within the Powder River Basin Known Recoverable Coal Resource Area. The purpose of the exploration program is to obtain data for the purpose of obtaining structural and quality information needed to identify coal reserves that may be used in the Gold Mine Draw Alluvial Valley Floor Exchange application that was filed August 15, 2003, by Powder River Coal Company.

ADDRESSES: The proposed exploration program is fully described and will be conducted pursuant to an exploration plan to be approved by the Bureau of Land Management. Copies of the exploration plan are available for review during normal business hours in the following offices (serialized under number WYW161763): Bureau of Land Management, Wyoming State Office, 5353 Yellowstone Road, P.O. Box 1828, Cheyenne, WY 82003; and, Bureau of Land Management, Casper Field Office, 2987 Prospector Drive, Casper, WY 82604.

SUPPLEMENTARY INFORMATION: This notice of invitation will be published in *The News-Record* of Gillette, WY, once each week for two consecutive weeks beginning the week of November 22, 2004, and in the **Federal Register**. Any party electing to participate in this exploration program must send written notice to both the Bureau of Land Management and Powder River Coal Company no later than thirty days after publication of this invitation in the **Federal Register**. The written notice should be sent to the following addresses: Powder River Coal Company, Attn: Les Petersen, P.O. Box 3034, Gillette, WY 82717, and the Bureau of Land Management, Wyoming State Office, Branch of Solid Minerals, Attn: Mavis Love, P.O. Box 1828, Cheyenne, WY 82003.

The foregoing is published in the **Federal Register** pursuant to 43 CFR 3410.2–1(c)(1).

Phillip C. Perlewitz,

Acting Deputy State Director, Minerals and Lands.

[FR Doc. 04–28150 Filed 12–26–04; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CA–310–0777–XG]

Meeting Date Correction for Public Meeting: Northwest California Resource Advisory Council

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act of 1976 (FLPMA), and the Federal Advisory Committee Act of 1972 (FACA), the U.S. Department of the Interior, Bureau of Land Management (BLM) Northwest California Resource Advisory Council will meet as indicated below.

DATES: The meeting will be held Tuesday and Wednesday, Feb. 1 and 2, 2005, in Redding, California. An earlier notice, published in the **Federal Register** on December 17, 2004 (Volume 69, Number 242)] [Notices] [Page 75561]) incorrectly listed the meeting dates as Feb. 2 and 3, 2005. On Feb. 1, the council members convene at 10 a.m. at the BLM Redding Field Office, 355 Hemsted Dr., and depart immediately for a field tour of projected land exchange sites. Members of the public are welcome on the tour, but they must provide their own transportation and lunch. On Feb. 2, the council convenes at 8 a.m. in the Conference Center at the McConnell Foundation headquarters, 800 Shasta View Drive in Redding. Time for public comment has been set aside for 10:30 a.m. Other meeting details published in the above referenced notice are unchanged.

FOR FURTHER INFORMATION CONTACT: Rich Burns, BLM Ukiah Field Office manager, (707) 468–4000; or BLM Public Affairs Officer Joseph J. Fontana, (530) 252–5332.

Dated: December 17, 2004.

Joseph J. Fontana,

Public Affairs Officer.

[FR Doc. 04–28122 Filed 12–23–04; 8:45 am]

BILLING CODE 4310–40–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[ID–300–1020–PH]

Notice of Public Meeting, Idaho Falls District Resource Advisory Council Meeting

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act (FLPMA) and the Federal Advisory Committee Act of 1972 (FACA), the U.S. Department of the Interior, Bureau of Land Management (BLM) Idaho Falls District Resource Advisory Council (RAC), will meet as indicated below.

DATES: The meeting will be held January 20 and 21, 2005 at the BLM Idaho Falls District Office, 1405 Hollipark Drive, in Idaho Falls, Idaho. The meeting will start at 1 p.m. January 20, with the public comment period as the first agenda item. The meeting will adjourn at or before 2 p.m. on the following day.

SUPPLEMENTARY INFORMATION: The 15-member Council advises the Secretary of the Interior, through the Bureau of Land Management, on a variety of planning and management issues associated with public land management in the BLM Idaho Falls District (IFD), which covers eastern Idaho. At this meeting, topics we plan to discuss include:

- Sage Grouse Conservation strategies (BLM national, and State of Idaho if completed).
- A presentation about tribal treaty rights by the Shoshone-Bannock Tribes.
- The South Fork of the Snake River Activity Plan (Upper Snake Field Office) public outreach opportunities.
- Idaho Falls District operations plan.
- Other current issues as appropriate.
- Other items of interest raised by the Council.

All meetings are open to the public. The public may present written comments to the Council. Each formal Council meeting will also have time allocated for hearing public comments. Depending on the number of persons wishing to comment and time available, the time for individual oral comments may be limited. Individuals who plan to attend and need special assistance, such as sign language interpretation, tour transportation or other reasonable accommodations, should contact the BLM as provided below.

FOR FURTHER INFORMATION CONTACT: David Howell, RAC Coordinator, Idaho Falls District, 1405 Hollipark Dr., Idaho Falls, ID 83401. Telephone (208) 524–7559. Email: *David_Howell@blm.gov.*

Dated: December 17, 2004.

LeRoy Cook,

Associate District Manager.

[FR Doc. 04–28143 Filed 12–23–04; 8:45 am]

BILLING CODE 4310–GG–P

DEPARTMENT OF THE INTERIOR

Minerals Management Service

Outer Continental Shelf (OCS), Alaska OCS Region, Cook Inlet Oil and Gas Sale 199, May 2006

AGENCY: Minerals Management Service (MMS), Interior.

ACTION: Request for Information (RFI) and Notice of Intent (NOI) to prepare an Environmental Assessment.

SUMMARY: The Secretary's approved 5-Year OCS Oil and Gas Leasing Program for 2002–2007 provides for two sales, Sales 191 and 199, to be held in the Cook Inlet program area. An Environmental Impact Statement (EIS) that covered both sales was prepared. For Sale 199 an Environmental Assessment will be prepared and, if significant effects are found, a supplemental EIS will also be written. In addition, a federal consistency determination (CD) under the Coastal Zone Management Act will be prepared, as well as a proposed and final notice of sale.

The RFI and a NOI to prepare an EIS for Sales 191 and 199 was published in the **Federal Register** on December 31, 2001, at 66 FR 67543. The Cook Inlet final EIS for Sales 191 and 199 was released in November 2003 (OCS EIS/EA, MMS 2003–055). The first sale, Sale 191, was held on May 19, 2004; however, the sale received no bids. The MMS is now initiating a Request for Information for Cook Inlet Sale 199.

COMMENT PERIOD: Comments on the RFI and on the NOI must be received no later than 45 days following publication of this document in the **Federal Register**. If you wish to comment, you may submit your comments by any one of the following methods:

- You may mail comments to the Alaska OCS Region, Minerals Management Service, 3801 Centerpoint Drive, Suite 500, Anchorage, Alaska 99503, in envelopes labeled ''Attn: Comments on Request for Information for Cook Inlet Sale 199'' or ''Attn: Comments on Notice of Intent to Prepare an Environmental Assessment for Cook Inlet Sale 199,'' as appropriate.
- You may fax your comments to MMS at (907) 334–5242.
- You may also comment using Public Connect at: *https://ocsconnect.mms.gov/pcs-public.*
- Finally, you may hand-deliver comments weekdays between 8 AM and 5 PM to the Alaska OCS Region, Minerals Management Service, 3801 Centerpoint Drive, Suite 500, Anchorage, Alaska 99503.

FOR FURTHER INFORMATION CONTACT: Please contact Fred King at (907) 334–5271 in MMS's Alaska OCS Region regarding questions on the RFI/NOI to prepare an Environmental Assessment.

SUPPLEMENTARY INFORMATION: The environmental analysis for Sale 199 will focus primarily on new issues that may have arisen since the completion of the EIS for Sales 191 and 199 (November 2003). A consistency determination will be prepared for the sale and will include analysis of any approved changes that may have occurred in the State's coastal management plan. The process will lead to identification of the area to be included in the proposed Notice of Sale. Each of these steps, including the proposed Notice of Sale, provides for a public review period. At the culmination of each step and after analysis of any public comments, the MMS will decide whether to proceed to the next step. This process will:

- Focus the environmental analysis on impact types and levels that may have changed since the analysis was done for Sale 191;
- Clearly highlight any new issues for the public;
- Eliminate the need for costly preparation and public review of a repetitive, voluminous new EIS for Sale 199; and
- Result in a more efficient and responsive application of the National Environmental Policy Act (NEPA).

The MMS will analyze all comments received in response to this RFI and re-examine information previously submitted in response to the Call and the draft and final EISs for Sales 191 and 199. The MMS will then identify the issues to be analyzed in the NEPA document.

This RFI does not indicate a decision to lease in the area described below. Final delineation of the areas for possible leasing will be made after completion of the pre-sale steps described above and in compliance with the current 5-year program and applicable laws, including all requirements of the NEPA and the OCS Lands Act.

Request for Information

1. Authority

This RFI is published pursuant to the OCS Lands Act, as amended (43 U.S.C. 1331–1356, (1994)) (OCS Lands Act), and the regulations issued thereunder (30 CFR 256); and in accordance with the 5-Year OCS Oil and Gas Leasing Program 2002 to 2007.

2. Purpose of Request

The purpose of the RFI is to gather information for Oil and Gas Lease Sale 199 in the Cook Inlet, scheduled for May 2006. Information on oil and gas leasing, exploration, and development and production within the Cook Inlet are sought from all interested parties. This early planning and consultation step is important for ensuring that all interests and concerns are communicated to the Department of the Interior for decisions in the leasing process.

The Call for Information and Nominations published in the **Federal Register** on December 31, 2001, requested information and nominations from industry for Sales 191 and 199 in the Cook Inlet Planning Area. The MMS will use the information submitted in response to that Call and any new information submitted in response to this RFI to determine the area that will be included in a NEPA analysis. The public need not re-submit comments sent in response to the multiple-sale Call. A company need not re-submit its areas of interest if its comments or indications of interest have not changed since that time. This request seeks to identify new concerns and new areas of interest to industry.

3. Description of Area

The area covered by this RFI is located offshore the State of Alaska in the Cook Inlet Planning Area. This area consists of approximately 517 whole and partial blocks (about 2.5 million acres). A page-size map of the area accompanies this Notice. A large scale RFI map showing the boundaries of the area on a block-by-block basis is

available without charge from the Records Manager at the address given below, or by telephone request at (907) 334–5207 or 1–800–764–2627. Copies of Official Protraction Diagrams (OPDs) are also available at the following location: Alaska OCS Region, Minerals Management Service, 3801 Centerpoint Drive, Suite 500, Anchorage, Alaska, 99503.

In addition, the OPDs are available on the MMS Web site at *http://www.mms.gov/ld/alaska.htm.*

4. Instructions on Request for Information

The RFI map delineates the area that is the subject of this request. Respondents are requested to indicate interest in and comment on any or all of the Federal acreage within the boundaries of the RFI area that they wish to have included in Cook Inlet Sale 199. Comments should be sent to the Regional Supervisor, Leasing and Environment, Alaska OCS Region, at the address or Public Connect Web site as stated above in the comment period section.

Our practice is to make comments, including names and addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their address from the rulemaking record, which we will honor to the extent allowable by law. Under some circumstances, MMS may withhold a respondent's identity, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. However, we will not 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.

A. Areas of Interest to the Oil and Gas Industry

The MMS requests industry to submit any new information, including nomination of blocks that are of significant interest for exploration and development and production. Information and nominations submitted in response to the multiple-sale Call for Sales 191 and 199, published on December 31, 2001 (66 FR 67543), will also be considered as information and nominations for the Sale 199 area identification process.

Nominations must be depicted on the RFI map by outlining the area(s) of interest along block lines. Nominators are asked to submit a list of whole and partial blocks nominated (by OPD and block number) to facilitate correct interpretation of their nominations on the Request for Information map. Although the identities of those submitting nominations become a matter of public record, the individual nominations are proprietary information.

Nominators also are requested to rank blocks nominated according to priority of interest [e.g., priority 1 (high), or 2 (medium)]. Blocks nominated that do not indicate priorities will be considered priority 3 (low). Nominators must be specific in indicating blocks by priority and be prepared to discuss their range of interest and activity regarding the nominated area(s). The telephone number and name of a person to contact in the nominator's organization for additional information should be included in the response. This person will be contacted to set up a mutually agreeable time and place for a meeting with the Alaska OCS Regional Office to present their views regarding the company's nominations.

B. Relation to Coastal Management Plans

Comments also are sought on potential conflicts with approved local coastal management plans that may result from the sale and future OCS oil and gas activities. These comments should identify specific coastal management plan policy of concern, the nature of the conflicts foreseen, and steps that MMS could take to avoid or mitigate the potential conflicts. Comments may be in terms of broad areas or restricted to particular blocks of concern. Commenters are requested to list block numbers or outline the subject area on the large-scale RFI map.

5. Use of Information From the Request for Information

Information submitted in response to this RFI will be used for several purposes. Responses will be used to:

- Help to further identify areas of potential oil and gas development;
- Identify environmental effects and potential use conflicts not previously addressed in the Final EIS and Consistency Determination for Sales 191 and 199 (OCS EIS/EA, MMS 2003–055);
- Develop any additional lease terms and conditions/mitigating measures that may be necessary; and
- Identify any potential conflicts between oil and gas activities and the Alaska coastal management plan not addressed in the Consistency Determination for Sale 191.

6. Existing Information

The MMS has acquired a substantial amount of information, including that gained through the use of traditional knowledge, on the issues and concerns related to oil and gas leasing in the Cook Inlet.

An extensive environmental, social, and economic studies program has been underway in this area since 1975. The emphasis has been on geologic mapping, environmental characterization of biologically sensitive habitats, endangered whales and marine mammals, physical oceanography, ocean-circulation modeling, and ecological and socio-cultural effects of oil and gas activities.

Information on the studies program, completed studies, and a program status report for continuing studies in this area is available on the MMS Web site *http://www.mms.gov/alaska,* or may be obtained from the Chief, Environmental Studies Section, Alaska OCS Region, by telephone request at (907) 334–5230, or by written request at the address stated under Description of Area. A request may also be made via the Alaska OCS Region Web site at *http://www.mms.gov/alaska/ref/pubindex/pubsindex.htm.*

7. Tentative Schedule

The following is a list of tentative milestone dates applicable to Cook Inlet Sale 199 covered by this RFI:

Request for Information published—December 2004
Area Identification—February 2005
National Environmental Policy Act/Environmental Assessment Review (or Supplemental EIS) published—October 2005
Proposed Notice and Consistency Determination—December 2005
Final Notice of Sale—April 2006
Tentative Sale Date—May 2006

Notice of Intent To Prepare an Environmental Analysis

1. Authority

The NOI is published pursuant to the regulations (40 CFR 1501.7) implementing the provisions of the National Environmental Policy Act of 1969 as amended [42 U.S.C. 4321 *et seq.* (1988)].

2. Purpose of Notice of Intent

Pursuant to the regulations (40 CFR 1501.7) implementing the procedural provisions of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), MMS is announcing its intent to prepare an environmental assessment for Cook Inlet Oil and Gas Lease Sale 199, scheduled

for May 2006. The environmental assessment will be prepared to determine if significant new issues or impacts not previously addressed in the EIS for Sales 191 and 199 have arisen. If no significant new issues or impacts are identified, a Finding of No New Significant Impacts will be issued. If information is submitted in response to this Request for Information or found by MMS analysts that identifies environmentally significant new issues and/or impacts not previously addressed, a supplemental EIS may be prepared.

3. Instructions on Notice of Intent

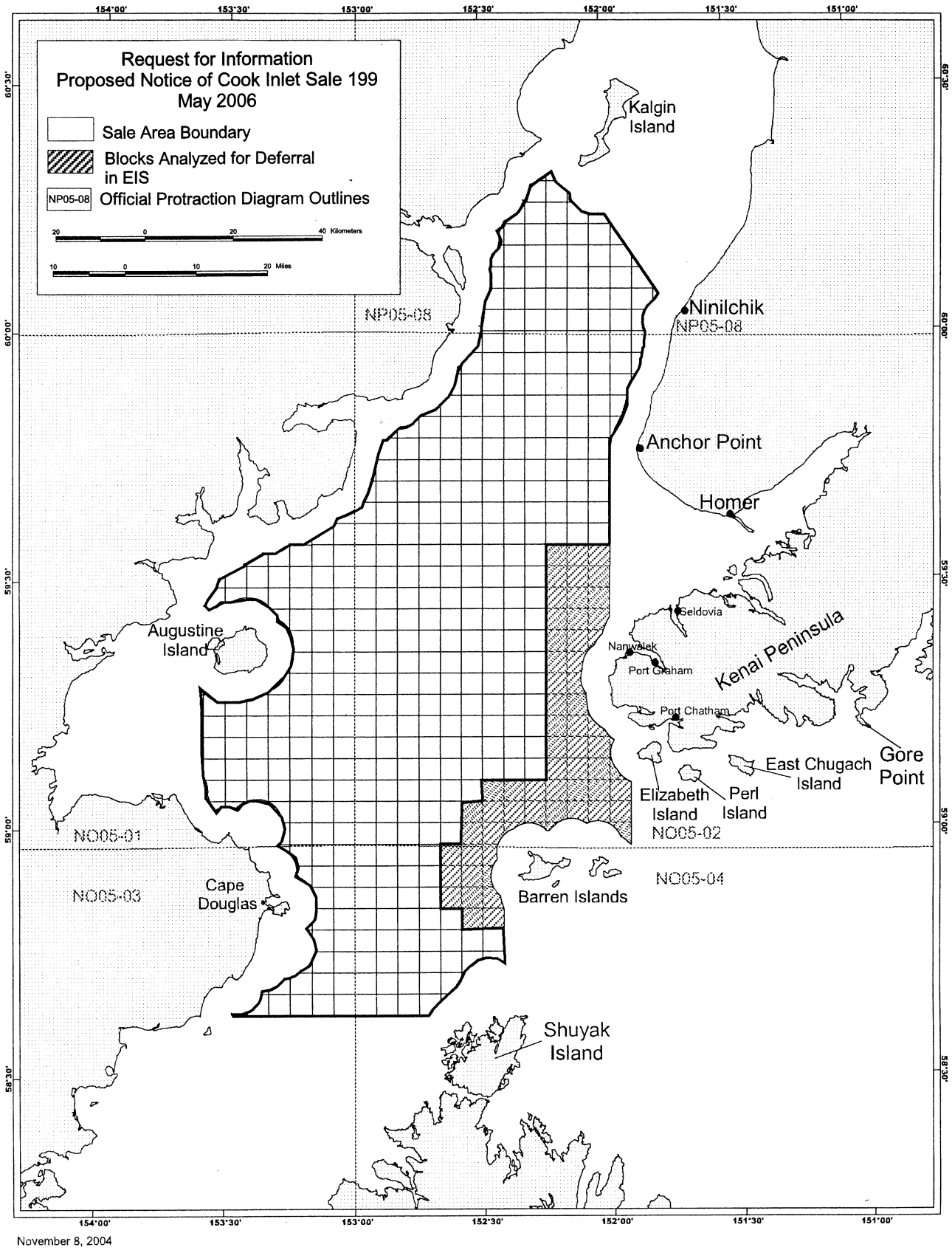
Federal, State, Tribal, and local governments and other interested parties are requested to send their written comments on new information and issues that should be addressed in the environmental assessment to the Regional Supervisor, Leasing and Environment, Alaska OCS Region, at the address or Public Connect Web site as stated above in the comment period section.

Dated: December 13, 2004.

Johnnie Burton,

Director, Minerals Management Service.

BILLING CODE 4310–MR–P



[FR Doc. 04–28102 Filed 12–23–04; 8:45 am]

BILLING CODE 4310–MR–C

INTERNATIONAL TRADE COMMISSION

[Inv. No. 337–TA–511]

In the Matter of Certain Pet Food Treats; Notice of Decision Not To Review an Initial Determination Granting United Pet Group's Motion for Summary Determination of Non-Infringement

AGENCY: International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review an initial determination (ID) issued by the presiding administrative law judge (ALJ) in the above-captioned investigation, granting the motion of United Pet Group, Inc. of Cincinnati, Ohio (''UPG'') for summary determination of non-infringement.

FOR FURTHER INFORMATION CONTACT: Andrea Casson, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone 202–205–3105. Copies of all nonconfidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202–205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on June 8, 2004, based on a complaint filed by Thomas J. Baumgartner and Hillbilly Smokehouse, Inc., both of Rogers, Arkansas. 69 FR 32044. The complaint alleges violations of section 337 of the Tariff Act of 1930, 337 U.S.C. 1337, in the importation into the United States, sale for importation, or sale within the United States after importation of certain pet food treats that infringe U.S. Design Patent No. 383,886 (''the '886 patent''). The notice of investigation lists six companies as respondents, including LLB Holdings, LLC, of Aiea, Hawaii (''LLB''). On August 11, 2004, the ALJ issued Order No. 4, which granted a motion by UPG to intervene in place of LLB. The Commission determined not to review that ID.

On June 23, 2004, the same day that UPG filed its motion to intervene, it also filed a motion for partial summary determination of non-infringement. Complaints and the Commission investigative attorney filed responses in opposition to UPG's motion for summary determination. On November 22, 2004, the ALJ issued an ID (order No. 10) granting UPG's motion for summary determination. No petitions for review of the ID were filed.

This action is taken under the authority of section 337 of the Tariff Act of 1930, 19 U.S.C. 1337, and sections 210.19 and 210.42 of the Commission Rules of Practice and Procedure, 19 CFR 210.19 and 210.42.

Issued: December 21, 2004.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 04–28225 Filed 12–23–04; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[USITC SE–04–032]

Sunshine Act Meeting

AGENCY HOLDING THE MEETING United States International Trade Commission.

TIME AND DATE: January 6, 2005 at 11 a.m.

PLACE: Room 101, 500 E Street SW., Washington, DC 20436, Telephone: (202) 205–2000.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

1. *Agenda for future meetings:* None.
2. Minutes.
3. Ratification List.
4. Inv. Nos. 731–TA–1063–1068 (Final) (Certain Frozen or Canned Warmwater Shrimp and Prawns from Brazil, China, Ecuador, India, Thailand, and Vietnam)—briefing and vote. (The Commission is currently scheduled to transmit its determination and Commissioners' opinions to the Secretary of Commerce on or before January 21, 2005.)
5. Inv. No. 731–TA–1070A (Certain Crepe Paper Products from China)—briefing and vote. (The Commission is currently scheduled to transmit its determination and Commissioners' opinions to the Secretary of Commerce on or before January 18, 2005.)
6. *Outstanding action jackets:* none.

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

Issued: December 21, 2004.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 04–28326 Filed 12–22–04; 11:17 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 60-day notice of information collection under review: a national repository for the collection and inventory of information related to arson and the criminal misuse of explosives.

The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), 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. Comments are encouraged and will be accepted for ''sixty days'' until February 25, 2005. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments, especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Jesse Chester, Chief, Arson and Explosives National Repository Branch, Suite 280, Judiciary Square Federal Building, 650 Massachusetts Avenue, NW., Washington, DC 20226.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—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 agencies' 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:* Revision of a currently approved collection.

(2) *Title of the Form/Collection:* A National Repository for the Collection and Inventory of Information Related to Arson and the Criminal Misuse of Explosives.

(3) *Agency Form Number, if Any, and the Applicable Component of the Department of Justice Sponsoring the Collection:* Form Number: None. Bureau of Alcohol, Tobacco, Firearms and Explosives.

(4) *Affected Public Who Will Be Asked or Required To Respond, as Well as a Brief Abstract:* Primary: State, Local or Tribal Government. Other: Federal Government. The Federal explosive laws require all Federal agencies to report to the Attorney General (AG) information relating to arson and criminal misuse of explosives for entry into a national repository. In addition, the law provides that such a repository will contain information on arson and explosives incidents voluntarily reported to the Attorney General by State, Local or Tribal authorities. The ATF National Repository maintains all explosive incident databases within the Department.

(5) *An Estimate of the Total Number of Respondents and the Amount of Time Estimated for an Average Respondent to Respond:* It is estimated that 2,000 respondents will report the information within approximately 10 minutes.

(6) *An Estimate of the Total Public Burden (in Hours) Associated With the Collection:* There are an estimated 333 annual total burden hours associated with this collection.

If additional information is required contact: Brenda E. Dyer, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, Department of Justice, Patrick Henry Building, Suite 1600, 601 D Street NW., Washington, DC 20530.

Dated: December 20, 2004.

Brenda E. Dyer,

Department Clearance Officer, Department of Justice.

[FR Doc. 04–28177 Filed 12–23–04; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF LABOR

Office of the Secretary

Submission for OMB Review: Comment Request

December 14, 2004.

The Department of Labor (DOL) has submitted the following public information collection requests (ICRs) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35). A copy of each ICR, with applicable supporting documentation, may be obtained by contacting Darrin King on 202–693–4129 (this is not a toll-free number) or email: *king.darrin@dol.gov.*

Comments should be sent to Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for the Employment Standards Administration (ESA), Office of Management and Budget, Room 10235, Washington, DC 20503, 202–395–7316 (this is not a toll-free number), within 30 days from the date of this publication in the **Federal Register**.

The OMB 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 submission of responses.

Agency: Employment Standards Administration.

Type of Review: Extension of a currently approved collection.

Title: Request for Information on Earnings, Dual Benefits, Dependents and Third Party Settlements.

OMB Number: 1215–0151.

Form No.: CA–1032.

Frequency: Annually.

Type of Response: Reporting.

Affected Public: Individuals or households.

Number of Respondents: 50,000.

Annual Responses: 50,000.

Average Response Time: 20 minutes.

Annual Burden Hours: 16,667.

Total Annualized capital/startup costs: $0.

Total Annual Costs (operating/maintaining systems or purchasing services): $20,000.

Description: The collection of this information is necessary under provisions of the Federal Employees' Compensation Act (FECA) which states: (1) Compensation must be adjusted to reflect a claimant's earnings while in receipt of benefits (5 U.S.C. 8106); (2) compensation is payable at the augmented rate of 75 percent only if the claimant has one or more dependents as defined by the FECA (5 U.S.C. 8110); (3) compensation may not be paid concurrently with certain benefits from other Federal Agencies, such as the Office of Personnel Management, Social Security, and the Veterans Administration (5 U.S.C. 8116); (4) compensation must be adjusted to reflect any settlement from a third party responsible for the injury for which the claimant is being paid compensation (5 U.S.C. 8132); (5) an individual convicted of any violation related to fraud in the application for, or receipt of, any compensation benefit, forfeits (as of the date of such conviction) any entitlement to such benefits, for any injury occurring on or before the date of conviction (5 U.S.C. 8148(a)); and, (6) no Federal compensation benefit can be paid to any individual for any period during which such individual is incarcerated for any felony offense (5 U.S.C. 8148(b)(1)). The information collected through Form CA–1032 is used to ensure that compensation being paid on the periodic roll is correct.

Agency: Employment Standards Administration.

Type of Review: Extension of a currently approved collection.

Title: Worker Information—Terms and Conditions of Employment.

OMB Number: 1215–0187.

Form No. WH–516.

Frequency: On occasion.

Type of Response: Third party disclosure.

Affected Public: Farms; Business or other for-profit; and Individuals or households.

Number of Respondents: 129,000.
Annual Responses: 1,594,800.
Average Response Time: 32 minutes.
Annual Burden Hours: 68,800.
Total Annualized capital/startup costs: $0.
Total Annual Costs (operating/maintaining systems or purchasing services): $43,060.
Description: Various sections of the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), 29 U.S.C. 1801 *et seq.*; require each farm labor contractor, agricultural employer and agricultural association to disclose employment terms and conditions in writing to: (a) Migrant agricultural workers at the time of recruitment (MSPA section 201(a)); (b) seasonal agricultural workers, upon request, at the time of hire (MSPA section 301(a)(1)); and (c) seasonal agricultural workers employed through a day-haul operation at the place of recruitment (MSPA section 301(a)(2)). MSPA sections 201(b) and 301(b) also require that each such respondent provide each migrant worker, upon request, a written statement of terms and conditions of employment. In addition, MSPA sections 201(g) and 301(f) require providing such information in English or, as necessary and reasonable, in a language common to the workers and that the U.S. Department of Labor (DOL) make forms available to provide such information. DOL prints and makes optional Form WH–516, Worker Information—Terms of Conditions of Employment, available for this purpose. MSPA sections 201(a)(8) and 301(a)(1)(H) require disclosure of certain information regarding State workers' compensation insurance to each migrant or seasonal agricultural worker (*i.e.*, whether State workers' compensation is provided and if so, the name of the State workers' compensation insurance carrier, the name of each person of the policyholder of such insurance, the name and the telephone number of each person who must be notified of an injury or death and the time period within which this notice must be given). Respondents may also meet this disclosure requirement, by providing the worker with a photocopy of any notice regarding workers' compensation insurance required by law of the state in which such worker is employed. The terms and conditions required to be disclosed to workers are set forth in sections 500.75(a) and (b) and 500.75(a), (b) and (c) of Regulations, 29 CFR part 500, Migrant and Seasonal Agricultural Worker Protection. Regulations 500.75(a) and 500.76(a) allow respondents to complete and disclose to workers the terms and conditions of employment using the DOL-developed optional form WH–516 to satisfy these requirements. Optional Form WH–516 may be used by the respondent to disclose employment terms and conditions in writing to migrant and seasonal agricultural workers.

Ira L. Mills,
Departmental Clearance Officer.
[FR Doc. 04–28190 Filed 12–23–04; 8:45 am]
BILLING CODE 4510–CH–P

DEPARTMENT OF LABOR

Employment Standards Administration

Proposed Collection; Comment Request

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Employment Standards Administration is soliciting comments concerning the proposed collection: Report of Changes That May Affect Your Black Lung Benefits (CM–929). A copy of the proposed information collection request can be obtained by contacting the office listed below in the addresses section of this Notice.

DATES: Written comments must be submitted to the office listed in the addresses section below on or before February 25, 2005.

ADDRESSES: Ms. Hazel M. Bell, U.S. Department of Labor, 200 Constitution Ave., NW., Room S–3201, Washington, DC 20210, telephone (202) 693–0418, fax (202) 693–1451, *E-mail bell.hazel@dol.gov*. Please use only one method of transmission for comments (mail, fax, or E-mail).

SUPPLEMENTARY INFORMATION:

I. Background

The Federal Mine Safety and Health Act of 1977 as amended, 30 U.S.C. 941, and 20 CFR 725.533(e) authorizes the Division of Coal Mine Workers' Compensation (DCMWC) to pay compensation to coal miner beneficiaries. Once a miner or survivor is found eligible for benefits, the primary beneficiary is requested to report certain changes that may affect black lung benefits. The CM–929 is used to help determine continuing eligibility of primary beneficiaries receiving black lung benefits from the Black Lung Disability Trust Fund. The CM–929 is completed by the beneficiary to report factors that may affect his or her benefits, including income, marital status, receipt of state workers' compensation and dependents' status. This information collection is currently approved for use through June 30, 2005.

II. Review Focus

The Department of Labor is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submissions of responses.

III. Current Actions

The Department of Labor seeks the approval of the extension of this information collection in order to carry out its responsibility to verify the accuracy of information in the beneficiary's claims file, and to identify changes in the beneficiary's status, to ensure that the amount of compensation being paid the beneficiary is accurate.

Type of Review: Extension.
Agency: Employment Standards Administration.
Titles: Report of Changes That May Affect Your Black Lung Benefits.
OMB Number: 1215–0084.
Agency Numbers: CM–929.
Affected Public: Individuals or households.
Total Respondents: 51,000.
Total Annual Responses: 51,000.

Estimated Total Burden Hours: 4,505.

Estimated Time Per Response: 5 to 8 minutes.

Frequency: Biennially.

Total Burden Cost (capital/startup): $0.

Total Burden Cost (operating/maintenance): $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: December 20, 2004.

Bruce Bohanon,

Chief, Branch of Management Review and Internal Control, Division of Financial Management, Office of Management, Administration and Planning, Employment Standards Administration.

[FR Doc. 04–28189 Filed 12–23–04; 8:45 am]

BILLING CODE 4510–CR–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

Docket No. ICR 1218–0131 (2005)

Hazardous Chemicals in Laboratories Standard; Extension of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Request for comment.

SUMMARY: OSHA solicits comments concerning its proposal to extend OMB approval of the information collection requirements contained in the Hazardous Chemicals in Laboratories Standard (29 CFR 1910.1450).

DATES: Comments must be submitted by the following dates:

Hard copy: Your comments must be submitted (postmarked or received) by February 25, 2005.

Facsimile and electronic transmission: Your comments must be received by February 25, 2005.

ADDRESSES: You may submit comments, identified by OSHA Docket No. ICR–1218–0131 (2005), by any of the following methods:

Regular mail, express delivery, hand delivery, and messenger service: Submit your comments and attachments to the OSHA Docket Office, Room N–2625, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693-2350 (OSHA's TTY number is (877) 889–5627). OSHA Docket Office and Department of Labor hours are 8:15 a.m. to 4:45 p.m., ET.

Facsimile: If your comments are 10 pages or fewer in length, including attachments, you may fax them to the OSHA Docket Office at (202) 693–1648.

Electronic: You may submit comments through the Internet at *http://dockets.osha.gov/.* Follow instructions on the OSHA Web Page for submitting comments.

Docket: For access to the docket to read or download comments or background materials, such as the complete Information Collection Request (ICR) (containing the Supporting Statement, OMB–83–I Form, and attachments), go to OSHA's Web Page at *http://www.OSHA.gov.* Comments, submissions, and the ICR are available for inspection and copying at the OSHA Docket Office at the address above. You may also contact Todd Owen at the address below to obtain a copy of the ICR.

(For additional information on submitting comments, please see the ''Public Participation'' heading in the **SUPPLEMENTARY INFORMATION** section of this document.)

FOR FURTHER INFORMATION CONTACT: Todd Owen, Directorate of Standards and Guidance, OSHA, Room N–3609, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–2222.

SUPPLEMENTARY INFORMATION:

I. Public Participation—Submission of Comments on This Notice and Internet Access to Comments and Submissions

You may submit comments and supporting materials in response to this notice by (1) hard copy, (2) fax transmission (facsimile), or (3) electronically through the OSHA Web page. Because of security related problems, there may be a significant delay in the receipt of comments by regular mail. Please contact the OSHA Docket Office at (202) 693–2350 (TTY (877) 889–5627) for information about security procedures concerning the delivery of materials by express delivery, hand delivery and messenger service.

All comments, submissions and background documents are available for inspection and copying at the OSHA Docket Office at the above address. Comments and submissions posted on OSHA's Web page are available at *http://www.OSHA.gov.* Contact the OSHA Docket Office for information about materials not available through the OSHA Web page and for assistance using the Web page to locate docket submissions.

Electronic copies of this **Federal Register** notice as well as other relevant documents are available on OSHA's Web page.

II. Background

The Department of Labor, as part of its continuing effort to reduce paperwork and respondent (*i.e.,* employer) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accordance with the Paperwork Reduction Act of 1995 (PRA–95) (44 U.S.C. 3506(c)(2)(A)).

This program ensures that information is in the desired format, reporting burden (time and costs) is minimal, collection instruments are clearly understood, and OSHA's estimate of the information collection burden is accurate. The Occupational Safety and Health Act of 1970 (the Act) (29 U.S.C. 651 *et seq.*) authorizes information collection by employers as necessary or appropriate for enforcement of the Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657).

The standard entitled ''Occupational Exposure to Hazardous Chemicals in Laboratories'' (29 CFR 1910.1450; the ''Standard'') applies to laboratories that use hazardous chemicals in accordance with the Standard's definitions for ''laboratory use of hazardous chemicals'' and ''laboratory scale.'' The Standard requires these laboratories to maintain employee exposures at or below the permissible exposure limits specified for the hazardous chemicals in 29 CFR Part 1910, subpart Z. They do so by developing a written Chemical Hygiene Plan (CHP) that describes: Standard operating procedures for using hazardous chemicals; hazard-control techniques; equipment-reliability measures; measures; employee information-and-training programs; conditions under which the employer must approve operations, procedures, and activities before implementation; and medical consultations and examinations. The CHP also designates personnel responsible for implementing the CHP, and specifies the procedures used to provide additional protection to employees exposed to particularly hazardous chemicals.

Other information-collection requirements of the Standard include: Documenting exposure-monitoring results; notifying employees in writing of these results; presenting specified information and training to employees; establishing a medical surveillance program for overexposed employees;

providing required information to the physician; obtaining the physician's written opinion using proper respiratory equipment and establishing, maintaining, transferring, and disclosing exposure-monitoring and medical records. These collection-of-information requirements, including the CHP, control employee overexposure to hazardous laboratory chemicals, thereby preventing serious illnesses and death among employees exposed to such chemicals.

III. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

—Whether the proposed information collection requirements are necessary for the proper performance of the Agency's functions, including whether the information is useful;

—The accuracy of OSHA's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;

—The quality, utility, and clarity of the information collected; and

—Ways to minimize the burden on employers who must comply; for example, by using automated or other technological information collection and transmission techniques.

IV. Proposed Actions

OSHA is proposing to extend the information collection requirements in the Hazardous Chemicals in Laboratories standard (29 CFR part 1910.1450). The Agency will summarize the comments submitted in response to this notice and will include this summary in its request to OMB to extend the approval of these information collection requirements contained in the Standard.

Type of Review: Extension of currently approved information collection requirements.

Title: Hazardous Chemicals in Laboratories (29 CFR 1910.1450).

OMB Number: 1218–0131.

Affected Public: Business or other for-profit; not-for-profit institutions; Federal government; State, local, or tribal governments.

Number of Respondents: 43,300.

Frequency of Response: Annually; monthly; occasionally.

Average Time per Response: Varies from five minutes (.08 hour) for a variety of requirements (e.g., for an office clerk to develop and post exposure-monitoring results) to eight (8) hours for an employer to develop a Chemical Hygiene Plan.

Estimated Total Burden Hours: 270,636.

Estimated Cost (Operation and Maintenance): $32,615,952.

V. Authority and Signature

John L. Henshaw, Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*), and Secretary of Labor's Order No. 5–2002 (67 FR 65008).

Dated: Signed at Washington, DC, on December 17, 2004.

John L. Henshaw,

Assistant Secretary of Labor

[FR Doc. 04–28188 Filed 12–23–04; 8:45 am]

BILLING CODE 4510–26–M

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. ICR–1218–0241 (2005)]

Subpart R (''Steel Erection''); Extension of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Request for comment.

SUMMARY: OSHA solicits comments concerning its proposal to extend OMB approval of the information collection requirements contained in Subpart R of 29 CFR part 1926 (''Steel Erection''). This Subpart requires employers to: Notify designated parties, especially steel erectors, that building materials, components, steel structures, and fall-protection equipment are safe for specific uses; and to ensure that employees exposed to fall hazards receive specified training in the recognition and control of fall hazards.

DATES: Comments must be submitted by the following dates:

Hard copy: Your comments must be submitted (postmarked or received) by February 25, 2005.

Facsimile and electronic transmission: Your comments must be received by February 25, 2005.

ADDRESSES: You may submit comments, identified by OSHA Docket No. ICR–1218–0241 (2005), by any of the following methods:

Regular mail, express delivery, hand delivery, and messenger service: Submit your comments and attachments to the OSHA Docket Office, Room N–2625, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–2350 (OSHA's TTY number is (877) 889–5627). OSHA Docket Office and Department of Labor hours are 8:15 a.m. to 4:45 p.m., ET.

Facsimile: If your comments are 10 pages or fewer in length, including attachments, you may fax them to the OSHA Docket Office at (202) 693–1648.

Electronic: You may submit comments through the Internet at *http://ecomments.osha.gov.* Follow instructions on the OSHA Webpage for submitting comments.

Docket: For access to the docket to read or download comments or background materials, such as the complete Information Collection Request (ICR) (containing the Supporting Statement, OMB–83–I Form, and attachments), go to OSHA's Web page at *http://www.OSHA.gov.* Comments, submissions, and the ICR are available for inspection and copying at the OSHA Docket Office at the address above. You may also contact Todd Owen at the address below to obtain a copy of the ICR.

(For additional information on submitting comments, please see the ''Public Participation'' heading in the **SUPPLEMENTARY INFORMATION** section of this document.)

FOR FURTHER INFORMATION CONTACT: Todd Owen, Directorate of Standards and Guidance, OSHA, Room N–3609, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–2222.

SUPPLEMENTARY INFORMATION:

I. Public Participation—Submission of Comments on This Notice and Internet Access to Comments and Submissions

You may submit comments and supporting materials in response to this notice by (1) hard copy, (2) fax transmission (facsimile), or (3) electronically through the OSHA Webpage. Because of security related problems, there may be a significant delay in the receipt of comments by regular mail. Please contact the OSHA Docket Office at (202) 693–2350 (TTY (877) 889–5627) for information about security procedures concerning the delivery of materials by express delivery, hand delivery and messenger service.

All comments, submissions and background documents are available for inspection and copying at the OSHA Docket Office at the above address. Comments and submissions posted on OSHA's Webpage are available at *http://www.OSHA.gov.* Contact the OSHA Docket Office for information about materials not available through the

OSHA Webpage and for assistance using the Webpage to locate docket submissions.

All comments, submissions and background documents are available for inspection and copying at the OSHA Docket Office at the above address. Comments and submissions posed on OSHA's Webpage are available at *http://www.OSHA.gov*. Contact the OSHA Docket Office for information about materials not available through the OSHA Webpage and for assistance using the Webpage to locate docket submissions.

Electronic copies of this **Federal Register** notice as well as other relevant documents are available on OSHA's Webpage. Since all admissions become public, private information such as social security numbers should not be submitted.

II. Background

The Department of Labor, as part of its continuing effort to reduce paperwork and respondent (*i.e.*, employer) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accordance with the paperwork Reduction Act of 1995 (PRA–95) (44 U.S.C. 3506(c)(2)(A)).

This program ensures that information is in the desired format, reporting burden (time and cost) is minimal, collection instruments are clearly understood, and OSHA's estimate of the information collection burden is accurate. The Occupational Safety and Health Act of 1970 (the Act) (29 U.S.C. 651 et seq.) authorizes information collection by employers as necessary or appropriate for enforcement of the Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657).

The following provisions of 29 CFR part 1926, subpart R (the ''Subpart'') contain paperwork requirements: §§ 1926.752(a)(1) and (a)(2); 1926.753(c)(5) and (e)(2); 1926.757(a)(7), (a)(9), and (e)(4)(i); 1926.758(g); 1926.760(e) and (e)(1); 1926.761; and paragraph (c)(4)(ii) of Appendix G. These provisions ensure that: Designated parties, especially steel erectors, receive notice that building materials, components, steel structures, and fall-protection equipment are safe for specific uses; and employees exposed to fall hazards receive the required training in the recognition and control of fall hazards. These paperwork requirements provide a direct and efficient means for controlling contractors and steel erectors to inform others (*e.g.*, employees) of steel-erection hazards and their control, thereby preventing death and serious injury by ensuring that structural steel members remain stable and that employees use fall protection correctly.

III. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for the proper performance of the Agency's functions, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and cost) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply; for example, by using automated or other technological information collection and transmission techniques.

IV. Proposed Actions

OSHA is proposing to extend the information collection requirements in 29 CFR par 1926, Subpart R (''Steel Erection''). The Agency will summarize the comments submitted in response to this notice and will include this summary in its request to OMB to extend the approval of these information collection requirements contained in the Standard.

Type of Review: Extension of currently approved information collection requirement.

Title: Subpart R Steel Erection 29 CFR 1926.750 through 1926.761.

OMB Number: 1218–0241.

Affected Public: Business or other for-profit: not-for-profit institutions; Federal government; State, local, or tribal governments.

Number of Respondents: 20,781.

Frequency of Response: Varies from one occurrence per project for most of the paperwork requirement to 10 occurrences per project for an employer to have a qualified rigger determine that it is safer to hoist and place purlins and single joists using deactivated safety latches on hooks rather than allowing the latches to remain activated.

Average Time per Response: Varies from one minute for a controlling contractor to inform a steel erector to leave fall protection at the jobsite to three hours for controlling contractors to obtain approval from the project structural engineer of record before modifying anchor bolts.

Estimated Total Burden Hours: 30,786.

Estimated Cost (Operation and Maintenance): $0.

V. Authority and Signature

John L. Henshaw, Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 et seq.) and Secretary of Labor's Order No. 5–2002 (67 FR 65008).

Signed at Washington, DC on December 20, 2004.

John L. Henshaw,

Assistant Secretary of Labor.

[FR Doc. 04–28218 Filed 12–23–04; 8:45 am]

BILLING CODE 4510–26–M

NATIONAL COUNCIL ON DISABILITY

Cultural Diversity Advisory Committee Meetings (Teleconference)

AGENCY: National Council on Disability (NCD).

Time and date: 3 p.m. e.s.t., January 13, 2005.

Place: National Council on Disability, 1331 F Street, NW., Suite 850, Washington, DC

Status: All parts of this meeting will be open to the public. Those interested in participating in this meeting should contact the appropriate staff member listed below. Due to limited resources, only a few telephone lines will be available for the call.

Agenda: Roll call, announcements, reports, new business, adjournment.

CONTACT PERSON FOR MORE INFORMATION: Geraldine (Gerrie) Drake Hawkins, PhD., Program Analyst, NCD, 1331 F Street NW., Suite 850, Washington, DC 20004; 202–272–2004 (voice), 202–272–2074 (TTY), 202–272–2022 (fax), *ghawkins@ncd.gov*.

Cultural Diversity Advisory Committee Mission: The purpose of NCD's Cultural Diversity Advisory Committee is to provide advice and recommendations to NCD on issues affecting people with disabilities from culturally diverse backgrounds. Specifically, the committee will help identify issues, expand outreach, infuse participation, and elevate the voices of underserved and unserved segments of this nation's population that will help NCD develop federal policy that will address the needs and advance the civil and human rights of people from diverse cultures.

Dated: December 17, 2004.

Jeff Rosen,

Acting Executive Director and General Counsel and Director of Policy.

[FR Doc. 04–28159 Filed 12–23–04; 8:45 am]

BILLING CODE 6820–MA–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50886; File No. SR–CBOE–2002–03]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the Chicago Board Options Exchange, Incorporated Relating to Customer Portfolio and Cross-Margining Requirements

December 20, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on April 2, 2004, the Chicago Board Options Exchange, Incorporated (''CBOE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') Amendment No. 1[3] to the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the CBOE. The CBOE submitted the original proposed rule change to the Commission on January 15, 2002 (''Original Proposal''). The proposed rule change was published in the **Federal Register** on March 29, 2002.[4] The Commission received one comment letter in response to the proposed rule change.[5] The CBOE is proposing Amendment No. 1 to make corrections or clarifications to the proposed rule, or to reconcile differences between the proposed rule and a parallel filing by the NYSE.[6] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The CBOE proposes to amend its rules, for certain customer accounts, to allow member organizations to margin listed, broad-based, market index options, index warrants and related exchange-traded funds according to a portfolio margin methodology as an alternative to the current strategy-based margin methodology. The proposed rule change also will provide for cross-margining by allowing broad-based index futures and options on such futures to be included with listed, broad-based index options, index warrants and related exchange-traded funds for portfolio margin treatment, in a separate cross-margin account. The text of the proposed rule change is below. Additions are in italics. Deletions are in brackets.

* * * * *

Chapter XII Margins

[Covered Options Contracts]

Portfolio Margin and Cross-Margin for Index Options

Rule 12.4. [Deleted January 15, 1975.] *As an alternative to the transaction / position specific margin requirements set forth in Rule 12.3 of this Chapter 12, members may require margin for listed, broad-based U.S. index options, index warrants and underlying instruments (as defined below) in accordance with the portfolio margin requirements contained in this Rule 12.4.*

In addition, members, provided they are a Futures Commission Merchant (''FCM'') and are either a clearing member of a futures clearing organization or have an affiliate that is a clearing member of a futures clearing organization, are permitted under this Rule 12.4 to combine a customer's related instruments (as defined below) and listed, broad based U.S. index options, index warrants and underlying instruments and compute a margin requirement (''cross-margin'') on a portfolio margin basis. Members must confine cross-margin positions to a portfolio margin account dedicated exclusively to cross-margining.

Application of the portfolio margin and cross-margining provisions of this Rule 12.4 to IRA accounts is prohibited.

(a) Definitions.

(1) The term ''listed option'' shall mean any option traded on a registered national securities exchange or automated facility of a registered national securities association.

(2) The term ''unlisted option'' means any option not included in the definition of listed option.

(3) The term ''options class'' refers to all options contracts covering the same underlying instrument.

(4) The term ''portfolio'' means options of the same options class grouped with their underlying instruments and related instruments.

(5) The term ''option series'' relates to listed options and means all option contracts of the same type (either a call or a put) and exercise style, covering the same underlying instrument with the same exercise price, expiration date, and number of underlying units.

(6) The term ''related instrument'' within an option class or product group means futures contracts and options on futures contracts covering the same underlying instrument.

(7) The term ''underlying instrument'' means long and short positions in an exchange traded fund or other fund product registered under the Investment Company Act of 1940 that holds the same securities, and in the same proportion, as contained in a broad based index on which options are listed. The term underlying instrument shall not be deemed to include, futures contracts, options on futures contracts, underlying stock baskets, or unlisted instruments.

(8) The term ''product group'' means two or more portfolios of the same type (see subparagraph (a)(9) below) for which it has been determined by Rule 15c3–1a under the Securities Exchange Act of 1934 that a percentage of offsetting profits may be applied to losses at the same valuation point.

(9) The term ''theoretical gains and losses'' means the gain and loss in the value of individual option series and related instruments at 10 equidistant intervals (valuation points) ranging from an assumed movement (both up and down) in the current market value of the underlying instrument. The magnitude of the valuation point range shall be as follows:

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b-4.

[3] See letter from Richard Lewandowski, Vice President, Division of Regulatory Services, CBOE, to Michael A. Macchiaroli, Associate Director, Division of Market Regulation (''Division''), Commission, dated April 1, 2004 (''Amendment No. 1'').

[4] See Securities Exchange Act Release No. 45630 (March 22, 2002), 67 FR 15263 (March 29, 2002).

[5] See E-mail from Mike Ianni, Private Investor to rule-comments@sec.gov, dated November 7, 2002 (''Ianni E-mail'').

[6] *See* Securities Exchange Act Release No. 46576 (October 1, 2002), 67 FR 62843 (October 8, 2002) (File No. SR–NYSE–2002–19) (''NYSE Proposal'').

Portfolio type	Up/Down market move (high & low valuation points)
non-high capitalization, broad based U.S. market index option[1]	*+/− 10%*
high capitalization, broad based U.S. market index option[1]	*+6%/− 8%*

[1] *In accordance with sub-paragraph (b)(1)(i)(B) of Rule 15c3–1a under the Securities Exchange Act of 1934.*

(b) Eligible Participants. The application of the portfolio margin provisions of this Rule 12.4, including cross-margining, is limited to the following:

(1) any broker or dealer registered pursuant to Section 15 of the Securities Exchange Act of 1934;

(2) any affiliate of a self-clearing member organization;

(3) any member of a national futures exchange to the extent that listed index options hedge the member's index futures; and

(4) any other person or entity not included in (b)1 through (b)3 above that has or establishes, and maintains, equity of at least 5 million dollars. For purposes of this equity requirement, all securities and futures accounts carried by the member for the same customer may be combined provided ownership across the accounts is identical. A guarantee by any other account for purposes of the minimum equity requirement is not to be permitted.

(c) Opening of Accounts.

(1) Only customers that, pursuant to Rule 9.7, have been approved for options transactions, and specifically approved to engage in uncovered short option contracts, are permitted to utilize a portfolio margin account.

(2) On or before the date of the initial transaction in a portfolio margin account, a member shall:

A. furnish the customer with a special written disclosure statement describing the nature and risks of portfolio margining and cross-margining which includes an acknowledgement for all portfolio margin account owners to sign, and an additional acknowledgement for owners that also engage in cross-margining to sign, attesting that they have read and understood the disclosure statement, and agree to the terms under which a portfolio margin account and the cross-margin account, respectively, are provided [see Rule 9.15(d)], and

B. obtain a signed acknowledgement(s) from the customer, both of which are required for cross-margining customers, and record the date of receipt.

(d) Establishing Account and Eligible Positions.

(1) Portfolio Margin Account. For purposes of applying the portfolio margin requirements provided in this Rule 12.4, members are to establish and utilize a dedicated securities margin account, or sub-account of a margin account, clearly identified as a portfolio margin account that is separate from any other securities account carried for a customer.

(2) Cross-Margin Account. For purposes of combining related instruments and listed, broad-based U.S. index options, index warrants and underlying instruments and applying the portfolio margin requirements provided in this Rule 12.4, members are to establish and utilize a portfolio margin account, clearly identified as a cross-margin account, that is separate from any other securities account or portfolio margin account carried for a customer.

A margin deficit in either the portfolio margin account or the cross-margin account of a customer may not be considered as satisfied by excess equity in the other account. Funds and/or securities must be transferred to the deficient account and a written record created and maintained.

(3) Portfolio Margin Account—Eligible Positions

(i) A transaction in, or transfer of, a listed, broad-based U.S. index option or index warrant may be effected in the portfolio margin account.

(ii) A transaction in, or transfer of, an underlying instrument may be effected in the portfolio margin account provided a position in an offsetting listed, broad-based U.S. index option or index warrant is in the account or is established in the account on the same day.

(iii) If, in the portfolio margin account, the listed, broad-based U.S. index option or index warrant position offsetting an underlying instrument position ceases to exist and is not replaced within 10 business days, the underlying instrument position must be transferred to a regular margin account, subject to Regulation T initial margin and the margin required pursuant to the other provisions of this chapter. Members will be expected to monitor portfolio margin accounts for possible abuse of this provision.

(iv) In the event that fully paid for long options and/or index warrants are the only positions contained within a portfolio margin account, such long positions must be transferred to a securities account other than a portfolio margin account or cross-margin account within 10 business days, subject to the margin required pursuant to the other provisions of this chapter, unless the status of the account changes such that it is no longer composed solely of fully paid for long options and/or index warrants.

(4) Cross-Margin Account—Eligible Positions

(i) A transaction in, or transfer of, a related instrument may be effected in the cross-margin account provided a position in an offsetting listed, U.S. broad based index option, index warrant or underlying instrument is in the account or is established in the account on the same day.

(ii) If the listed, U.S. broad-based index option, index warrant or underlying instrument position offsetting a related instrument ceases to exist and is not replaced within 10 business days, the related instrument position must be transferred to a futures account. Members will be expected to monitor cross-margin accounts for possible abuse of this provision.

(iii) In the event that fully paid for long options and/or index warrants (securities) are the only positions contained within a cross-margin account, such long positions must be transferred to a securities account other than a portfolio margin account or cross-margin account within 10 business days, subject to the margin required pursuant to the other provisions of this chapter, unless the status of the account changes such that it is no longer composed solely of fully paid for long options and/or index warrants.

(e) Initial and Maintenance Margin Required. The amount of margin required under this Rule 12.4 for each portfolio shall be the greater of:

(1) the amount for any of the 10 equidistant valuation points representing the largest theoretical loss as calculated pursuant to paragraph (f) below or

(2) $.375 for each listed index option and related instrument multiplied by the contract or instrument's multiplier, not to exceed the market value in the case of long positions in listed options and options on futures contracts.

(f) Method of Calculation.

(1) Long and short positions in listed options, underlying instruments and related instruments are to be grouped by option class; each option class group being a ''portfolio''. Each portfolio is categorized as one of the portfolio types specified in paragraph (a)(9) above.

(2) For each portfolio, theoretical gains and losses are calculated for each position as specified in paragraph (a)(9) above. For purposes of determining the theoretical gains and losses at each valuation point, members shall obtain and utilize the theoretical value of a listed index option, underlying instrument or related instrument rendered by a theoretical pricing model that, in accordance with paragraph (b)(1)(i)(B) of Rule 15c3–1a under the Securities Exchange Act of 1934, qualifies for purposes of determining the amount to be deducted in computing net capital under a portfolio based methodology.

(3) Offsets. Within each portfolio, theoretical gains and losses may be netted fully at each valuation point.

Offsets between portfolios within the High Capitalization, Broad Based Index Option product group and the Non-High Capitalization, Broad Based Index Option product group may then be applied as permitted by Rule 15c3–1a under the Securities Exchange Act of 1934.

(4) After applying paragraph (3) above, the sum of the greatest loss from each portfolio is computed to arrive at the total margin required for the account (subject to the per contract minimum).

(g) Equity Deficiency. If, at any time, equity declines below the 5 million dollar minimum required under Paragraph (b)(4) of this Rule 12.4 and is not brought back up to at least 5 million dollars within three (3) business days (T+3) by a deposit of funds or securities, or through favorable market action; members are prohibited from accepting opening orders starting on T+4, except that opening orders entered for the purpose of hedging existing positions may be accepted if the result would be to lower margin requirements. This prohibition shall remain in effect until such time as an equity of 5 million dollars is established.

(h) Determination of Value for Margin Purposes. For the purposes of this Rule 12.4, all listed index options and related instrument positions shall be valued at current market prices. Account equity for the purposes of this Rule 12.4 shall be calculated separately for each portfolio margin account by adding the current market value of all long positions, subtracting the current market value of all short positions, and adding the credit (or subtracting the debit) balance in the account.

(i) Additional Margin.

(1) If at any time, the equity in any portfolio margin account, including a cross-margin account, is less than the margin required, additional margin must be obtained within one business day (T+1). *In the event a customer fails to deposit additional margin within one business day, the member must liquidate positions in an amount sufficient to, at a minimum, lower the total margin required to an amount less than or equal to account equity. Exchange Rule 12.9—Meeting Margin Calls by Liquidation shall not apply to portfolio margin accounts. However, members will be expected to monitor the risk of portfolio margin accounts pursuant to the risk monitoring procedures required by Rule 15.8A. Guarantees by any other account for purposes of margin requirements are not to be permitted.*

(2) The day trading requirements of Exchange Rule 12.3(j) shall not apply to portfolio margin accounts, including cross-margin accounts.

(j) Cross-Margin Accounts—Requirement to Liquidate.

(1) A member is required immediately either to liquidate, or transfer to another broker-dealer eligible to carry cross-margin accounts, all customer cross-margin accounts that contain positions in futures and/or options on futures if the member is:

(i) insolvent as defined in section 101 of title 11 of the United States Code, or is unable to meet its obligations as they mature;

(ii) the subject of a proceeding pending in any court or before any agency of the United States or any State in which a receiver, trustee, or liquidator for such debtor has been appointed;

(iii) not in compliance with applicable requirements under the Securities Exchange Act of 1934 or rules of the Securities and Exchange Commission or any self-regulatory organization with respect to financial responsibility or hypothecation of customers' securities; or

(iv) unable to make such computations as may be necessary to establish compliance with such financial responsibility or hypothecation rules.

(2) Nothing in this paragraph (j) shall be construed as limiting or restricting in any way the exercise of any right of a registered clearing agency to liquidate or cause the liquidation of positions in accordance with its by-laws and rules.

* * * * *

Chapter XIII—Net Capital

Customer Portfolio Margin Accounts

Rule 13.5. (a) No member organization that requires margin in any customer accounts pursuant to Rule 12.4—Portfolio Margin and Cross-Margin for Index Options, shall permit gross customer portfolio margin requirements to exceed 1,000 percent of its net capital for any period exceeding three business days. The member organization shall, beginning on the fourth business day of any non-compliance, cease opening new portfolio margin accounts until compliance is achieved.

(b) If, at any time, a member organization's gross customer portfolio margin requirements exceed 1,000 percent of its net capital, the member organization shall immediately transmit telegraphic or facsimile notice of such deficiency to the Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC, 20549; to the district or regional office of the Securities and Exchange Commission for the district or region in which the member organization maintains its principal place of business; and to its Designated Examining Authority.

* * * * *

Chapter XV Records, Reports and Audits

Risk Analysis of Portfolio Margin Accounts

Rule 15.8A. (a) Each member organization that maintains any portfolio margin accounts for customers shall establish and maintain written procedures for assessing and monitoring the potential risk to the member organization's capital over a specified range of possible market movements of positions maintained in such accounts. Current procedures shall be filed and maintained with the Department of Financial and Sales Practice Compliance. The procedures shall specify the computations to be made, the frequency of computations, the records to be reviewed and maintained, and the position(s) within the organization responsible for the risk function.

(b) Upon direction by the Department of Financial and Sales Practice Compliance, each affected member organization shall provide to the Department such information as the Department may reasonably require with respect to the member organization's risk analysis for any or all of the portfolio margin accounts it maintains for customers.

(c) In conducting the risk analysis of portfolio margin accounts required by this Rule 15.8A, each affected member organization is required to follow the Interpretations and Policies set forth under Rule 15.8—Risk Analysis of Market-Maker Accounts. In addition, each affected member organization shall include in written procedures required pursuant to paragraph (a) above the following:

(1) Procedures and guidelines for the determination, review and approval of credit limits to each customer, and across all customers, utilizing a portfolio margin account.

(2) Procedures and guidelines for monitoring credit risk exposure to the member organization, including intra-day credit risk, related to portfolio margin accounts.

(3) Procedures and guidelines for the use of stress testing of portfolio margin accounts in order to monitor market risk exposure from individual accounts and in the aggregate.

(4) Procedures providing for the regular review and testing of these risk analysis procedures by an independent unit such as internal audit or other comparable group.

* * * * *

Chapter 9 Doing Business With the Public

Delivery of Current Options Disclosure Documents and Prospectus

Rule 9.15. (a) no change

(b) no change

(c) no change

(d) The special written disclosure statement describing the nature and risks of portfolio margining and cross-margining, and acknowledgement for customer signature, required by Rule 12.4(c)(2) shall be in a format prescribed by the Exchange or in a format developed by the member organization, provided it contains substantially similar information as the prescribed Exchange format and has received prior written approval of the Exchange.

Sample Risk Description for Use by Firms to Satisfy Requirements of Exchange Rule 9.15(d)

Portfolio Margining and Cross-Margining Disclosure Statement and Acknowledgement

For a Description of the Special Risks Applicable to a Portfolio Margin Account and its Cross-Margining Features, See the Material Under Those Headings Below.

Overview of Portfolio Margining

1. Portfolio margining is a margin methodology that sets margin requirements for an account based on the greatest projected net loss of all positions in a ''product class'' or ''product group'' as determined by an options pricing model using multiple pricing scenarios. These pricing scenarios are designed to measure the theoretical loss of the positions given changes in both the underlying price and implied volatility inputs to the model. Portfolio margining is currently limited to product classes and groups of index products relating to broad-based market indexes.

2. The goal of portfolio margining is to set levels of margin that more precisely reflect actual net risk. The customer benefits from portfolio margining in that margin requirements calculated on net risk are generally lower than alternative ''position'' or ''strategy'' based methodologies for determining margin requirements. Lower margin requirements allow the customer more leverage in an account.

Customers Eligible for Portfolio Margining

3. To be eligible for portfolio margining, customers (other than broker-dealers and certain non-broker-dealer affiliates of the carrying broker-dealer) must meet the basic standards for having an options account that is approved for uncovered writing and must have and maintain at all times account net equity of not less than $5 million, aggregated across all accounts under identical ownership at the clearing broker. The identical ownership requirement excludes accounts held by the same customer in different capacities (e.g., as a trustee and as an individual) and accounts where ownership is overlapping but not identical (e.g., individual accounts and joint accounts).

Positions Eligible for a Portfolio Margin Account

4. All positions in broad-based U.S. market index options and index warrants listed on a national securities exchange, and exchange traded funds and other fund products registered under the Investment Company Act of 1940 that are managed to track the same index that underlies permitted index options, are eligible for a portfolio margin account.

Special Rules for Portfolio Margin Accounts

5. A portfolio margin account may be either a separate account or a subaccount of a customer's regular margin account. In the case of a subaccount, equity in the regular account will be available to satisfy any margin requirement in the portfolio margin subaccount without transfer to the subaccount.

6. A portfolio margin account or subaccount will be subject to a minimum margin requirement of $.375 multiplied by the index multiplier for every options contract or index warrant carried long or short in the account. No minimum margin is required in the case of eligible exchange traded funds or other eligible fund products.

7. Margin calls in the portfolio margin account or subaccount, regardless of whether due to new commitments or the effect of adverse market moves on existing positions, must be met within one business day. Any shortfall in aggregate net equity across accounts must be met within three business days. Failure to meet a margin call when due will result in immediate liquidation of positions to the extent necessary to reduce the margin requirement. Failure to meet an equity call prior to the end of the third business day will result in a prohibition on entering any opening orders, with the exception of opening orders that hedge existing positions, beginning on the fourth business day and continuing until such time as the minimum equity requirement is satisfied.

8. A position in an exchange traded index fund or other eligible fund product may not be established in a portfolio margin account unless there exists, or there is established on the same day, an offsetting position in securities options or other eligible securities. Exchange traded index funds and/or other eligible funds will be transferred out of the portfolio margin account and into a regular securities account subject to strategy based margin if, for more than 10 business days and for any reason, the offsetting securities options or other eligible securities no longer remain in the account.

9. When a broker-dealer carries a regular cash account or margin account for a customer, the broker-dealer is limited by rules of the Securities and Exchange Commission and of The Options Clearing Corporation (''OCC'') in the extent to which the broker-dealer may permit OCC to have a lien against long option positions in those accounts. In contrast, OCC will have a lien against all long option positions that are carried by a broker-dealer in a portfolio margin account, and this could, under certain circumstances, result in greater losses to a customer having long option positions in such an account in the event of the insolvency of the customer's broker. Accordingly, to the extent that a customer does not borrow against long option positions in a portfolio margin

account or have margin requirements in the account against which the long option can be credited, there is no advantage to carrying the long options in a portfolio margin account and the customer should consider carrying them in an account other than a portfolio margin account.

Special Risks of Portfolio Margin Accounts

10. Portfolio margining generally permits greater leverage in an account, and greater leverage creates greater losses in the event of adverse market movements.

11. Because the time limit for meeting margin calls is shorter than in a regular margin account, there is increased risk that a customer's portfolio margin account will be liquidated involuntarily, possibly causing losses to the customer.

12. Because portfolio margin requirements are determined using sophisticated mathematical calculations and theoretical values that must be calculated from market data, it may be more difficult for customers to predict the size of future margin calls in a portfolio margin account. This is particularly true in the case of customers who do not have access to specialized software necessary to make such calculations or who do not receive theoretical values calculated and distributed periodically by The OCC.

13. For the reasons noted above, a customer that carries long options positions in a portfolio margin account could, under certain circumstances, be less likely to recover the full value of those positions in the event of the insolvency of the carrying broker.

14. Trading of securities index products in a portfolio margin account is generally subject to all the risks of trading those same products in a regular securities margin account. Customers should be thoroughly familiar with the risk disclosure materials applicable to those products, including the booklet entitled Characteristics and Risks of Standardized Options.

15. Customers should consult with their tax advisers to be certain that they are familiar with the tax treatment of transactions in securities index products.

16. The descriptions in this disclosure statement relating to eligibility requirements for portfolio margin accounts, and minimum equity and margin requirements for those accounts, are minimums imposed under exchange rules. Time frames within which margin and equity calls must be met are maximums imposed under exchange rules. Broker-dealers may impose their own more stringent requirements.

Overview of Cross-Margining

17. With cross-margining, index futures and options on index futures are combined with offsetting positions in securities index options and underlying instruments, for the purpose of computing a margin requirement based on the net risk. This generally produces lower margin requirements than if the futures products and securities products are viewed separately, thus providing more leverage in the account.

18. Cross-margining must be done in a portfolio margin account type. A separate portfolio margin account must be established exclusively for cross-margining.

19. When index futures and options on futures are combined with offsetting positions in index options and underlying instruments in a dedicated account, and a portfolio margining methodology is applied to them, cross-margining is achieved.

Customers Eligible for Cross-Margining

20. The eligibility requirements for cross-margining are generally the same as for portfolio margining, and any customer eligible for portfolio margining is eligible for cross-margining.

21. Members of futures exchanges on which cross-margining eligible index contracts are traded are also permitted to carry positions in cross-margin accounts without regard to the minimum aggregate account equity.

Positions Eligible for Cross-Margining

22. All securities products eligible for portfolio margining are also eligible for cross-margining.

23. All broad-based U.S. market index futures and options on index futures traded on a designated contract market subject to the jurisdiction of the Commodity Futures Trading Commission are eligible for cross-margining.

Special Rules for Cross-Margining

24. Cross-margining must be conducted in a portfolio margin account type. A separate portfolio margin account must be established exclusively for cross-margining. A cross-margin account is a securities account, and must be maintained separate from all other securities accounts.

25. Cross-margining is automatically accomplished with the portfolio margining methodology. Cross-margin positions are subject to the same minimum margin requirement for every contract, including futures contracts.

26. Margin calls arising in the cross-margin account, and any shortfall in aggregate net equity across accounts, must be satisfied within the same time frames, and subject to the same consequences, as in a portfolio margin account.

27. A position in a futures product may not be established in a cross-margin account unless there exists, or there is established on the same day, an offsetting position in securities options and/or other eligible securities. Futures products will be transferred out of the cross-margin account and into a futures account if, for more than 10 business days and for any reason, the offsetting securities options and/or other eligible securities no longer remain in the account. If the transfer of futures products to a futures account causes the futures account to be undermargined, a margin call will be issued or positions will be liquidated to the extent necessary to eliminate the deficit.

28. According to the rules of the exchanges, a broker-dealer is required to immediately liquidate, or, if feasible, transfer to another broker-dealer eligible to carry cross-margin accounts, all customer cross-margin accounts that contain positions in futures and/or options on futures in the event that the carrying broker-dealer becomes insolvent.

29. Customers participating in cross-margining will be required to sign an agreement acknowledging that their positions and property in the cross-margin account will be subject to the customer protection provisions of Rule 15c3–3 under the Securities Exchange Act of 1934 and the Securities Investor Protection Act, and will not be subject to the provisions of the Commodity Exchange Act, including segregation of funds.

30. In signing the agreement referred to in paragraph 29 above, a customer also acknowledges that a cross-margin account that contains positions in futures and/or options on futures will be immediately liquidated, or, if feasible, transferred to another broker-dealer eligible to carry cross-margin accounts, in the event that the carrying broker-dealer becomes insolvent.

Special Risks of Cross-Margining

31. Cross-margining must be conducted in a portfolio margin account type. Generally, cross-margining and the portfolio margining methodology both contribute to provide greater leverage than a regular margin account, and greater leverage creates greater losses in the event of adverse market movements.

32. As cross-margining must be conducted in a portfolio margin account type, the time required for meeting margin calls is shorter than in a regular securities margin account and may be shorter than the time ordinarily required

by a futures commission merchant for meeting margin calls in a futures account. As a result, there is increased risk that a customer's cross-margin positions will be liquidated involuntarily, causing possible loss to the customer.

33. As noted above, cross-margin accounts are securities accounts and are subject to the customer protections set-forth in Rule 15c3–3 under the Securities Exchange Act of 1934 and the Securities Investor Protection Act. Cross-margin positions are not subject to the customer protection rules under the segregation provisions of the Commodity Exchange Act and the rules of the Commodity Futures Trading Commission (''CFTC'') adopted pursuant to the Commodity Exchange Act.

34. Trading of index options and futures contracts in a cross-margin account is generally subject to all the risks of trading those same products in a futures account or a regular securities margin account, as the case may be. Customers should be thoroughly familiar with the risk disclosure materials applicable to those products, including the booklet entitled Characteristics and Risks of Standardized Options and the risk disclosure document required by the CFTC to be delivered to futures customers. Because this disclosure statement does not disclose the risks and other significant aspects of trading in futures and options, customers should review those materials carefully before trading in a cross-margin account.

35. Customers should bear in mind that the discrepancies in the cash flow characteristics of futures and certain options are still present even when those products are carried together in a cross-margin account. Both futures and options contracts are generally marked to the market at least once each business day, but the marks may take place with different frequency and at different times within the day. When a futures contract is marked to the market, the gain or loss is immediately credited to or debited from, respectively, the customer's account in cash. While an increase in value of a long option contract may increase the equity in the account, the gain is not realized until the option is sold or exercised. Accordingly, a customer may be required to deposit cash in the account in order to meet a variation payment on a futures contract even though the customer is in a hedged position and has experienced a corresponding (but as yet unrealized) gain on a long option. On the other hand, a customer who is in a hedged position and would otherwise be entitled to receive a variation payment on a futures contract may find that the cash is required to be held in the account as margin collateral on an offsetting option position.

36. Customers should consult with their tax advisers to be certain that they are familiar with the tax treatment of transactions in index products, including tax consequences of trading strategies involving both futures and option contracts.

37. The descriptions in this disclosure statement relating to eligibility requirements for cross-margining, and minimum equity and margin requirements for cross-margin accounts, are minimums imposed under exchange rules. Time frames within which margin and equity calls must be met are maximums imposed under exchange rules. The broker-dealer carrying a customer's portfolio margin account, including any cross-margin account, may impose its own more stringent requirements.

* * * * *

Acknowledgement for Customers Utilizing a Portfolio Margin Account —Cross-Margining and Non Cross-Margining—

Rule 15c3–3 under the Securities Exchange Act of 1934 requires that a broker or dealer promptly obtain and maintain physical possession or control of all fully-paid securities and excess margin securities of a customer. Fully-paid securities are securities carried in a cash account and margin equity securities carried in a margin or special account (other than a cash account) that have been fully paid for. Excess margin securities are a customer's margin securities having a market value in excess of 140% of the total of the debit balances in the customer's non-cash accounts. For the purposes of Rule 15c3–3, securities held subject to a lien to secure obligations of the broker-dealer are not within the broker-dealer's physical possession or control. The Commission staff has taken the position that all long option positions in a customer's portfolio-margining account (including any cross-margining account) may be subject to such a lien by OCC and will not be deemed fully-paid or excess margin securities under Rule 15c3–3.

The hypothecation rules under the Securities Exchange Act of 1934 (Rules 8c-1 and 15c2–1), prohibit broker-dealers from permitting the hypothecation of customer securities in a manner that allows those securities to be subject to any lien or liens in an amount that exceeds the customer's aggregate indebtedness. However, all long option positions in a portfolio-margining account (including any cross-margining account) will be subject to OCC's lien, including any positions that exceed the customer's aggregate indebtedness. The Commission staff has taken a position that would allow customers to carry positions in portfolio-margining accounts (including any cross-margining account), even when those positions exceed the customer's aggregate indebtedness. Accordingly, within a portfolio margin account or cross-margin account, to the extent that you have long option positions that do not operate to offset your aggregate indebtedness and thereby reduce your margin requirement, you receive no benefit from carrying those positions in your portfolio margin account or cross-margin account and incur the additional risk of OCC's lien on your long option position(s).

BY SIGNING BELOW, THE CUSTOMER AFFIRMS THAT THE CUSTOMER HAS READ AND UNDERSTOOD THE FOREGOING DISCLOSURE STATEMENT AND ACKNOWLEDGES AND AGREES THAT LONG OPTION POSITIONS IN PORTFOLIO-MARGINING ACCOUNTS AND CROSS-MARGINING ACCOUNTS WILL BE EXEMPTED FROM CERTAIN CUSTOMER PROTECTION RULES OF THE SECURITIES AND EXCHANGE COMMISSION AS DESCRIBED ABOVE AND WILL BE SUBJECT TO A LIEN BY THE OPTIONS CLEARING CORPORATION WITHOUT REGARD TO SUCH RULES.

CUSTOMER NAME: _____

BY: _____

(signature/title)

DATE: _____

* * * * *

Acknowledgement for Customers Engaged in Cross-Margining

As disclosed above, futures contracts and other property carried in customer accounts with Futures Commission Merchants (''FCM'') are normally subject to special protection afforded under the customer segregation provisions of the Commodity Exchange Act (''CEA'') and the rules of the CFTC adopted pursuant to the CEA. These rules require that customer funds be segregated from the accounts of financial intermediaries and be separately accounted for, however, they do not provide for, and regular futures accounts do not enjoy the benefit of, insurance protecting customer accounts against loss in the event of the insolvency of the intermediary carrying the accounts.

As also has been discussed above, cross-margining must be conducted in a portfolio margin account dedicated exclusively to cross-margining, and cross-margin accounts are not treated as a futures account with an FCM. Instead, cross-margin accounts are treated as securities accounts carried with broker-dealers. As such, cross-margin accounts are covered by Rule 15c3–3 under the Securities Exchange Act of 1934, which protects customer accounts. Rule 15c3–3, among other things, requires a broker-dealer to maintain physical possession or control of all fully-paid and excess margin securities and maintain a special reserve account for the benefit of their customers. However, in respect of cross-margin accounts, there is an exception to the possession or control requirement of Rule 15c3–3 that permits The Options Clearing Corporation to have a lien on long positions. This aspect is outlined in a separate acknowledgement form that must be signed prior to or concurrent with this form. Additionally, the Securities Investor Protection Corporation (''SIPC'') insures customer accounts against the financial insolvency of a broker-dealer in the amount of up to $500,000 to protect against the loss of registered securities and cash maintained in the account for purchasing securities or as proceeds from selling securities (although the limit on cash claims is $100,000). According to the rules of the exchanges, a broker-dealer is required to immediately liquidate, or, if feasible, transfer to another broker-dealer eligible to carry cross-margin accounts, all customer cross-margin accounts that contain positions in futures and/or options on futures in the event that the carrying broker-dealer becomes insolvent.

BY SIGNING BELOW, THE CUSTOMER AFFIRMS THAT THE CUSTOMER HAS READ AND UNDERSTOOD THE FOREGOING DISCLOSURE STATEMENT AND ACKNOWLEDGES AND AGREES THAT: 1) POSITIONS AND PROPERTY IN CROSS-MARGINING ACCOUNTS, WILL NOT BE SUBJECT TO THE CUSTOMER PROTECTION RULES UNDER THE CUSTOMER SEGREGATION PROVISIONS OF THE COMMODITY EXCHANGE ACT (''CEA'') AND THE RULES OF THE COMMODITY FUTURES TRADING COMMISSION ADOPTED PURSUANT TO THE CEA, AND 2) CROSS-MARGINING ACCOUNTS THAT CONTAIN POSITIONS IN FUTURES AND/OR OPTIONS ON FUTURES WILL BE IMMEDIATELY LIQUIDATED, OR, IF FEASIBLE, TRANSFERED TO ANOTHER BROKER-DEALER ELIGIBLE TO CARRY CROSS-MARGIN ACCOUNTS, IN THE EVENT THAT THE CARRYING BROKER-DEALER BECOMES INSOLVENT.

CUSTOMER NAME: _____

BY: _____

(signature/title)

DATE: _____

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the CBOE included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The CBOE has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

a. Introduction

The CBOE proposes to expand its margin rules by providing a portfolio margin methodology for listed, broad-based market index options, index warrants and related exchange-traded funds that clearing member organizations may extend to eligible customers as an alternative to the current strategy-based option margin requirements. The proposed rule change would also allow broad-based index futures and options on such futures to be included in a separate portfolio margin account, thus providing a cross-margin capability. The CBOE seeks to introduce the proposed new rule as a two-year pilot program that would be made available to member organizations on a voluntary basis.

The proposed rule change would permit self-clearing member organizations to apply a prescribed portfolio margin methodology to an account [7] of an affiliate, another broker-dealer, and an account of a member of a national futures exchange who is a futures floor trader. Any other customers of the clearing member would be required to have account equity of at least $5 million to be eligible for portfolio margin treatment. This circumscribes the number of accounts able to participate and adds safety in that such accounts are more likely to be of significant financial means and investment sophistication. Further, portfolio margining is most effective when applied to larger accounts with diverse option positions and related securities, and any related futures contracts. It is expected that institutional customers will be the primary participants. Whether the account equity requirement should be lowered to allow participation of more customers will be assessed at the end of the pilot program period. Application of portfolio margin, including cross-margin, to an IRA account would be prohibited under the proposed rule change.

A number of revisions contained in Amendment No. 1 were deemed warranted, or requested or recommended by staff of the Commission. In either case, the reason for these revisions is to make corrections or clarifications to the proposed rule, or to reconcile differences between the proposed rule and a parallel filing by the NYSE.[8]

The proposed portfolio margin and cross-margin rules have been developed by the CBOE in cooperation with The Options Clearing Corporation (''The OCC''), the New York Stock Exchange, Inc. (''NYSE''), the American Stock Exchange LLC (''AMEX''), the Board of Trade of the City of Chicago, Inc. (''CBOT''), and the Chicago Mercantile Exchange Inc. (''CME''). The CBOE intends to provide a written overview describing the operational details of the portfolio margin and cross-margin pilot program to potential member organization participants to introduce and explain the pilot program.

A committee of representatives from the member organizations identified as potential participants, and staff of the sponsoring exchanges and The OCC (the ''Portfolio Margin Committee'') was formed and met several times in 1999 and 2000 to refine the portfolio margin and cross-margin pilot program. This group has recommended adoption of the portfolio margin and cross-margin pilot program, as finalized by the group, and the related rule proposals. In addition, the portfolio margin and cross-margin pilot program has been presented to the NYSE's Rule 431 Committee [9] on two

[7] An account dedicated to portfolio margining.

[8] *See* NYSE Proposal, *supra* note 6.

[9] The NYSE Rule 431 Committee is comprised of securities industry representatives, primarily representatives of NYSE member organizations. NYSE Rule 431 contains the NYSE's margin rules. the function of the NYSE Rule 431 Committee is to assess the adequacy of NYSE Rule 431 on an ongoing basis, review proposals for changes to

Continued

occasions, with draft rules included on the second occasion, and has received the NYSE's Rule 431 Committee's support.

b. Overview—Portfolio Margin Computation

(1) Portfolio Margin

Under a portfolio margin system, margin is required based on the greatest loss that would be incurred in a portfolio if the value of components (underlying instruments in the case of options) move up or down by a predetermined amount (*e.g.*, ±5%). Under the Exchange's proposed portfolio margin rule, listed index options and underlying instruments (also related instruments [10] in the case of a cross-margin account) would be grouped by class [11] (*e.g.*, S&P 500, S&P 100, etc.), each class group being a portfolio.[12] The gain or loss on each position in a portfolio would be calculated at each of 10 equidistant points (''valuation points'') set at and between the upper and lower market range points. A theoretical options pricing model would be used to derive position values [13] at each valuation point for the purpose of determining the gain or loss. Gains and losses would then be netted for positions within the class or portfolio at each valuation point. The greatest net loss among the 10 valuation points would be the margin required on the portfolio or class. The margin for all other portfolios within an account would be calculated in a similar manner. Broad-based index classes (portfolios) that are highly correlated would be allowed offsets such that, at the same valuation point, for example, 90% of a gain in one class may reduce or offset a loss in another class. The amount of offset allowed between portfolios would be the same amount that is permitted under the risk-based haircut methodology set forth in Appendix A of the Commission's net capital rule.[14] A per contract minimum would be established and would override if a lesser requirement is rendered by the portfolio margin computation.[15] Member organizations would not be permitted to use any theoretical pricing model to generate the prices used to calculate theoretical profits and losses. Under the proposed rule change, the theoretical prices used for computing profits and losses must come from a theoretical pricing model that, pursuant to the Commission's net capital rule,[16] qualifies for purposes of determining the amount to be deducted in computing net capital under a portfolio-based methodology. CBOE believes that delineating acceptable theoretical pricing models is best achieved by applying the Commission's net capital rule by reference. In this way, consistency with the Commission's net capital rule is maintained. In addition, since theoretical pricing models must be approved by a Designated Examining Authority (''DEA'') and reviewed by the Commission to qualify, uniformity across models can be assured. As a result, portfolio margin and cross-margin requirements will not vary materially from firm to firm. Currently, the theoretical model used by The OCC is the only model qualified pursuant to the Commission's net capital rule. Consequently, all member organizations participating in the pilot program would, at least for the foreseeable future, obtain their theoretical values from The OCC.

The Exchange's proposed rule would propose a market range of ±10% for computing theoretical gains and losses in broad-based, non-high capitalization index portfolios. A market range of +6%/−8% is proposed for broad-based, high capitalization index portfolios.[17] These are the same ranges currently applied to options market makers for the purpose of computing portfolio or risk-based haircuts. On a historical basis, these ranges cover one day moves at a very high level of confidence, and would be competitive with the market range coverage applied for performance bond (margin) purposes in the futures industry on comparable index futures.

The proposed rule change requires that a separate securities margin account (or subaccount of a securities margin account) be used for portfolio margining.

Amendment No. 1 to the proposed rule change also adds rule language that requires fully paid for long options (and/or index warrants) to be transferred out of the portfolio margin account and/or cross-margin account and into a securities account that is not a portfolio margin account, in the event that such long positions are the only components.

(2) Cross-Margining

The proposed rule permits related index futures and options on such futures to be carried in a separate portfolio margin account, thus affording a cross-margin capability. Amendment No. 1 contains changes that primarily relate to the addition of rule language (*i.e.*, Rule 12.4(j)) that, pursuant to agreement between Commission staff, the Exchange and The Options Clearing Corporation, requires cross-margin positions to be liquidated or transferred in the event the carrying broker-dealer becomes insolvent. The Original Proposal allowed cross-margining to be commingled with other, non-cross margin portfolio margin positions in the same account. However, the proposal of Amendment No. 1 to require liquidation or transfer of the cross-margin account necessitates that cross-margining be conducted in an account separate from non-cross-margining activity. Therefore, Amendment No. 1 contains a number of proposed revisions that relate to isolation of cross-margin positions in a separate account.

In a portfolio margin account, including one that is used exclusively for cross-margining, constituent portfolios may be formed containing index options, index warrants and exchange-traded funds structured to replicate the composition of the index underlying a particular portfolio, as well as related index futures and options on such futures. Cross-margining would operate similar to the cross-margin program that was approved by the Commission and the Commodity Futures Trading Commission (''CFTC'') for listed options market-makers and proprietary accounts of clearing member organizations. For determining theoretical gains and losses, and resultant margin requirements, the same portfolio margin computation program will be applied to portfolio margin accounts, as well as cross-margin accounts.

NYSE Rule 431, and recommend changes that are deemed appropriate.

[10] Under the proposed rule change, the term ''related instrument'' would mean, with respect to an options class or product group, futures contracts and options on futures contracts covering the same underlying instrument.

[11] Under the proposed rule change, the term ''options class'' would refer to all options contracts covering the same underlying instrument.

[12] CBOE's pilot program would permit an exchange-traded fund structured to replicate the composition of the index to be included; however, stock baskets would not be permitted at this time.

[13] Position values would represent the difference between the position closing price and the theoretical value at each valuation point.

[14] Rule 15c3–1a under the Act, 17 CFR 240.15c3–1a.

[15] The proposed rules set a per contract minimum of $37.50.

[16] *See* Rule 15c3–1a(b)(1)(i)(B) under the Act, 17 CFR 240.15c3–1a(b)(1)(i)(B).

[17] CBOE believes that it is imperative that these market move ranges be competitive with the range used in the futures industry for computing margin (performance bond) on broad-based index futures. The proposed ranges accomplish this goal. Customer performance bond in the futures industry is computed using a portfolio margining system known as the Standard Portfolio Analysis of Risk (''SPAN''). The terms ''high capitalization'' and ''non-high capitalization'' have the same meaning as they do for the purposes of risk-based haircuts (Rule 15c3–1 under the Act, 17 CFR 240.15c3–1).

c. Margin or Minimum Equity Deficiency

Under proposed CBOE Rule 12.4(h), positions in a portfolio margin account would be valued at current market prices, as currently defined in the Exchange's margin rules. Under the proposed rule change, account equity would be calculated and maintained separately for each portfolio margin account. For purposes of the $5 million minimum account equity requirement, all accounts owned by an individual or entity may be combined. Proposed CBOE Rule 12.4(i) requires that additional margin must be obtained within one business day (T+1) whenever equity is below the margin required, regardless of whether the deficiency is caused by the addition of new positions, the effect of unfavorable market movement on existing positions, or a combination of both. The portfolio margin requirement, therefore, would be both the initial and maintenance margin requirement, and no differentiation would be necessary. In addition, proposed CBOE Rule 12.4(g) would require that, in the event account equity falls below the $5 million minimum, additional equity must be deposited within 3 business days (T+3). If the deficiency were not resolved within 3 business days, the carrying member organization would be prohibited under the proposed rule change from accepting any new opening orders beginning on T+4, with the exception of opening orders that hedge existing positions. This prohibition would remain in effect until a $5 million equity was established.

d. Risk Disclosure Statement and Acknowledgement

In addition, the Exchange proposes that member organizations provide every portfolio margin customer with a written risk disclosure statement at or prior to the initial opening of a portfolio margin account.[18] This disclosure statement highlights the risks and operation of portfolio margin accounts, including cross-margining, and the differences between portfolio margin and strategy-based margin requirements. The disclosure statement is divided into two sections, one dealing with portfolio margining and the other with cross-margining. The disclosure statement clearly notes that additional leverage is possible in an account margined on a portfolio basis in relation to strategy-based margin. Among other things, the disclosure statement covers who is eligible to open a portfolio margin account, the instruments that are allowed, and when deposits to meet margin and minimum equity are due. The fact that long option positions held in a portfolio margin account are not segregated, as they generally would be in the case of a regular margin account under the Commission's customer protection rules, is explained. Also included within the portfolio margin section is a summary list of the special risks of portfolio margin accounts, such as: increased leverage; shorter time for meeting margin; involuntary liquidation if margin not received; inability to calculate future margin requirements because of the data and calculations required; and that long positions are subject to a lien. The risks and operation of a cross-margin feature are outlined in the cross-margin section of the disclosure statement, and a summary list of the special risks associated with cross-margining is included.

Further, at or prior to the time a portfolio margin account is initially opened, member organizations would be required to obtain a signed acknowledgement concerning portfolio margining in general from the customer. In addition, prior to accommodating cross-margining, member organizations would be required to obtain a second signed acknowledgement within the same time frame that pertains to cross-margin.

By signing the general acknowledgement required of all customers, the customer would attest to having read the disclosure statement and being aware of the fact that long option positions in a portfolio margin account (which includes cross-margin accounts) are not subject to the segregation requirements under the customer protection rules of the Commission, and would be subject to a lien by the OCC. In signing the additional acknowledgement applicable to cross-margining, the customer would attest to having read the disclosure statement and being aware of the fact that futures positions are being carried in a securities account, are subject to the Commission's customer protection rules,[19] and fall under the authority of the SIPC in the event the carrying broker-dealer becomes financially insolvent. Within Chapter 9 of the Exchange's rules (''Doing Business with the Public''), the Exchange would prescribe the format of the written disclosure statement and acknowledgements in proposed Exchange Rule 9.15(d)—Delivery of Current Options Disclosure Documents and Prospectus. Like a current Exchange rule that prescribes the format for a Special Statement for Uncovered Options Writers (CBOE Rule 9.15(c)), proposed Exchange Rule 9.15(d) would allow member organizations to develop their own format, provided it contains substantially similar information and it is approved in advance by the Exchange.

e. Net Capital

The Exchange also proposes to add a new requirement in CBOE Rule 13.5 to mandate that the gross customer portfolio margin requirements of a broker-dealer may at no time exceed 1,000 percent of a carrying broker-dealer's net capital (a 10:1 ratio). This requirement is intended to place a ceiling on the amount of margin a broker-dealer can extend to its customers in relation to its net capital.

f. Internal Risk Monitoring Procedures

The Exchange further proposes a separate, related rule that would require member organizations that carry portfolio margin or cross-margin accounts to establish and maintain written procedures for assessing and monitoring the potential risks to their capital. Specifically, proposed CBOE Rule 15.8A (Risk Analysis of Portfolio Margin and Cross-Margin Accounts) would require that the member organization file and maintain its current procedures with its DEA, and provide the DEA with such information as the DEA may reasonably require regarding the member organization's risk analysis of any and all portfolio margin and cross-margin accounts carried for customers. Proposed CBOE Rule 15.8A would incorporate current Exchange Rule 15.8—Risk Analysis of Market-Maker Accounts—by reference to require that the risk analysis be conducted in the same manner as prescribed in Exchange Rule 15.8. Additionally, proposed CBOE Rule 15.8A would set forth certain undertakings that must be included in the written procedures (*e.g.*, review and approval of credit limits for each customer and across all accounts).

Because member organizations would be required under the proposed rule change to have risk monitoring procedures, proposed CBOE Rule 12.4(i) states that the current CBOE Rule 12.9—Meeting Margin Calls by Liquidation Prohibited—prohibiting excessive

[18] Even a customer that engages exclusively in cross-margining is a portfolio margin customer, as the proposed rule change permits cross-margining to be conducted only by applying the portfolio margin methodology.

[19] As disclosed in the general acknowledgement form (required of any portfolio or cross-margin customer), portfolio margin and cross-margin accounts operate pursuant to an exception to the customer protection rules in that fully paid long positions will not be segregated.

liquidations to meet margin requirements will not apply to portfolio margin and cross-margin accounts. Furthermore, given the proposed risk monitoring procedures, CBOE proposes that day trading margin requirements would not apply to portfolio margin and cross-margin accounts. Through these risk-monitoring procedures, member organizations will be expected to oversee portfolio margin and cross-margin accounts for excessive liquidations and day trading and take appropriate action according to their procedures.

It should be noted that the disclosure statement delivery requirement, the $5 million minimum equity requirement, and the next day deposit condition for additionally required margin were all added by the Portfolio Margin Committee. The Portfolio Margin Committee deemed these requirements prudent given that less margin is generally required under a portfolio margining approach than under the current strategy-based methodology, and these measures made the plan entirely acceptable to the member firm representatives.

g. Margin at the Clearing House Level [20]

The Exchange proposes that all customer portfolio margin account transactions not involving a futures transaction (*e.g.*, cross-margin) be cleared in one special omnibus account for the clearing firm at The OCC. In addition, the Exchange proposes that all transactions involving cross-margining, both the security and futures products, be cleared in one of two additional special omnibus accounts for cross-margining, depending on the entity that clears the futures product being cross-margined. One cross-margin omnibus account corresponds to a cross-margining agreement between The OCC, the CME and the New York Clearing Corporation. The other omnibus account corresponds to a cross-margining agreement between The OCC and the Board of Trade Clearing Corporation. The OCC will compute margin for the special omnibus accounts using the same portfolio margin methodology applied at the customer level. The OCC will continue to require full payment from the clearing firm for all long option positions. However, as previously noted, long positions will not be segregated like they are in the firm's regular customer range account at The OCC. This is necessary and preferred with a portfolio margining methodology because all long positions must be available for margin offset. Margin relief is based on a dollar offset basis as opposed to identifying specific contract to contract offsets under a strategy-based methodology. This may result in situations where the long positions of a given customer could serve to offset the risk in another customer's short position. Long positions would, therefore, be subject to The OCC lien. An OCC clearing member currently has the ability to unsegregate a long position in order to pair it with a short position (contract to contract basis) and form a qualified spread. Under the proposed treatment of long positions in a portfolio margin omnibus account at The OCC, all long positions would be unsegregated, freeing The OCC clearing member from the task of determining which long positions offset risk and from specifying each position to be unsegregated.

h. Rationale For Portfolio Margin

Portfolio margining brings a modern approach to quantifying risk and offers a number of efficiencies. It eliminates the task of analyzing the portfolio and sorting it according to currently recognized strategies (*e.g.*, spreads), and computing a margin requirement for each individual position or strategy. This process becomes quite cumbersome in an account with multiple positions and complex strategies. More importantly, for a given market move, up or down, in a diverse portfolio there will be listed option positions that appreciate and other option positions that will depreciate. Under a portfolio margin system, offsets are fully realized, whereas, under the current strategy-based system, positions and/or a group of positions comprising a single strategy are margined independent of each other and offsets between them do not figure into the total margin requirement as efficiently. In addition, under a portfolio margin system, the volatility of an individual listed option series is used in the theoretical pricing model that renders the price used to compute a gain/loss on that option position at each valuation point. This links the margin required to the risk in each particular position in contrast to the strategy-based margin. Strategy-based margin applies a universal percentage requirement (of the underlying index value) to all short option positions in the same category (*e.g.*, broad-based), irrespective of the fact that all options prices do not change equally (in percentage terms) with a change in the price or level of the underlying instrument.

Theoretical options pricing models have become widely accepted and utilized since Fischer Black and Myron Scholes first introduced a formula for calculating the value of a European style option in 1973. Other formulas, such as the Cox-Ross-Rubinstein model have since been developed. Option pricing formulas are now used routinely by option market participants to analyze and manage risk and have proven to be highly effective and preferred. In addition, essentially the same portfolio methodology described above has been used successfully by broker-dealers since 1994 to calculate haircuts on option positions for net capital purposes.[21]

The Board of Governors of the Federal Reserve System (the ''Federal Reserve Board'' or ''FRB'') in its amendments to Regulation T in 1998 permitted SROs to implement portfolio margin rules, provided they are approved by the Commission.[22] A portfolio margin system recognizes the offsetting gains from positions that react favorably in market declines, while market rises are tempered by offsetting losses from positions that react negatively. A portfolio margin approach can thus have a neutralizing effect on option portfolio volatility. In times of market stress, the current strategy-based margin can result in margin calls and forced liquidations, thus contributing to the selling pressure in the market. The offset ability of portfolio margining can alleviate the need for liquidations, slowing acceleration of volatility in a crisis.

More recently, the FRB encouraged the development of a portfolio margin approach in a letter to the Commission and the CFTC delegating authority to the agencies to jointly prescribe margin regulations for security futures products.[23] In that letter, the FRB wrote that it ''has encouraged the development of [portfolio margin approaches] by, for example, amending its Regulation T so that portfolio margining systems approved by the Commission can be used in lieu of the strategy-based system

[20] The Commission anticipates that the clearing arrangements described in this section will be the subject of a separate proposed rule change filed by the OCC.

[21] On March 15, 1994, the Commission issued a no-action letter allowing the implementation of a risk-based haircut pilot program. See letter from Brandon Becker, Director, Division, Commission, to Mary Bender, First Vice President, Division of Regulatory Services, CBOE, and Timothy Hinkes, Vice President, The OCC, dated March 15, 1994. The risk-based haircut program took full effect on September 1, 1997. *See* ''Net Capital Rule,'' Securities Exchange Act Release No. 38248 (February 6, 1997), 62 FR 6474 (February 12, 1997).

[22] *See* Federal Reserve System, ''Securities Credit Transactions; Borrowing by Brokers and Dealers'; Regulations G, T, U and X; Docket Nos. R–0905, R–0923 and R–0944, 63 FR 2806 (January 16, 1998).

[23] *See* letter from the FRB to James E. Newsome, Acting Chairman, CFTC, and Laura S. Unger, Acting Chairman, Commission, dated March 6, 2001.

embodied in the Board's regulation.'' The FRB concluded that letter by writing ''The Board anticipates that the creation of security future products will provide another opportunity to develop more risk sensitive, portfolio-based approaches for all securities, including security options and security futures products.''

An ability to cross-margin listed index options with index futures, and options on such futures, is critical because many professional investors hedge their listed index options with futures. Although haircuts assessed on broker-dealers with respect to computing their net capital requirement recognize offsets between securities index options and index futures, current margin practice does not allow these offsets. Cross-margin benefits the financial markets and clearing system in general, not just individual investors. Cross-margin would reduce the number of forced liquidations. Currently, an option (securities) account and futures account of the same customer are viewed as separate and unrelated. In addition, currently an option account must be liquidated if the risk in the positions has increased dramatically or margin calls cannot be met, even if gains in the customer's futures account offset the losses in the options account. If the accounts can be combined (*i.e.*, cross-margined), there is little or no net change in risk and unnecessary liquidation can be avoided. The severity of a period of high volatility in the market is lessened if the number of liquidations is reduced because, for example, liquidating into a declining market exacerbates the decline. A capability to cross-margin listed index options and index futures would further alleviate excessive margin calls, improve cash flows and liquidity, and reduce volatility, particularly in times of market downturns. Various government agencies and task groups have previously advocated implementation of a cross-margin system. Those groups include the Presidential Task Force on Market Mechanics (also know as the Brady Commission) [24] and the Commission.[25]

Listed index options are now at a disadvantage to economically equivalent derivative products traded on futures exchanges in terms of margin requirements. Since 1988, index futures and options have been margined under a portfolio margin system known as SPAN. While the risks of listed index options are no greater than an equivalent position in an index future or option on the future, margin required on listed securities index options is significantly higher in many cases. Currently, listed index options margin (excluding the option premium) for a short at-the-money contract approximates 15% of the underlying index value while SPAN margin on a comparable futures index option contract is approximately 6% of the index value. When faced with such a disparity, investment managers discerningly choose futures products over listed index options for their hedging to reduce their costs. A portfolio style margin application for listed index options will reduce disparities between securities index options and futures products, thus making listed index products more competitive and more effective tools for investors.

Relief provided by a portfolio margin system is also needed so that listed index options can compete with over-the-counter derivatives, which can be margined on a good faith basis if hedged with a listed option.[26]

2. Statutory Basis

The Exchange believes the proposed rule change, as amended, is consistent with Section 6(b) of the Act [27] in general, and furthers the objectives of Section 6(b)(5) of the Act [28] in particular, in that it is designed perfect the mechanism of a free and open market and to protect investors and the public interest. The proposed portfolio margin rule change is intended to promote greater reasonableness, accuracy and efficiency in respect of Exchange margin requirements for complex, multiple position listed index option strategies, and to offer a cross-margin capability with related index futures positions in eligible accounts.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in the furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

(A) By order approve such proposed rule change, as amended, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2002–03 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 Number SR–CBOE–2002–03. 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/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the

[24] *See* ''The Brady Report,'' Report of the Presidential Task Force on Market Mechanisms, January 1988, p. 59 and pp. 65–66.

[25] *See* ''The October 1987 Market Break: Report by the Division,'' Commission, February 1988, pp. 10–57. See also the interim report of the ''Working Group on Financial Markets,'' (Department of the Treasury, CFTC, Commission and FRB), May 1988, Appendix D III A.

[26] *See* ''OTC Derivatives Dealers,'' Securities Exchange Act Release No. 40594, (October 23, 1998), 63 FR 59362 (November 3, 1998).

[27] 15 U.S.C. 78f(b).

[28] 15 U.S.C. 78f(b)(5).

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 the CBOE. All comments received will be posted without change; the Commission does 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 Number SR–CBOE–2002–03 and should be submitted on or before January 18, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[29]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–28184 Filed 12–23–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50883; File No. SR–NASD–2004–027]

Self-Regulatory Organizations; Order Approving Proposed Rule Change by NASD, Inc., Relating to Investment Company Portfolio Transactions

December 20, 2004.

I. Introduction

On February 10, 2004, the National Association of Securities Dealers, Inc. (''NASD'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change relating to investment company portfolio transactions. On September 17, 2004, NASD filed Amendment No. 1 to the proposed rule change.[3] The proposed rule change, as amended, was published for comment in the **Federal Register** on November 5, 2004.[4] The Commission received one comment letter in response to the proposed rule change.[5] For the reasons discussed below, the Commission is approving the proposed rule change.

II. Description of the Proposed Rule Change

A. Description of the Proposal

NASD Rule 2830(k) governs NASD members' execution of investment company portfolio transactions. In general, the rule prohibits NASD members from favoring the sale of shares of any investment company on the basis of brokerage commissions received or expected to be received from any source, including the investment company.[6] However, subparagraph (7)(B) of the rule allows an NASD member, subject to the requirements of best execution, to sell the shares of, or act as an underwriter for, an investment company where that investment company ''follows a policy, disclosed in its prospectus, of considering sales of shares of the investment company as a factor in the selection of broker/dealers to execute portfolio transactions * * *.''

NASD now proposes to strike subparagraph (k)(7)(B) from Rule 2830 and add a new subparagraph, designated (k)(2), that would prohibit NASD members from selling the shares of, or acting as underwriter for, any investment company:

> if the member knows or has reason to know that such investment company, or an investment adviser or principal underwriter of the company, has a written or oral agreement or understanding under which the company directs or is expected to direct portfolio securities transactions (or any commission, markup or other remuneration resulting from any such transaction) to a broker or a dealer in consideration for the promotion or sale of shares issued by the company or any other registered investment company.[7]

As NASD noted in its description of the proposed rule change, proposed new subparagraph (k)(2) ''would add an objective proscription, in that the broker-dealer's intent to favor or disfavor a particular fund would not be relevant to that prohibition. The existing proscription of paragraph (k)(1), in contrast, turns upon the question of whether a broker-dealer favors or disfavors a fund based on receipt or expected receipt of brokerage commissions.''[8] The proposed prohibition would apply not only to the distribution of shares of the fund that directs portfolio transaction commissions to the distributing broker, but also to the distribution of the shares of any other registered investment company. Further, the rule would continue to provide that an NASD member will not violate Rule 2830(k) solely because it promotes or sells the shares of an investment company that directs fund portfolio transactions to the member, so long as the member does not engage in conduct otherwise prohibited by the rule.

B. Comment Summary

The proposal was published for comment in the **Federal Register** on November 5, 2004.[9] The SEC received one comment letter, from the Investment Company Institute (''ICI''), in response to the proposed rule change.[10] The ICI expressed support for the proposed rule change, asserting that it ''would complement the Commission's recent amendment to Rule 12b–1 under the Investment Company Act of 1940, which prevents funds from paying for the distribution of their shares with brokerage commissions.''[11] The ICI stated that NASD's proposal, ''coupled with the Commission's amendment to Rule 12b–1, would make it clear to both fund advisers and broker-dealers that distribution considerations have no appropriate role in the allocation of fund brokerage.''[12] The ICI also supported NASD's retention of Rule 2830(k)(7)(A) (to be re-designated (8)(A)), which provides that an NASD member would not violate the rule solely because it sells shares of an investment company for which it also executes transactions, because NASD members might otherwise ''be improperly discouraged from performing both execution and sales functions for a particular fund.''[13]

III. Discussion and Findings

The Commission finds the proposed rule change is consistent with the Act, and in particular with Section 15A(b)(6) of the Act, which requires, among other things, that NASD's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in

[29] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* letter from Patrice Gliniecki, Senior Vice President and Deputy General Counsel, NASD, to Katherine England, Assistant Director, Division of Market Regulation, Commission, dated September 16, 2004.

[4] Securities Exchange Act Release No. 50611 (Oct. 29, 2004), 69 FR 64609 (Nov. 5, 2004) (''Notice'').

[5] *See* letter to Jonathan G. Katz, Secretary, Commission from Amy B.R. Lancellotta, Senior Counsel, Investment Company Institute, dated November 24, 2004 (''ICI letter''). The comment letter is available online at *http://www.sec.gov/rules/sro/nasd/nasd2004027.shtml*.

[6] *See* NASD Rule 2830(k)(1).

[7] *See* Notice 69 FR at 64609.

[8] *See* Notice, 69 FR 64609, 64610 n. 5.

[9] *See* note 4, *supra*.

[10] *See* note 5, *supra*.

[11] ICI letter. *See Prohibition on the Use of Brokerage Commissions to Finance Distribution,* Investment Company Act Release No. 26591 (Sept. 2, 2004) 69 FR 54728 (Sept. 9, 2004) (adopting amendments to Rule 12b–1 [17 CFR 270.12b–1] under the Investment Company Act of 1940 [15 U.S.C. 80a] to prohibit investment companies from paying for the distribution of their shares with brokerage commissions).

[12] ICI letter.

[13] *Id.*

general, to protect investors and the public interest.[14] The Commission believes that the proposed rule change is consistent with the provisions of the Act noted above because it will strengthen NASD's rules against *quid pro quo* arrangements between NASD members and investment companies whereby investment companies compensate broker-dealers for promotion of their shares with brokerage commissions (or similar transaction-related remuneration), which are paid out of fund assets. The Commission has noted that such practices pose significant conflicts of interest and may be harmful to fund shareholders, as well as potential purchasers of fund shares, in that they may induce broker-dealers ''to recommend funds that best compensate the broker rather than funds that meet the customer's investment needs.'' [15]

The addition of new subparagraph (k)(2) to Rule 2830 would clarify that no member may sell the shares of, or act as an underwriter for, an investment company if the member knows, or has reason to know, that such investment company, or an investment adviser or principal underwriter of the company, has a written or oral agreement or understanding whereby the investment company directs, or is expected to direct, portfolio securities transactions (or any commission, markup or other remuneration resulting from any such transaction) to a broker-dealer in consideration for the promotion or sale of shares issued by the company or any other registered investment company. As NASD noted in its description of the proposed rule change,[16] this requirement will differ from that in existing subparagraph (k)(1) of the rule because ''the broker-dealer's intent to favor or disfavor a particular fund would not be relevant.'' Rather, the new provision will require NASD members to refrain from distributing the shares of an investment company in any case where the member knows, or has reason to know, of the investment company's participation in such an arrangement. The Commission believes that this amendment of NASD's rules is consistent with the protection of investors because it will clarify that broker-dealers may not enter into such *quid pro quo* distribution arrangements. One important purpose of Rule 2830(k) is to help eliminate conflicts of interest in the sale of investment company securities, and this rule change will improve NASD's ability to achieve this objective.

NASD's proposal would also strike subparagraph (7)(B) from Rule 2830(k). This provision of NASD's rules has heretofore allowed NASD members to distribute shares of investment companies that, pursuant to a disclosed policy, consider sales of their shares by broker-dealers as a factor when selecting broker-dealers for the execution of transactions for a fund. NASD's proposal would add new subparagraph (k)(2) to NASD Rule 2830. This subparagraph will now explicitly state that members are not permitted to sell the shares of investment companies that the member knows or has reason to know engages in such practices. The Commission believes that elimination of subparagraph (k)(7)(B) of Rule 2830 should strengthen investor protection because it removes a possible incentive for brokers to recommend investments based on their own financial interests, rather than the best interests of their customers.

Finally, the Commission notes that, under subparagraph (8)(A) of Rule 2830(k),[17] NASD members may still sell the shares of an investment company that directs fund portfolio transactions to the member, so long as the other provisions of the rule are satisfied. The Commission believes that this existing provision of the rule makes clear that an NASD member may continue to distribute the shares of investment companies for which the member executes investment portfolio transactions, where the member's sales efforts are not connected to any arrangements for the direction of brokerage commissions in exchange for distribution. In this regard, the Commission notes that NASD Rule 3010 requires NASD members to establish and maintain a supervisory system for registered representatives and associated persons that is reasonably designed to achieve compliance with applicable securities laws and regulations and with the NASD's rules.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act [18] that the proposed rule change (SR–NASD–2004–027), as amended, be, and hereby is, approved.[19]

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[20]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E4–3806 Filed 12–23–04; 8:45 am]

BILLING CODE 8010–01–P

[14] 15 U.S.C. 78o–3(b)(6).

[15] *Prohibition on the Use of Brokerage Commissions to Finance Distribution*, note 10, *supra*, 69 FR 54728 *at* 54729–54730.

[16] *See* Notice, 69 FR 64609, 64610 n. 5.

[17] Previously designated as Rule 2830(k)(7)(A).

[18] 15 U.S.C. 78s(b)(2).

[19] In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[20] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50885; File No. SR–NYSE–2002–19]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment Nos. 1 and 2 Thereto by the New York Stock Exchange, Inc. Relating to Customer Portfolio and Cross-Margining Requirements

December 20, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on June 21, 2004, the New York Stock Exchange, Inc. (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'' or ''SEC'') Amendment No. 2 [3] to the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The NYSE submitted the original proposed rule change to the Commission on May 13, 2002 (''Original Filing''). On August 21, 2002, the NYSE filed Amendment No. 1 to the proposed rule change.[4] The proposed rule change and Amendment No. 1 were published in the **Federal Register** on October 8, 2002.[5] The Commission received three comment letters in response to proposed rule change.[6] The NYSE is proposing

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* letter from Darla C. Stuckey, Corporate Secretary, NYSE, to Michael A. Macchiaroli, Associate Director, Division of Market Regulation (''Division''), Commission, dated June 17, 2004 (''Amendment No. 2'').

[4] *See* letter from Mary Yeager, Assistant Secretary, NYSE, to T.R. Lazo, Senior Special Counsel, Division of Market Regulation, Commission, dated August 20, 2002 (''Amendment No. 1''). In Amendment No. 1, the NYSE made technical corrections to its proposed rule language to eliminate any inconsistencies between its proposal and the Chicago Board Options Exchange, Inc.'s (''CBOE'') proposal pursuant to the Rule 431 Committee's (''Committee'') recommendations. See Securities Exchange Act Release No. 45630 (March 22, 2002), 67 FR 15263 (March 29, 2002) (File No. SR–CBOE–2002–03) (''CBOE Proposal'').

[5] *See* Securities Exchange Act Release No. 46576 (October 1, 2002), 67 FR 62843 (October 8, 2002).

[6] *See* letter from R. Allan Martin, President, Auric Trading Enterprises, Inc., to Secretary, Commission, dated October 9, 2002 (''Martin Auric Letter'');

Continued

Amendment No. 2 for the purpose of eliminating inconsistencies between the proposed NYSE and CBOE rules,[7] and to incorporate certain substantive amendments requested by Commission staff. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend NYSE Rule 431 to permit self-clearing members and member organizations to margin listed, broad-based, market index options, index warrants and related exchange-traded funds according to a prescribed portfolio margin methodology relating to a portfolio margin account of a registered broker-dealer, any affiliate of a self-clearing member or member organization, certain qualified members of a national futures exchange, and any other person or entity that maintains account equity of at least $5 million.

The Exchange further proposes to amend NYSE Rule 726 to require that a disclosure statement and written acknowledgement for use with the proposed portfolio margining and cross-margining changes be furnished to customers. The text of the proposed rule change is below. Additions are in italics. Deletions are in brackets.

* * * * *

Margin Requirements

Rule 431. (a) through (f) unchanged.

Portfolio Margin and Cross-Margin for Index Options

(g) As an alternative to the ''strategy'' based margin requirements set forth in paragraphs (a) through (f) of this Rule, member organizations may elect margin for listed, broad-based U.S. index options, index warrants and underlying instruments (as defined below) in accordance with the portfolio margin requirements set forth in this Rule.

In addition, member organizations, provided they are a Futures Commission Merchant (''FCM'') and are either a clearing member of a futures clearing organization or have an affiliate that is a clearing member of a futures clearing organization, are permitted under this section to combine a customer's related instruments (as defined below) and listed, broad-based U.S. index options, index warrants and underlying instruments and compute a margin requirement (''cross margin'') on a portfolio margin basis. Member organizations must confine cross-margin positions to a portfolio margin account dedicated exclusively to cross-margining.

The portfolio margin and cross-margining provisions of this Rule shall not apply to Individual Retirement Accounts (''IRAs'').

(1) Member organizations will be expected to monitor the risk of portfolio margin accounts and maintain a written risk analysis methodology for assessing the potential risk to the member organization's capital over a specified range of possible market movements of positions maintained in such accounts. The risk analysis methodology shall specify the computations to be made, the frequency of computations, the records to be reviewed and maintained, and the position(s) within the organization responsible for the risk function. This risk analysis methodology shall be made available to the Exchange upon request. In performing the risk analysis of portfolio margin accounts required by this Rule, each member organization shall include the following in the written risk analysis methodology:

(A) Procedures and guidelines for the determination, review and approval of credit limits to each customer, and across all customers, utilizing a portfolio margin account.

(B) Procedures and guidelines for monitoring credit risk exposure to the member organization, including intra-day credit risk, related to portfolio margin accounts.

(C) Procedures and guidelines for the use of stress testing of portfolio margin accounts in order to monitor market risk exposure from individual accounts and in the aggregate.

(D) Procedures providing for the regular review and testing of these risk analysis procedures by an independent unit such as internal audit or other comparable group.

(2) Definitions.—For purposes of this paragraph (g), the following terms shall have the meanings specified below:

(A) The term ''listed option'' shall mean any option traded on a registered national securities exchange or automated facility of a registered national securities association.

(B) The term ''options class'' refers to all options contracts covering the same underlying instrument.

(C) The term ''portfolio'' means options of the same options class grouped with their underlying instruments and related instruments.

(D) The term ''option series'' relates to listed options and means all option contracts of the same type (either a call or a put) and exercise style, covering the same underlying instrument with the same exercise price, expiration date, and number of underlying units.

(E) The term ''related instrument'' within an option class or product group means futures contracts and options on futures contracts covering the same underlying instrument.

(F) The term ''underlying instrument'' means long and short positions in an exchange traded fund or other fund product registered under the Investment Company Act of 1940, that holds the same securities, and in the same proportion, as contained in a broad-based index on which options are listed. The term underlying instrument shall not be deemed to include, futures contracts, options on futures contracts, underlying stock baskets, or unlisted instruments.

(G) The term ''product group'' means two or more portfolios of the same type (see sub-paragraph (g)(2)(H) below) for which it has been determined by Rule 15c3–1a under the Securities Exchange Act of 1934 that a percentage of offsetting profits may be applied to losses at the same valuation point.

(H) The term ''theoretical gains and losses'' means the gain and loss in the value of individual option series and related instruments at 10 equidistant intervals (valuation points) ranging from an assumed movement (both up and down) in the current market value of the underlying instrument. The magnitude of the valuation point range shall be as follows:

Portfolio type	Up/down market move (high & low valuation points)
Non-High Capitalization, Broad-based U.S. Market Index Option[8].	+/−10%
High Capitalization, Broad-based U.S. Market Index Option[9].	+6%/−8%

[8] *In accordance with sub-paragraph (b)(1)(i)(B) of Rule 15c3–1a (Appendix A to Rule 15c3–1) under the Securities Exchange Act of 1934, 17 CFR 240.15c3–1a(b)(1)(i)(B).*

[9] *See footnote above.*

(3) Approved Theoretical Pricing Models.—Theoretical pricing models must be approved by a Designated Examining Authority and reviewed by the Securities and Exchange Commission (''The Commission'') in order to qualify. Currently, the theoretical model utilized by The

Phupinder S. Gill, Managing Director and President, Chicago Mercantile Exchange Inc., to Jonathan G. Katz, Secretary, Commission, dated October 21, 2002 (''Gill CBOE Letter''); and E-mail from Mike Ianni, Private Investor to *rule-comments@sec.gov,* dated November 7, 2002 (''Ianni E-mail'').

[7] *See supra* note 4.

Options Clearing Corporation (''The OCC'') is the only model qualified pursuant to The Commission's Net Capital Rule. All member organizations participating in the pilot program shall obtain their theoretical values from The OCC.

(4) Eligible Participants.—The application of the portfolio margin provisions of this paragraph (g), including cross-margining, is limited to the following:

(A) any broker or dealer registered pursuant to Section 15 of the Securities Exchange Act of 1934;

(B) any affiliate of a self-clearing member organization;

(C) any member of a national futures exchange to the extent that listed index options hedge the member's index futures; and

(D) any other person or entity not included in (4)(A) through (4)(C) above that has or establishes, and maintains, equity of at least 5 million dollars. For purposes of this equity requirement, all securities and futures accounts carried by the member organization for the same customer may be combined provided ownership across the accounts is identical. A guarantee pursuant to paragraph (f)(4) of this Rule is not permitted for purposes of the minimum equity requirement.

(5) Opening of Accounts.

(A) Only customers that have been approved for options transactions and approved to engage in uncovered short option contracts pursuant to Exchange Rule 721, are permitted to utilize a portfolio margin account.

(B) On or before the date of the initial transaction in a portfolio margin account, a member organization shall:

(i) furnish the customer with a special written disclosure statement describing the nature and risks of portfolio margining and cross-margining which includes an acknowledgement for all portfolio margin account owners to sign, and an additional acknowledgement for owners that also engage in cross-margining to sign, attesting that they have read and understood the disclosure statement, and agree to the terms under which a portfolio margin account and the cross-margin account respectively, are provided (see Exchange Rule 726 (d)), and

(ii) obtain the signed acknowledgement(s) noted above from the customer (both of which are required for cross-margining customers) and record the date of receipt.

(6) Establishing Account and Eligible Positions

(1) Portfolio Margin Account. For purposes of applying the portfolio margin requirements provided in this paragraph (g), member organizations are to establish and utilize a specific securities margin account, or sub-account of a margin account, clearly identified as a portfolio margin account that is separate from any other securities account carried for a customer.

(2) Cross-Margin Account. For purposes of combining related instruments and listed, broad-based U.S. index options, index warrants and underlying instruments and applying the portfolio margin requirements members are to establish and utilize a portfolio margin account, clearly identified as a cross-margin account, that is separate from any other securities account or portfolio margin account carried for a customer.

A margin deficit in either the portfolio margin account or the cross-margin account of a customer may not be considered as satisfied by excess equity in the other account. Funds and/or securities must be transferred to the deficient account and a written record created and maintained.

(A) Portfolio Margin Account—Eligible Positions

(i) A transaction in, or transfer of, a listed, broad-based U.S. index option or index warrant may be effected in the portfolio margin account.

(ii) A transaction in, or transfer of, an underlying instrument may be effected in the portfolio margin account provided a position in an offsetting listed, broad-based U.S. index option or index warrant is in the account or is established in the account on the same day.

(iii) If, in the portfolio margin account, the listed, broad-based U.S. index option or index warrant position offsetting an underlying instrument position ceases to exist and is not replaced within ten business days, the underlying instrument position must be transferred to a regular margin account, subject to initial Regulation T margin and margined according to the other provisions of this Rule. Member organizations will be expected to monitor portfolio margin accounts for possible abuse of this provision.

(iv) In the event that fully paid for long options and /or index warrants are the only positions contained within a portfolio margin account, such long positions must be transferred to a securities account other than a portfolio margin account or cross ''margin account within 10 business days, subject to the margin required, unless the status of the account changes such that it is no longer composed solely of fully paid for long options and/or index warrants.

(B) Cross-Margin Account—Eligible Positions

(i) A transaction in, or transfer of, a related instrument may be effected in the cross margin account provided a position in an offsetting listed, U.S. broad-based index option, index warrant or underlying instrument is in the account or is established in the account on the same day.

(ii) If the listed, U.S. broad-based index option, index warrant or underlying instrument position offsetting a related instrument ceases to exist and is not replaced within ten business days, the related instrument position must be transferred to a futures account and margined accordingly. Member organizations will be expected to monitor cross-margin accounts for possible abuse of this provision.

(iii) In the event that fully paid for long options and/or index warrants (securities) are the only positions contained within a cross-margin account, such long positions must be transferred to a securities account other than a portfolio margin account or cross margin account within 10 business days, subject to the margin required, unless the status of the account changes such that it is no longer composed solely of fully paid for long options and/or index warrants.

(7) Initial and Maintenance Margin Required.— The amount of margin required under this paragraph (g) for each portfolio shall be the greater of:

(A) the amount for any of the 10 equidistant valuation points representing the largest theoretical loss as calculated pursuant to paragraph (g)(8) below, or

(B) $.375 for each listed index option and related instrument multiplied by the contract's or instrument's multiplier, not to exceed the market value in the case of long positions in listed options and options on futures contracts.

(C) Account guarantees pursuant to paragraph (f)(4) of this Rule are not permitted for purposes of meeting initial and maintenance margin requirements.

(8) Method of Calculation.

(A) Long and short positions in listed options, underlying instruments and related instruments are to be grouped by option class; each option class group being a ''portfolio''. Each portfolio is categorized as one of the portfolio types specified in sub-paragraph (g)(2)(H) above.

(B) For each portfolio, theoretical gains and losses are calculated for each position as specified in sub-paragraph (g)(2)(H) above. For purposes of determining the theoretical gains and losses at each valuation point, member organizations shall obtain and utilize

the theoretical value of a listed index option, underlying instrument or related instrument rendered by a theoretical pricing model that, in accordance with sub-paragraph (b)(1)(i)(B) of Rule 15c3–1a under the Securities Exchange Act of 1934, qualifies for purposes of determining the amount to be deducted in computing net capital under a portfolio based methodology.

(C) Offsets. Within each portfolio, theoretical gains and losses may be netted fully at each valuation point.

Offsets between portfolios within the High Capitalization, Broad-based Index Option product group and the Non-High Capitalization, Broad-based Index Option product group may then be applied as permitted by Rule 15c3–1a under the Securities Exchange Act of 1934.

(D) After applying the Offsets above, the sum of the greatest loss from each portfolio is computed to arrive at the total margin required for the account (subject to the per contract minimum).

(9) Equity Deficiency.—If, at any time, equity declines below the 5 million dollar minimum required under sub-paragraph (4)(D) of this paragraph (g) and is not restored to at least 5 million dollars within three (3) business days (T+3) by a deposit of funds and/or securities; member organizations are prohibited from accepting opening orders starting on T+4, except that opening orders entered for the purpose of hedging existing positions may be accepted if the result would be to lower margin requirements. This prohibition shall remain in effect until equity of 5 million dollars is established.

(10) Determination of Value for Margin Purposes.—For the purposes of this paragraph (g), all listed index options and related instrument positions shall be valued at current market prices. Account equity for the purposes of this paragraph (g) shall be calculated separately for each portfolio margin account by adding the current market value of all long positions, subtracting the current market value of all short positions, and adding the credit (or subtracting the debit) balance in the account.

(11) Additional Margin.—If at any time, the equity in any portfolio margin account is less than the margin required, the customer may deposit additional margin or establish a hedge to meet the margin requirement within one business day (T+1). In the event a customer fails to hedge existing positions or deposit additional margin within one business day, the member organization must liquidate positions in an amount sufficient to, at a minimum, lower the total margin required to an amount less than or equal to account equity. Paragraph (f)(7) of this Rule—Practice of Meeting Regulation T Margin Calls by Liquidation Prohibited shall not apply to portfolio margin accounts. However, member organizations will be expected to monitor portfolio margin and cross-margin accounts for possible abuse of this provision.

(12) Net Capital Treatment of Portfolio Margin and Cross Margin Accounts.

(A) No member organization that requires margin in any customer account pursuant to paragraph (g) of this Rule shall permit gross customer portfolio margin requirements to exceed 1,000 percent of its net capital for any period exceeding three business days. The member organization shall, beginning on the fourth business day, cease opening new portfolio margin accounts until compliance is achieved.

(B) If, at any time, a member organization's gross customer portfolio margin requirements exceed 1,000 percent of its net capital, the member organization shall immediately transmit telegraphic or facsimile notice of such deficiency to the Securities and Exchange Commission, 450 Fifth Street NW, Washington, DC, 20549; to the district or regional office of the Securities and Exchange Commission for the district or region in which the member organization maintains its principal place of business; and to its Designated Examining Authority.

(13) Day Trading Requirements.—The requirements of sub-paragraph (f)(8)(B) of this Rule—Day-Trading shall not apply to portfolio margin accounts including cross margin accounts.

(14) Cross Margin Accounts—Requirements to Liquidate

(A) A member is required immediately either to liquidate, or transfer to another broker-dealer eligible to carry cross-margin accounts, all customer cross-margin accounts that contain positions in futures and/or options on futures if the member is:

(i) Insolvent as defined in section 101 of title 11 of the United States Code, or is unable to meet its obligations as they mature;

(ii) The subject of a proceeding pending in any court or before any agency of the United States or any State in which a receiver, trustee, or liquidator for such debtor has been appointed;

(iii) Not in compliance with applicable requirements under the Securities Exchange Act of 1934 or rules of the Securities and Exchange Commission or any self-regulatory organization with respect to financial responsibility or hypothecation of customer's securities; or

(iv) Unable to make such computations as may be necessary to establish compliance with such financial responsibility or hypothecation rules.

(B) Nothing in this paragraph (14) shall be construed as limiting or restricting in any way the exercise of any right of a registered clearing agency to liquidate or cause the liquidation of positions in accordance with its by-laws and rules.

* * * * *

Delivery of Options Disclosure Document and Prospectus

Rule 726 (a) through (c) unchanged.

Portfolio Margining and Cross-Margining Disclosure Statement and Acknowledgement

(d) The special written disclosure statement describing the nature and risks of portfolio margining and cross-margining, and acknowledgement for customer signature, required by Rule 431(g)(5)(B) shall be in a format prescribed by the Exchange or in a format developed by the member organization, provided it contains substantially similar information as in the prescribed Exchange format and has received the prior written approval of the Exchange.

Sample Portfolio Margining and Cross-Margining Risk Disclosure Statement to Satisfy Requirements of Exchange Rule 431(g)

Overview of Portfolio Margining

1. Portfolio margining is a margin methodology that sets margin requirements for an account based on the greatest projected net loss of all positions in a ''product class'' or ''product group'' as determined by an options pricing model using multiple pricing scenarios. These pricing scenarios are designed to measure the theoretical loss of the positions given changes in both the underlying price and implied volatility inputs to the model. Portfolio margining is currently limited to product classes and groups of index products relating to broad-based market indexes.

2. The goal of portfolio margining is to set levels of margin that more precisely reflects actual net risk. The customer benefits from portfolio margining in that margin requirements calculated on net risk are generally lower than alternative ''position'' or ''strategy'' based methodologies for determining margin requirements. Lower margin requirements allow the customer more leverage in an account.

Customers Eligible for Portfolio Margining

3. To be eligible for portfolio margining, customers (other than broker-dealers and certain non-broker-dealer affiliates of the carrying broker-dealer) must meet the basic standards for having an options account that is approved for uncovered writing and must have and maintain at all times account net equity of not less than $5 million, aggregated across all accounts under identical ownership at the clearing broker. The identical ownership requirement excludes accounts held by the same customer in different capacities (e.g., as a trustee and as an individual) and accounts where ownership is overlapping but not identical (e.g., individual accounts and joint accounts).

Positions Eligible for a Portfolio Margin Account

4. All positions in broad-based U.S. market index options and index warrants listed on a national securities exchange, and exchange traded funds and other products registered under the Investment Company Act of 1940 that are managed to track the same index that underlies permitted index options, are eligible for a portfolio margin account.

Special Rules for Portfolio Margin Accounts

5. A portfolio margin account may be either a separate account or a sub-account of a customer's regular margin account. In the case of a sub-account, equity in the regular account will be available to satisfy any margin requirement in the portfolio margin sub-account without transfer to the sub-account.

6. A portfolio margin account or sub-account will be subject to a minimum margin requirement of $.375 multiplied by the index multiplier for every option contract or index warrant carried long or short in the account. No minimum margin is required in the case of eligible exchange traded funds or other eligible fund products.

7. Margin calls in the portfolio margin account or sub-account, regardless of whether due to new commitments or the effect of adverse market moves on existing positions, must be met within one business day. Any shortfall in aggregate net equity across accounts must be met within three business days. Failure to meet a margin call when due will result in immediate liquidation of positions to the extent necessary to reduce the margin requirement. Failure to meet an equity call prior to the end of the third business day will result in a prohibition on entering any opening orders, with the exception of opening orders that hedge existing positions, beginning on the fourth business day and continuing until such time as the minimum equity requirement is satisfied.

8. A position in an exchange traded index fund or other eligible fund product may not be established in a portfolio margin account unless there exists, or there is established on the same day, an offsetting position in securities options, or other eligible securities. Exchange traded index funds and/or other eligible funds will be transferred out of the portfolio margin account and into a regular securities account subject to initial Regulation T and NYSE Rule 431 margin if the offsetting securities options, other eligible securities and/or related instruments no longer remain in the account for ten business days.

9. When a broker-dealer carries a regular cash account or margin account for a customer, the broker-dealer is limited by rules of the Securities and Exchange Commission and of The Options Clearing Corporation (''OCC'') to the extent to which the broker-dealer may permit OCC to have a lien against long option positions in those accounts. In contrast, OCC will have a lien against all long option positions that are carried by a broker-dealer in a portfolio margin account, and this could, under certain circumstances, result in greater losses to a customer having long option positions in such an account in the event of the insolvency of the customer's broker. Accordingly, to the extent that a customer does not borrow against long option positions in a portfolio margin account or have margin requirements in the account against which the long option can be credited, there is no advantage to carrying the long options in a portfolio margin account and the customer should consider carrying them in an account other than a portfolio margin account.

Special Risks of Portfolio Margin Accounts

10. Portfolio margining generally permits greater leverage in an account, and greater leverage creates greater losses in the event of adverse market movements.

11. Because the time limit for meeting margin calls is shorter than in a regular margin account, there is increased risk that a customer's portfolio margin account will be liquidated involuntarily, possibly causing losses to the customer.

12. Because portfolio margin requirements are determined using sophisticated mathematical calculations and theoretical values that must be calculated from market data, it may be more difficult for customers to predict the size of future margin calls in a portfolio margin account. This is particularly true in the case of customers who do not have access to specialized software necessary to make such calculations or who do not receive theoretical values calculated and distributed periodically by The Options Clearing Corporation.

13. For the reasons noted above, a customer that carries long options positions in a portfolio margin account could, under certain circumstances, be less likely to recover the full value of those positions in the event of the insolvency of the carrying broker.

14. Trading of securities index products in a portfolio margin account is generally subject to all the risks of trading those same products in a regular securities margin account. Customers should be thoroughly familiar with the risk disclosure materials applicable to those products, including the booklet entitled Characteristics and Risks of Standardized Options.

15. Customers should consult with their tax advisers to be certain that they are familiar with the tax treatment of transactions in securities index products.

16. The descriptions in this disclosure statement relating to eligibility requirements for portfolio margin accounts, and minimum equity and margin requirements for those accounts, are minimums imposed under Exchange rules. Time frames within which margin and equity calls must be met are maximums imposed under Exchange rules. Broker-dealers may impose their own more stringent requirements.

Overview of Cross-Margining

17. With cross-margining, index futures and options on index futures are combined with offsetting positions in securities index options and underlying instruments, for the purpose of computing a margin requirement based on the net risk. This generally produces lower margin requirements than if the related instruments[10] and securities products are viewed separately, thus providing more leverage in the account.

18. Cross-margining must be done in a portfolio margin account type. A separate portfolio margin account must be established exclusively for cross-margining.

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[10] *For purposes of this Rule, the term ''related instruments,'' within an option class or product means futures contracts, and options on futures contracts covering the same underlying instrument.*

19. When index futures and options on futures are combined with offsetting positions in index options and underlying instruments in a dedicated account, and a portfolio margining methodology is applied to them, cross-margining is achieved.

Customers Eligible for Cross-Margining

20. The eligibility requirements for cross-margining are generally the same as for portfolio margining, and any customer eligible for portfolio margining is eligible for cross-margining.

21. Members of futures exchanges on which cross-margining eligible index contracts are traded are also permitted to carry positions in cross-margin accounts without regard to the minimum aggregate account equity.

Positions Eligible for Cross-Margining

22. All securities products eligible for portfolio margining are also eligible for cross-margining.

23. All broad-based U.S. listed market index futures and options on index futures traded on a designated contract market subject to the jurisdiction of the Commodity Futures Trading Commission (''CFTC'') are eligible for cross-margining.

Special Rules for Cross-Margining

24. Cross-margining must be conducted in a portfolio margin account type. A separate portfolio margin account must be established exclusively for cross-margining. A cross margin account is a securities account, and must be maintained separate from all other securities account.

25. Cross-margining is automatically accomplished with the portfolio margining methodology. Cross-margin positions are subject to the same minimum margin requirement for every contract, including futures contracts.

26. Margin calls arising in cross-margin account, and any shortfall in aggregate net equity across accounts, must be satisfied within the same timeframe, and subject to the same consequences, as in a portfolio margin account.

27. A position in a futures product may not be established in a cross-margin account unless there exists, or there is established on the same day, an offsetting position in securities options and/or other eligible securities. Related instruments will be transferred out of the cross margin account and into a futures account if, for more than ten business days and for any reason, the offsetting securities options and/or other eligible securities no longer remain in the account. If the transfer of related instruments to a futures account causes the futures account to be undermargined, a margin call will be issued or positions will be liquidated to the extent necessary to eliminate the deficit.

28. Customers participating in cross-margining will be required to sign an agreement acknowledging that their positions and property in the cross-margin account will be subject to the customer protection provisions of Rule 15c3–3 under the Securities Exchange Act of 1934 and the Securities Investor Protection Act, and will not be subject to the provisions of the Commodity Exchange Act, including segregation of funds.

29. According to the rules of the exchanges, a broker dealer is required to immediately liquidate, or, if feasible, transfer to another broker-dealer eligible to carry cross-margin accounts, all customer cross-margin accounts that contain positions in futures and/or options on futures in the event that the carrying broker-dealer becomes insolvent.

30. In signing the agreement referred to in paragraph 28 above, a customer also acknowledges that a cross-margin account that contains positions in futures and/or options on futures will be immediately liquidated, or, if feasible, transferred to another broker-dealer eligible to carry cross-margin accounts, in the event that the carrying broker-dealer becomes insolvent.

Special Risks of Cross-Margining

31. Cross-margining must be conducted in a portfolio margin account type. Generally, cross-margining and the portfolio margining methodology both contribute to provide greater leverage than a regular margin account, and greater leverage creates greater losses in the event of adverse market movements.

32. Since cross-margining must be conducted in a portfolio margin account type, the time required for meeting margin calls is shorter than in a regular securities margin account and may be shorter than the time ordinarily required by a futures commission merchant for meeting margin calls in a futures account. Consequently, there is increased risk that a customer's cross-margin positions will be liquidated involuntarily, causing possible loss to the customer.

33. As noted above, cross margin accounts are securities accounts and are subject to the customer protections set-forth in Rule 15c3–3 under the Securities Exchange Act of 1934 and the Securities Investor Protection Act. Cross-margin positions are not subject to the customer protection rules under the segregation provisions of the Commodity Exchange Act and the rules of the CFTC adopted pursuant to the Commodity Exchange Act.

34. Trading of index options and futures contracts in a cross-margin account is generally subject to all the risks of trading those same products in a futures account or a regular securities margin account. Customers should be thoroughly familiar with the risk disclosure materials applicable to those products, including the booklet entitled Characteristics and Risks of Standardized Options and the risk disclosure document required by the CFTC to be delivered to futures customers. Because this disclosure statement does not disclose the risks and other significant aspects of trading in futures and options, customers should review those materials carefully before trading in a cross-margin account.

35. Customers should bear in mind that the discrepancies in the cash flow characteristics of futures and certain options are still present even when those products are carried together in a cross margin account. Both futures and options contracts are generally marked to the market at least once each business day, but the marks may take place with different frequency and at different times within the day. When a futures contract is marked to the market, the gain or loss is immediately credited to or debited from, respectively, the customer's account in cash. While an increase in the value of a long option contract may increase the equity in the account, the gain is not realized until the option is sold or exercised. Accordingly, a customer may be required to deposit cash in the account in order to meet a variation payment on a futures contract even though the customer is in a hedged position and has experienced a corresponding (but yet unrealized) gain on a long option. Alternatively, a customer who is in a hedged position and would otherwise be entitled to receive a variation payment on a futures contract may find that the cash is required to be held in the account as margin collateral on an offsetting option position.

36. Customers should consult with their tax advisers to be certain that they are familiar with the tax treatment of transactions in index products, including tax consequences of trading strategies involving both futures and option contracts.

37. The descriptions in this disclosure statement relating to eligibility requirements for cross-margining, and minimum equity and margin requirements for cross margin accounts, are minimums imposed under Exchange

rules. Time frames within which margin and equity calls must be met are maximums imposed under Exchange rules. The broker-dealer carrying a customer's portfolio margin account, including any cross-margin account, may impose its own more stringent requirements.

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Sample Portfolio Margining and Cross-Margining Acknowledgements

Acknowledgement for Customers Utilizing a Portfolio Margin Account

—Cross-Margining and Non-Cross-Margining—

Rule 15c3–3 under the Securities Exchange Act of 1934 requires that a broker or dealer promptly obtain and maintain physical possession or control of all fully-paid securities and excess margin securities of a customer. Fully-paid securities are securities carried in a cash account and margin equity securities carried in a margin or special account (other than a cash account) that have been fully paid for. Excess margin securities are a customer's margin securities having a market value in excess of 140% of the total of the debit balances in the customer's non-cash accounts. For the purposes of Rule 15c3–3, securities held subject to a lien to secure obligations of the broker-dealer are not within the broker-dealer's physical possession or control. The Commission staff has taken the position that all long option positions in a customer's portfolio-margining account (including any cross-margin account) may be subject to such a lien by OCC and will not be deemed fully-paid or excess margin securities under Rule 15c3–3.

The hypothecation rules under the Securities Exchange Act of 1934 (Rules 8c–1 and 15c2–1), prohibit broker-dealers from permitting the hypothecation of customer securities in a manner that allows those securities to be subject to any lien or liens in an amount that exceeds the customer's aggregate indebtedness. However, all long option positions in a portfolio-margining account (including any cross-margining account) will be subject to OCC's lien, including any positions that exceed the customer's aggregate indebtedness. The Commission staff has taken a position that would allow customers to carry positions in portfolio-margining accounts, (including any cross-margining account) even when those positions exceed the customer's aggregate indebtedness. Accordingly, within a portfolio margin account or cross-margin account, to the extent that you have long option positions that do not operate to offset your aggregate indebtedness and thereby reduce your margin requirement you receive no benefit from carrying those positions in your portfolio-margin account or cross-margin account and incur the additional risk of OCC's lien on your long option position(s).

By signing below the customer affirms that the customer has read and understood the foregoing disclosure statement and acknowledges and agrees that long option positions in portfolio-margining accounts, and cross-margining accounts, will be exempted from certain customer protection rules of the Securities and Exchange Commission as described above and will be subject to a lien by the Options Clearing Corporation without regard to such rules.

Customer Name: _____

By: _____

(Signature/title)

Date: _____

Acknowledgement for Customers Engaged in Cross-Margining

As disclosed above, futures contracts and other property carried in customer accounts with Futures Commission Merchants (''FCM'') are normally subject to special protection afforded under the customer segregation provisions of the Commodity Exchange Act (''CEA'') and the rules of the Commodity Futures Trading Commission adopted pursuant to the CEA. These rules require that customer funds be segregated from the accounts of financial intermediaries and be accounted for separately. However, they do not provide for, and regular futures accounts do not enjoy the benefit of, insurance protecting customer accounts against loss in the event of the insolvency of the intermediary carrying the accounts.

As discussed above, cross-margining must be conducted in a portfolio margin account, dedicated exclusively to cross margining and cross margin accounts are not treated as a futures account with an FCM. Instead, cross margin accounts are treated as securities accounts carried with broker-dealers. As such, cross margin accounts are covered by Rule 15c3–3 under the Securities Exchange Act of 1934, which protects customer accounts. Rule 15c3–3, among other things, requires a broker-dealer to maintain physical possession or control of all fully-paid and excess margin securities and maintain a special reserve account for the benefit of their customers. However, with regard to cross margin accounts, there is an exception to the possession or control requirement of Rule 15c3–3 that permits The Options Clearing Corporation to have a lien on long positions. This exception is outlined in a separate acknowledgement form that must be signed prior to or concurrent with this form. Additionally, the Securities Investor Protection Corporation (''SIPC'') insures customer accounts against the financial insolvency of a broker-dealer in the amount of up to $500,000 to protect against the loss of registered securities and cash maintained in the account for purchasing securities or as proceeds from selling securities (although the limit on cash claims is $100,000). According to the rules of the exchanges, a broker-dealer is required to immediately liquidate, or, if feasible, transfer to another broker-dealer eligible to carry cross-margin accounts, all customer cross margin accounts that contain positions in futures and/or options on futures in the event that the carrying broker-dealer becomes insolvent.

By signing below the customer affirms that the customer has read and understood the foregoing disclosure statement and acknowledges and agrees that: (1) Positions and property in cross-margining accounts, will not be subject to the customer protection rules under the customer segregation provisions of the Commodity Exchange Act and the rules of the Commodity Futures Trading Commission adopted pursuant to the CEA and (2) cross-margining accounts that contain positions in futures and/or options on futures will be immediately liquidated, or if feasible, transferred to another broker-dealer eligible to carry cross-margin accounts in the event that the carrying broker-dealer becomes insolvent.

Customer Name: _____

By: _____

(Signature/title)

Date: _____

* * * * *

I. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

a. Background

NYSE Rule 431 generally prescribes minimum maintenance margin requirements for customer accounts held at members and member organizations. In April 1996, the Exchange established the Committee to assess the adequacy of NYSE Rule 431 on an ongoing basis, review margin requirements, and make recommendations for change. A number of proposed amendments resulting from the Committee's recommendations have been approved by the Exchange's Board of Directors since the Committee was established. Similarly, the proposed amendments discussed below have been recommended by the Committee and have been adopted by the Exchange in this proposal, as amended.[11] The Exchange represents that the proposed portfolio margin and cross-margin rules have been developed in conjunction with the CBOE, The Options Clearing Corporation, the American Stock Exchange LLC, the Board of Trade of the City of Chicago, Inc., the Chicago Mercantile Exchange Inc., and the National Association of Securities Dealers, Inc.

The Exchange filed Amendment No. 2 for the purpose of eliminating inconsistencies between the proposed NYSE and CBOE rules,[12] and to incorporate certain substantive amendments requested by Commission staff.

b. Portfolio Margin

The Exchange proposes to amend NYSE Rule 431 to expand the scope of its margin rule by providing a portfolio margin methodology for listed, broad-based market index options, index warrants and related exchange-traded funds. The Exchange believes that the proposed amendments would allow clearing members and member organizations to extend a portfolio margin methodology to eligible customers as an alternative to the current strategy-based margin requirements. The Exchange further believes that the proposed rule also would allow broad-based market index futures and options on such futures to be included in a portfolio margin account, thus providing a cross-margin capability. The Exchange proposes to introduce the amendments as a two-year pilot program that would be available on a voluntary basis to member organizations.

Portfolio margining is a margin methodology that sets margin requirements for an account based on the greatest projected net loss of all positions in a product class or group as determined by the Commission-approved options pricing model using multiple pricing scenarios. These scenarios are designed to measure the theoretical loss of the positions given changes in both the underlying price and implied volatility inputs to the model. Accordingly, the margin required is based on the greatest loss that would be incurred in a portfolio if the value of its components move up or down by a predetermined amount.

The Exchange represents that the purpose and benefit of portfolio margining is to efficiently set levels of margin that more precisely reflect actual net risk of all positions in the account. A customer benefits from portfolio margining in that margin requirements calculated on net position risk are generally lower than strategy-based margin methodologies currently in place. In permitting margin computation based on actual net risk, members and member organizations will no longer be required to compute a margin requirement for each individual position or strategy in a customer's account.

However, as a pre-condition to permitting portfolio margining, the member or member organization would be required to establish procedures and guidelines to monitor credit risk to the member or member organization's capital, including intra-day credit risk, and stress testing of portfolio margin accounts. Further, members and member organizations would have to establish procedures for regular review and testing of these required risk analysis procedures.

c. Cross-Margining Capability

Amendment No. 2 requires a clearing member or member organization to establish a separate portfolio margin account (securities margin account) exclusively for cross-margining.[13] In this regard, related index futures and options on such futures would be carried in a separate cross-margin account, thus affording a cross-margin capability. In a portfolio margin account that is used exclusively for cross-margining, separate portfolios may be established containing index options, index warrants and exchange-traded funds structured to replicate the composition of the index underlying a particular portfolio, as well as related index futures and options on such futures.

To determine theoretical gains and losses, and resulting margin requirements, the same portfolio margin computation procedure will be applied to a portfolio margin account that is identified as a cross-margin account.

The liquidation/transfer requirement set forth in Amendment No. 2 necessitates that cross-margin positions be carried in a separate account, whereas the Original Proposal and Amendment No. 1 permitted cross-margin positions to either be combined in the same account with other portfolio margin positions, or carried in a separate cross-margin account. Amendment No. 2 also proposes changes to numerous sections of Rule 431 to remove references to the ability to co-mingle cross-margin positions along with all other portfolio margin positions.

Another change in Amendment No. 2 is the incorporation of a provision, as requested by Commission staff, that requires liquidation or transfer of cross-margin accounts in the event that a carrying broker-dealer becomes insolvent. This requirement would provide for Securities Investor Protection Corporation (''SIPC'') coverage of futures and options on futures in a securities account because such instruments would be viewed as converted to cash in the event of a firm insolvency.

d. Disclosure Document and Customer Attestation

Exchange Rule 726 prescribes requirements for the delivery of options disclosure documents concerning the opening of customer accounts. As proposed by the Exchange, members and member organizations would be required to provide every portfolio margin customer with a written risk disclosure statement at or prior to the initial opening of a portfolio margin account. The disclosure statement is divided into two sections, one dealing with portfolio margining, and the other with cross-margining.

The statement would disclose the risk and operation of portfolio margin accounts, including cross-margining, and the differences between portfolio margin and strategy-based margin requirements. The disclosure statement

[11] Many aspects of the proposed rule change are similar to the CBOE's proposed rule change to permit customer portfolio margining and cross-margining. *See* CBOE Proposal, *supra* note 4.

[12] *See* CBOE Proposal, *supra* note 4.

[13] The Original Proposal and Amendment No. 1 permitted cross-margin positions to either be combined in the same account with other portfolio margin positions, or carried in a separate cross-margin account.

would also address who is eligible to open a portfolio margin account, the instruments that are allowed, and when deposits to meet margin and minimum equity are required.

Included within the portfolio margin section of the disclosure statement would be a list of certain of the risks unique to portfolio margin accounts, such as: Increased leverage; shorter time for meeting margin; involuntary liquidation if margin not received; inability to calculate future margin requirements because of the data and calculations required; and that long positions are subject to a lien. The risks and operation of a cross-margin feature are delineated in the cross-margin section of the disclosure statement, and a list of certain of the risks associated with cross-margining will be included as well.

In addition, at or prior to the time a portfolio margin account is initially opened, members and member organizations would be required to obtain a signed acknowledgement regarding certain implications of portfolio margining (*e.g.*, treatment under SEC Rules 8c–1, 15c2–1 and 15c3–3 under the Act) from the customer. Further, prior to providing cross-margining, members and member organizations would be required to obtain a second signed customer acknowledgement relative to the segregation treatment for futures contracts and SIPC coverage.

Amendment No. 2 reflects changes to the risk disclosure statement and acknowledgement forms to reflect proposed amendments to the rule language concerning separation of cross-margining from all other portfolio margining. The acknowledgement form in Amendment No. 2 will require that by signing the cross-margin agreement, the signer acknowledges that all positions carried in a cross-margin account will be immediately liquidated or transferred to another broker-dealer eligible to carry cross-margin accounts in the event that the carrying broker-dealer becomes insolvent.

2. Statutory Basis

The Exchange believes the proposed rule change, as amended, is consistent with Section 6(b) of the Act [14] in general, and furthers the objectives of Section 6(b)(5) of the Act [15] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. In addition, the Exchange believes that Section 6(b)(5) of the Act [16] requires that the rules of an exchange foster cooperation and coordination with persons engaged in regulating transactions in securities.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in the furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

(A) By order approve such proposed rule change, as amended, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NYSE–2002–19 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 Number SR–NYSE–2002–19. 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/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference 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 the NYSE. All comments received will be posted without change; the Commission does 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 Number SR–NYSE–2002–19 and should be submitted on or before January 18, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[17]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–28183 Filed 12–23–04; 8:45 am]

BILLING CODE 8010–01–P

[14] 15 U.S.C. 78f(b).

[15] 15 U.S.C. 78f(b)(5).

[16] 15 U.S.C. 78f(b)(5).

[17] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No.34–50877; File No. SR–Phlx–2004–90]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Philadelphia Stock Exchange, Inc. Relating to Remote Streaming Quote Traders

December 17, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1], and Rule 19b–4 [2] thereunder, notice is hereby given that on December 9, 2004, the Philadelphia Stock Exchange, Inc. (''Phlx'' or ''Exchange'') filed with the Securities and Exchange

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19–4.

Commission (''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by Phlx. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Phlx proposes to amend the Exchange's rules to establish a new category of option market-making participant on the Exchange, a Remote Streaming Quote Trader (''RSQT''). An RSQT would be defined as a Registered Options Trader (''ROT'') that is a member or member organization with no physical trading floor presence who has received permission from the Exchange to generate and submit option quotations electronically through AUTOM in eligible options to which such RSQT has been assigned. The Exchange is also proposing to amend various Exchange rules to apply to and govern RSQTs.

The text of the proposed rule change is set forth below. Brackets indicate deletions; *italics* indicates new text.

Obligations and Restrictions Applicable to Specialists and Registered Options Traders Rule 1014. (a) General. Transactions of a Specialist and a Registered Options Trader (ROT) should constitute a course of dealings reasonably calculated to contribute to the maintenance of a fair and orderly market, and those members should not enter into transactions or make bids or offers that are inconsistent with such a course of dealings.

(b) ROT. (i) An ROT is a regular member or a foreign currency options participant of the Exchange located on the trading floor who has received permission from the Exchange to trade in options for his own account. For purposes of this Rule 1014, the term ''ROT'' shall include a Streaming Quote Trader, *and a Remote Streaming Quote Trader*, as defined below.

Each ROT electing to engage in Exchange options transactions shall be assigned by the Exchange one or more classes of options, and Exchange options transactions initiated by such ROT on the Floor for any account in which he had an interest shall to the extent prescribed by the Exchange be in such assigned classes.

(ii) (A) Streaming Quote Trader (''SQT''). An SQT is an ROT who has received permission from the Exchange to generate and submit option quotations electronically through [an electronic interface with] AUTOM [via an Exchange approved proprietary electronic quoting device] in eligible options to which such SQT is assigned. *An SQT may only submit such quotations while such SQT is physically present on the floor of the Exchange.*

(B) Remote Streaming Quote Trader (''RSQT''). An RSQT is an ROT that is a member or member organization with no physical trading floor presence who has received permission from the Exchange to generate and submit option quotations electronically through AUTOM in eligible options to which such RSQT has been assigned.

Notwithstanding the provisions of sub-paragraph (b)(i) above, an RSQT may only submit such quotations electronically from off the floor of the Exchange. No person who is either directly or indirectly affiliated with an RSQT shall submit quotations as a specialist, SQT, RSQT or non-SQT ROT in options in which such affiliated RSQT is assigned. An RSQT may only trade in a market making capacity in classes of options in which he is assigned.

(C) Non-SQT ROT. A non-SQT ROT is an ROT who is neither an SQT nor an RSQT.

([B]*D*) Market Making Obligations Applicable in Streaming Quote Options. In addition to the other requirements for ROTs set forth in this Rule 1014, an SQT *and an RSQT* shall be responsible to quote continuous, two-sided markets in not less than 60% of the series in each Streaming Quote Option (as defined in Rule 1080(k)) in which such SQT *or RSQT* is assigned, *provided that a Directed SQT or RSQT (as defined in Rule 1080(l)(i)(C)) shall be responsible to quote continuous, two-sided markets in not less than 100% of the series in each Streaming Quote Option in which they receive Directed Orders (as defined in Rule 1080(l)(i)(A)).* The specialist shall be responsible to quote continuous, two-sided markets in not less than 100% of the series in each Streaming Quote Option in which such specialist is assigned.

(1) During a six month period commencing on the date of the initial deployment of Phlx XL (the ''initial six-month period''), any SQT *or RSQT* assigned in a Streaming Quote Option (and the specialist assigned in such Streaming Quote Option) may submit electronic quotations with a size of fewer than 10 contracts for a period of sixty days after such option begins trading as a Streaming Quote Option. Beginning on the sixty-first day after such option begins trading as a Streaming Quote Option, SQTs, *RSQTs* and the specialist assigned in such Streaming Quote Option shall submit electronic quotations with a size of not less than 10 contracts.

(2) During a six month period commencing on the first day following the expiration of the initial six-month period, any SQT *or RSQT* assigned in a Streaming Quote Option (and the specialist assigned in such Streaming Quote Option) may submit electronic quotations with a size of fewer than 10 contracts for a period of thirty days after such option begins trading as a Streaming Quote Option. Beginning on the thirty-first day after such option begins trading as a Streaming Quote Option, SQTs, *RSQTs* and the specialist assigned in such Streaming Quote Option shall submit electronic quotations with a size of not less than 10 contracts.

(3) Thereafter, any SQT *or RSQT* assigned in a Streaming Quote Option that is newly deployed on Phlx XL (and the specialist assigned in such Streaming Quote Option) shall submit electronic quotations with a size of not less than 10 contracts beginning on the date on which such Streaming Quote Option begins trading on Phlx XL.

[An SQT may only submit such quotations while such SQT is physically present on the floor of the Exchange.]

([C]*E*) Non-SQT ROTs Trading Streaming Quote Options. These requirements are applicable on a per option basis depending upon the percentage of volume a non-SQT ROT transacts electronically (*i.e.*, by way of placing limit orders on the limit order book that are executed electronically and allocated automatically in accordance with Rule 1014(g)(vii)) versus in open outcry. With respect to making this determination, the Exchange will monitor the non-SQT ROT's trading activity every calendar quarter to determine whether they exceed the thresholds established in this sub-paragraph (C). If a non-SQT ROT exceeds the threshold established below, the obligations contained in sub-paragraph (C)(2) will be effective the next calendar quarter.

For a period of 90 days commencing immediately after an option begins trading as a Streaming Quote Option, the provisions of sub-paragraph (C)(1) below shall govern trading in that Streaming Quote Option.

(1) No change.

(2)(a) and (b) No change.

(c) Continuous Open Outcry Quoting Obligation: In response to any request for quote by a Floor Broker, specialist, Floor Official, [or other ROT (including an] SQT *or other non-SQT ROT* [)], non-SQT ROTs must provide a two-sided market complying with the quote spread parameter requirements contained in

Rule 1014(c)(i). During a six month period commencing on the date of the initial deployment of Phlx XL (the ''initial six-month period''), for a period of sixty days commencing immediately after an option begins trading as a Streaming Quote Option, such non-SQT ROTs may provide such quotations with a size of fewer than 10 contracts. Beginning on the sixty-first day after such option begins trading as a Streaming Quote Option, such quotations shall be for a size of at least 10 contracts. During a six month period commencing on the first day following the expiration of the initial six-month period, such non-SQT ROT may provide such quotations with a size of fewer than 10 contracts for a period of thirty days after such option begins trading as a Streaming Quote Option. Beginning on the thirty-first day after such option begins trading as a Streaming Quote Option, such quotations shall be for a size of at least 10 contracts. Thereafter, such non-SQT ROTs shall provide such quotations with a size of not less than 10 contracts beginning on the date on which such Streaming Quote Option begins trading on Phlx XL.

(c) In Classes of Option Contracts to Which Assigned —Affirmative Obligations. With respect to classes of option contracts to which his assignment extends, a Specialist and an ROT, whenever the ROT (*except an RSQT*) enters the trading crowd in other than a floor brokerage capacity or is called upon by a Floor Official or a Floor Broker, to make a market, are expected to engage, to a reasonable degree under the existing circumstances, in dealing for his own account when there exists, or it is reasonably anticipated that there will exist, a lack of price continuity, a temporary disparity between the supply of and demand for a particular option contract, or a temporary distortion of the price relationships between option contracts of the same class. Without limiting the foregoing, a Specialist and an ROT is expected to perform the following activities in the course of maintaining a fair and orderly market:

(i)–(ii) No change.

(d) In Classes of Option Contracts Other Than Those Which Appointed. With respect to classes of option contracts other than those to which his appointment extends, an ROT (*other than an RSQT*), whenever he enters the trading crowd in other than a floor brokerage capacity or is called upon by a floor official or a floor broker to make a market, shall undertake the obligations specified in paragraph (c) of this rule. Furthermore, *an* ROT should not:

(i) Individually or as a group, intentionally or unintentionally, dominate the market in option contracts of a particular class; or

(ii) Effect purchases or sales on the floor of the Exchange except in a reasonable and orderly manner.

(iii) Be conspicuous in the general market or in the market in a particular option.

(e)–(f) No change.

(g) Equity Option and Index Option Priority and Parity

(i)–(iv) No change.

(v) Allocation of the Remainder of the Order Among Specialists and ROTs on Parity. After the application of Rule 1014(g)(i) to an Initiating Order, the Remainder of the Order shall be allocated by the Allocating Participant (as defined in Rule 1014(g)(vi)) as follows:

(A) Entitlement. ROTs and specialists on parity are entitled to their Defined Participation (as described below), subject to: (1) Any Waiver, as described below; and (2) rounding, as described below.

(B) Size. The term ''stated size'' [in relation to a crowd participant and] in respect of an order *or electronic quotation* shall mean:

(1) In the case of orders handled manually by the specialist: (a)(*i*) If a crowd participant (including the specialist) has actually stated a size (''Actual Size''), such crowd participant's stated size shall be his or her Actual Size;

(ii) if the specialist, an SQT or RSQT is disseminating an electronic quotation at the Exchange's disseminated price in a particular series at the time of the execution of an Initiating Order in such series, such specialist, SQT or RSQT's disseminated size at the Exchange's disseminated price shall be his or her Actual Size, and such specialist, SQT and/or RSQT shall be deemed a ''crowd participant'' for purposes of this Rule 1014(g)(v);

(b)–(c) No change.

(2) No change.

(C) No change.

(D) Waiver. (1) An[y] ROT (*other than an RSQT*) or specialist may, in his or her sole discretion, offer to waive, in whole or in part, any part of a trade to which they were entitled to be allocated (an ''Offer to Waive'').

(a)–(c) No change.

(E)–(G) No change.

(vi) In order to facilitate timely tape reporting of executed trades, it is the duty of the persons identified below to allocate, match and time stamp manually executed trades as well as to submit the matched trade to the appropriate person at the respective specialist post immediately upon execution:

([i]*a*) In a trade involving a floor broker, the floor broker shall so do, provided that a floor broker may delegate this responsibility to the specialist (or an assistant to the specialist under the specialist's direct supervision) if the specialist agrees to accept such responsibility, and, in the event of such delegation, the specialist (or an assistant to the specialist under the specialist's direct supervision) shall do so:

([ii]*b*) In all other cases where the specialist is a participant (*i.e.,* where there is no floor broker), the specialist (or an assistant to the specialist under the specialist's direct supervision) shall do so;

([iii]*c*) in any other case (*i.e.,* where there is no floor broker and no specialist is involved), the largest *on-floor* participant shall do so (for example, where several Registered Options Traders are involved)[:]*;* and

([iv]*d*) if there is only one seller and one buyer (no floor broker and no specialist is involved), the seller shall do so (for example, where only two Registered Options Traders are involved) *, unless either the seller or the buyer is an RSQT, in which case the on-floor participant in the transaction shall do so*.

The person responsible for trade allocation (the ''Allocating Participant'') shall, for each trade allocated by such Allocating Participant, circle his or her badge identification number on the trade tickets, identifying himself or herself as the Allocating Participant in the particular trade. If the Allocating Participant is not a participant in the trade to be allocated, he/she shall identify himself/herself by initiating the trade tickets. In the case of a trade in which a Floor Broker is the Allocating Participant, such Floor Broker shall allocate the trade using the Options Floor Broker Management System.

(vii) Allocation of Automatically Executed Trades in Streaming Quote Options. Solely with respect to Streaming Quote Options approved by the Exchange to be traded on Phlx XL [by Streaming Quote Traders (''SQTs'')] pursuant to Exchange Rule 1080(k), after public customer market and marketable limit orders have been executed, trades automatically executed in such options shall be allocated automatically in the following manner:

(A) If the specialist, an SQT, *RSQT* or a non-SQT ROT that has placed a limit order on the limit order book (''Phlx XL Participant'') is quoting alone at the disseminated price and their quote is not matched by another Phlx XL

participant prior to execution, such Phlx XL Participant shall be entitled to receive a number of contracts up to the size associated with his/her quotation.

(B) Parity. Quotations entered electronically by the specialist*, an RSQT* or an SQT that do not cause an order resting on the limit order book to become due for execution may be matched at any time by quotations entered electronically by the specialist and/or other SQTs *and RSQTs*, and by ROT limit orders entered via electronic interface and shall be deemed to be on parity, subject to the requirement that orders of controlled accounts must yield priority to customer orders as set forth in Rule 1014(g)(i)(A).

(1) (a)–(e) No change. (2)–(4) No change.

(h) No change.

Commentary

.01 An ROT electing to engage in Exchange Options transactions is designated as a specialist on the Exchange for all purposes under the Securities Exchange Act of 1934 and the rules and regulations thereunder with respect to options transactions initiated and effected by him on the floor in his capacity as an ROT. For purposes of this commentary, the term ''transactions initiated and effected on the floor'' shall not include transactions initiated by an ROT off the floor, but which are considered ''on-floor'' pursuant to Commentaries .07 and .08 of Rule 1014. *Similarly, an RSQT electing to engage in Exchange Options transactions is designated as a specialist on the Exchange for all purposes under the Securities Exchange Act of 1934 and the rules and regulations thereunder with respect to options transactions initiated and effected by him in his capacity as an ROT.*

However, in order for an ROT (*other than an RSQT*) to receive specialist margin treatment for off-floor orders in any calendar quarter, the ROT must execute the greater of 1,000 contracts or 80% of his total contracts that quarter in person (not through the use of orders) and 75% of his total contracts that quarter in assigned options. The off-floor orders for which an ROT receives specialist margin treatment shall be subject to the obligations of Rule 1014(a) and, in general, be effected for the purpose of hedging, reducing risk of, or rebalancing positions of the ROT. An ROT is responsible for evidencing compliance with these provisions. The Options Committee may exempt one or more classes of options from this calculation.

.02 No change.

.03 The Exchange has determined for purposes of paragraph (c) of this Rule that, except for unusual circumstances, at least 50% of the trading activity in any quarter (measured in terms of contract volume) of an ROT (*other than an RSQT*) shall ordinarily be in classes of options to which he is assigned. Temporarily undertaking the obligations of paragraph (c) at the request of a member of the Committee on Options in non assigned classes of options shall not be deemed trading in non assigned option contracts.

The Exchange may, in computing the percentage specified herein, assign a weighting factor based upon relative inactivity to one or more classes or series of option contracts.

.04 No change.

.05 (a) Assignment in non-Streaming Quote Options. With respect to options that are not eligible to be traded by SQTs *and RSQTs* (''non-Streaming Quote Options''), the Exchange will assign an ROT to act in one or more classes of option contracts. In making such assignments, the Exchange shall give attention to (i) the preference of applicants; (ii) assuring that financial resources available to an ROT enable him to satisfy the obligations set forth in Rule 1014 with respect to each class of option contracts to which he is assigned; (iii) the applicant's expertise in options trading; and (iv) the applicant's prior market performance. The Exchange may suspend or terminate any assignment of an ROT under this Rule and may make additional assignments whenever, in the Exchange's judgment, the interests of a fair and orderly market are best served by such action.

(b) Assignment in Streaming Quote Options. The Options Allocation, Evaluation and Securities Committee (''*OAESC*'') or its designee shall assign SQTs *and RSQTs* in one or more Streaming Quote Options in accordance with Rule 507. An SQT *or RSQT* may be assigned to (and thus submit quotes electronically in) *any option traded on Phlx XL for which they are approved by the OAESC.*

[up to all of the options located within a specified physical zone on the Exchange Options Floor (an ''SQT Zone'') provided that such SQT is physically present in such SQT Zone. Each member organization must have at least one SQT physically present in each SQT Zone in which such member organization submits electronic quotations. The number and location of SQT Zones will be determined by the Options Committee. Initially, there will be one single SQT Zone encompassing the entire options floor. In the event the Options Committee determines to change the number and/or location of SQT Zones, the effectiveness of any such change shall be conditioned upon its having been approved by the Securities and Exchange Commission pursuant to Section 19(b) of the Securities Exchange Act of 1934, as amended, and the rules and regulations thereunder.]

(c) Non-Electronic Orders. In the event that a Floor Broker or specialist presents a non-electronic order in a[n option] *Streaming Quote Option* in which an *RSQT is assigned, and/or in which an* SQT *assigned in such Streaming Quote Option* is not a crowd participant, [but which is traded in the SQT Zone where such SQT is located,] such SQT *and/or RSQT* may not participate in trades stemming from such a non-electronic order unless such non-electronic order is executed at the price quoted by the non-crowd participant SQT *and/or RSQT* at the time of execution. The specialist and/or SQTs participating in a trading crowd may, in response to a verbal request for a market by a floor broker, state a bid or offer that is different than their electronically submitted bid or offer, provided that such stated bid or offer is not inferior to such electronically submitted bid or offer, except when such stated bid or offer is made in response to a floor broker's solicitation of a single bid or offer as set forth in Rule 1033(a)(ii). For purposes of this Rule, an SQT or non-SQT ROT shall be deemed to be participating in a crowd if such SQT is, at the time an order is represented in the crowd, physically located in a specific ''Crowd Area.'' A Crowd Area shall consist of a specific physical location marked with specific, visible physical boundaries on the options floor, as determined by the Options Committee. An SQT or non-SQT ROT who is physically present in such Crowd Area may engage in options transactions in assigned issues as a crowd participant in such a Crowd Area, provided that such SQT or non-SQT ROT fulfills the requirements set forth in this Rule 1014. An SQT or non-SQT ROT shall be deemed to be participating in a single Crowd Area.

.06 An RSQT shall be required to maintain information barriers that are reasonably designed to prevent the misuse of material, non-public information with any affiliates that may conduct a brokerage business in options assigned to the RSQT or act as a specialist or market maker in any security underlying options assigned to the RSQT, and otherwise comply with the requirements of Rule 1020 regarding restrictions on the flow of privileged

information between the affiliate and the specialist organization.

.07 No change.

.08 An off-Floor order for an account in which a member has an interest is to be treated as an on-Floor order if it is executed by the member who initiated it.

In addition to transactions originated on the Floor by an ROT for an account in which he has an interest, the following transactions are considered on-Floor trading:

(a)–(b) No change.

(c) Any transaction for the account of an RSQT.

.09 Orders given out by an ROT to commission brokers—An on-Floor order given by an ROT [Trader] to a commission broker, for an account in which the ROT has [I]*a*n interest, is subject to all the Rules restricting ROTs. When an ROT gives out such an order on the Floor to another member, the order must be so marked to indicate that it is for an account in which the ROT has [i]an interest, unless it is exempt from this Rule, in order that the other member may know whether it may be entitled to priority or parity.

.10 *RESERVED* [Orders given out by an ROT to specialists—An on-Floor order given to a specialist by an ROT for an account in which he has an interest may not have the privilege of a ''Stop'' and it is subject to the provisions of paragraphs (d) and (e) of this Rule. In addition, such order which establishes or increases a position is subject to the provisions of Commentary .12 of this Rule.]

.11 Pair-offs before opening—An ROT cannot acquire a ''long'' option by pairing off with a sell order before the opening, unless all off-Floor bids at that price are filled.

.12 The number of ROT[']s in a trading crowd who are establishing or increasing a position may temporarily be limited when, in the judgment of two Floor Officials, the interests of a fair and orderly market are served by such limitation.

.13 Within each quarter an ROT must execute in person, and not through the use of orders, a specified number of contracts, such number to be determined from time to time by the Committee on Options.

.14–.17 No change.

.18 RESERVED

Openings In Options

Rule 1017. (a)—(d) No change.

(e) With respect to Streaming Quote Options, SQTs *and RSQTs* may participate in opening transactions by submitting electronic quotations to interact with opening orders.

(f) This Rule 1017 shall be effective as a pilot, which will expire 180 days following the initial deployment of the Exchange's electronic options trading platform, Phlx XL.

Commentary

.01 Pre-Opening. (i) Prior to the opening of the underlying security on the primary market, the specialist shall:

(A) determine from Floor Brokers, and from orders resting on the limit order book, the size and prices of those orders which are near the previous closing prices of those options in which the specialist is assigned.

(B) consider markets from ROTs in the crowd in addition to electronic quotations submitted by SQTs *and RSQTs* (''SQT/*RSQT* Quotations'').

(C) determine the specialist's own quote in each series.

(ii) No change.

.02 No change.

.03 Opening Price. (a) No change.

(b) (i)–(v) No change.

(vi) Once the opening trade price in a series has been disseminated to OPRA, the specialist, ROTs, RSQTs and SQTs trading such series shall be required to fulfill their respective quoting obligations under Rule 1014.

(c) No change.

(d) The specialist will not open a series if one of the following conditions is met:

(i) The opening price is not within an acceptable range, as described in Commentary .03(a) above, unless a specific exemption is given by a Floor Official in the interest of a fair and orderly market;

(ii) The opening trade would leave a market order imbalance (*i.e.*, there are more market orders to buy or to sell for the particular series than can be satisfied by the market orders, limit orders and specialist, [or] SQT *and RSQT* quotations on the opposite side).

(iii) No change.

(e) If one of the conditions described in sub-paragraphs (d)(i)–(iii) above is met, the specialist will request bids and offers from ROTs in the crowd and, in the case of Streaming Quote Options, SQTs *and RSQTs* that are assigned in the option. Such ROTs, *RSQTs* and/or SQTs shall respond to such a request immediately. The opening will be delayed until responses to the specialist's request have been received and the consequent opening price is deemed by a Floor Official to be compatible with a fair and orderly market.

(f) No change.

Philadelphia Stock Exchange Automated Options Market (AUTOM) and Automatic Execution System (AUTO–X)

Rule 1080. (a)–(b) No change.

(c) * * *

(i)–(ii) No change.

(iii) Book Sweep. Book Sweep is a feature of AUTOM which, when engaged, does the following:

(A) Respecting non-Streaming Quote Options, when the bid or offer generated by the Exchange's Auto-Quote system (or by a proprietary quoting system provided for in Commentary .02 of this Rule called ''Specialized Quote Feed'' or ''SQF''), matches or crosses the Exchange's best bid or offer in a particular series as established by an order on the limit order book, orders on the limit order book in that series will be automatically executed and allocated among crowd participants signed onto the Wheel. If Book Sweep is not engaged at the time the Auto-Quote or SQF bid or offer matches or crosses the Exchange's best bid or offer represented by a limit order on the book, the specialist may manually initiate the Book Sweep feature. Book Sweep shall be engaged when AUTO–X is engaged, and shall be disengaged when AUTO–X is disengaged in accordance with Rule 1080(c)(iv) and Rule 1080(e). Eligible orders on the limit order book will be automatically executed up to the size associated with the quote that matches or crosses such limit orders.

(B) Respecting Streaming Quote Options, when the bid or offer generated by the Exchange's Auto-Quote system, SQF, or by an SQT *or RSQT* (as defined in Rule 1014(b)(ii)) matches or crosses the Exchange's best bid or offer in a particular series as established by an order on the limit order book, orders on the limit order book in that series will be automatically executed and automatically allocated in accordance with Exchange rules. If Book Sweep is not engaged at the time the Auto-Quote, SQF, *RSQT* or SQT bid or offer matches or crosses the Exchange's best bid or offer represented by a limit order on the book, the specialist*, RSQT,* or SQT may manually initiate the Book Sweep feature.

(iv) No change.

(d)–(e) No change.

(f) No change.

(g) AUTO–X Contra-Party Participation—The contra-side to automatically executed orders may be: (i) A Wheel Participant; or (ii) a booked customer limit order.

(A) No change.

(B) Book Match—For purposes of this sub-paragraph, the contra-side to

automatically executed inbound marketable orders shall be a limit order on the book or specialist, *RSQT* and/or SQT electronic quotes (''electronic quotes'') at the disseminated price where: (1) the Exchange's disseminated size includes limit orders on the book and/or electronic quotes at the disseminated price; and (2) the disseminated price is the National Best Bid or Offer. This feature is called Book Match.

(h)–(j) No change.

(k) Electronic Streaming Quotations. The Options Committee may, on an issue-by-issue basis, determine the specific issues in which [Streaming Quote Traders ('']SQTs[''), as defined in Exchange Rule 1014(b)(ii)] *may generate and submit option quotations if such SQT is physically present on the Exchange floor, and RSQTs* may generate and submit option quotations from [on] *off* the floor of the Exchange, electronically [through an electronic interface with AUTOM, via an Exchange approved proprietary electronic quoting device]. Such issues shall be known as ''Streaming Quote Options.''

Commentary

.01 (a)–(b) No change.

(i) No change.

(ii) *Respecting non-Streaming Quote Options,* [S]*s*pecialists [and SQTs, respectively,] determine which model to select per option and may change models during the trading day. Each pricing model requires the specialist [and SQT, respectively,] to input various parameters, such as interest rates, volatilities (delta, vega, theta, gamma, etc.) and dividends. [Respecting non-Streaming Quote Options, t]*T*he specialist may, but is not required to: (a) consult with and/or (b) agree with the trading crowd in setting these parameters or selecting a model, but the members of the trading crowd are not required to provide input in these decisions, and in all cases, the specialist has the responsibility and authority to make the final determination.

(c)–(d) No change.

.02–.07 No change.

Firm Quotations

Rule 1082. (a) Definitions.

(i) No change.

(ii) The term ''disseminated size'' shall mean with respect to the disseminated price for any quoted options series:

(A) Respecting non-Streaming Quote options (as defined in Rule 1080(k)), at least the sum of the size associated with: (1) Limit orders; and (2) specialists' quotations generated by Auto-Quote or Specialized Quote Feed as described in Rule 1080, Commentary .01 (which represents the collective quotation size of the specialist and any ROTs bidding or offering at the disseminated price unless an ROT has expressly indicated otherwise in a clear and audible manner).

(B) respecting Streaming Quote Options, at least the sum of the size associated with limit orders, specialists' quotations, [and Streaming Quote Traders'] *SQTs'* quotations, *and RSQTs' (as defined in Rule 1014(b)(ii)(B)) quotations*.

(C) (1) If an SQT *or RSQT*'s *(other than a Directed SQT or RSQT)* quotation size in a particular series in a Streaming Quote Option is exhausted, such SQT *or RSQT's* quotation shall be deleted from the Exchange's disseminated quotation until the time the SQT *or RSQT* revises his/her quotation.

(2) If the Exchange's disseminated size in a particular series in a Streaming Quote Option is exhausted *at that particular price level*, and [the Exchange shall disseminate the next best available quotation. If] no specialist, [or] SQT *or RSQT* has revised their quotation immediately following the exhaustion of the Exchange's disseminated size *at such price level*, the Exchange shall automatically disseminate the specialist's most recent disseminated price prior to the time of such exhaustion with a size of one contract.

(iii)–(iv) No change.

(b) (i) No change.

(ii) With respect to Streaming Quote Options, in the event an SQT, *RSQT* or specialist in a Streaming Quote Option has electronically submitted on the Exchange bids or offers for a Streaming Quote Option, each such SQT, *RSQT* or specialist member shall be considered a ''responsible broker or dealer'' for that bid or offer, up to the size associated with such responsible broker or dealer's bid or offer.

(c)–(d) No change.

Commentary

.01 No change.

.02 Locked Markets. In the event that an SQT, *RSQT*, and/or specialist's electronically submitted quotations in Streaming Quote Options interact with the electronically submitted quotations of other SQTs, *RSQTs* and/or the specialist, resulting in the dissemination of a ''locked'' quotation (*e.g.,* $1.00 bid—$1.00 offer), the following shall occur:

(a) The Exchange will disseminate the locked market and both quotations will be deemed ''firm'' disseminated market quotations;

(b) A ''counting period'' of one second will begin during which SQTs, *RSQTs* and/or specialists whose quotations are locked may eliminate the locked market. Provided, however, that in accordance with subparagraph (a) above, such SQT, *RSQT* and/or specialist shall be obligated to execute orders at their disseminated quotation. During the ''counting period'' SQTs and specialists located in the Crowd Area in which the option that is the subject of the locked market is traded will continue to be obligated to respond to Floor Brokers as set forth in Rule 1014, Commentary .05(c), and will continue to be obligated for one contract in open outcry to other SQTs, non-SQT ROTs, and specialists. If at the end of the one-second counting period the quotations remain locked, the locked quotations will automatically execute against each other in accordance with the allocation algorithm set forth in Rule 1014(g)(vii).

The quotation that is locked may be executed by an order during the one-second counting period.

.03 Crossed Markets. The Exchange will not disseminate an internally crossed market (*e.g.,* $1.10 bid, $1.00 offer). If an SQT, *RSQT* or specialist electronically submits a quotation in a Streaming Quote Option (''incoming quotation'') that would cross an existing quotation (''existing quotation''), the Exchange will: (i) change the incoming quotation such that it locks the existing quotation; (ii) send a notice to the SQT, *RSQT* or specialist that submitted the existing quotation indicating that its quotation was crossed; and (iii) send a notice to the specialist, [or] SQT *or RSQT* that submitted the incoming quotation, indicating that its quotation crossed the existing quotation and was changed. Such a locked market shall be handled in accordance with Commentary .01 above. During the one-second counting period, if the existing quotation is cancelled subsequent to the time the incoming quotation is changed, the incoming quotation will automatically be restored to its original terms.

Application for Assignment in Streaming Quote Options

Rule 507. (a) When a Streaming Quote Option, as defined in Rule 1080(k), is to be assigned or reassigned by the Committee, the Committee will solicit applications from all eligible Streaming Quote Traders (''SQTs'') *and Remote Streaming Quote Traders (''RSQTs'')*, as defined in Rule 1014(b)(ii).

(b)(i) An application for assignment in Streaming Quote Options shall be submitted in writing to the Exchange's designated staff and shall include, at a minimum, the name of the SQT *or RSQT* applicant and written verification

from the Exchange's Membership Services Department that such SQT *or RSQT* applicant is qualified as a Registered Options Trader.

(ii) No application for assignment in Streaming Quote Options shall be approved by the Committee without written certification signed by an officer (Vice President or above) of the Exchange's Financial Automation Department indicating that (A) the SQT *or RSQT* applicant has sufficient technological ability to support his/her continuous quoting requirements as set forth in Rule 1014(b)(ii), and (B) the SQT *or RSQT* applicant has successfully completed, or is scheduled to complete, testing of its quoting system with the Exchange.

(iii) *(A)* This Rule 507 places no limit on the number of qualifying ROTs that may become SQTs *or RSQTs*; any applicant that is qualified as an ROT in good standing, and that satisfies the technological readiness and testing requirements described in sub-paragraph (b)(ii) above, shall be approved as an SQT. However, based on system constraints, capacity restrictions or other factors relevant to the maintenance of a fair and orderly market, the Board may defer, for a period to be determined in the Board's discretion, approval of qualifying applications for SQT *or RSQT* status pending any action required to address the issue of concern to the Board. The Board may not defer a determination of the approval of the application of any SQT *or RSQT* applicant or place any limitation(s) on access to Phlx XL on any SQT *or RSQT* applicant unless the basis for such limitation(s) or deferral have been objectively determined by the Board, subject to Securities and Exchange Commission approval or effectiveness pursuant to a rule change filing under Section 19(b) of the Securities Exchange Act of 1934, as amended. The Committee shall provide written notification to any SQT *or RSQT* applicant whose application is the subject of such limitation(s) or deferral, describing the objective basis for such limitation(s) or deferral.

(B) In addition to the above requirements, an RSQT applicant must demonstrate to the Committee that it has:

(1) Significant market-making and/or specialist experience in a broad array of securities;

(2) Superior resources, including capital, technology and personnel;

(3) Demonstrated history of stability, superior electronic capacity, and superior operational capacity;

(4) Proven ability to interact with order flow in all types of markets;

(5) Existence of order flow commitments;

(6) Willingness to accept allocations as an RSQT in options overlying 400 or more securities; and

(7) Willingness and ability to make competitive markets on the Phlx and otherwise to promote the Phlx in a manner that is likely to enhance the ability of the Phlx to compete successfully for order flow in the options it trades.

(c)–(d) No change.

(e) If an SQT *or RSQT* seeks to withdraw from acting as such in a Streaming Quote Option, it should so notify the Committee at least three business days prior to the desired effective date of such withdrawal.

(f) During the first six months of the Exchange's program to allow SQTs *and RSQTs* to submit electronic option quotations, an SQT *or RSQT* applicant member or member organization that has, for at least the immediately preceding twelve months: (i) been a member of the Exchange; and (ii) maintained a continuous presence as an ROT in the trading crowd associated with the Streaming Quote Option(s) that are the subject of the application, shall be guaranteed an assignment in the Streaming Quote Option, provided that such member organization has satisfied the requirements set forth in paragraph (b)(ii) of this Rule 507. SQT *and RSQT* applicants that have been granted trading privileges in Streaming Quote Options pursuant to this Rule 507(f) shall not be required to re-apply for such privileges after the initial six-month period.

(g) No change.

Amendments to Option Floor Procedure Advices

A–12 Opening Rotations and SORT Procedures

It is the responsibility of the Specialist to arrange the price at which an option series opens and re-opens on the Exchange. Unless a specific exemption is given by a Floor Official, an opening transaction in an equity option series may only be arranged at a price that does not fall outside of the previous session's closing quote in the option by more than the differential between the closing sale in the underlying security and the opening sale in the underlying security.

The Specialist must accept and include in the opening for equity options all market orders which are placed on the book five minutes or more prior to the opening of the underlying security, unless exempted by a Floor Official. Market orders have precedence over limit orders at an opening regardless of account type (*i.e.* customer, firm, market maker, specialist) except that a limit order to buy which is at a higher limit than the price at which the option is to be opened and a limit order to sell which is at a lower limit than the price at which the option is to be opened are to be treated as market orders in connection with an opening (PHLX Rule 1017). Limit orders at the opening price are afforded participation on the opening in accordance with the Exchange's parity/priority rule (PHLX Rule 1014).

Openings and re-openings in options are to be conducted by way of rotation procedures or by way of SORT procedures, as provided by Exchange Rule 1047. Rotation procedures allow a brief period of auction pricing for each option series during which bids and offers, including, with respect to Streaming Quote Options, bids and offers submitted electronically by SQTs *and/or RSQTs*, and transactions for that option class may normally only occur in that series. SORT procedures allow, but do not require, a Specialist in any series for which no opening interest to buy or sell has been received to open such series with a quote without prior auction pricing. To ensure that buy and sell interests are properly represented in those series in which received, Specialists must follow the procedures below:

(i)–(iii) No change.

FINE SCHEDULE No change.

B–3 Trading Requirements

(a) An ROT *(other than an RSQT)* is required to trade in person, and not through the use of orders, the greater of 1,000 contracts or 50% of his contract volume on the Exchange each quarter. Also, at least 50% of an ROT's trading activity in each quarter must be in assigned options. No application by an ROT to change options assignments will be approved unless such ROT is in compliance with the above requirements at the time the application for change is made.

FINE SCHEDULE No change.

(b) For any calendar quarter, in addition to the requirements of paragraph (a) above, in order for an ROT *(other than an RSQT)* to receive specialist margin treatment for off-floor orders in accordance with Rule 1014, Commentary .01, the ROT must execute the greater of 1,000 contracts or 80% of his total contracts that quarter in person (not through the use of orders) and 75% of his total contracts that quarter in assigned options. Violations of this

trading requirement are subject to Business Conduct Committee review.

B–6 Priority of Options Orders for Equity Options and Index Options by Account Type

(EQUITY OPTION AND INDEX OPTION ONLY)

Section A–D No change.

Section E

Allocation of the Remainder of the Order Among Specialist and ROTs on Parity. After the application of this Advice to an Initiating Order, the Remainder of the Order shall be allocated by the Allocating Participant (as defined in Rule 1014(g)(vi)) as follows:

(A) No change.

(B) Size. The term ''stated size'' [in relation to a crowd participant and] in respect of an order *or electronic quotation* shall mean:

(1) In the case of orders handled manually by the specialist:

(a)(*i*) If a crowd participant (including the specialist) has actually stated a size (''Actual Size''), such crowd participant's stated size shall be his or her Actual Size;

(ii) if the specialist, an SQT or RSQT is disseminating an electronic quotation at the Exchange's disseminated price in a particular series at the time of the execution of an Initiating Order in such series, such specialist, SQT or RSQT's disseminated size at the Exchange's disseminated price shall be his or her Actual Size, and such specialist, SQT and/or RSQT shall be deemed a ''crowd participant'' for purposes of this Advice;

(b)–(c) No change.

(2) No change.

(C) No change.

(D) Waiver. (1) Any ROT *(other than an RSQT)* or specialist may, in his or her sole discretion, offer to waive, in whole or in part, any part of a trade to which they were entitled to be allocated (an ''Offer to Waive'').

(a)–(c) No change.

(E)–(G)

Section F No change.

FINE SCHEDULE No change.

F–7 [Bids and Offers] Size of Exchange's Disseminated Bid or Offer

[All bid and offer prices shall be general ones and shall not be specified for acceptance by particular members.

In the absence of a stated size to any bid or offer voiced or displayed on the Options Floor, the person responsible for such bid and offer is deemed to be quoting for one contract, except in those instances where predetermined volume guarantees are provided for the facilitation of specific account types. Floor traders (Specialists and ROTs) are, however, required to trade more than one contract in connection with the execution of a customer order pursuant to Advice A–11.]

The size of any disseminated bid or offer by the Exchange shall be, with respect to the disseminated price for any quoted options series, equal to:

(a) Respecting non-Streaming Quote options (as defined in Rule 1080(k), at least the sum of the size associated with: (1) Limit orders; and (2) specialists' quotations generated by Auto-Quote or Specialized Quote Feed as described in Rule 1080, Commentary .01 (which represents the collective quotation size of the specialist and any ROTs bidding or offering at the disseminated price unless an ROT has expressly indicated otherwise in a clear and audible manner).

(b) respecting Streaming Quote Options, at least the sum of the size associated with limit orders, specialists' quotations, [and] *SQTs'* quotations, *and RSQTs' quotations*.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Phlx included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Phlx has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to establish a new category of Exchange market-making participant on the Phlx XL trading platform—the RSQT.

Definitions

Proposed Phlx Rule 1014(b)(ii)(C) would define a ''non-SQT ROT'' as an ROT who is neither a Streaming Quote Trader (''SQT'')[3] nor an RSQT. Proposed Phlx Rule 1014(b)(ii)(B) would define an RSQT as an ROT that is a member[4] or member organization[5] with no physical trading floor presence who has received permission from the Exchange to generate and submit option quotations electronically through AUTOM in eligible options to which such RSQT has been assigned. An RSQT could be an individual or a member organization, whereas an SQT must be an individual. Under the Exchange's rules, such member or member organization must have a natural person or person associated with that member organization who is a permit holder.[6]

Proposed Phlx Rule 1014(b)(ii)(B) would also make clear that, although an RSQT is a new category of ROT, an RSQT may only submit such quotations electronically from off the floor of the Exchange.[7] Further, the rule would prohibit any person who is either directly or indirectly affiliated with an RSQT to be a specialist, RSQT, SQT, or non-SQT ROT in options in which such affiliated RSQT is assigned. The purpose of this provision is to prevent multiple affiliated parties from quoting electronically in the same option and thus receiving multiple automatic allocations for the same or affiliated beneficial account owners. Finally, an RSQT may trade in a market-making capacity only in classes of options in which he is assigned, because the RSQT is an ROT with market-making obligations.

Appointment of RSQTs

Currently, the Options Allocation, Evaluation and Securities Committee (''OAESC'')[8] has the authority to appoint on-floor SQTs under Exchange Rule 507 and to assign SQTs in one or more Streaming Quote Options.[9] The

[3] An SQT is an ROT who has received permission from the Exchange to generate and submit option quotations electronically through an electronic interface with AUTOM via an Exchange approved proprietary electronic quoting device in eligible options to which such SQT is assigned. *See* Exchange Rule 1014(b)(ii)(A).

[4] The term ''member'' means a holder of a permit which has not been terminated in accordance with the By-Laws and the rules of the Exchange. *See* Exchange By-Law Article I, Section 1–1(p).

[5] The term ''member organization'' means a corporation, partnership (general or limited), limited liability partnership, limited liability company, business trust, or similar organization, transacting business as a broker or a dealer in securities and which has the status of a member organization. *See* Exchange By-Law Article I, Section 1–1(q).

[6] *See* Exchange Rule 908(b).

[7] Exchange Rule 1014 defines an ROT as a regular member or a foreign currency options participant of the Exchange located on the trading floor. Notwithstanding this provision, an RSQT would be permitted only to submit electronic quotations from off the floor of the Exchange.

[8] The OAESC has jurisdiction over the allocation, retention, and transfer of the privileges to deal in all options to, by, and among members on the options and foreign currency options trading floors. *See* Exchange By-Law Article X, Section 10–7. *See* also Exchange Rule 500.

[9] Streaming Quote Options are the specific issues in which SQTs may generate and submit option quotations from on the floor of the Exchange. *See* Exchange Rule 1080(k). The proposed rule change

proposed amendments to Phlx Rule 507 would authorize the OAESC to appoint and assign RSQTs in one or more Streaming Quote Options in a similar fashion to the current practice of assigning SQTs in Streaming Quote Options. Proposed Phlx Rule 507 would set forth the solicitation, application, and review process to be followed by the OAESC in appointing RSQTs.

The current requirements for SQT applicants for assignment in Streaming Quote Options would apply to RSQT applicants as well. Specifically, RSQTs would be required to submit an application for assignment in writing to the Exchange, and the proposed amendments to Phlx Rule 507(b)(ii) would mandate that no application for assignment as an RSQT in Streaming Quote Options would be approved by the OAESC without written certification signed by an officer (Vice President or above) of the Exchange's Financial Automation Department [10] indicating that the RSQT applicant has sufficient technological ability to support his/her continuous quoting requirements as set forth in Phlx Rule 1014(b)(ii) and the RSQT applicant has successfully completed, or is scheduled to complete, testing of its quoting system with the Exchange.

The Exchange expects to approve and appoint RSQTs who demonstrate additional qualifications that would serve to enhance the overall business of the Exchange. Accordingly, in addition to the above requirements, an RSQT applicant must demonstrate to the OAESC that it has: (1) Significant market-making and/or specialist experience in a broad array of securities; (2) superior resources, including capital, technology, and personnel; (3) demonstrated history of stability, superior electronic capacity, and superior operational capacity; (4) proven ability to interact with order flow in all types of markets; (5) existence of order flow commitments; (6) willingness to accept assignments as an RSQT in options overlying 400 or more securities; and (7) willingness and ability to make competitive markets on Phlx and otherwise to promote Phlx in a manner that is likely to enhance the ability of Phlx to compete successfully for order flow in the options it trades.[11] ''Willingness to promote Phlx'' includes assisting in meeting and educating market participants, maintaining communications with member firms in order to be responsive to suggestions and complaints, responding to suggestions and complaints, and other like activities.

The Exchange represents that it intends to use the final factor listed above to take into consideration which of the applicants would best be able to enhance the competitiveness of the Exchange. The Exchange would not apply this factor in any way to restrict, either directly or indirectly, RSQTs' activities as market makers or specialists on other exchanges or to restrict how RSQTs handle orders held by them in a fiduciary capacity to which they owe a duty of best execution.

The Exchange would use the factor relating to the existence of order flow commitments to evaluate existing order flow commitments between the RSQT applicant and order flow providers. A future change to, or termination of, any such commitments would not be used by the Exchange at any point in the future to terminate or take remedial action against an RSQT. Furthermore, the Exchange would not take remedial action solely because orders subject to any such commitments were not subsequently routed to the Exchange. As part of the approval of an RSQT, the Exchange would be permitted to place conditions on the approval based on the operations of the applicant and the number of options in which the RSQT applicant may be assigned. Additionally, an RSQT would not be permitted to transfer its approval to act as an RSQT unless permitted to do so by the Exchange.

The proposed amendments to Phlx Rule 507(b)(iii) would clarify that, as in the case of SQTs, the Exchange's Board of Governors may defer qualifying applications for RSQT status, based on system constraints, capacity restrictions, or other factors relevant to the maintenance of a fair and orderly market. The basis for such deferral, however, would be required to have been objectively determined by the Board, subject to Commission approval or effectiveness pursuant to a filing under Section 19(b) of the Act, as amended. In such an event, the OAESC would be required to provide written notification to any SQT or RSQT applicant whose application is the subject of such limitation(s) or deferral, describing the objective basis for such limitation(s) or deferral.

RSQT Obligations

An RSQT would be responsible to quote continuous, two-sided markets in not less than 60% of the series in each Streaming Quote Option in which such RSQT is assigned.[12] RSQTs' obligation would increase, however, for RSQTs who receive Directed Orders (as defined in Phlx Rule 1080(l)(i)(A)).[13] Specifically, a Directed RSQT (as defined in Phlx Rule 1080(l)(i)(C)) would be responsible to quote continuous, two-sided markets in not less than 100% of the series in each Streaming Quote Option in which such Directed RSQT receive Directed Orders.

RSQT quotations would be subject to the same minimum size requirement as that imposed on SQTs. Current Phlx Rule 1014(b)(ii)(B) allows SQTs to stream electronic quotations with a minimum size of one contract for a period of time following the deployment of an option as a Streaming Quote Option trading on Phlx XL, after which such quotation must be for a minimum of 10 contracts. The rule would be amended to impose the same minimum size requirements on RSQTs and renumbered as Phlx Rule 1014(b)(ii)(D).

ROT Obligations and RSQTs

Exchange Rule 1014 and the commentaries thereto impose certain rights and obligations on ROTs. Because of the unique nature of an RSQT (*i.e.*, participating as an Exchange market maker from off the floor of the Exchange), the proposal would amend various sections of the Commentary to Phlx Rule 1014 to clarify the obligations that would apply to RSQTs.

First, for clarity, Commentary .01 to Phlx Rule 1014 would be amended to state that an RSQT electing to engage in Exchange options transactions is designated as a specialist on the Exchange for all purposes under the Act and the rules and regulations thereunder with respect to options

would expand the definition of Streaming Quote Options to include those issues in which RSQTs may submit electronic quotations from off the floor of the Exchange.

[10] The Exchange's Financial Automation Department is responsible for the design, development, implementation, testing, and maintenance of the Exchange's automated trading systems, surveillance systems, and back office systems. It is also responsible for monitoring the quality of performance and operational readiness of such systems, in addition to user training and validation of user technology as it pertains to such users' interface with the Exchange's systems.

[11] This is similar to Chicago Board Options Exchange, Inc. (''CBOE'') Rule 8.92.

[12] For example, if an RSQT is assigned in one Streaming Quote Option that includes five series (A, B, C, D, and E), such RSQT would be required to quote continuous, two-sided markets in three of those series in order to fulfill the 60% quoting requirement. If such an RSQT initially submits quotations in series A, B, and C, and the size associated with the quotation in Series A is exhausted, such SQT would be required either to refresh its quotation in Series A while continuing to submit quotations in Series B and C, or to submit new quotations in any three of the five series, in order to fulfill the 60% quoting requirement.

[13] *See* SR–Phlx–2004–73.

transactions initiated and effected by him in his capacity as an ROT.[14]

Commentary .01 also imposes certain minimum ''in-person'' trading requirements applicable to ROTs in order to preserve specialist margin treatment. Because RSQTs submitting electronic quotations from off the floor of the Exchange could not possibly fulfill the ''in-person'' requirement, the Exchange proposes to amend Commentary .01 to exclude RSQTs from this requirement.

Similarly, Commentary .03 requires that at least 50% of the trading activity in any quarter (measured in terms of contract volume) of an ROT must ordinarily be in classes of options to which he is assigned. RSQTs may only submit electronic quotations from off the floor in options in which they are assigned (resulting in 100% of their quarterly trading activity measured in terms of contract volume). Therefore, the Exchange proposes to amend Commentary .03 to exclude RSQTs from the 50% obligation, because it does not make sense to apply such a requirement.

The Exchange also proposes to adopt Commentary .06 to Phlx Rule 1014. Commentary .06 requires RSQTs to maintain information barriers that are reasonably designed to prevent the misuse of material, non-public information with any affiliates that may conduct a brokerage business in options assigned to the RSQT or act as a specialist or market maker in any security underlying options assigned to the RSQT, and otherwise comply with the requirements of Phlx Rule 1020 regarding restrictions on the flow of privileged information between the affiliate and the specialist organization.

Commentary .08 currently describes certain ROT transactions that are deemed ''on-floor'' trading for purposes of the rule. The Exchange proposes to adopt Commentary .08(c) to deem any transaction for the account of an RSQT as on-floor trading in order to ensure that RSQTs may effect off-floor transactions in their market maker accounts as for purposes of margin treatment.

As a housekeeping matter, the Exchange proposes to delete Commentary .10 to Phlx Rule 1014, relating to orders given out by an ROT to specialists. The purpose of this proposal is to remain consistent with the Exchange's current proposed rule change relating to limit order display, which requires ROTs who wish to place limit orders on the limit order book to do so electronically via interface with the AUTOM System.[15] An ROT can no longer ''give out'' an order to a specialist but instead must place the order on the limit order book electronically, thus obviating the need for Commentary .10.

Trade Allocation

Currently, Exchange Rule 1014(g)(vii) governs the allocation of trades executed in Streaming Quote Options traded on Phlx XL. The proposed rule change would afford RSQTs the same entitlement to receive contracts under the algorithm described in the rule as SQTs.

Phlx Rule 1014(g)(vii)(A) currently provides that, if one Phlx XL Participant (including the specialist, an SQT, or a non-SQT ROT) is quoting alone at the disseminated price and his quote is not matched by another Phlx XL Participant prior to execution, such Phlx XL Participant would be entitled to receive a number of contracts up to the size associated with his/her quote. The proposed rule change would expand the definition of ''Phlx XL Participant'' to include an RSQT.

Currently, Phlx Rule 1014(g)(vii)(B) governs the automatic allocation algorithm that applies to orders or electronic quotes in Streaming Quote Options that result in automatic executions when two or more Phlx XL Participants have quotes or booked limit orders at the Exchange's disseminated price.[16] Under current Exchange rules, orders in Streaming Quote Options traded on Phlx XL for 5 contracts or fewer are allocated first to the specialist, provided that the specialist is quoting at the Exchange's disseminated price. Other Phlx XL Participants quoting at the execution price are entitled to receive contracts under the algorithm contained in Exchange Rule 1014(g)(vii)(B)(1)(b), which includes a weighted percentage of contracts to be allocated among Phlx XL Participants on parity (including the specialist) on an equal basis and a weighted percentage of contracts to be allocated among Phlx XL Participants on parity on a size pro rata basis.[17] The proposed rule change would include RSQTs in this algorithm applicable to orders for greater than 5 contracts. The algorithm in Phlx Rule 1014(g)(vii)(B)(1)(b) would not apply to a Directed Specialist, SQT, or RSQT. The algorithm applicable to Phlx XL trades that involve a Directed Specialist, SQT, or RSQT is contained in Phlx Rule 1080(l).[18]

Trade Allocation of Non-Electronic Orders

The proposed rule change would provide that current rules applicable to out-of-crowd SQTs regarding participation in non-electronic orders traded in the crowd would apply to RSQTs as well. Specifically, RSQTs would not be permitted to participate in trades stemming from such a non-electronic order unless the order is executed at the price quoted by the RSQT at the time of execution.

The proposal would further clarify the allocation algorithm to be applied by the person responsible to allocate such orders by adding a new definition of ''Actual Size'' to Phlx Rule 1014(g)(v)(B), the Exchange's rule governing the allocation of orders traded in the crowd. Specifically, if the specialist, an SQT, or RSQT is disseminating an electronic quotation at the Exchange's disseminated price in a particular series at the time of the execution of an order in such series, such specialist, SQT, or RSQT's disseminated size at the Exchange's disseminated price would be his or her Actual Size. Actual Size is the number of contracts for each crowd participant on which the person responsible for allocating the trade (''Allocating Participant'') bases allocation of the order among crowd participants on parity. The purpose of this provision is to establish a definition of Actual Size for specialists, out-of crowd SQTs, and RSQTs whose electronically submitted quotations are on parity with other crowd participants. Because the rest of Phlx Rule 1014(g)(v) refers to allocation of orders to ''crowd participants'' on parity, such specialist, SQT, and/or RSQT would be deemed a crowd participant for purposes of this rule.

The Exchange proposes to amend Phlx Rule 1014(g)(v)(D) which permits any ROT or specialist to, in his or her sole discretion, offer to waive, in whole or in part, any part of a trade to which he was entitled to be allocated (''Offer to Waive''). The proposed rule change

[14] *See* Section 11(b) of the Act, 15 U.S.C. 78k(b), and Rule 11b–1 thereunder, 17 CFR 240.11b–1.

[15] *See* SR–Phlx–2004–73.

[16] Phlx Rules 119, 120, and 1014(g) are the general rules concerning the establishment of parity and priority in the execution of orders on the options floor. The trade allocation algorithm in Phlx Rule 1014(g)(vii) generally does not contemplate that price-time priority applies to quotes and orders in Streaming Quote Options. Accordingly, Phlx Rule 1014(g)(vii)(B)(3) states that, notwithstanding the first sentence of Phlx Rule 1014(g)(i), neither Phlx Rule 119(a)–(d) and (f), nor Phlx Rule 120 (insofar as it incorporates those provisions by reference) shall apply to the allocation of automatically executed trades in Streaming Quote Options.

[17] *See* Securities Exchange Act Release No. 50788 (December 3, 2004), 69 FR 71860 (December 10, 2004) (SR–Phlx–2004–57).

[18] *See* SR–Phlx–2004–91.

would exclude RSQTs from the provisions of the rule. An RSQT would not be permitted to waive any part of a trade to which he is entitled to be allocated. Because an RSQT is not physically present on the floor of the Exchange, it would be impractical to permit an RSQT to offer to waive all or a portion of his entitlement, since he could not verbalize such an offer and would not be able to communicate such an offer to waive electronically. Furthermore, the crowd participants would have no means to communicate their acceptance or rejection of such an offer to waive. Therefore, as a practical matter, the Exchange proposes to exclude RSQTs from the provisions contained in Phlx Rule 1014(g)(v)(D).

Finally, the proposal would amend Exchange Rule 1014(g)(vi), which describes who must function as the Allocating Participant in non-electronic orders executed in the crowd. Generally, the Floor Broker representing the order or the specialist is required to be the Allocating Participant. Current Phlx Rule 1014(g)(vi)(iii), however, states that where there is no floor broker and no specialist is involved in the transaction, the largest participant must be the Allocating Participant. The rule would be amended to provide that the largest on-floor participant must be the Allocating Participant, because if an RSQT or out-of-crowd SQT is the largest participant, it is virtually impossible to allocate the order from another crowd on the floor or from a remote location off the floor. Similarly, current Phlx Rule 1014(g)(vi)(iv) states that if there is only one seller and one buyer (no Floor Broker and no specialist is involved) the seller must be the Allocating Participant. However, if the seller is an RSQT (and thus not on the floor of the Exchange), the RSQT could not allocate the order in the crowd. Accordingly, the Exchange proposes to amend Phlx Rule 1014(g)(vi)(iv) to provide that, if the seller or the buyer is an RSQT, the on-floor participant in the transaction would be required to be the Allocating Participant.[19] This provision would now cover each trading situation.

As a housekeeping matter, Phlx Rule 1014(g)(vi)(i)–(iv) would be renumbered for consistency with the numbering of other Exchange rules.

Elimination of ''SQT Zones''

Currently, Commentary .05(b) to Phlx Rule 1014 provides that an SQT may be assigned to (and thus submit quotes electronically in) all of the options located within a specified physical zone on the Exchange Options Floor (''SQT Zone''), provided that such SQT is physically present in such SQT Zone. Each member organization must currently have at least one SQT physically present in each SQT Zone in which such member organization submits electronic quotations. The number and location of SQT Zones will be determined by the Options Committee.

Currently, the entire Exchange floor is considered one SQT Zone. Therefore, the proposed rule change would delete the rule concerning SQT Zones and establish that an SQT or RSQT may be assigned to (and thus submit quotes electronically in) any option traded on Phlx XL for which they are approved by the Exchange. The elimination of this provision would allow SQTs and RSQTs to stream electronic quotations floor-wide without consideration of physical boundaries. SQTs would continue to be required to be physically present on the Exchange floor in order to submit electronic quotations in Streaming Quote Options. Because the entire exchange has been considered one SQT Zone, this deletion would have no practical effect. The Exchange no longer envisions dividing the options trading floor into various SQT Zones.

RSQT Participation in Openings

Phlx Rule 1017 currently permits SQTs to participate in opening transactions by submitting electronic quotations to interact with opening orders. Under the proposed rule change, RSQTs would be permitted to participate in openings in the same manner as SQTs. Commentary .01 to Phlx Rule 1017 currently requires specialists to consider markets from ROTs in the crowd in addition to electronic quotations submitted by SQTs prior to the opening of the underlying security on the primary market. Phlx Rule 1017 would be amended to require specialists to consider RSQT quotations in the pre-opening period. Phlx Rule 1017 would also be amended to require RSQTs to fulfill their quoting requirements under Phlx Rule 1014, as discussed above, once the opening trade price in a series has been disseminated to the Option Price Reporting Authority. Finally, if the specialist determines that a series will not open due to an opening price that is not within an acceptable range or an order imbalance, the specialist currently requests bids and offers from ROTs in the crowd and, in the case of Streaming Quote Options, SQTs. Phlx Rule 1017 would be amended to provide that the specialist would also request bids and offers from RSQTs that are assigned in the option. As with the current rules applicable to ROTs and SQTs, RSQTs would be required to respond to such a request immediately. The opening would be delayed until responses to the specialist's request have been received and the consequent opening price is deemed by a Floor Official to be compatible with a fair and orderly market.

Book Sweep

Currently, Exchange Rule 1080(c)(iii)(B) governs a feature of AUTOM known as ''Book Sweep'' as it relates to Streaming Quote Options trading on Phlx XL. When the specialist or an SQT has engaged the Book Sweep feature, and when such a specialist or SQT submits a quotation that locks or crosses a limit order on the book that represents the Exchange's best bid or offer, such limit order would be executed automatically up to the size associated with the specialist or SQT's quotation and would be automatically allocated in accordance with Exchange rules. Book Sweep functions only in situations where the Exchange's disseminated best bid or offer is represented by a limit order on the limit order book and such bid or offer is or is equal to the National Best Bid/Offer (''NBBO''). The proposed rule change would amend Phlx Rule 1080(c)(iii)(B) to state that an RSQT quotation would also initiate the Book Sweep Function under these conditions. The specialist, RSQT, or SQT may manually initiate the Book Sweep feature by sending a manual quote in situations where the specialist, SQT, or RSQT's automatic generation of electronic quotations is suspended due to, for example, a system malfunction. Eligible orders on the limit order book would be automatically executed up to the size associated with the quote that matches or crosses such limit orders. Orders on the limit order book are not eligible for Book Sweep when the NBBO is crossed (*i.e.*, 2.10 bid, 2 offer).

Book Match

Book Match is a feature of AUTOM that currently provides automatic executions for inbound AUTOM-delivered customer and off-floor broker-dealer[20] orders against customer limit

[19] The Exchange believes that it is more practical to require the on-floor participant to allocate the transaction, because the RSQT is not physically present on the floor of the Exchange.

[20] Exchange Rule 1080(b)(i)(C) defines an ''off-floor broker-dealer'' as a broker-dealer that delivers orders from off the floor of the Exchange for the proprietary account(s) of such broker-dealer, including a market maker located on an exchange or trading floor other than the Exchange's trading floor who elects to deliver orders via AUTOM for the proprietary account(s) of such market maker.

orders on the book. Phlx Rule 1080(g) states that in Streaming Quote Options the contra-side to automatically executed inbound eligible orders can be a limit order on the book or specialist and/or SQT electronic quotes (''electronic quotes'') at the disseminated price, where the Exchange's disseminated size includes a limit order on the book and/or electronic quotes at the disseminated price. Phlx Rule 1080 would be amended to provide that the contra-side to an inbound eligible order can be an RSQT electronic quote. As with Book Sweep, Book Match would not be engaged when the Exchange's disseminated price represented by a limit order on the book is not the NBBO. In these situations, incoming orders would be subject to manual handling by the specialist.

Additional Amendment to Phlx Rule 1080

Phlx Rule 1080, Commentary .01(b)(ii) would be amended in order to clarify that the specialist determines which options pricing model to select per option in non-Streaming Quote Options only. Respecting Streaming Quote Options, each specialist, SQT, and RSQT is a ''responsible broker or dealer'' (as described below) for his proprietary electronic quotation. Therefore, each specialist, SQT, and RSQT may select the options pricing model that is appropriate for him.

Firm Quotations

Exchange Rule 1082, Firm Quotations, would be amended in a number of ways to capture the firm quote requirements applicable to RSQTs. First, Phlx Rule 1082(a)(ii)(B), which currently defines the Exchange's ''disseminated size'' respecting Streaming Quote Options as at least the sum of the size associated with limit orders, specialists' quotations, and SQT quotations, would be amended to expand the definition of disseminated size to include RSQT quotations. Second, the proposed amended Phlx Rule 1082 would be applied to RSQT quotations in Streaming Quote Options in the same manner as it is applied to SQT quotations. Specifically:

- If an SQT or RSQT's (other than a Directed SQT or RSQT's) quotation size in a particular series in a Streaming Quote Option is exhausted, such RSQT's quotation would be deleted from the Exchange's disseminated quotation until the time the RSQT revises his/her quotation.
- If the Exchange's disseminated size in a particular series in a Streaming Quote Option is exhausted at that particular price level, and no specialist, SQT, or RSQT has revised their quotation immediately following the exhaustion of the Exchange's disseminated size, the Exchange would automatically disseminate the specialist's most recent disseminated price (which was that particular price level) prior to the time of such exhaustion with a size of one contract.
- In the event an SQT, RSQT, or specialist in a Streaming Quote Option has electronically submitted on the Exchange bids or offers for a Streaming Quote Option, each such SQT, RSQT, or specialist member would be considered a ''responsible broker or dealer'' for that bid or offer, up to the size associated with such responsible broker or dealer's bid or offer.
- In the event that an RSQT bid or offer locks another Phlx XL Participant's electronic bid or offer, a ''counting period'' of one second would begin during which Phlx XL Participants, including the RSQT whose quotation is locked, may eliminate the locked market. Provided, however, that such RSQT (and any Phlx XL Participant whose electronic bid or offer is locked with another electronic bid/offer) would be required to execute orders at their disseminated quotation.
- In the event of a crossed market (*i.e.*, 1.10 bid, 1 offer) wherein an incoming quotation crosses an existing quotation, the Exchange would: (i) Change the incoming quotation such that it locks the existing quotation; (ii) send a notice to the SQT, RSQT, or specialist that submitted the existing quotation indicating that its quotation was crossed; and (iii) send a notice to the specialist, SQT, or RSQT that submitted the incoming quotation, indicating that its quotation crossed the existing quotation and was changed. Such a locked market is handled in accordance with the rules relating to locked quotations as stated above.

Amendments to Option Floor Procedure Advices

In addition to the proposed amendments to Exchange rules, the Exchange also proposes amendments to certain Exchange Option Floor Procedure Advices (''OFPAs'') in order to make them applicable to RSQTs. The Exchange proposes to amend OFPA A–12, Opening Rotations and SORT Procedures, to clarify that bids and offers may be submitted by RSQTs during opening rotations.[21] The Exchange also proposes amendments to OFPA B–3, Trading Requirements, which includes the same ''in-person'' trading requirement applicable to ROTs that is included in current Commentary .01 to Phlx Rule 1014 and the same obligation for ROTs to conduct 50% of their quarterly trading activity in assigned options contained in Commentary .03 to such Phlx Rule. Because, as stated above, the in-person requirement and the 50% quarterly volume requirement in assigned issues would not apply to RSQTs, OFPA B–3 would be amended to exclude RSQTs from those requirements.

OFPA B–6, Priority of Options Orders for Equity Options and Index Options by Account Type, includes the same trade allocation algorithm for orders represented in the crowd by Floor Brokers and specialists as contained in Phlx Rule 1014(g)(v). Therefore, the Exchange proposes to amend the provisions in Section E of OFPA B–6 relating to Actual Size and Waiver that are identical to the proposed amendments to Phlx Rule 1014(g)(v).

Finally, the Exchange proposes to amend OFPA F–7, Bids and Offers, in a number of ways. As a housekeeping matter, the Exchange proposes to delete the paragraphs in current OFPA F–7 that provide that all bid and offer prices are general and shall not be specified for acceptance by particular members and, that in the absence of a stated size to any bid or offer voiced or displayed on the Options Floor, the person responsible for such bid and offer is deemed to be quoting for one contract. The purpose of this provision is to make OFPA F–7 consistent with another Exchange proposal relating to the acceptance by particular members of Directed Orders [22] and to make it consistent with Phlx Rule 1014(g)(v) and OFPA B–6, each of which addresses crowd participants' ''stated size'' differently. The Exchange proposes to further amend OFPA F–7 to define the Exchange's disseminated size as defined in proposed Phlx Rule 1082(a)(ii). Finally, in order to more specifically describe the content of proposed amended OFPA F–7, the Exchange proposes to change the title from ''Bids and Offers'' to ''Size of Exchange's Disseminated Bid or Offer.''

Summary

The Exchange believes that its proposal to adopt rules respecting RSQTs is an important step forward in

[21] Rotation procedures allow a brief period of auction pricing for each option series during which bids and offers, including, with respect to Streaming Quote Options, bids and offers submitted electronically by SQTs (and, under the proposal, RSQTs), and transactions for that option class may normally only occur in that series. *See* Exchange Rule 1047 and OFPA A–12.

[22] *See* SR–Phlx–2004–91.

the evolution of the Exchange's trading systems towards more electronic trading of options on the Exchange via Phlx XL.

1. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act [23] in general, and furthers the objectives of Section 6(b)(5) of the Act [24] in particular, in that it is designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanisms of a free and open market and a national market system, and to protect investors and the public interest, by allowing a new category of market maker, the RSQT, to quote competitively from off the floor of the Exchange, thereby increasing the depth and liquidity in the Exchange's markets, and allowing the Exchange to remain competitive for order flow by adding additional liquidity to the Exchange's markets, enhancing the ability of order flow providers to fulfill their duty of best execution on behalf of their customers.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any inappropriate burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which Phlx consents, the Commission shall: (a) By order approve such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–Phlx–2004–90 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 Number SR–Phlx–2004–90. 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/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of the filing also will be available for inspection and copying at the principal office of Phlx. All comments received will be posted without change; the Commission does 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 Number SR–Phlx–2004–90 and should be submitted on or before January 18, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[25]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–28149 Filed 12–23–04; 8:45 am]

BILLING CODE 8010–01–P

[23] 15 U.S.C. 78f(b).

[24] 15 U.S.C. 78f(b)(5).

[25] 17 CFR 200.30–3(a)(12).

SOCIAL SECURITY ADMINISTRATION

Rate for Attorney Fee Assessment Beginning in 2005

AGENCY: Social Security Administration (SSA).

ACTION: Notice.

SUMMARY: The Social Security Administration is announcing that the attorney-fee assessment percentage rate under section 206(d) of the Social Security Act (the Act), 42 U.S.C. 406(d), is 6.3 percent for 2005.

FOR FURTHER INFORMATION CONTACT: James A. Winn, Associate General Counsel for Program Law, Office of the General Counsel, Social Security Administration, Phone: (410) 965–3137, email *jim.winn@ssa.gov*.

SUPPLEMENTARY INFORMATION: Section 406 of Public Law No. 106–170, the Ticket to Work and Work Incentives Improvement Act of 1999, established an assessment for the services required to determine and certify payments to attorneys from the benefits due claimants under Title II of the Act. This provision is codified in section 206 of the Act (42 U.S.C. 406). The legislation set the assessment for the calendar year 2000 at 6.3 percent of the amount that would be required to be certified for direct payment to the attorney under section 206(a)(4) or 206(b)(1) before the application of the assessment. For subsequent years, the legislation requires the Commissioner of Social Security to determine the percentage rate necessary to achieve full recovery of the costs of determining and certifying fees to attorneys, but not in excess of 6.3 percent. The Commissioner of Social Security has determined, based on the best available data, that the current rate of 6.3 percent will continue for 2005. During the calendar year 2005, we will begin directly paying fees to attorneys in cases under Title XVI of the Act and to eligible non-attorney representatives in cases under Title II and/or Title XVI of the Act, as provided in sections 302 and 303 of Public Law No. 108–203, the Social Security Protection Act of 2004. Once these new programs begin, we will use the 6.3 percent rate announced in this notice when calculating assessments on direct payments made under these new statutory provisions during the calendar year 2005.

We will continue to review our costs on a yearly basis.

Dated: December 17, 2004.

Dale W. Sopper,

Deputy Commissioner for Finance, Assessment and Management.

[FR Doc. 04–28172 Filed 12–23–04; 8:45 am]

BILLING CODE 4191–02–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Modification of the Tariff-Rate Import Quota for Certain Cheeses

AGENCY: Office of the United States Trade Representative.

ACTION: Modification of the Harmonized Tariff Schedule of the United States.

SUMMARY: This document modifies Additional U.S. Notes 2, 16, 17, 18, 19, 20, 21, 22, 23, and 25 to Chapter 4 of the Harmonized Tariff Schedule of the United States (HTS) to reflect the enlargement of the European Union (EU) to 25 countries on May 1, 2004.

EFFECTIVE DATE: This modification is effective on January 1, 2005.

FOR FURTHER INFORMATION CONTACT: Sharon Sydow, Director for Agricultural Trade Policy, Office of the United States Trade Representative, 600 17th Street NW., Washington, DC 20508; telephone (202) 395–6127.

SUPPLEMENTARY INFORMATION: On May 1, 2004, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic, and Slovenia acceded to the European Community (EC), and the EC customs union of 15 member countries (''EC–15'') was enlarged to a customs union of 25 member countries (''EC–25''). At that time, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic, and Slovenia withdrew their tariff schedules under the World Trade Organization (WTO) and applied the common external tariff of the EC–15 to imports into the EC–25. To recognize the membership of Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic, and Slovenia in the EC–25, the tariff-rate quota (TRQ) allocations for certain cheeses from the EC–15 will be available to the EC–25, and the TRQ allocation for certain cheeses from the Czech Republic, Hungary, Poland, and the Slovak Republic will become part of the total TRQ allocations for certain cheeses from the EC–25.

Section 404(d)(3) of the Uruguay Round Agreements Act (URAA) (19 U.S.C. 3601(d)(3)) authorizes the President to allocate in-quota quantities of a TRQ for any agricultural product among supplying countries or customs areas and to modify any allocation as the President determines appropriate. Section 604 of the Trade Act of 1974, as amended (''Trade Act'') (19 U.S.C. 2483) authorizes the President to embody in the HTS the substance of the relevant provisions of that Act, and of other Acts affecting import treatment, and actions thereunder, including the removal, modification, continuance, or imposition of any rate of duty or other import restriction.

In paragraph (3) of Proclamation 6763 of December 23, 1994, the President delegated his authority under section 404(d)(3) of the URAA to the United States Trade Representative (USTR). In paragraph 5 of Proclamation 6914 of August 26, 1996, the President determined that it is appropriate to authorize the USTR to exercise his authority under section 604 of the Trade Act to embody in the HTS the substance of any action taken by USTR under section 404(d)(3) of the URAA.

Modification of the HTS

Pursuant to the authority delegated to the USTR in Proclamations 6763 and 6914, the USTR has determined that it is appropriate to modify the TRQ allocations of Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic, and Slovenia and to embody such modifications in the HTS. Effective with respect to articles entered, or withdrawn from warehouse for consumption, on or after January 1, 2005:

1. The additional U.S. notes to chapter 4 are modified by deleting additional U.S. note 2 and inserting the following new additional U.S. note 2 in lieu thereof:

''2. For the purposes of this schedule, the expression ''EC 25'' refers to articles which are the product of one of the following: Austria, Belgium, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, the Federal Republic of Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, the Slovak Republic, Slovenia, Spain, Sweden or the United Kingdom.''

2. Additional U.S. note 16 to chapter 4 is modified by:

(a) Deleting from the list in such note the following countries and quantities:

''Czech Republic 200,000

Poland 1,236,224

Slovak Republic 600,000''; and

(b) Deleting from the list in such note the expression ''EC 15'' and the quantity ''25,810,000'' set out opposite such expression and inserting in lieu thereof the expression ''EC 25'' and the quantity ''27,846,224''.

3. Additional U.S. note 17 to chapter 4 is modified by:

(a) Deleting from the list in such note the following country and quantity:

''Czech Republic 50,000''; and

(b) Deleting from the list in such note the expression ''EC 15'' and the quantity ''2,779,000'' set out opposite such expression and inserting in lieu thereof the expression ''EC 25'' and the quantity ''2,829,000''.

4. Additional U.S. Note 18 to chapter 4 is modified by:

(a) Deleting from the list in such note the following country and quantity:

''Czech Republic 50,000''; and

(b) Deleting from the list in such note the expression ''EC 15'' and the quantity ''1,263,000'' set out opposite such expression and inserting in lieu thereof the expression ''EC 25'' and the quantity ''1,313,000''.

5. Additional U.S. Note 19 to chapter 4 is modified by:

(a) Deleting from the list in such note the expression ''EC 15'' and inserting in lieu thereof the expression ''EC 25''.

6. Additional U.S. Note 20 to chapter 4 is modified by:

(a) Deleting from the list in such note the following country and quantity:

''Czech Republic 100,000''; and

(b) Deleting from the list in such note the expression ''EC 15'' and the quantity ''6,289,000'' set out opposite such expression and inserting in lieu thereof the expression ''EC 25'' and the quantity ''6,389,000''.

7. Additional U.S. Note 21 to chapter 4 is modified by:

(a) Deleting from the list in such note the following country and quantity:

''Poland 1,325,000''; and

(b) Deleting from the list in such note the expression ''EC 15'' and the quantity ''4,082,000'' set out opposite such expression and inserting in lieu thereof the expression ''EC 25'' and the quantity ''5,407,000''.

8. Additional U.S. Note 22 to chapter 4 is modified by:

(a) Deleting from the list in such note the expression ''EC 15'' and inserting in lieu thereof the expression ''EC 25''.

9. Additional U.S. Note 23 to chapter 4 is modified by:

(a) Deleting from the list in such note the following country and quantity:

''Poland 174,907''; and

(b) Deleting from the list in such note the expression ''EC 15'' and the quantity ''4,250,000'' set out opposite such expression and inserting in lieu thereof the expression ''EC 25'' and the quantity ''4,424,907''.

10. Additional U.S. Note 25 to chapter 4 is modified by:

(a) Deleting from the list in such note the following countries and quantities:

''Czech Republic 400,000

Hungary 800,000''; and

(b) Deleting from the list in such note the expression ''EC 15'' and the quantity ''21,700,000'' set out opposite such expression and inserting in lieu thereof the expression ''EC 25'' and the quantity ''22,900,000''.

Robert B. Zoellick,

United States Trade Representative.

[FR Doc. 04–28123 Filed 12–23–04; 8:45 am]

BILLING CODE 3190–W5–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Agency Information Collection Activity Under OMB Review

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for extension of the currently approved collection. The ICR describes the nature of the information collection and the expected burden. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on July 13, 2004, page 42078.

DATES: Comments must be submitted on or before January 26, 2005. A comment to OMB is most effective if OMB receives it within 30 days of publication.

FOR FURTHER INFORMATION CONTACT: Judy Street on (202) 267–9895.

SUPPLEMENTARY INFORMATION:

Federal Aviation Administration

Title: Airport Noise Compatibility Planning.

Type of Request: Extension of a currently approved collection.

OMB Control Number: 2120–0517.

Forms(s): NA.

Affected Public: A total of 15 airport operators and consultants.

Abstract: The respondents are those airport operators voluntarily submitting noise exposure maps and noise compatibility programs to the FAA for review and approval. FAA approval makes airport operators' noise compatibility programs eligible for discretionary grant funds set aside under the FAA Airport Improvement Program for that purpose.

Estimated Annual Burden Hours: An estimated 43,650 hours annually.

Addresses: Send comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, Attention FAA Desk Officer.

Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimates of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Issued in Washington, DC, on December 17, 2004.

Judith D. Street,

FAA Information Collection Clearance Officer, Standards and Information Division, APF–100.

[FR Doc. 04–28234 Filed 12–23–04; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Passenger Facility Charge (PFC) Approvals and Disapprovals

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Monthly Notice of PFC Approvals, and Disapprovals. In November 2004, there were six applications approved. This notice also includes information on three applications, approved in October 2004, inadvertently left off the October 2004 notice. Additionally, five approved amendments to previously approved applications are listed.

SUMMARY: The FAA publishes a monthly notice, as appropriate, of PFC approvals and disapprovals under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101–508) and Part 158 of the Federal Aviation Regulations (14 CFR part 158). This notice is published pursuant to paragraph d of § 158.29.

PFC Applications Approved

Public Agency: Luzerne and Lackawanna Counties, Avoca, Pennsylvania.

Application Number: 04–04–U–00–AVP.

Application Type: Use PFC revenue.

PFC Level: $4.50.

Total PFC Revenue to be Used in This Decision: $522,012.

Charge Effective Date: May 1, 2001.

Estimated Charge Expiration Date: April 1, 2011.

Class of Air Carriers Not Required To Collect PFC's: No change from previous decision.

Brief Description of Projects Approved For Use: Design and construct snow removal equipment maintenance facility. Design and construct airport perimeter fence. Acquire snow removal equipment.

Decision Date: October 21, 2004.

FOR FURTHER INFORMATION CONTACT: Lori Ledebohm, Harrisburg Airports District Office, (717) 730–2835.

Public Agency: Gillette-Campbell County Airport Board, Gillette, Wyoming.

Application Number: 04–04–U–00–GCC.

Application Type: Use PFC revenue.

PFC Level: $4.50.

Total PFC Revenue To Be Used in This Decision: $40,000.

Charge Effective Date: December 1, 2001.

Estimated Charge Expiration Date: December 1, 2004.

Class of Air Carriers Not Required To Collect PFC's: No change from previous decision.

Brief Description of Project Approved For Use: Construct combined aircraft rescue and firefighting/snow removal equipment building.

Decision Date: October 29, 2004.

FOR FURTHER INFORMATION CONTACT: Christopher J. Schaffer, Denver Airports District Office, (303) 342–1258.

Public Agency: Gillette-Campbell County Airport Board, Gillette, Wyoming.

Application Number: 04–05–C–00–GCC.

Application Type: Impose and use a PFC.

PFC Level: $4.50.

Total PFC Revenue Approved in This Decision: $170,000.

Earliest Charge Effective Date: January 1, 2005.

Estimated Charge Expiration Date: January 1, 2008.

Classes of Air Carriers Not Required To Collect PFC's: Air taxi/commercial operators filing or required to file FAA Form 1800–31.

Determination: Approved. Based on information contained in the public agency's application, the FAA has determined that the approved class

accounts for less than 1 percent of the total annual enplanements at Gillette-Campbell County Airport.

Brief Description of Project Approved for Collection and Use: Acquire two snow removal vehicles.

Decision Date: October 29, 2004.

FOR FURTHER INFORMATION CONTACT: Christopher J. Schaffer, Denver Airports District Office, (303) 342–1258.

Public Agency: Augusta Aviation Commission, Augusta, Georgia.

Application Number: 04–02–C–00–AGS.

Application Type: Impose and use a PFC.

PFC Level: $4.50.

Total PFC Revenue Approved in This Decision: $2,007,000.

Earliest Charge Effective Date: July 1, 2030.

Estimated Charge Expiration Date: August 1, 2032.

Class of Air Carriers Not Required To Collect PFC's: Nonscheduled/on-demand air carriers.

Determination: Approved. Based on information contained in the public agency's application, the FAA has determined that the approved class accounts for less than 1 percent of the total annual enplanements at Augusta Regional Airport.

Brief Description of Projects Approved for Collection And Use:

Fencing improvements.

Terminal security improvements.

Runway safety area improvements.

Communications equipment.

Runway 8/26 rehabilitation.

General aviation apron partial pavement rejuvenation.

Taxiway E crack sealing.

Airport layout plan update.

Runway 17/35 rehabilitation.

PFC development, implementation, and administration.

Decision Date: November 4, 2004.

FOR FURTHER INFORMATION CONTACT: Paul Lo, Atlanta Airports District Office, (404) 305–7145.

Public Agency: Monroe County Board of Commissioners, Key West, Florida.

Application Number: 04–08–C–00–EYW.

Application Type: Impose and use a PFC.

PFC Level: $4.50.

Total PFC Revenue Approved in This Decision: $425,250.

Earliest Charge Effective Date: February 1, 2005.

Estimated Charge Expiration Date: July 1, 2005.

Classes of Air Carriers not Required to Collect PFC's: (1) Air taxi/commercial operators filing FAA form 1800–31; and (2) communters or small certificated air carriers filing Department of Transportation Form 298C T1 or E1.

Determination: Approved. Based on information contained in the public agency's application, the FAA has determined that each approved class accounts for less than 1 percent of the total annual enplanements at Key West International Airport (EYW).

Brief Description of Projects Approved for Collection at EYW and Use at EYW:

PFC application.

Noise improvement program phase 4.

Noise contour update #5.

New terminal complex development—phase II.

Customs building rehabilitation.

Taxiway 9 pavement rehabilitation.

New terminal design including permitting.

Wildlife study.

Acquire pavement sweeper.

Seal coat ramps and mark, phase II.

Environmental mitigation, mosquito ditches.

Security perimeter fencing.

Brief Description of Projects Approved for Collection at EYW and Use at Florida Keys Marathon Airport:

Rehabilitate terminal canopy.

Airfield guidance signs.

Taxiway lights, taxiways E and D.

Update airport layout plan.

Brief Description of Project Approved For Collection at EYW and Future Use at EYW: Runway safety area development.

Decision Date: November 5, 2004.

FOR FURTHER INFORMATION CONTACT: Susan Moore, Orlando Airports District Office, (407) 812–6331, extension 120.

Public Agency: Tupelo Airport Authority, Tupelo, Mississippi.

Application Number: 04–04–C–00–TUP.

Application Type: Impose and use a PFC.

PFC Level: $4.50.

Total PFC Revenue Approved In This Decision: $170,000.

Earliest Charge Effective Date: January 1, 2013.

Estimated Charge Expiration Date: July 1, 2014.

Class Of AIR Carriers Not Required To Collect PFC's: None.

Brief Description of Projects Approved For Collection And Use:

Airport terminal and entrance security equipment acquisition.

Airport passenger equipment acquisition.

Airport equipment acquisition.

Brief Description Of Disapproved Project:

Past Airport Improvement Program project audit costs.

Determination: The FAA has determined that these audit costs are administrative elements of Airport Improvement Program (AIP) grant approvals. Administrative elements of AIP grant approvals do not meet the project eligibility requirements § 158.15.

Decision Date: November 5, 2004.

FOR FURTHER INFORMATION CONTACT: David Shumate, Jackson Airports District Office, (601) 664–9882.

Public Agency: Bradford Regional Airport Authority, Lewis Run, Pennsylvania.

Application Number: 04–03–U–00–BFD.

Application Type: Use PFC revenue.

PFC Level: $4.50.

Total PFC Revenue to Be Used in This Decision: $7,996.

Charge Effective Date: May 1, 2003.

Estimated Charge Expiration Date: December 1, 2009.

Class of Air Carriers Not Required to Collect PFC's: No change from previous decision.

Brief Description of Project Approved For Use: Deicing equipment.

Decision Date: November 24, 2004.

FOR FURTHER INFORMATION CONTACT: Lori Ledebohm, Harrisburg Airports District Office, (717) 730–2835.

Public Agency: Allegheny County Airport Authority, Pittsburgh, Pennsylvania.

Application Number: 04–03–U–00–PIT.

Application Type: Use PFC revenue.

PFC Level: $4.50.

Total PFC Revenue to Be Used in This Decision: $7,834,933.

Charge Effective Date: October 1, 2001.

Estimated Charge Expiration Date: October 1, 2006.

Class of Air Carriers Not Required to Collect PFC's: No change from previous decision.

Brief Description of Project Approved For Use: Improve runway safety areas for runways 10L/28R and 10R/28L.

Decision Date: November 24, 2004.

FOR FURTHER INFORMATION CONTACT: Lori Ledebohm, Harrisburg Airports District Office, (717) 730–2835.

Public Agency: Roanoke Regional Airport Commission, Roanoke, Virginia.

Application Number: 04–02–C-00–ROA.

Application Type: Impose and use a PFC.

PFC Level: $4.50.

Total PFC Revenue Approved in This Decision: $8,483,280.

Earliest Charge Effective Date: February 1, 2005.

Estimated Charge Expiration Date: November 1, 2011.

Class of Air Carriers Not Required to Collect PFC's: Air taxi/commercial operators filing FAA Form 1800–31.

Determination: Approved. Based on information contained in the public agency's application, the FAA has determined that the approved class accounts for less than 1 percent of the total annual enplanements at Roanoke Regional Airport.

Brief Description of Projects Approved For Collection and Use:

General aviation rehabilitation phases 1 and 1B (construct taxiway and tie-down).

Rehabilitate and construct taxiway A—north and middle.

Multi-user flight information display system.

Passenger elevator from concourse to ground level.

Drainage improvements.

Update noise exposure maps, phase 1.

Install precision approach path indicator on runway 33.

Construct taxiway A—south.

Sinkhole repair on airfield operations area.

Construct entrance road and non-revenue parking for general aviation area.

Runway snow blower.

Rubber wheel snow loader.

Rehabilitate runways 6/24 and relocate taxiway E; rehabilitate taxiways L, P, G, and K.

Acquire passenger boarding device.

Rehabilitate terminal building.

Construct passenger baggage ramp.

Acquire land in runway 24 protection zone.

Construct perimeter fencing and gate.

Runway tunnel rehabilitation—phase 2.

Acquire land for airport expansion, 2.7 acres.

Acquire navigational aid land—8.5 acres in the critical area.

Overhead directional signage at terminal entrance.

Regional jet adapter for leading bridge.

Relocate taxiways A and G—design and demolish (phases 1 and 2).

Rehabilitate runway 15/33, phases 1 and 2, and construct safety area.

Install engineered materials arresting system for safety area, runway 15.

Noise abatement program, phases 2, 3, and 4.

PFC program formulation and annual administration.

Decision Date: November 24, 2004.

FOR FURTHER INFORMATION CONTACT: Terry J. Page, Washington Airports District Office, (703) 661–1354.

Amendment to PFC Approvals:

Amendment No. City, State	Amendment approved date	Original approved net PFC revenue	Amended approved net PFC revenue	Original estimated charge exp. date	Amended estimated charge exp. date
* 03–04–C–01–AZO Kalamazoo, MI	10/28/04	$2,080,000	$2,080,000	05/01/07	05/01/06
93–03–C–02–SJC San Jose, CA	11/23/04	17,245,000	16,535,353	05/01/97	05/01/97
92–01–C–04–SBP San Luis Obispo, CA	11/23/04	584,587	615,677	12/01/94	12/01/94
00–03–C–02–MDT Middletown, PA	11/24/04	4,206,613	10,903,365	01/01/03	01/01/03
02–04–C–01–MDT Middletown, PA	11/24/04	66,334,500	95,513,500	08/01/20	11/01/29

Note: The amendment denoted by an asterisk (*) includes a change to the PFC level charged from $3.00 per enplaned passenger to $4.50 per enplaned passenger. For Kalamazoo, MI, this change is effective on January 1, 2005.

Issued in Washington, DC on December 16, 2004.

Joseph G. Washington,

Acting Manager, Financial Analysis and Passenger Facility Charge Branch.

[FR Doc. 04–28233 Filed 12–23–04; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA–2003–16171]

Aircraft Rescue and Fire Fighting (ARFF) Mobile Live Fire Training Simulators

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Notice of policy.

SUMMARY: The FAA issues regulations and prescribes standards for the training of aircraft rescue and fire fighters (ARFF) on United States airports certificated under 14 Code of Federal Regulations part 139. One of the requirements of part 139 is for all ARFF personnel to participate in at least one live-fire drill every 12 months. As guidance for airport operators in providing this training, the FAA issued standards for different size fire training facilities based on the largest air carrier aircraft serving the airport. With the introduction of new technologies, ARFF personnel have had the option to train on both mobile as well as fixed training facilities. The FAA published a Notice of Proposed Policy: Request for Comments in the **Federal Register** on September 18, 2003 at 68 FR 54772, seeking public comment on whether we should allow firefighters at Index C, D, and E airports to meet the § 139.319 requirements using the mobile trainers every year. As a result of the comments received, FAA's policy is being modified to accept mobile simulators for 2 years for Index C, D, and E airports holding a Class I airport operating certificate. Every third year, these airport fire departments will be required to attend a large fixed facility to learn about new technologies and procedures and to gain experience fighting a larger pit fire than the mobile simulators can duplicate. Class I airports that are Index A and B and Class II, III, and IV airports may continue to use the mobile trainer every year to meet the 14 CFR part 139 requirements.

FOR FURTHER INFORMATION CONTACT: Ken Gilliam, Senior Fire Fighting Specialist, Airport Safety and Operations Division, AAS–300, Federal Aviation Administration, 800 Independence Ave. SW., Washington, DC 20591, telephone (407) 812–6331, ext 34.

SUPPLEMENTARY INFORMATION: The 1988 revision of 14 Code of Federal Regulations part 139, Certification and Operations: Land Airports Serving Certain Air Carriers, section 139.319(j)(3) requires ''All rescue and fire fighting personnel participate in at least one live fire drill every 12 months.'' 52 FR 44276 (Nov. 18, 1997) (effective Jan. 1, 1988). At the time this rule was promulgated, hydrocarbon fuels, such as diesel or jet-A, fueled the training facilities. In the early 1990s, Federal and State environmental protection agencies began banning such facilities because of ground contamination from the fuel. As a result, the FAA assisted in developing Liquid Propane Gas (LPG) fired facilities. The FAA funded these facilities throughout the country. The FAA refers to them as regional training facilities because, mostly, they were intended to serve an area of more than one state. The aim was for a fire fighter to travel to the nearest training facility and receive both classroom and live fire training. FAA's position has been that all ARFF personnel should be exposed to live

ground rule fire fighting, either at their home airport or at a regional training facility. The size of the fire at a training facility was to be commensurate with the type of air carrier service that could be expected to serve the airport of the ARFF personnel.

In the mid-1990's, industry, with the assistance of FAA, developed a mobile fire training simulator that could be transported from airport to airport on trucks. The simulations allowed for engine fires, interior fires, wheel well fires, and cargo hold fires. However, one of the drawbacks of the first models of the mobile simulator was that they did not provide for a ground fire. In the late 1990's industry was able to develop a grid system ancillary to the simulator that provided a ground fire of limited size.

The FAA published a Notice of Proposed Policy: Request for Comments in the **Federal Register** on September 18, 2003, at 54772, seeking public comment on whether we should allow firefighters at Index C, D, and E airports to meet the section 139.319 requirements using the mobile trainers every year. The advantages and disadvantages of using Mobile Aircraft Fire Trainers for annual training by all airports were outlined in the Notice of Proposed Policy. Twenty-six comments were entered on Docket number 16171. Sixteen comments were in favor of using mobile trainers for index C, D, and E airports and ten were against. Two of the sixteen in favor included stipulations.

Commenters in favor (16) provided the following reasons:

1. Flexibility (5)—more training variables available
2. Economic (10)—lower individual student and operational cost
3. Training with local procedures and equipment (10)—students can train on the same equipment they use every day, rather than the equipment maintained at a regional facility
4. Frequency of training (4)—can increase with mobile trainers
5. Cross training with structural and mutual aid companies (7)—local training can include the local government municipal firefighters and emergency services that would back up the airport ARFF department
6. Use with tri-annual exercises (7)
7. FAA inspector use (1)—able to observe
8. Train while maintaining index (1)—crews remain in service on site
9. Mobility (4)
10. Used in search and rescue training (2)
11. Uses modern and high technology (2)
12. Reduces pollution from large pit fires (1)
13. Increases fire fighter proficiency (1)
14. All associated agencies can participate (1)—non fire
15. Train at different locations on the airport (1)
16. Experience in past use is favorable (1)

Commenters opposed (10) provided the following reasons:

1. Size—a mobile trainer does not provide the perception of a large incident (10)
2. Cost should not be a factor—there should not be a price on safety (3)
3. Mobile trainers should not replace fixed facilities (2)
4. Increased use of mobile trainers will have an adverse impact on fixed facilities (4)
5. New Large aircraft coming will further the problems of training (1)—(Although we note that any aircraft in the new large aircraft category would require Index E ARFF capability, and could not operate at the Index A, B, or C airports).
6. Not environmentally friendly because of the water run off (1)
7. Larger facilities are better and provide greater quality (1)
8. Lowers standards (3)

Some specific comments made by various organizations individuals were:

- The American Association of Airport Executives (AAAE) opposed the increased use of the mobile trainer for index C, D, and E stating the FAA should:
  1. Stay with the current policy
  2. Conduct further study
  3. Develop a policy that provides flexibility and also maintains the present policy
- Eight members of AAE and Airports Council International—North America commented, some for and some against the proposal.
- The Air Line Pilots Association opposed the use of mobile trainers, citing the elimination of fixed facilities and the smaller size of the mobile trainers.
- Two international commenters, Transport Canada and Concord Express Limited, opposed the use of the mobile trainer, citing the size of the pool fire and the size of the mock-up as the reason.
- One commenter in favor of the use of mobile trainers each year at all airports made the point that while fighting a large fire is important, it is only a part of ARFF. He goes on the say ''The tactics used on a 10,000 gallon ground fuel spill fire and a 5,000 gallon ground spill fire using an ARFF truck are going to be the same. The mandate is that a fire of a certain size be fought; it does not go on to specify how it is to be fought. The tactics will vary by airport, because the equipment will vary. Since the airport decides on the type of equipment it buys, and on the tactics it will use, it should also decide on the best training options available.''
- The FAA received a letter from a tenant fire-fighting department on an airport extolling the virtues of the mobile simulator. According to the letter, the mobile simulator was found to be a helpful and realistic trainer. It went on to say that the simulator allows fire crews to use both hand lines and ARFF truck turrets, and easily simulates interior and exterior aircraft fires.

Recognizing the virtues and shortcomings of both systems and the diversity of opinions in the airport community as well as in the ARFF community, the FAA will adopt this policy for the following reasons: the use of the mobile trainer will allow more flexibility with the fire fighters training on their own equipment at local facilities with local procedures and equipment, allow for greater frequency of training, training with structural and mutual aid companies, provide training of crews without the need to travel and in some cases without crews being out of service, training at different locations on a local airport, provides many variable scenarios placing emphasis on incidents responded to on a daily bases as opposed to the pool fire encountered infrequently, and allows for more frequent training therefore lowering individual student and operational cost. The reduction in pool size is offset in that the mobile trainer provides fire evolutions similar to what is actually being offered by the larger facilities today. Many burn only one fourth the size of the pit due to economic reasons.

In finding that an airport has met the requirement of 14 CFR 139.319(i)(3), the FAA will accept the use of mobile training simulators for 2 years for Class I Index C, D, and E airports. Every third year, these airport fire departments will be required to attend a large fixed facilities as referenced in the Advisory Circular AC150/5220–17A to learn about new technologies and procedures and to gain experience fighting a larger pit fire than the mobile simulators can duplicate. For Class I airports that are Index A and B, and for Class II, III, and IV airports, they may continue to use the mobile trainer every year to meet the 14 CFR part 139 requirements.

Issued in Washington, DC, on November 30, 2004.

David L. Bennet,

Director, Office of Airport Safety and Standards.

[FR Doc. 04–28235 Filed 12–23–04; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. 2004–19922]

Requested Administrative Waiver of the Coastwise Trade Laws

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Invitation for public comments on a requested administrative waiver of the Coastwise Trade Laws for the vessel CAROL ANN.

SUMMARY: As authorized by Pub. L. 105–383 and Pub. L. 107–295, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below. The complete application is given in DOT docket 2004–19922 at *http://dms.dot.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels.

If MARAD determines, in accordance with Pub. L. 105–383 and MARAD's regulations at 46 CFR Part 388 (68 FR 23084; April 30, 2003), that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR Part 388.

DATES: Submit comments on or before January 26, 2005.

ADDRESSES: Comments should refer to docket number MARAD–2004 19922. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. DOT Dockets, Room PL–401, Department of Transportation, 400 7th St., SW., Washington, DC 20590–0001. You may also send comments electronically via the Internet at *http://dmses.dot.gov/submit/.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., e.t., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: Michael Hokana, U.S. Department of Transportation, Maritime Administration, MAR–830 Room 7201, 400 Seventh Street, SW., Washington, DC 20590. Telephone 202–366–0760.

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel CAROL ANN is:

Intended Use: Carrying passengers for hire, coastal sailing cruises.

Geographic Region: California.

Dated: December 17, 2004.

By order of the Maritime Administrator.

Joel C. Richard,

Secretary, Maritime Administration.

[FR Doc. 04–28204 Filed 12–23–04; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. 2004–19921]

Requested Administrative Waiver of the Coastwise Trade Laws

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Invitation for public comments on a requested administrative waiver of the Coastwise Trade Laws for the vessel MYEERAH.

SUMMARY: As authorized by Pub. L. 105–383 and Pub. L. 107–295, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below. The complete application is given in DOT docket 2004–19921 at *http://dms.dot.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with Pub. L. 105–383 and MARAD's regulations at 46 CFR Part 388 (68 FR 23084; April 30, 2003), that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR Part 388.

DATES: Submit comments on or before January 26, 2005.

ADDRESSES: Comments should refer to docket number MARAD–2004 19921. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. DOT Dockets, Room PL–401, Department of Transportation, 400 7th St., SW., Washington, DC 20590–0001. You may also send comments electronically via the Internet at *http://dmses.dot.gov/submit/.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., e.t., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: Michael Hokana, U.S. Department of Transportation, Maritime Administration, MAR–830 Room 7201, 400 Seventh Street, SW., Washington, DC 20590. Telephone 202–366–0760.

SUPPLEMENTARY INFORMATION: As described by the applicant, the intended service of the vessel MYEERAH is:

Intended Use: Intended for charter.

Geographic Region: East Coast of the United States and Florida.

Dated: December 17, 2004.

By order of the Maritime Administrator.

Joel C. Richard,

Secretary, Maritime Administration.

[FR Doc. 04–28203 Filed 12–23–04; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. 2004–19920]

Requested Administrative Waiver of the Coastwise Trade Laws

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Invitation for public comments on a requested administrative waiver of the Coastwise Trade Laws for the vessel TEMPTATION.

SUMMARY: As authorized by Pub. L. 105–383 and Pub. L. 107–295, the Secretary

of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below. The complete application is given in DOT docket 2004–19920 at *http://dms.dot.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with Pub. L. 105–383 and MARAD's regulations at 46 CFR Part 388 (68 FR 23084; April 30, 2003), that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR Part 388.

DATES: Submit comments on or before January 26, 2005.

ADDRESSES: Comments should refer to docket number MARAD–2004 19920. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. DOT Dockets, Room PL–401, Department of Transportation, 400 7th St., SW., Washington, DC 20590–0001. You may also send comments electronically via the Internet at *http://dmses.dot.gov/submit/.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: Michael Hokana, U.S. Department of Transportation, Maritime Administration, MAR–830 Room 7201, 400 Seventh Street, SW., Washington, DC 20590. Telephone 202–366–0760.

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel TEMPTATION is:

Intended Use: Day sail charter use.

Geographic Region: Texas.

Dated: December 17, 2004.

By order of the Maritime Administrator.

Joel C. Richard,

Secretary, Maritime Administration.

[FR Doc. 04–28205 Filed 12–23–04; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2004–19875]

Notice of Receipt of Petition for Decision That Nonconforming 1998 BMW 3 Series Passenger Cars Are Eligible for Importation

AGENCY: National Highway Traffic Safety Administration, DOT.

ACTION: Notice of receipt of petition for decision that nonconforming 1998 BMW 3 series passenger cars are eligible for importation.

SUMMARY: This document announces receipt by the National Highway Traffic Safety Administration (NHTSA) of a petition for a decision that 1998 BMW 3 series passenger cars that were not originally manufactured to comply with all applicable Federal motor vehicle safety standards are eligible for importation into the United States because (1) they are substantially similar to vehicles that were originally manufactured for importation into and sale in the United States and that were certified by their manufacturer as complying with the safety standards, and (2) they are capable of being readily altered to conform to the standards.

DATES: The closing date for comments on the petition is January 26, 2005.

ADDRESSES: Comments should refer to the docket number and notice number, and be submitted to: Docket Management, Room PL–401, 400 Seventh Street, SW., Washington, DC 20590. (Docket hours are from 9 a.m. to 5 p.m.) 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*.

FOR FURTHER INFORMATION CONTACT: Coleman Sachs, Office of Vehicle Safety Compliance, NHTSA ((202) 366–3151).

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 30141(a)(1)(A), a motor vehicle that was not originally manufactured to conform to all applicable Federal motor vehicle safety standards shall be refused admission into the United States unless NHTSA has decided that the motor vehicle is substantially similar to a motor vehicle originally manufactured for importation into and sale in the United States, certified under 49 U.S.C. 30115, and of the same model year as the model of the motor vehicle to be compared, and is capable of being readily altered to conform to all applicable Federal motor vehicle safety standards.

Petitions for eligibility decisions may be submitted by either manufacturers or importers who have registered with NHTSA pursuant to 49 CFR part 592. As specified in 49 CFR 593.7, NHTSA publishes notice in the **Federal Register** of each petition that it receives, and affords interested persons an opportunity to comment on the petition. At the close of the comment period, NHTSA decides, on the basis of the petition and any comments that it has received, whether the vehicle is eligible for importation. The agency then publishes this decision in the **Federal Register**.

Sunshine Car Import (''SCI'') of Ft. Myers, Florida, (Registered Importer 01–289) has petitioned NHTSA to decide whether nonconforming 1998 BMW 3 series passenger cars are eligible for importation into the United States. The vehicles which SCI believes are substantially similar are 1998 BMW 3 series passenger cars that were manufactured for importation into, and sale in, the United States and certified by their manufacturer as conforming to all applicable Federal motor vehicle safety standards.

The petitioner claims that it carefully compared non-U.S. certified 1998 BMW 3 series passenger cars to their U.S.-certified counterparts, and found the vehicles to be substantially similar with respect to compliance with most Federal motor vehicle safety standards.

SCI submitted information with its petition intended to demonstrate that non-U.S. certified 1998 BMW 3 series passenger cars, as originally manufactured, conform to many Federal motor vehicle safety standards in the same manner as their U.S. certified counterparts, or are capable of being readily altered to conform to those standards.

Specifically, the petitioner claims that non-U.S. certified 1998 BMW 3 series passenger cars are identical to their U.S. certified counterparts with respect to

compliance with Standard Nos. 102 *Transmission Shift Lever Sequence, Starter Interlock, and Transmission Braking Effect*, 103 *Windshield Defrosting and Defogging Systems*, 104 *Windshield Wiping and Washing Systems*, 105 *Hydraulic and Electric Brake Systems*, 106 Brake Hoses, 109 *New Pneumatic Tires*, 113 *Hood Latch System*, 116 *Motor Vehicle Brake Fluids*, 124 *Accelerator Control Systems*, 201 *Occupant Protection in Interior Impact*, 202 *Head Restraints*, 204 *Steering Control Rearward Displacement*, 205 *Glazing Materials*, 206 *Door Locks and Door Retention Components*, 207 *Seating Systems*, 209 *Seat Belt Assemblies*, 210 *Seat Belt Assembly Anchorages*, 212 *Windshield Mounting*, 216 *Roof Crush Resistance*, 219 *Windshield Zone Intrusion*, and 302 *Flammability of Interior Materials*.

The petitioner also contends that the vehicles are capable of being readily altered to meet the following standards, in the manner indicated:

Standard No. 101 *Controls and Displays:* (a) Installation of an indicator lamp lens cover inscribed with the word ''brake'' in the instrument cluster in place of the one inscribed with the international ECE warning symbol, and (b) replacement or conversion of the speedometer to read in miles per hours.

Standard No. 108 *Lamps, Reflective Devices and Associated Equipment:* Inspection of all vehicles and installation, on vehicles that are not already so equipped, of U.S.-model headlamps, front side marker lamps, taillamp assemblies that incorporate rear side marker lamps, a high-mounted stoplamp assembly, and front and rear side reflex reflectors.

Standard No. 110 *Tire Selection and Rims:* Installation of a tire information placard.

Standard No. 111 *Rearview Mirrors:* Installation of a U.S.-model passenger side rearview mirror, or inscription of the required warning statement on the face of that mirror.

Standard No. 114 *Theft Protection:* Installation of a supplemental key warning buzzer system to meet the requirements of this standard.

Standard No. 118 *Power-Operated Window, Partition, and Roof Panel Systems:* Installation of a supplemental relay system to meet the requirements of the standard.

Standard No. 208 *Occupant Crash Protection:* (a) Installation of U.S. version software to ensure that the seat belt warning system meets the requirements of this standard, and (b) inspection of all vehicles and replacement of any non-U.S.-model components (including air bag modules and control units, seat belts, and knee bolsters) necessary for conformity with this standard with U.S.-model components.

Petitioner states that the restraint systems used in the vehicles include airbags and knee bolsters at the front outboard seating positions, and combination lap and shoulder belts at the front and rear designated seating positions.

Standard No. 214 *Side Impact Protection:* Inspection of all vehicles and replacement of any non-U.S.-model components necessary for conformity with this standard with U.S.-model components.

Standard No. 301 *Fuel System Integrity:* Inspection of all vehicles and replacement of any non-U.S.-model components necessary for conformity with this standard with U.S.-model components.

The petitioner states that all vehicles will be inspected prior to importation to assure compliance with the Theft Prevention Standard at 49 CFR part 541, and that vehicles will be modified, if necessary, to comply with that standard.

The petitioner also states that all vehicles will be inspected for conformity with the Bumper Standard found in 49 CFR part 581 and that any non-U.S.-model components necessary for conformity with this standard will be replaced with U.S.-model components.

The petitioner additionally states that a vehicle identification plate must be affixed to the vehicles near the left windshield post to meet the requirements of 49 CFR part 565.

Interested persons are invited to submit comments on the petition described above. Comments should refer to the docket number and be submitted to: Docket Management, Room PL–401, 400 Seventh Street, SW., Washington, DC 20590. (Docket hours are from 9 a.m. to 5 p.m.) It is requested but not required that 10 copies be submitted.

All comments received before the close of business on the closing date indicated above will be considered, and will be available for examination in the docket at the above address both before and after that date. To the extent possible, comments filed after the closing date will also be considered. Notice of final action on the petition will be published in the **Federal Register** pursuant to the authority indicated below.

Authority: 49 U.S.C. 30141(a)(1)(A) and (b)(1); 49 CFR 593.8; delegations of authority at 49 CFR 1.50 and 501.8.

Claude H. Harris,

Director, Office of Vehicle Safety Compliance.

[FR Doc. 04–28236 Filed 12–23–04; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 34564]

Portland & Western Railroad, Inc.—Lease and Operation Exemption—Union Pacific Railroad Company

Portland & Western Railroad, Inc. (PNWR), a Class III rail carrier, has filed a verified notice of exemption under 49 CFR 1150.41 to lease and operate approximately 0.87 miles of rail line currently owned by Union Pacific Railroad Company (UP) between milepost 741.59 near Willsburg Jct. and milepost 740.72 at the connection with UP's main line at Willsburg Jct., in Clackamas County, OR.

PNWR certifies that its projected revenues as a result of this transaction will not result in the creation of a Class II or Class I rail carrier. Because PNWR's projected annual revenues will exceed $5 million, PNWR has certified to the Board on October 6, 2004, that the required notice of the transaction was posted at the workplace of the employees on the affected line on October 1, 2004, and was sent to the national offices of the labor unions representing employees on the line. *See* 49 CFR 1150.42(e).

The transaction was scheduled to be consummated on or after December 10, 2004 (which is more than 60 days after PNWR's certification to the Board that it had complied with the Board's rule at 49 CFR 1150.42(e)).

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. 34564, 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 Eric M. Hockey, Gollatz, Griffin & Ewing, P.C., Four Penn Center, Suite 200, 1600 John F. Kennedy Blvd., Philadelphia, PA 19103–2808.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: December 20, 2004.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 04–28176 Filed 12–23–04; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 34629]

Indiana & Ohio Railway Company—Trackage Rights Exemption—West Central Ohio Port Authority and Indiana & Ohio Central Railroad, Inc.

Pursuant to a written trackage rights agreement dated October 16, 2004, the Indiana & Ohio Central Railroad, Inc. (IOCR), as operator, and West Central Ohio Port Authority (WESTCO PA), as owner, have agreed to grant overhead trackage rights to Indiana & Ohio Railway Company (IORY), between milepost 202.7 near Springfield, OH, and milepost 229.83 at Fayne, OH, a distance of approximately 27.13 miles.[1]

The parties state that consummation of the transaction was scheduled to occur on or shortly after December 15, 2004.

The involved trackage rights will enable IORY to enhance service for certain shippers and provide more efficient and economical routings and service for this traffic.

As a condition to this exemption, any employees affected by the trackage rights will be protected by the conditions imposed in *Norfolk and Western Ry. Co.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Ry., Inc.—Lease and Operate*, 360 I.C.C. 653 (1980).

This notice is filed under 49 CFR 1180.2(d)(7). If the 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. 34629, 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 Louis E. Gitomer, Ball Janik LLP, 1455 F Street, NW., Suite 225, Washington, DC 20005.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov*.

Decided: December 17, 2004.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 04–28175 Filed 12–23–04; 8:45 am]

BILLING CODE 4915–01–P

[1] IOCR currently operates over the rail line. IORY and IOCR are both subsidiaries of RailAmerica, Inc., and will coordinate operations over the line once IOCR begins operations pursuant to these trackage rights.

DEPARTMENT OF THE TREASURY

Financial Crimes Enforcement Network

Agency Information Collection Activities; Proposed Collection; Comment Request; Designation of Exempt Person Form

AGENCY: Financial Crimes Enforcement Network (''FinCEN''), Treasury.

ACTION: Notice and request for comments.

SUMMARY: FinCEN, a bureau of the U.S. Department of the Treasury (''Treasury''), invites all interested parties to comment on its continuing collection of information through its ''Designation of Exempt Person'' form that is used by banks and other depository institutions to designate their eligible customers as exempt from the requirement to report transactions in currency over $10,000.

DATES: Written comments should be received on or before February 25, 2005.

ADDRESSES: Direct all written comments to: Office of Chief Counsel, Financial Crimes Enforcement Network, U.S. Department of the Treasury, P.O. Box 39, Vienna, VA 22183, *Attention:* PRA Comments—Designation of Exempt Person form. Comments also may be submitted by electronic mail to the following Internet address: *''regcomments@fincen.treas.gov''* with the caption in the body of the text, ''Attention: PRA Comments—Designation of Exempt Person Form.''

FOR FURTHER INFORMATION CONTACT: Requests for additional information or for a copy of the form should be directed to Russell Stephenson, Senior Compliance Administration Specialist, Office of Regulatory Policy (RP), Regulatory Policy and Programs Division (RPP), (202) 354–6400, or Albert R. Zarate, Senior Regulatory Counsel, Office of Chief Counsel, FinCEN, (703) 905–3590.

SUPPLEMENTARY INFORMATION: Pursuant to the Paperwork Reduction Act of 1995, Pub. L. 104–13 (44 U.S.C. 3506(c)(2)(A)), FinCEN is soliciting comments on the collection of information described below.

Title: Designation of Exempt Person.

OMB Number: 1506–0012.

Form Number: FinCEN Form 110 (Formerly TD F 90–22–53).

Abstract: The Bank Secrecy Act, Titles I and II of Pub. L. 91–508, as amended, codified at 12 U.S.C. 1829b, 12 U.S.C. 1951–1959, and 31 U.S.C. 5311–5314; 5316–5332, authorizes the Secretary of the Treasury, among other things, to issue regulations requiring records and reports that are determined to have a high degree of usefulness in criminal, tax, and regulatory matters. Regulations implementing Title II of the Bank Secrecy Act (codified at 31 U.S.C. 5311–5314; 5316–5332) appear at 31 CFR Part 103. The authority of the Secretary to administer Title II of the Bank Secrecy Act has been delegated to the Director of FinCEN.

The reporting by financial institutions of transactions in currency in excess of $10,000 has long been a major component of the Treasury's implementation of the Bank Secrecy Act. The reporting requirement is imposed by 31 CFR 103.22, a rule issued under the broad authority granted to the Secretary of the Treasury by 31 U.S.C. 5313(a) to require reports of domestic coins and currency transactions.

The Money Laundering Suppression Act of 1994, Title IV of the Riegle Community Development and Regulatory Improvement Act (Pub. L. 103–325) amended 31 U.S.C. 5313. The statutory amendments mandate exemptions from currency transaction reporting in the case of customers that are other banks, certain governmental entities, or businesses for which reporting would serve little or no law enforcement purpose. The amendments also authorize Treasury to exempt certain other businesses.

On September 8, 1997, and September 30, 1998, Treasury issued final rules regarding these statutory amendments (62 FR 47141 and 63 FR 50147, respectively). The final rules reform and simplify the process by which banks may exempt eligible customers. The final rules, as further amended by 65 FR 46356, are set forth at 31 CFR 103.22(d).

Under the simplified exemption rules, a key requirement is a ''designation'' sent to the Treasury indicating that a customer will be treated by the bank as an exempt person, so that no further currency transaction reports will be filed on the customer's cash transactions exceeding $10,000. As part of the

simplification process, Treasury previously issued a form specifically for making that designation.

The information collected on the form, Designation of Exempt Person, FinCEN Form 110 (Formerly TD F 90–22.53), is required to exempt bank customers from currency transaction reporting. The information is used to help determine whether a bank has properly exempted its customers. The collection of information is mandatory. The draft revisions to the current form simplify some of the data elements on the form based on information from the federal regulators and questions received on the FinCEN Helpline. The instructions have been expanded and clarified to provide additional guidance for correctly completing the form. The section on the biennial renewal has been clarified so that the certification for suspicious activity monitoring indicates that the certification is being made on behalf of the filer and any applicable bank subsidiaries. The form has been renumbered to conform to the FinCEN form numbering system.

Type of Review: Revision of currently approved collection.

Affected Public: Business or other for-profit institutions.

Frequency: As required.

Estimated Number of Respondents: 19,000.

Estimated Total Annual Responses: 85,000.

Estimated Total Annual Burden Hours: 106,250 hours. (Reporting average of 15 minutes per response; recordkeeping average of 1 hour per response).

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden collection of information; (c) ways to enhance quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance and purchase of services to provide information.

Dated: December 15, 2004.

William J. Fox,

Director, Financial Crimes Enforcement Network.

Atch: Revised (draft) Designation of Exempt Person form.

BILLING CODE 4820–02–P

FinCEN Form 110
(Formerly form TD F 90-22.53)

July 2005
Previous editions will not be accepted after January 2006

Designation of Exempt Person

Previous editions will not be accepted after June 30, 2006

Please type or print. Complete all parts that apply. See instructions.

OMB No.1506-0012

Send your completed form to: IRS Detroit Computing Center, Attn: Designation of Exempt Person, P. O. Box 33112, Detroit, MI 48232-0112

Part I Filing Information

1 Indicate the type of filing by checking a, b, c, or d (check only one)

a ☐ Initial designation b ☐ Biennial renewal c ☐ Exemption amended d ☐ Exemption revoked

2 Effective date of the exemption ____/____/____ (MM DD YYYY)

Part II Exempt Person Information

3 Legal name of the exempt person

4 Doing business as (DBA)

5 Address

6 City

7 State

8 ZIP Code

*9 EIN or SSN

10 Type of exempt person, check box a, b, c, d, e, or f (check only one)

a ☐ Bank b ☐ Government agency/Governmental authority c ☐ Listed company

d ☐ Listed company subsidiary e ☐ Eligible non-listed business f ☐ Payroll customer

11 If this is a biennial renewal, and the exempt person is an eligible non-listed business or a payroll customer, (10 e or f above) has there been a change in control of the exempt person during the last two calender years? a ☐ Yes b ☐ No

Part III Filer Information

12 Name of bank

13 Address

14 City

15 State

16 ZIP Code

17 EIN

18 Indicate the bank's primary federal regulator by checking a, b, c, d, e, or f (check only one) a ☐ OCC b ☐ FDIC c ☐ FRS d ☐ OTS e ☐ NCUA f ☐ IRS

19 If this designation is also being made for one or more affiliate banks, check this box. ☐
The form instructions provide the procedure for listing additional affiliate bank(s).

Part IV Signature

I am authorized to sign this form on behalf of the bank granting the exemption and any listed bank subsidiaries. I declare that the information provided is true, correct and complete.

20 Signature

21 Print name

22 Title

23 Date of signature ____/____/____ (MM DD YYYY)

24 Telephone number - (include area code) ( ) —

Part V Biennial Renewal Certification

Complete this part only if you are filing a biennial renewal.

I certify on behalf of the bank and any listed bank subsidiaries that its system of monitoring the transactions in currency of an exempt person for suspicious activity has been applied as necessary, but at least annually, to this exempt person.

25 Signature

26 Print name

27 Title

28 Date of signature ____/____/____ (MM DD YYYY)

29 Telephone number - (include area code) ( ) —

FinCEN Form 110 Designation of Exempt Person

General Information

The Bank Secrecy Act and its implementing regulations require banks to file currency transaction reports on transactions in currency of more than $10,000. The regulations also permit a bank to exempt certain customers from currency transaction reporting in accordance with 31 CFR 103.22.

Banks are the only type of financial institution that may exempt customers from CTR filing requirements. The term bank is defined in 31 CFR 103.11(c); and includes savings and loan associations, thrift institutions, and credit unions.

The customers that the bank may exempt are called "exempt persons". An exempt person may be a bank, government agency/government authority, listed company, listed company subsidiary, eligible non-listed business, or payroll customer, as defined in 31 CFR 103.22.

FinCEN encourages banks to use the exemption procedure to the fullest extent. FinCEN also reminds banks of their continuing obligation to monitor for, and report suspicious activity with respect to transactions of all customers, including currency transactions conducted by exempt persons.

When to file

Any bank that wishes to designate a customer as an exempt person must file FinCEN Form 110 Designation of Exempt Person. An initial designation of exempt person must be filed with the IRS Detroit Computing Center no later than 30 days after the first transaction to be exempted.

The biennial renewal must be filed by March 15 of the second calendar year following the year of the initial designation, and every other March 15 thereafter.

General Instructions

1. This form can be e-filed through the Patriot Act Communications System (PACS). Go to http://pacs.treas.gov to register. This form is also available for download on the Financial Crimes Enforcement Network's Web site at www.fincen.gov, or may be ordered by calling the IRS Forms Distribution Center at (800) 829-3676.

2. Complete the form in accordance with specific instructions for each item. Unless there is a specific instruction to the contrary, leave blank any items that do not apply or for which information is not available.

3. Do not include supporting documents with this form unless specifically instructed otherwise.

4. Enter all dates in MM/DD/YYYY format where MM=month, DD=day, and YYYY=year. Precede any single number with a zero, *i.e.*, 01,02, etc.

5. List all U.S. telephone numbers with area code first and then the seven-digit phone number, using the format (XXX) XXX-XXXX.

6. Enter identifying numbers starting from left to right. Do not include spaces, dashes, or other punctuation. Identifying numbers include social security number (SSN), employer identification number (EIN), and individual taxpayer identification number (ITIN).

7. Enter all Post Office ZIP Codes from left to right with at least the first five numbers, or with all nine (ZIP + 4) if known.

8. Addresses: Enter the permanent street address, city, two-letter state or territory abbreviation used by the U.S. Postal Service and ZIP Code (ZIP+4 if known) of the individual or entity. A post office box number should not be used , unless no other address is available. Also enter any apartment number, suite number, or road or route number. If a P.O. Box is used for an entity, enter the street name, suite number, and road or route number. Complete any part of the address that is known, even if the entire address is not known.

Specific Instructions

Part I Filing Information

Item 1--Type of filing. Check only one of the four boxes. The bank will file an initial designation just once, marking item 1a to signify the initial designation. Additionally, with regard to non-listed businesses (item 10e checked) or payroll customers (item 10f checked), the bank must file the form biennially to renew the exempt status of these customers, marking item 1b to signify the biennial renewal.

Item 2--Effective date of the exemption. For initial designation, enter the date of the first transaction to be exempted.

-For biennial renewal, the effective date of the exemption will be the same date the bank used in the "effective date of the exemption box" when the initial designation was filed.

-For exemptions amended, if the effective date of the exemption is not being amended, the date entered should be the same date the bank used in the "effective date of the exemption box" when the initial designation was made; or if the effective date of the exemption is being amended, enter the date of the first transaction to be exempted.

-For exemption revoked, enter the day after the last transaction to be exempted.

Part II Exempt Person Information

Item 3--Legal name of the exempt person. Enter the full legal name of the exempt person as it is shown on the charter or other document creating the entity. For exempt persons that are sole proprietorship, enter the first and last name of the proprietor.

Item 4--Doing business as (DBA). If applicable, enter the separate DBA name of the exempt person.

Item 5, 6, 7 and 8--Address. Enter the permanent address of the exempt person. For exempt persons doing business at more than one physical location, enter the headquarters address or local address of the exempt person. For sole proprietorship, enter the address of the sole proprietorship rather than the sole proprietor, unless they are the same.

Item 9--EIN or SSN. Enter the EIN of the exempt person. If a sole proprietorship does not have an EIN, enter the social security number (SSN).

Item 10--Type of exempt person. Check only one of the six boxes. See 31 CFR 103.22(a).

Item 11--Change in control. Complete this item only if you checked Item 1b to indicate that you are filing a biennial renewal (biennial renewals only required for item 10e and 10f).

Part III Filer Information

Item 12--Name of bank. Enter the bank's full legal name.

Item 13, 14, 15 and 16--Address. Enter the bank's headquarters address.

Item 17--EIN. Enter the bank's employer identification number (EIN).

Item 18--Primary regulator. Check only one of the following six boxes, OCC, FDIC, FRS, OTS, NCUA, or IRS.

Item 19--Subsidiary banks. A parent bank holding company or one of its bank subsidiaries may make the designation of exempt person on behalf of all bank subsidiaries of the holding company so long as the designation lists each bank subsidiary that will treat the customer as an exempt person. If you are making such a designation, check the box in item 19. List the name and address of each bank subsidiary by completing Part III of an additional Designation of Exempt Person form for each bank subsidiary. Complete the additional forms by entering the bank's name and address in items 12 through 18, and copy the information from Part IV, items 21 through 24 of your Designation of Exempt Person form onto each additional form. Submit the additional forms by attaching them to your Designation of Exempt Person form.

Part IV Signature

Item 20--Signature. An authorized official of the bank shall sign the form.

Item 21-- Print name. Enter the name of the bank official who signed the form.

Item 22--Title. Enter the title of the bank official who signed the form.

Item 23--Date of signature. Enter the date the form was signed.

Item 24--Telephone number. Enter the phone number of the bank official who signed the form.

Part V Biennial Renewal Certification

When filing a biennial renewal, a bank must certify that it has applied as necessary, but at least annually, a system of monitoring the transactions in currency for suspicious activity.

Item 25--Signature. An authorized official of the bank shall sign the certification.

Item 26-- Print name. Enter the name of the bank official who signed the certification.

Item 27--Title. Enter the title of the bank official who signed the certification.

Item 28--Date of signature. Enter the date the certification was signed.

Item 29--Telephone number. Enter the phone number of the bank official who signed the certification.

Send your completed form to:

IRS Detroit Computing Center
Attn: Designation of Exempt Person
P.O. Box 33112
Detroit, MI 48232-0112

Paperwork Reduction Act Notice: The purpose of this form is to provide an effective means for banks and depository institutions to exempt eligible customers from currency transaction reporting. This report is required by law, pursuant to 31 CFR 103.22. Federal law enforcement and regulatory agencies, including the U.S. Department of Treasury and other authorized authorities, may use and share this information. You are not required to provide the requested information unless a form displays a valid OMB control number. Public reporting and recordkeeping burden for this form is estimated to average 70 minutes per response, and includes time to gather and maintain information for the required report, review the instructions, and complete the information collection. The record retention period is five years. Send comments regarding this burden estimate, including suggeations for reduciing the burden, to Financial Crimes Enforcement Network, Attention: Paperwork Reduction Act, P. O. Box 39, Vienna, VA 22183-0039.

[FR Doc. 04–28146 Filed 12–23–04; 8:45 am]
BILLING CODE 4820–02–C

DEPARTMENT OF THE TREASURY

Financial Crimes Enforcement Network

Proposed Collection; Comment Request; Money Services Business Survey

AGENCY: Financial Crimes Enforcement Network (''FinCEN''), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, Financial Crimes Enforcement Network (''FinCEN''), requires current information regarding the size, extent, income derived by and nature of the Money Services Business (''MSB'') industry to more effectively regulate and inform MSBs about Bank Secrecy Act regulations that include requiring MSBs to register with FinCEN and to file Suspicious Activity Reports. FinCEN places a high priority on effective and broad-reaching initiatives to facilitate the education of MSBs and their agents in their responsibilities under the Bank Secrecy Act. FinCEN proposes to conduct a survey that is intended to provide data that can be used to update the 1997 Coopers & Lybrand study of the MSB industry to determine the current profile or make up of this industry and to include issuers, sellers and redeemers of stored value (which were not included in the 1997 Coopers & Lybrand study). The survey will consist of questions that will enable the contractor to provide a statistical estimate of the size and other business characteristics for the following 5 MSB industry sectors: (1) Check cashers, (2) currency dealers or exchangers (limited to those that exchange or deal in actual legal tender such as bank notes and coins), (3) issuers of money orders, traveler's checks or stored value, (4) sellers or redeemers of money orders, traveler's checks or stored value, and (5) money transmitters. Other goals of this study are: To identify the extent to which such financial services, which are not their primary business, are currently being offered through businesses, and to identify the percentage of income generated by these financial services activities; to determine how many of each of these MSBs are currently within the United States as well as their geographical distribution; to analyze, by state or other geographic grouping, and by type of business, differences in the number of MSBs currently registered as compared to the number, size and geographic distribution of the MSB industry segments identified in the study; to determine the extent to which MSBs are predominantly or primarily engaged in providing financial services as opposed to those in which these services are ancillary to their chief purposes as convenience or other retail stores. This request for comments is being made pursuant to the Paperwork Reduction Act of 1995, Public Law 104–13, 44 U.S.C. 3506(c)(2)(A).

DATES: Written comments are welcome and must be received on or before February 25, 2005.

ADDRESSES: Written comments should be submitted to: Office of Chief Counsel, Financial Crimes Enforcement Network, Department of the Treasury, P.O. Box 39, Vienna, Virginia 22183, *Attention:* PRA Comments—MSB Survey. Comments also may be submitted by electronic mail to the following Internet address: *regcomments@fincen.treas.gov,* with a caption in the body of the text, ''*Attention:* PRA Comments—MSB Survey.''

Inspection of comments. Comments may be inspected, between 10 a.m. and 4 p.m., in the FinCEN reading room in Washington, DC. Persons wishing to inspect the comments submitted must request an appointment by telephoning (202) 354–6400.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or requests for copies of the questions for the new MSB industry survey that is the subject of this notice should be directed to: Anna Fotias, Senior Regulatory Compliance Specialist, Office of Regulatory Policy, FinCEN, at (202) 354–6400; Christine Del Toro, Attorney-Advisor, FinCEN, at (703) 905–3590.

SUPPLEMENTARY INFORMATION:

Title: Money Services Business Program Response.

OMB Number: 1506–xxxx.

Abstract: Survey to be conducted with business owners and managers in the Money Services Business industry. Survey asks respondents to report on financial services provided by their businesses.

Type of Review: New information collection.

Affected Public: Business or other for-profit institutions.

Frequency: One time.

Estimated Burden: Reporting average of 15 minutes per response.

Estimated Number of Respondents: 24,000.

Estimated Total Responses: 24,000.

Estimated Total Annual Burden Hours: 6,000.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected: (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance and purchase of services to provide information.

Dated: December 15, 2004.

William J. Fox,

Director, Financial Crimes Enforcement Network.

[FR Doc. 04–28147 Filed 12–23–04; 8:45 am]

BILLING CODE 4810–02–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

December 14, 2004.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 11000, 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

DATES: Written comments should be received on or before January 26, 2005 to be assured of consideration.

Internal Revenue Service (IRS)

OMB Number: 1545–1901.

Revenue Procedure Number: Revenue Procedure 2004–59.

Type of Review: Extension.

Title: Offer to Resolve Issues Arising from Certain Tax, Withholding, and Reporting Obligations of the U.S. Withholding Agents with Respect to Payment to Foreign Persons.

Description: This revenue procedure describes the section 1441 Voluntary Compliance Program (''VCP''), which is available to certain withholding agents with respect to the payment, withholding, and reporting certain tax

due on payments made to foreign persons.

Respondents: Business or other for-profit.

Estimated Number of Respondents: 500.

Estimated Burden Hours Respondent: 400 hours.

Frequency of response: On occasion.

Estimated Total Reporting Burden: 200,000 hours.

Clearance Officer: R. Joseph Durbala (202) 622–3634, Internal Revenue Service, Room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224.

OMB Reviewer: Joseph F. Lackey, Jr. (202) 395–7316, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,

Treasury PRA Clearance Officer.

[FR Doc. 04–28208 Filed 12–23–04; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Office of the Undersecretary for Domestic Finance; Proposed Collection; Comment Request

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the Office of the Under Secretary for Domestic Finance of the Department of the Treasury is soliciting comments concerning requests for its determination that certain activities are financial in nature pursuant to the Gramm-Leach-Bliley Act, Public Law 106–102, 113 Stat. 1338 (GLBA).

DATES: Written comments should be received on or before February 25, 2005, to be assured of consideration.

ADDRESSES: Direct all written comments to Three Financial Activities Regulation, Office of Financial Institutions Policy, 1500 Pennsylvania Ave., NW., Room 3160 Treasury Annex, Washington, DC 20220.

FOR FURTHER INFORMATION CONTACT: Mario Ugoletti, Director, Office of Financial Institutions Policy (202) 622–0715, or Gary W. Sutton, Senior Banking Counsel, (202) 622–1976.

SUPPLEMENTARY INFORMATION:

Title: Activities permitted under section 5136A(b)(1) of the Revised Statutes.

OMB Number: 1505–0174.

CFR Cite: 12 CFR 1501.2.

Abstract: Section 121 of the GLBA authorizes the Secretary of the Treasury (Secretary), in consultation with the Board of Governors of the Federal Reserve System, to determine whether activities are financial in nature or incidental to a financial activity, and therefore permissible for a financial subsidiary of a national bank. National banks and other interested parties may submit requests that the Secretary determine that an activity is financial in nature or incidental to a financial activity, including in such request information to enable the Secretary to make such a determination.

Current Actions: The Secretary may notify those requesting such a determination that an activity is or is not financial in nature or incidental.

Type of Review: Extension.

Affected Public: National banks; other interested parties.

Estimated Number of Respondents: 2.

Estimated Time Per Respondent: 20 hours.

Estimated Total Annual Burden Hours: 40 hours.

Request for Comments

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: December 16, 2004.

Lois K. Holland,

Treasury PRA Clearance Officer.

[FR Doc. 04–28209 Filed 12–23–04; 8:45 am]

BILLING CODE 4810–25–P

DEPARTMENT OF THE TREASURY

Office of the Undersecretary for Domestic Finance; Proposed Collection; Comment Request

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the Office of the Under Secretary for Domestic Finance of the Department of the Treasury is soliciting comments concerning requests for its determination that certain activities are financial in nature pursuant to the Gramm-Leach-Bliley Act, Public Law 106–102, 113 Stat. 1338 (GLBA).

DATES: Written comments should be received on or before February 25, 2005, to be assured of consideration.

ADDRESSES: Direct all written comments to Three Financial Activities Regulation, Office of Financial Institutions Policy, 1500 Pennsylvania Ave., NW., Room 3160 Treasury Annex, Washington, DC 20220.

FOR FURTHER INFORMATION CONTACT: Mario Ugoletti, Director, Office of Financial Institutions Policy (202) 622–0715, or Gary W. Sutton, Senior Banking Counsel, (202) 622–1976.

SUPPLEMENTARY INFORMATION:

Title: Activities permitted under section 5136A(b)(3) of the Revised Statutes.

OMB Number: 1505–0179.

CFR Cite: 12 CFR 1501.2.

Abstract: Section 121 of the GLBA requires the Secretary of the Treasury (Secretary), in consultation with the Board of Governors of the Federal Reserve System, to define the extent to which three generally described activities are financial in nature or incidental to a financial activity, and therefore permissible for a financial subsidiary of a national bank. National banks and other interested parties may submit requests that the Secretary determine that an activity is included within one of these categories of activities and is therefore financial in nature or incidental to a financial activity, including in such request information to enable the Secretary to make such a determination.

Current Actions: The Secretary may notify those requesting such a

determination that an activity is or is not within one of the three categories of activities and therefore is or is not financial in nature or incidental.

Type of Review: Extension.

Affected Public: National banks; other interested parties.

Estimated Number of Respondents: 1.

Estimated Time Per Respondent: 20 hours.

Estimated Total Annual Burden Hours: 20 hours.

Request for Comments

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: December 16, 2004.

Lois K. Holland,

Treasury PRA Clearance Officer.

[FR Doc. 04–28210 Filed 12–23–04; 8:45 am]

BILLING CODE 4810–25–P

DEPARTMENT OF THE TREASURY

Office of the Undersecretary for Domestic Finance; Proposed Collection; Comment Request

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the Office of the Under Secretary for Domestic Finance of the Department of the Treasury is soliciting comments concerning requirements for merchant banking investments authorized pursuant to the Gramm-Leach-Bliley Act, Public Law 106–102, 113 Stat. 1338 (GLBA).

DATES: Written comments should be received on or before February 25, 2005, to be assured of consideration.

ADDRESSES: Direct all written comments to OMB, Attention: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Mario Ugoletti, Director, Office of Financial Institutions Policy (202) 622–0715, or Gary W. Sutton, Senior Banking Counsel, (202) 622–1976.

SUPPLEMENTARY INFORMATION:

Title: Merchant banking investments permitted under 12 U.S.C. 1843(k)(4)(H).

OMB Number: 1505–0182.

CFR Cite: 12 CFR 1500.

Abstract: Section 103 of the GLBA amended the Bank Holding Company Act to authorize financial holding companies to make merchant banking investments. The Board of Governors of the Federal Reserve System and the Secretary of the Treasury have jointly issued a final rule governing these investments, including recordkeeping and reporting requirements.

Current Actions: Financial holding companies conducting merchant banking investments maintain records and file reports pursuant to the joint final rule.

Type of Review: Extension.

Affected Public: Financial holding companies.

Estimated Number of Respondents: 450.

Estimated Time Per Respondent: 50 hours.

Estimated Total Annual Burden Hours: 22,500 hours.

Request for Comments:

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: December 16, 2004.

Lois K. Holland,

Treasury PRA Clearance Officer.

[FR Doc. 04–28211 Filed 12–23–04; 8:45 am]

BILLING CODE 4810–25–P

DEPARTMENT OF THE TREASURY

United States Mint; Notice of Meeting

ACTION: Notification of Citizens Coinage Advisory Committee January 2005 public meeting.

SUMMARY: Pursuant to Public Law 108–15, sec. 103, the United States Mint announces the Citizens Coinage Advisory Committee (CCAC) public meeting scheduled for January 25, 2005. The purpose of the meeting is to advise the Secretary of the Treasury on designs pertaining to the coinage of the United States and for other purposes.

Date: January 25, 2005—Washington, DC.

Time: 1 p.m. to 4 p.m.

Location: United States Mint; 801 9th Street, NW., Washington, DC; 2nd floor Conference Room A.

Subject: Consider state commemorative quarter-dollar coin design candidates and other business.

Interested persons should call 202–354–7502 for the latest update on meeting time and location.

Public Law 108–15 established the CCAC to:

■ Advise the Secretary of the Treasury on any theme or design proposals relating to circulating coinage, bullion coinage, congressional gold medals, and national and other medals.

■ Advise the Secretary of the Treasury with regard to the events, persons, or places to be commemorated by the issuance of commemorative coins in each of the five calendar years succeeding the year in which a commemorative coin designation is made.

■ Make recommendations with respect to the mintage level for any commemorative coin recommended.

FOR FURTHER INFORMATION CONTACT: Madelyn Simmons Marchessault; United States Mint Liaison to the CCAC; 801 Ninth Street, NW., Washington, DC 20220, or call 202–354–6669.

Any member of the public interested in submitting matters for the CCAC's consideration is invited to submit them by fax to the following number: 202–756–6830.

Authority: Public Law 108–15 (April 23, 2003).

Dated: December 20, 2004.

Henrietta Holsman Fore,

Director, United States Mint.

[FR Doc. 04–28139 Filed 12–23–04; 8:45 am]

BILLING CODE 4810–37–P

DEPARTMENT OF THE TREASURY

United States Mint

Notification of Citizens Coinage Advisory Committee 2005 Public Meetings

ACTION: Notification of Citizens Coinage Advisory Committee 2005 Public Meetings.

SUMMARY: Pursuant to Public Law 108–15, Sec. 103, the United States Mint announces the Citizens Coinage Advisory Committee (CCAC) meetings for the calendar year 2005. These meetings are open to the public. The purpose of these meetings is to advise the Secretary of the Treasury on designs pertaining to the coinage of the United States and for other purposes.

January 25, 2005—Washington, DC
March 15, 2005—Washington, DC
May 24, 2005—Washington, DC
July 28, 2005—San Jose, CA
September 27, 2005—Washington, DC
November 15, 2005—Washington, DC

The meeting times and locations will be announced at least 2 weeks prior to each meeting. *Interested persons should call 202–354–7502 for the latest update on meeting time and location.*

Public Law 108–15 established the CCAC to:

- Advise the Secretary of the Treasury on any theme or design proposals relating to circulating coinage, bullion coinage, congressional gold medals, and national and other medals.
- Advise the Secretary of the Treasury with regard to the events, persons, or places to be commemorated by the issuance of commemorative coins in each of the five calendar years succeeding the year in which a commemorative coin designation is made.
- Make recommendations with respect to the mintage level for any commemorative coin recommended.

FOR FURTHER INFORMATION CONTACT: Madelyn Simmons Marchessault; United States Mint Liaison to the CCAC; 801 Ninth Street, NW., Washington, DC 20220, or call 202–354–6669.

Any member of the public interested in submitting matters for the CCAC's consideration is invited to submit them by fax to the following number: 202–756–6830.

Authority: Public Law 108–15 (April 23, 2003)

Dated: December 20, 2004.

Henrietta Holsman Fore,

Director, United States Mint.

[FR Doc. 04–28140 Filed 12–23–04; 8:45 am]

BILLING CODE 4810–37–P

Corrections

Federal Register

Vol. 69, No. 247

Monday, December 27, 2004

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–149519–03]

RIN 1545–BC63

Section 707 Regarding Disguised Sales, Generally

Correction

In proposed rule document 04–26112 beginning on page 68838 in the issue of Friday, November 26, 2004 make the following corrections:

§1.707-7 [Corrected]

1. On page 68849, in § 1.707-7(l), under Example 2. (ii), in the second column, in the fifth line from the top, ''transfer- $50x'' should read ''transfer – $50x''.

2. On the same page, in the same section, in the same column, under Example 3. (iii), in the 12th line, ''$1,000x- -$700x'' should read ''$1,000x – $700x''.

3. On the same page, in the same section, in the same column, under the same example, in the 14th line, ''$1,000x- $200x'' should read ''$1,000x – $200x''.

4. On the same page, in the same section, in the same column, under the same example, in the sixth line from the bottom, ''Property- $1,000x'' should read ''Property – $1,000x''.

[FR Doc. C4–26112 Filed 12–23–04; 8:45 am]

BILLING CODE 1505–01–D

Federal Register

Monday,
December 27, 2004

Part II

Department of Labor

Employment and Training Administration

20 CFR Parts 655 and 656

Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System; Final Rule

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Parts 655 and 656

RIN 1205–AA66

Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System

AGENCY: Employment and Training Administration, Labor.

ACTION: Final rule.

SUMMARY: The Department of Labor (DOL) is amending its regulations governing the filing and processing of labor certification applications for the permanent employment of aliens in the United States to implement a new system for filing and processing such applications. The new system requires employers to conduct recruitment before filing their applications. State Workforce Agencies (SWAs) will provide prevailing wage determinations to employers, but will no longer receive or process applications as they do under the current system. Employers will be required to place a job order with the SWA, but the job order will be processed the same as any other job order. Employers will have the option of filing applications electronically, using web-based forms and instructions, or by mail.

DATES: *Effective Date:* This final rule is effective on March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date.

FOR FURTHER INFORMATION CONTACT: PERM Help Desk, Division of Foreign Labor Certification, Employment and Training Administration, 200 Constitution Avenue, NW., Room C–4312, Washington, DC 20210. Telephone (202) 693–3010 (this is not a toll free number). Questions may be sent via e-mail to the following address '' *PERM.DFLC@dol.gov.* We encourage questions to be submitted by e-mail, because the Division of Foreign Labor Certification intends to post responses to frequently asked questions on its Web site *(http://www.ows.doleta.gov/foreign/)* and e-mail submission of questions will facilitate thorough consideration and response to questions.

SUPPLEMENTARY INFORMATION

I. Introduction

On May 6, 2002, the Department published in the **Federal Register** a Notice of Proposed Rulemaking (NPRM) to amend its regulations for the certification of permanent employment of immigrant labor in the United States. The NPRM also proposed amending the regulations governing employer wage obligations under the H–1B program. 67 FR 30466 (May 6, 2002). Comments were invited through July 5, 2002.

II. Statutory Standard

Before the Department of Homeland Security (DHS) may approve petition requests and the Department of State (DOS) may issue visas and admit certain immigrant aliens to work permanently in the United States, the Secretary of Labor must certify to the Secretary of State and to the Secretary of Homeland Security:

(a) There are not sufficient United States workers who are able, willing, qualified, and available at the time of the application for a visa and admission into the United States and at the place where the alien is to perform the work; and

(b) The employment of the alien will not adversely affect the wages and working conditions of similarly employed United States workers. 8 U.S.C. 1182(a)(5)(A).

If the Secretary of Labor, through the Employment and Training Administration (ETA), determines there are no able, willing, qualified, and available U.S. workers and employment of the alien will not adversely affect the wages and working conditions of similarly employed U.S. workers, DOL so certifies to the Department of Homeland Security and to the Department of State by issuing a permanent alien labor certification.

If DOL can not make both of the above findings, the application for permanent alien employment certification is denied.

III. Current Department of Labor Regulations

DOL has promulgated regulations, at 20 CFR part 656, governing the labor certification process for the permanent employment of immigrant aliens in the United States. Part 656 was promulgated under Section 212(a)(14) of the Immigration and Nationality Act (INA) (now at Section 212(a)(5)(A)). 8 U.S.C. 1182(a)(5)(A).

Part 656 sets forth the responsibilities of employers who desire to employ immigrant aliens permanently in the United States. Part 656 was recently amended through an Interim Final Rule effective on August 20, 2004, which added measures to address a backlog in permanent labor certification applications waiting processing. 69 FR 43716 (July 21, 2004). When this final rule refers to the ''current regulation,'' it refers to the regulation in 20 CFR part 656 as published in April 2004 and amended by 69 FR 43716.

The current process for obtaining a labor certification requires employers to file a permanent labor certification application with the SWA serving the area of intended employment and, after filing, to actively recruit U.S. workers in good faith for a period of at least 30 days for the job openings for which aliens are sought.

Job applicants are either referred directly to the employer or their résumés are sent to the employer. The employer has 45 days to report to either the SWA or an ETA backlog processing center or regional office the lawful job-related reasons for not hiring any referred qualified U.S. worker. If the employer hires a U.S. worker for the job opening, the process stops at that point, unless the employer has more than one opening, in which case the application may continue to be processed. If, however, the employer believes able, willing, and qualified U.S. workers are not available to take the job, the application, together with the documentation of the recruitment results and prevailing wage information, is sent to either an ETA backlog processing center or ETA regional office. There, it is reviewed and a determination made as to whether to issue the labor certification based upon the employer's compliance with applicable labor laws and program regulations. If we determine there are no able, willing, qualified, and available U.S. workers, and the employment of the alien will not adversely affect the wages and working conditions of similarly employed U.S. workers, we so certify to the DHS and the DOS by issuing a permanent labor certification. See 20 CFR part 656 (April 2004) as amended by 69 FR 43716 (July 21, 2004); see also section 212(a)(5)(A) of the INA, as amended.

IV. Overview of the Regulation

This final rule deletes the current language of 20 CFR part 656 and replaces the part in its entirety with new regulatory text, effective on March 28, 2005. This new regulation will apply to all applications filed on or after the effective date of this final rule. Applications filed before this rule's effective date will continue to be processed and governed by the current regulation, except to the extent an employer seeks to withdraw an existing application and refile it in accordance with the terms of this final rule.

On December 8, 2004, the President signed into law the Consolidated Appropriations Act, 2005. This

legislation amends Section 212(p) of the INA, 8 U.S.C. 1182(p), to provide that:

(3) The prevailing wage required to be paid pursuant to (a)(5)(A), (n)(1)(A)(i)(II) and (t)(1)(A)(i)(II) shall be 100 percent of the wage determined pursuant to those sections.

(4) Where the Secretary of Labor uses, or makes available to employers, a governmental survey to determine prevailing wage, such survey shall provide at least 4 levels of wages commensurate with experience, education, and the level of supervision. Where an existing government survey has only 2 levels, 2 intermediate levels may be created by dividing by 3 the difference between the two levels offered, adding the quotient thus obtained to the first level, and subtracting that quotient from the second level.

The 100 percent requirement is consistent with this final rule. The Department will be preparing guidance concerning the implementation of the 4 levels of wages.

The process for obtaining a permanent labor certification has been criticized as being complicated, time consuming, and requiring the expenditure of considerable resources by employers, State Workforce Agencies and the Federal government. The new system is designed to streamline processing and ensure the most expeditious processing of cases, using the resources available.

The new system requires employers to conduct recruitment before filing their applications. Employers are required to place a job order and two Sunday newspaper advertisements. If the application is for a professional occupation, the employer must conduct three additional steps that the employer chooses from a list of alternative recruitment steps published in the regulation. The employer will not be required to submit any documentation with its application, but will be expected to maintain the supporting documentation specified in the regulations. The employer will be required to provide the supporting documentation in the event its application is selected for audit and as otherwise requested by a Certifying Officer.

This final rule also provides employers with the option to submit their forms either electronically or by mail directly to an ETA application processing center. A number of commenters indicated they wanted the option of filing electronically. Since January 14, 2002, employers have been allowed to submit Labor Condition Applications (LCAs) electronically under the nonimmigrant H–1B program, which has been very successful. Similarly, we expect electronic filing of applications for permanent alien employment certification to be successful and to be used by the overwhelming majority of employers filing applications. Employers will receive more prompt adjudication of their applications than would have been the case under a system that permitted only submission of applications by facsimile transmission or by mail. The new form—*Application for Permanent Employment Certification* (ETA Form 9089)—has been designed to be completed in a web-based environment and submitted electronically or to be completed by hand and submitted by mail.

The preamble to the proposed rule indicated that, initially, if a processing fee was not implemented, employers would be allowed to submit applications by facsimile transmission or by mail. DOL, however, has decided employers will not be permitted to submit applications by facsimile. Our experience with facsimile transmission under the H–1B program has been considerably less than optimal. It should also be noted employers do not have such an option under the current regulations for the permanent labor certification program.

To accommodate electronic filing, a complete application will consist of one form. The new form, ETA Form 9089, will contain additional ''blocks'' to be marked by the employer to acknowledge that the submission is being made electronically and that information contained in the application is true and correct. We have developed a customer-friendly Web site *(http://www.workforcesecurity.doleta.gov/foreign/)* that can be accessed by employers to electronically fill out and submit the form. The Web site includes detailed instructions, prompts, and checks to help employers fill out the form. The Web site also provides an option to permit employers that frequently file permanent applications to set up secure files within the ETA electronic filing system containing information common to any permanent application they file. Under this option, each time an employer files an ETA Form 9089, the information common to all of its applications, *e.g.*, employer name, address, etc., will be entered automatically, and the employer will have to enter only the data specific to the application at hand.

Electronic submission and certification requires ETA Form 9089 be printed out and signed by the employer immediately after DOL provides the certification. A copy of the signed form must be maintained in the employer's files, and the original signed form must be submitted to support the Immigrant Petition for Alien Worker (DHS Form I–140).

Because we do not yet have the technology to satisfy the statutes that deal with electronic signatures on Government applications—the Government Paperwork Elimination Act (44 U.S.C. 3504 n.) and/or the Electronic Records and Signatures in Global and National Commerce Act (E–SIGN) (15 U.S.C. 7001—7006)—we are not implementing either of these statutes in this final rule. In the event such technology becomes available in the future, we will modify the electronic process for filing and certifying applications for permanent alien employment to comply with these statutes, and will provide appropriate notice(s) and instructions to employers. We view it as inadvisable to delay the electronic filing and certifications system while we develop this additional technology. When the statutes that deal with electronic signatures are implemented, all electronic filings will require such signatures. We are, however, implementing use of a PIN/Password system in the interim.

As indicated above, a complete application will consist of a single form: ETA Form 9089. The majority of the items on the application form consist of questions that require the employer to check Yes, No, or NA (not applicable) as a response. These questions and other information required by the application form elicit information similar to that required by the current labor certification process. For example, the wage offered on the application form must be equal to or greater than the prevailing wage determination provided by the SWA. The application form also requires the employer to describe the job and specific skills or other requirements.

The employer will not be required to provide any supporting documentation with its application but must maintain and, when requested by the Certifying Officer, furnish documentation to support its answers, attestations and other information provided on the form. The standards used in adjudicating applications under the new system will be substantially the same as those used in arriving at a determination in the current system. The determination will still be based on: whether the employer has met the procedural requirements of the regulations; whether there are insufficient U.S. workers who are able, willing, qualified and available; and whether the employment of the alien will have an adverse effect on the wages and working conditions of U.S. workers similarly employed.

Many commenters were concerned about the potential for fraud, misrepresentation, and non-meritorious applications in an attestation-based system. Some, but not all, of the measures we have taken to minimize these problems, include: a review of applications, upon receipt, to verify the existence of the employer and to verify the employer has employees on its payroll, and the use of auditing techniques that can be adjusted as necessary to maintain program integrity. The concerns about fraud and the measures we will implement to address such concerns are discussed below in greater detail.

SWAs will no longer be the intake point for receipt of applications for permanent alien employment certification and will not be required to be the source of recruitment and referral of U.S. workers as they are in the current system. The required role of SWAs in the redesigned permanent labor certification process will be limited to providing prevailing wage determinations (PWD). Employers will be required to obtain a PWD from the SWA before filing their applications with DOL. The SWAs will, as they do under the current process, evaluate the particulars of the employer's job offer, such as the job duties and requirements for the position and the geographic area in which the job is located, to arrive at a PWD.

The combination of pre-filing recruitment, providing employers with the option to complete applications in a web-based environment, automated processing of applications including those submitted by mail, and elimination of the SWA's required role in the recruitment process will yield a large reduction in the average time needed to process labor certification applications. The redesigned system should also eliminate the need to institute special resource-intensive efforts to reduce backlogs, which have been a recurring problem.

After ETA's initial review of an application has determined that it is acceptable for processing, a computer system will review the application based upon various selection criteria that will allow problematic applications to be identified for audit. Additionally, as a quality control measure, some applications will be randomly selected for audit without regard to the results of the computer analysis. DOL has incorporated identifiers into the processing system, which are used to select cases for audit based upon program requirements. In some instances, DOL will be confirming specific information with employers.

If an application has not been selected for audit, and satisfies all other reviews, the application will be certified and returned to the employer. The employer must immediately sign the application and then submit the certified application to DHS in support of an employment-based I–140 petition. We anticipate an electronically filed application not selected for audit will have a computer-generated decision within 45 to 60 days of the date the application was initially filed.

If an application is selected for audit, the employer will be notified and required to submit, in a timely manner, documentation specified in the regulations to verify the information stated in or attested to on the application. Upon timely receipt of an employer's audit documentation, it will be reviewed by ETA personnel. If the employer does not submit a timely response to the audit letter, the application will be denied. If the audit documentation is complete and consistent with the employer's statements and attestations contained in the application, and not deficient in any material respect, the application will be certified the employer will be notified. If the audit documentation is incomplete, is inconsistent with the employer's statements and/or attestations contained in the application, or if the application is otherwise deficient in some material respect, the application will be denied and a notification of denial with the reasons therefore will be issued to the employer. However, on any application, the CO will have the authority to request additional information before making a final determination.

The CO may also order supervised recruitment for the employer's job opportunity, such as where questions arise regarding the adequacy of the employer's test of the labor market. The supervised recruitment that may be required is similar to the current regulations for recruitment under basic processing, which requires placement of advertisements in conjunction with a 30-day job order by the employer. The recruitment, however, will be supervised by ETA COs instead of the SWAs. At the completion of the supervised recruitment effort, the employer will be required to document in a recruitment report the outcome of such effort, whether successful or not, and if unsuccessful, the lawful job-related reasons for not hiring any U.S. workers who applied for the position. Upon review of the employer's documentation, the CO will either certify or deny the application.

In all instances in which an application is denied, the notification will set forth the deficiencies upon which the denial is based. The employer will be able to seek administrative-judicial review of a denial by the Board of Alien Labor Certification Appeals (BALCA).

Excepted Occupations in Team Sports

The preamble to the NPRM made no mention of the special procedures used in processing applications on behalf of certain aliens to be employed in professional team sports. Those special procedures have been in place for over 25 years and it was not our intent to modify those procedures as a result of this rulemaking. Employers filing applications on behalf of aliens to be employed in professional team sports will continue to use the existing special procedures and will continue to file their applications using the *Application for Alien Employment Certification* (ETA 750). ETA intends to issue a directive detailing the procedures to be followed in filing applications on behalf of aliens to be employed in professional team sports.

V. Discussion of Comments on Proposed Rule

We received a total of 195 comments from attorneys, educational institutions, individuals, businesses and SWAs. Most of the commenters were critical of one or more of the changes, and suggested alternatives and improvements. Some commenters suggested abandonment of the proposed system entirely.

A. Fraud, Program Abuse, and Non-Meritorious Applications

Many commenters expressed concerns about the potential for fraud, program abuse, and the filing of non-meritorious applications in an attestation-based system. Some commenters suggested a two-tier system for processing applications to address an expected increase in fraudulent or non-meritorious applications.

1. Concerns About Fraud, Program Abuse, and Non-Meritorious Applications

Numerous commenters believed the proposed system would be more susceptible to fraud and non-meritorious applications than the current system. The Federation for American Immigration Reform (FAIR) was of the opinion the review process in the proposed rule would not meet the legal standard in INA section 212(a)(5)(A). A couple of commenters emphasized the need to provide for meaningful enforcement.

A SWA noted its application cancellation and withdrawal rate of 15 percent, and stated the incidence of fraud and abuse of the current system suggests a need for tighter controls, rather than a process that relies on employer self-attestations. Another SWA expressed concern that many instances of fraud would not be apparent to the CO, who would be relatively unfamiliar with the situation in individual states.

A DOL employee expressed concern about the increasing number of permanent applications not supported by an actual job location or position, or for which there is no bona fide employer signature. The commenter also believed the pre-filing recruitment would increase opportunities for employers to avoid hiring qualified U.S. workers.

Several commenters expressed concern about the lack of hands-on review. These commenters included the American Council of International Personnel (ACIP), the American Federation of Labor and Congress of Industrial Organizations (AFL–CIO), FAIR, and various SWAs. ACIP believed the proposed rule's audit and enforcement procedures would not act as effective deterrents to fraud and misrepresentation. The AFL–CIO considered a thorough manual review of labor certification applications to be, at times, the sole protection of American workers. One commenter suggested DOL impose penalties similar to those used in the H–1B program, such as civil money penalties and debarment from the labor certification program, for employers who file fraudulent applications.

We believe commenters exaggerate the current system's ability to identify fraud and underestimate the new system's ability to deter it. We agree with the commenters that fraud is a serious problem. As a result of our program experience, we envision a review of applications, upon receipt, to check among other things, the bona fides of the employer. Additionally, we intend to aggressively pursue means by which to identify those applications that may be fraudulently filed.

Our initial review will verify whether the employer-applicant is a bona fide business entity and has employees on its payroll. For example, the employer's tax identification number could be crosschecked with available off-the-shelf software used by credit-reporting agencies; we may also use off-the-shelf commercial products such as the American Business Directory or similar compendiums of employers in the U.S. We also intend to conduct checks to ensure the employer is aware that the application was filed on its behalf. Finally, we intend to explore means of coordination with the SWAs, which retain responsibility for making prevailing wage determinations, in order to avail ourselves of state expertise regarding the local employer community and the local labor market.

Regarding the imposition of civil money penalties and other penalties, we are not imposing such penalties in this final rule. We have concluded that before making such fundamental changes in the program we should publish proposed penalties for notice and comment in another NPRM.

We plan to minimize the impact of non-meritorious applications by adjusting the audit mechanism in the new system as needed. We have the authority under the regulations to increase the number of random audits or change the criteria for targeted audits. As we gain program experience, we will adjust the audit mechanism as necessary to maintain program integrity. We also note that under section 656.21(a) the CO has the authority to order supervised recruitment when he or she determines it to be appropriate.

2. Proposals for a Two-Tier System

Several commenters believed the automated processing under the new system would lead to a flood of non-meritorious applications that would clog the system. ACIP, for example, worried a large increase in fraudulent applications could lead to long backlogs and possibly an oversubscription of visa numbers. To address the potential flood of non-meritorious applications, ACIP, the American Immigration Lawyers Association (AILA), and others proposed a two-track system for processing applications. Many proponents of a two-track system observed by devoting fewer resources to readily approvable applications, DOL could devote more resources to more problematic cases.

The proposals for a two-track system varied, but all envisioned a category of employers or jobs that would qualify for special treatment. Three universities proposed creating a class of ''registered'' or ''established'' users, whose applications would be exempt from random audit but who would have to file annual reports with DOL. Two of these commenters explained how established users could be identified: Employers could submit an application form to DOL, which could review the employers' history of labor certification filings. The two commenters pointed to the blanket L program, run by DHS, and the J–1 program, run by the Department of State, as examples of how such a program could work. A third university suggested alternatives to the random audit of what it referred to as the ''automated electronic labor certification request method.'' One alternative was to implement an Established Users Program whereby university, non-profit research, and government institutions could be trained and certified in the submission of electronic labor certification requests. Another alternative was to require these institutions to submit an annual report to DOL based on pre-determined specifications.

ACIP also referenced the blanket L and J visas and proposed that attestation-based filing be reserved for two categories of applications that would qualify for a ''pre-certification track.'' One category would focus on the employer and the employer's track record with DOL; this would include employers who showed they were good-faith users of the system by meeting certain specified criteria. The other category would focus on the nature of the occupation and shortages in the economy; this would include occupations listed on an updated *Schedule A*. Applications in either of these two categories would have no specific recruitment requirements. All other applications would be processed on a ''standard'' track; these applications would have requirements similar to, but less than, the current requirements for Reduction in Recruitment (RIR) processing.

Two high-tech companies supported ACIP's call for a pre-certification procedure for established users. One also recommended only publicly traded companies be allowed to use an attestation-based system because these companies would be far less likely to file fraudulent applications.

Another commenter favored a two-tier system that categorized applications based on their job requirements. Tier 1 would be reserved for applications that contained no special skills, no experience exceeding the specific vocational preparation (SVP) level for the position, etc. Tier 1 applications would be filed according to the procedures outlined in the proposed rule. All other applications would fall into Tier 2, and would be filed according to the procedures for basic processing under current regulations.

AILA recommended integrating an RIR option into the new system, to accommodate employers that conduct ongoing recruitment for multiple openings, and that might fail to satisfy the recruitment requirements outlined in the proposed rule. To do this, DOL

would need to set standards in three areas: RIR eligibility, recruitment requirements, and reporting recruitment results. AILA suggested recruitment be required over only a 2 or 3 month period.

AILA also proposed expanding *Schedule A* to include a special group for labor shortages by geographic area, to respond to acute labor shortages in a timely manner. AILA was of the opinion that substantial data on job openings in particular labor market areas could be extracted from the attestation-based applications, and this data could be used to determine when and where labor shortages occur or disappear.

The single-track, attestation-based system outlined in the proposed rule was designed to ensure the most expeditious processing of cases, using the resources available. We do not believe a two-track system would result in significant, if any, savings of time and resources. Proponents of a two-track system provide no statistical evidence of potential savings gained by establishing a pre-certification track. Any savings may be offset by the costs of establishing and administering a two-track system. They may also be offset by an increase in the amount of resources needed to process the ''second'' track of cases.

Most of the proposals for a two-track system envision fewer, if any, recruitment requirements for one category of employers or applications. Under ACIP's proposal, all applications would have fewer recruitment requirements than they would have under the proposed regulations. Were we to adopt any one of these proposals, the Secretary of Labor would be unable to carry out the statutory obligation to certify that no U.S. qualified workers are available. For example, under an established users program, employers could qualify on the basis of their history of filings. However, an employer's past practice has no bearing on whether qualified U.S. workers are available for the current job opening. Additionally, economic conditions may change radically over time, which would justify a different approach to assess whether qualified U.S. workers were available. Further, because the proposed system is new and contains new recruitment requirements, at least for the first few years there would be no appropriate past practice to review. Comparisons to the L and J programs are also inappropriate. Both of these programs involve temporary visas, and neither depends upon the unavailability of U.S. workers.

Finally, all of the suggestions for a two-track system do more than modify the proposed rule; they envision a different approach to case processing than the approach outlined in the proposed rule. Some of the proposals for a two-track system and Established Users program are fairly detailed; others are less clear. None of the proposals could be adopted as described in the comments. We do not believe the arguments made in favor of a two-track system are sufficiently compelling to justify formulating a new proposed rule.

Some of the proposals for a two-track system envision aggressive management of *Schedule A*, to reflect more current shortages in the labor market. We believe it would be inappropriate to make changes to *Schedule A* in this final rule. However, it may be productive to consider whether we could create a more flexible *Schedule A* in the future. See our discussion of *Schedule A* in Section D below.

B. Role of the State Workforce Agencies

Under the proposed system, SWAs will no longer receive or review applications. They will, however, continue to provide PWDs.

1. Loss of State Workforce Agency Expertise

Many commenters expressed concerns about the loss of SWA expertise on local labor markets as a result of centralized processing.

A few commenters felt the revised process would not be more efficient because the additional workload associated with cases pulled for audit would exceed the resources available to the COs and would result in backlogs. Another commenter felt the shift in workload from the SWAs to the COs would place unnecessary burdens on COs who may not have extensive knowledge of local labor markets or experience in navigating the various state employment service systems.

Another commenter contended the proposed rule failed to consider that many employers, unfamiliar with the labor certification process and without the assistance of attorneys or representatives, routinely file incorrect or incomplete applications. This commenter envisioned that without the benefit of the SWA's expertise, the increase in correspondence between employers and regional offices would lead to backlogs similar to those under the current system.

FAIR recommended the following revisions:

- Give COs discretion to forward any labor certification application selected for audit to a SWA for confirmation;
- Authorize SWAs, based on a ''reasonable-basis'' complaint from the public or on their own information and belief, to require an audit of any application within the SWA's jurisdiction; and
- Require notices posted pursuant to 20 CFR 656.10(d) to include the name, address, and contact information for the local SWA where a complaint may be filed.

The AFL–CIO viewed limiting the role of the SWA to providing PWDs as a severe deficiency of the new system that would lead to increased fraud and abuse.

Because of resource constraints, among other things, state processing adds considerable time to the processing of applications in the current system. We believe we can retain the benefits of state labor market expertise without having state staff processing applications and thereby save significant processing time and expense.

We view centralized application processing as a customer-friendly change that will simplify the labor certification application process, remove duplicative efforts that occur at the state and Federal levels, and result in greater consistency in the adjudication of cases.

We believe the COs possess sufficient knowledge of local job markets, recruitment sources, and advertising media to administer the program appropriately. We have acquired much expertise during our administration of the current system and expect to maintain this expertise under the new system. Currently, we assess the adequacy of the recruitment before making a final determination in each case. We will be making similar judgments under the new system in the course of making determinations on the labor certifications, auditing applications and in overseeing any supervised recruitment.

Guam requested it be allowed to continue its current role in processing labor certifications. We do not believe Guam's circumstances are so unique that it must have a role in processing the applications to protect the wages and working conditions of U.S. workers. Its role under the current permanent labor certification regulations is no different than of the other states and territories that have a role in the current permanent labor certification program.

2. Job Bank Orders

One commenter inquired how DOL intends to verify job order referrals with SWA staff, screen résumés received while conducting supervised recruitment, verify layoffs have not occurred in the last 6 months in the area of intended employment, verify the employer is a bona fide employer with

an active Federal Employer Identification Number (FEIN), and answer employer questions and provide technical assistance. The commenter recommended the continued involvement of SWAs in conducting supervised recruitment for employers in their states.

Another commenter was concerned the proposed rule does not specifically authorize states to reject illegal specifications in job orders or make it clear the SWA has this authority. Therefore, this commenter recommended DOL add a provision to reinstate the ban against illegal job duties and requirements, and to make it clear that employers who refuse to delete illegal duties or requirements will not be allowed to submit their application.

Still another commenter noted under the proposed rule all jobs must be listed in a Job Bank, which will result in an increased burden on the SWAs. The commenter suggested if user fees are not required, the Federal government should cover this additional cost as part of the alien labor certification process. The commenter also recommended: (1) Using the SWA's résumé unit staff to process these Job Bank orders after the current backlog decreases, and (2) tracking labor certification applications to monitor employers' recruiting efforts.

Under the new regulation, job orders submitted under § 656.17(e) will be indistinguishable from any other job orders placed by employers. Referrals will be handled the same way they are handled for other job orders, which may vary from state to state. Under supervised recruitment, applicants will be directed to respond to the CO. Issues regarding layoffs are addressed in the preamble discussion of § 656.17(k).

The general instructions in this final rule, at 20 CFR 656.10(c) provide the employer must certify the conditions of employment listed on the *Application for Permanent Employment Certification* (Form ETA 9089). These attestations include certifying the job opportunity does not involve unlawful discrimination and the terms, conditions, and occupational environment are not contrary to Federal, state, or local law. Furthermore, although not specified in this final rule, the SWA can not accept job orders that are not acceptable under the Employment Service Regulations in 20 CFR parts 651 through 658.

We have not determined whether any additional funds will be provided for any increased expenses resulting from employers submitting job orders under the recruitment provisions at 20 CFR 656.17(e) of this final rule. It should be noted, however, all such activities are within the scope of the Wagner-Peyser Act, that processing job orders required under this final rule are covered by existing Wagner-Peyser grants, and we are not required to provide additional funds to the SWAs.

C. Definitions, for Purposes of This Part, of Terms Used in This Part

The proposed rule made several changes in § 656.3 to the definitions of the terms used in part 656.

1. Definition of the Area of Intended Employment

The proposed rule defines an ''area of intended employment'' as the area within normal commuting distance of the place (address) of intended employment. There is no rigid measure of distance that constitutes a normal commuting distance or normal commuting area because there may be widely varying factual circumstances among different areas. If the place of intended employment is within a Metropolitan Statistical Area (MSA) or Primary Metropolitan Statistical Area (PMSA), any place within the MSA or PMSA is deemed to be within normal commuting distance of the place of intended employment; however, all locations within a Consolidated Metropolitan Statistical Area (CMSA) will not be deemed automatically to be within normal commuting distance. The borders of MSAs and PMSAs are not controlling in identifying the normal commuting area; a location outside of an MSA or PMSA (or a CMSA) may be within normal commuting distance of a location that is inside the MSA or PMSA (or CMSA). We acknowledge that the terminology CMSAs and PMSAs are being replaced by the Office of Management and Budget (OMB). However, we will continue to recognize use of these area concepts as well as their replacements.

One commenter touched on the definition of area of intended employment in its discussion of alternate published surveys used to document the prevailing wage (see our discussion of prevailing wages below). The commenter noted that some surveys list data for only the CMSA or for a region of a state. While recognizing these surveys may include employers from outside the normal commuting distance, the commenter felt it was highly unlikely that prevailing wage rates are that sensitive to commuting distance.

We reject the proposal to allow data from broader geographical areas because our program experience indicates that wage rates vary with commuting distance.

2. Definition of the Employer and Employment

The definition of employer in the proposed rule reflected longstanding DOL policy, and has been modified to ensure that persons who are temporarily in the United States can not be employers for the purpose of obtaining a labor certification. In addition, the definition of employment has been modified to specify that job duties performed totally outside the United States can not be the subject of a permanent application for alien employment certification.

Some commenters touched on the definition of ''employer.'' A DOL employee proposed amendments to the definition of employer to address situations in which all workers at the place of employment are independent contractors and the creation of an employee position is contingent on the granting of a labor certification. The commenter was concerned the term ''worker'' in subparagraph (1) could be construed to include independent contractors, and wanted to amend the regulation to make it unambiguous that the job opening must be for an employee position, not an independent contractor position. Specifically, the commenter proposed to either amend the regulation to add the phrase ''that has an employer-employee relationship with its workers'' or change ''a full-time worker'' to ''a full-time employee'' or change the definition of ''job opportunity'' to read ''a job opening for an employee'' instead of ''a job opening for employment.''

In this final rule, the definition of employer has been clarified by removing from the first sentence the phrase ''full-time worker'' and adding the phrase ''full-time employee'' in lieu thereof. Further, a sentence has been added to the definition to underline that a certification can not be granted for an *Application for Permanent Employment Certification* filed on behalf of an independent contractor.

A SWA recommended including holders of temporary visa types (*i.e.,* B—visitor's visa) on the list of persons who are temporarily in the United States and, therefore, are not included in the definition of employers for the purpose of obtaining a labor certification.

We agree that the list should include persons on a B visa. Therefore, this final rule adds visitors for business or pleasure to the list of persons who are temporarily in the United States and who can not be employers for the

purpose of obtaining a labor certification.

3. References to the Immigration and Naturalization Service

This final rule reflects the creation of the Department of Homeland Security and the attendant government reorganization. All references in the proposed rule to the Immigration and Naturalization Service (INS), in the Department of Justice, have been changed to either Department of Homeland Security (DHS) or the United States Citizenship and Immigration Services (USCIS), in the Department of Homeland Security.

4. Definition of the Standard Vocational Preparation and Educational Equivalents

The proposed rule defined the term ''Standard Vocational Preparation (SVP)'' as the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation. Lapsed time is not the same as work time; for example, 3 months of lapsed time refers to 3 calendar months, not 90 work days. The definition includes a list of SVP levels and the corresponding amount of lapsed time for each.

A university commenter noted the SVP level is for the most part unknown to most employers, and thanked DOL for including the information in the regulations. However, the commenter felt the regulations should also include the table of educational equivalencies used to determine how many years of experience a given degree or course of study is worth. The commenter noted the employer's job requirements can not exceed the SVP level assigned to the job, and complained the SVP values do not adequately reflect the actual amount of experience and education required for specific positions. Citing full professors as an example, the commenter noted the assigned SVP level is 8, which means the employer may require between 4 to 10 years of combined education and experience; however, universities rarely hire anyone who has a Ph.D. (equivalent to 7 years of experience) and only 3 years of experience. A second commenter simply asked that this final rule clarify the O*NET job zones that are referenced in the preamble to the proposed rule at 67 FR at 30472.

With respect to the commenter's concern that the proposed rule does not allow an employer to use job requirements that exceed the SVP level assigned to the occupation, this final rule reinstates a business necessity test for job requirements that exceed the SVP level assigned to the occupation. See our discussion of business necessity below. Revision of the SVP is beyond the scope of this rulemaking.

ETA plans to utilize the guidance provided in the administrative directive Field Memorandum No. 48–94, issued May 16, 1994, Subject: *Policy Guidance on Labor Certification Issues (FM).* In summary, the FM provided that a general associate's degree is equivalent to 0 years SVP, a specific associate's degree is equivalent to 2 years; a bachelor's degree is equivalent to 2 years; a master's degree is equivalent to 4 (2 + 2) years; and, a doctorate is 7 (2 + 2 + 3) years.

In administering this final rule, the *Dictionary of Occupational Titles* (DOT) will no longer be consulted to determine whether the training and experience requirements are normal; O*NET will be used instead. It should be noted, however, the job opportunity's job requirements, unless adequately arising from business necessity, must be those normally required for the occupation and must not exceed the Specific Vocational Preparation assigned to the occupation as shown in the O*Net Job Zones. More information about O*NET, including the O*NET job zones can be found at *http://online.onetcenter.org/.*

5. Definition of the State Employment Security Administration

One commenter noted the acronyms ''SESA'' and ''SWA'' are used interchangeably in some parts of the proposed rule; for example, § 655.731(a)(2)(ii)(A)(3) uses SESA. The commenter recommended to avoid confusion, the definition of ''State Employment Security Agency'' be modified to include the phrase ''now known as State Workforce Agency'' before the acronym SWA. As if to underscore the confusion, a second commenter thought the use of SWA in the definition was a typographical error.

We are amending only one section in part 655 subpart H of the Code of Federal Regulations. We use SESA in § 655.731 to be consistent with part 655 subpart H (dealing with H–1B and H–1B1 applications), which references the SESA. However, in Part 656, we use SWA throughout. We have modified the heading of the definition in § 656.3 to read ''State Workforce Agency (SWA), formerly known as the State Employment Security Agency (SESA).''

D. Electronic Filing of Applications

In the Notice of Proposed Rulemaking (NPRM), we proposed that the employer would submit two forms to an ETA application processing center. These forms were designed to be machine readable and we anticipated most employers would submit them by facsimile transmission to an ETA application processing center.

1. Electronic Filing

Many commenters indicated the forms published with the NPRM were not ''user friendly'' because they were designed to be machine readable to facilitate submission by facsimile transmission. Many commenters indicated because of problems during the implementation of the LCA ''Fax-back'' system for H–1B applications, we should not require submission of the form by facsimile transmission. In view of the success of electronic filing of H–1B applications, commenters recommended we use a system based on electronic filing in the redesigned permanent labor certification process.

We have decided to implement the redesigned labor certification process using an electronic filing and certification system. This system is partially modeled after the system used for filing and certifying labor condition applications under the H–1B nonimmigrant program. Employers will also have the option to submit applications by mail.

Under the e-filing option, the *Application for Permanent Employment Certification* (ETA Form 9089) must be completed by the user on-line. The system will assist the employer by checking for obvious errors, and will input the information into an ETA database. This will speed the process of evaluating the application, and help to prevent data entry errors. ETA will accept mailed ''hard copy'' applications from those who either have no access to the internet or simply choose to submit a form completed by hand. Submission of applications by facsimile transmission will not be accepted, because our experience indicates facsimile submissions can not be relied on for consistent, error-free receipt and return of applications. We have determined that average processing time will be considerably shortened if we limit submission of applications to electronic filing or by mail. Applications submitted by mail will not be processed as timely as those filed electronically.

The comments pertaining to user friendliness were considered in designing the electronic filing system and consolidating the *Application for Permanent Employment Certification* and *Prevailing Wage Determination Request* (PWDR) form proposed in the NPRM into a single application form (see discussion below). We believe the

consolidated form addresses virtually all of the issues regarding the lack of ''user friendliness'' of the proposed forms. For example, as suggested by commenters, the items formerly on the PWDR, such as the job description and requirements and prevailing wage determination, are now on the application form.

Employers will, as discussed below in the section on prevailing wages, request a PWD using the form required by the state in which the job is being offered. Information from the state's prevailing wage determination request form, such as the prevailing wage, occupational code, occupational title, state determination number, and the date the determination was made, will be included on the application form. The employer will be expected to retain the state prevailing wage determination form to furnish to the CO if requested to do so in the event of an audit or otherwise.

2. Elimination of the Prevailing Wage Determination Request Form (ETA 9088)

Under the current permanent labor certification program, requests for PWD are made to the SWAs on the various forms the SWAs have developed for employers to use in submitting such requests. The NPRM sought to standardize the process whereby employers make requests to the SWAs for PWD by proposing all requests be submitted on the PWDR. However, after reviewing our experience under the H–1B program with the FAX-based filing system and the comments received on this issue we have decided to implement electronic filing by the use of a consolidated form. The consolidated form includes most of the items proposed for the *Application for Permanent Employment Certification* and the information that would have been provided by the PWDR. This includes the information that the employer would have provided on the PWDR, such as the job description and job requirements, as well as the information that the SWAs would have entered on the PWDR, such as the prevailing wage determination and the SWA tracking number.

Another reason why we have chosen not to require one standardized form be used by employers to submit requests for prevailing wage determinations to the SWAs is because such a requirement would, in effect, impose an unfunded mandate on the SWAs to develop computer systems to support the proposed PWDR. It also became evident that, assuming funding were available to develop the computer systems necessary to support the PWDR, several years would elapse before such systems would be operational in all of the SWAs.

Accordingly, employers will continue the practice of requesting PWD from the SWAs on the various forms developed for this purpose by the SWA.

3. Multiple Beneficiaries

One commenter suggested DOL allow a single application to be used to support multiple vacancies/beneficiaries. Multiple beneficiary applications are discussed under the basic process below.

4. Assistance in Completing the Application Form

Several commenters suggested DOL provide assistance in completing the application form. Among the suggestions were the creation of a toll-free number, an instruction handbook, and detailed instructions on the internet. We hope to make all of these methods available, although some may not be available upon initial implementation of the new system.

5. Recommended Changes to the Application Form

Commenters provided many specific suggestions for both the application form and the instructions. Those suggestions have been reviewed and many have been incorporated into the revised ETA Form 9089 and instructions, which have been submitted to the OMB for approval and follow the final rule. The changes most often requested and our responses are provided below.

- Include on the first page a box for the employer to indicate whether the request is for a *Schedule A* occupation, with instructions reminding the user that, for *Schedule A* occupations, the recruitment sections of the form need not be completed and the form should be submitted directly to USCIS for processing. We have modified the form to include these suggestions.
- Clarify on the form that the ''special requirement process'' includes the optional process for college and university teachers. We removed the ''special requirement process'' item and, under the recruitment section, included the optional process for college and university teachers.
- Change the term ''Education or Training: Highest Level Required'' (see the proposed ETA Form 9088, Item section H) to ''Education and Training: Minimum Level Required.'' We have modified the new form 9089 to include this suggestion.
- We addressed the comments regarding the need to specify technical degrees by adding a blank space identified as ''Other.'' This change allows the degree to be filled in by the employer. The number of technical degrees that commenters wished to have identified was too large to incorporate as a checklist on the application form.
- Change Wage Offer Information (see the ETA Form 9089, section G) to read: Offered Wage Range, From: ____ To: ____. Several commenters indicated the form should ask for a wage range instead of a specific wage rate. We have made this change to clarify that employers can offer a wage range as well as a specific rate as long as the bottom of the wage range (reflected in the ''From'' box) is not below the prevailing wage.
- One commenter requested there be a box on the application form allowing the employer to go directly to supervised recruitment, rather than conduct pre-filing recruitment. We have decided not to provide this option to employers. The supervised recruitment process is lengthy, and is one of the reasons the current system is severely backlogged. Supervised recruitment will be conducted only if ordered by the CO.

E. Schedule A

The proposed rule did not change the general requirements for *Schedule A* pre-certification. It proposed a technical change for the description of Group I professional nurses, specifying that only a permanent, full and unrestricted state license from the state of intended employment may be used as an alternative to passage of the Commission on Graduates of Foreign Nursing Schools examination (CGFNS). It also proposed moving aliens of exceptional ability in the performing arts (included under § 656.21a(a)(1)(iv) of the current regulations) to Group II of *Schedule A.*

We received several comments about the requirements for pre-certification for professional nurses. A number of commenters proposed additional occupations and classes of aliens to be added to *Schedule A.* No commenters objected to moving aliens with exceptional ability in the performing arts to Group II of *Schedule A.*

1. Nurses

As proposed, an employer seeking permanent labor certification for a professional nurse must file, as part of its application with the DHS, documentation the alien has passed the CGFNS examination. Alternatively, the employer may document the alien has a permanent, full and unrestricted license

to practice nursing in the state of intended employment.

A number of commenters suggested changes in the proposed rule that would allow a greater number of nurses to receive certification under *Schedule A.* Several commenters addressed the requirement that foreign-trained nurses must demonstrate passage of the CGFNS examination. One commenter supported the proposed rule's requirements for handling *Schedule A* applications, including the option of documenting that the alien holds a permanent license as an alternative to passage of the examination.

Three commenters mistakenly thought that we were removing passage of the CGFNS examination as a means of certification. This appears to have been a misunderstanding of the preamble to the proposed rule, which stated: ''only a permanent license can be used to satisfy the alternative requirement to passing the [CGFNS] exam'' (see 67 FR at 30469). The proposed rule did not delete passage of the CGFNS examination as documentation of eligibility as a *Schedule A* professional nurse. The only change proposed was to specify that the full and unrestricted state license must be a permanent license. This revision conforms the general descriptions of aliens seeking *Schedule A* certification as professional nurses at § 656.5(a)(2) to the procedures regarding documentary evidence to support a *Schedule A* certification at § 656.15(c)(2).

One commenter requested clarification as to whether the rule requires a CGFNS Certificate or simply evidence of passing the CGFNS nursing skills examination. The commenter noted that successfully passing the CGFNS nursing skills examination results in issuance of a ''pass'' letter. The CGFNS Certificate is only issued if the individual has passed the nursing skills examination, demonstrated English language proficiency (by passing the Test of English as a Foreign Language or a similar exam) and CGFNS has made a favorable evaluation of the individual's nursing credentials. This and another commenter requested the regulation be clarified to specify that passage of the CGFNS nursing examination, and not a CGFNS Certificate, is adequate documentation to satisfy § 656.15(c)(2).

After reviewing the comments, and information from CGFNS, we have modified the proposed rule to require in this final rule a CGFNS Certificate, not merely proof that the alien has passed the CGFNS nursing skills examination. When the current regulation was drafted CGFNS did not issue a Certificate, but instead required applicants to pass a test that evaluated both English proficiency and nursing skills. As such, we understood passage of the CGFNS nursing examination to include both factors. We believe proficiency in English is essential to perform the job duties of a professional nurse in the United States, due to the need to communicate with doctors and patients. The current CGFNS Certificate is analogous to passage of the old CGFNS nursing exam.

Several commenters supported adding a provision allowing alien nurses who pass the National Council Licensure Examination for Registered Nurses (NCLEX–RN), administered by the National Council of State Boards of Nursing (NCSBN), to qualify for *Schedule A.* The commenters contended that because every state requires passage of the NCLEX–RN before issuing a permanent license, proof of passing should be another means to qualify under § 656.5(a)(2). Although the availability of the examination only in the U.S. and its territories had been a burden for foreign-trained applicants in the past, the commenters noted that the NCLEX–RN is being given in more locations abroad and some organizations bring foreign nurses to the U.S. to take the examination.

Our intent in promulgating the existing and proposed *Schedule A* procedures for professional nurses was to put an end to the pre-1981 practice whereby some nurses entered the United States on temporary licenses and permits, but failed to pass state examinations for a permanent license. We have determined that passage of NCLEX–RN examination is consistent with and furthers the policy rationale for allowing CGFNS Certification as an alternative to holding a permanent, full and unrestricted license to practice nursing in the state of intended employment. This final rule includes a provision in § 656.15 allowing certification by demonstrating passage of the NCLEX–RN.

A few commenters noted procedural problems posed by the requirement of a permanent state license in the state of intended employment. Commenters asserted many states will not issue a permanent license until the applicant has a Social Security number, even when the nurse has passed the NCLEX–RN. Because the NCLEX–RN is the final hurdle to the practice of nursing in a state, the commenters urged DOL to allow a foreign nurse to satisfy the permanent license requirement by having a letter from a state nursing board attesting to the nurse having passed the NCLEX–RN and having full eligibility for the RN license, pending receipt of a Social Security card. A commenter noted Alaska and a few other states already follow this practice.

Other commenters identified additional state-imposed obstacles to using the permanent license alternative, including refusal to issue a permanent license until the foreign-trained nurse has arrived in the United States, or requirements for in-state residence, a valid visa, and fingerprint screening. Allowing a foreign-trained nurse to satisfy the permanent license requirement by documenting success on the NCLEX–RN would also alleviate these barriers, according to the commenters.

Two commenters raised a related issue about nurses who hold a permanent license in one state and are the beneficiary of a petition for employment in another state. In this situation, the alien nurse would not have to pass an examination in the second state, but would initially be given a temporary license in order to practice. The commenters maintained this type of temporary license should be distinguished from those situations in which the alien does not have a permanent license in any state. Because it believed that a temporary license in this situation is the functional equivalent of a permanent license, AILA suggested DOL add the following additional alternative to § 656.15(c)(2), to include alien nurses ''who hold a temporary license in the state of intended employment and require no further examination to attain permanent licensure in that state.''

We have decided not to recognize temporary licensure in the state of intended employment. As we have broadened the rule to include passage of the NCLEX–RN as qualifying for *Schedule A,* we believe virtually all alien nurses who have temporary licensure would be covered under this rule. This avoids any need to distinguish between different types of temporary licenses. In addition, the NCSBN indicates several states have passed legislation authorizing Nurse Licensure Compacts, which allow a nurse licensed in his or her state of residence to practice nursing in another state. It is anticipated that most states will pass legislation to authorize the Nurse Licensure Compact, and adopt the mutual-recognition model of nurse licensure. In the event of such legislation being passed, concerns raised by several commenters where an alien nurse is licensed in one state, but is sponsored to practice in another state, would be resolved.

2. Performing Artists

We received several comments supporting the proposal to add performing artists of exceptional ability to Group II of *Schedule A.* No commenters opposed this proposal. Accordingly, this final rule provides that performing artists of exceptional ability are included in Group II of *Schedule A.*

3. Expansion of Schedule A

Several commenters recommended expansion of *Schedule A* to pre-certify certain occupations or classes of aliens.

A high-tech company recommended expanding *Schedule A* occupations to provide for an ''earned'' labor certification for otherwise excluded foreign nationals when beneficial to the U.S. economy. This category would include employees who gained irreplaceable experience on the job, performed unusual combinations of duties or key duties; or who worked for the employer or its subsidiaries for a specified period of time, either within or outside the U.S.; and employees whose efforts had created jobs for U.S. workers. The commenter claimed including these categories under *Schedule A* would not interfere with streamlining and would protect U.S. workers, relieve DOL of its adjudication responsibilities because its burden would be shifted to USCIS Service Centers, and would afford an outlet to a deserving class that would otherwise be denied access to permanent residency under the proposed rule. Similarly, AILA recommended expanding *Schedule A* occupations to accommodate ''special merit'' foreign nationals, including company founders and managers; key employees in managerial, executive, or essential positions in affiliated, predecessor, or successor-in-interest companies; employees who have been employed by a U.S. employer for a certain number of years and gained irreplaceable training and experience in distinct positions; and employees central to the existence of the employer.

Another commenter expressed concern that the proposed rule would adversely affect small businesses by declaring a large number of deserving aliens to be ineligible for labor certification. The commenter pointed to a list of such deserving but ineligible aliens: small business investors; employees in key positions who previously worked for affiliated, predecessor, or successor entities; employees who gained essential experience with the sponsoring employer; employees who are required to perform rare or unusual combinations of duties; and alien workers who are so inseparable from the sponsoring employer the employer would be unlikely to continue in operations without the alien. The commenter urged expanded use of *Schedule A* to cover these classes of aliens who would otherwise be denied access to permanent residency.

All of these comments fail to address the core premise for *Schedule A;* namely, pre-certification of occupations for which there are few qualified, willing, and available U.S. workers. Most of the categories suggested by commenters, such as key employees, employees with special or unique skills, and small business investors are not occupational categories; instead, as admitted by most of the commenters, they are categories of foreign workers. In light of our revisions to § 656.17(h) and (i) regarding job requirements and actual minimum requirements, some foreign workers with special or unique skills might be eligible for labor certification under the basic process. Regarding alien workers who are so inseparable from the sponsoring employer that the employer would be unlikely to continue in operation without the alien, we have long held the position that if a job opportunity is not open to U.S. workers, it is not eligible for labor certification.

In addition to the above-cited categories, AILA proposed that *Schedule A* be revised to clarify the distinction between aliens of extraordinary ability, covered by 8 U.S.C. 1153(b)(1), and aliens of exceptional ability, covered by *Schedule A,* Group II. AILA noted when DOL published the regulations implementing the Immigration Act of 1990 (IMMACT 90), we recognized some aliens may qualify under *Schedule A,* Group II, as aliens of exceptional ability but may not be able to qualify as an alien of extraordinary ability. See 56 FR at 54923 (October 23, 1991). AILA claimed DHS has continued to apply DOL's pre-IMMACT 90 definition of exceptional ability, and has denied eligibility for *Schedule A,* Group II, unless the higher post-IMMACT 90 standard of extraordinary ability can be satisfied. AILA recommended we revise the definition of aliens of exceptional ability in a manner that makes material distinctions between exceptional and extraordinary ability. AILA suggested we develop a checklist of factors to establish exceptional ability analogous to the DHS criteria for aliens of extraordinary ability. AILA also suggested we allow the submission of other ''comparable evidence'' to establish the alien's eligibility as a worker of exceptional ability, and permit exceptional ability aliens with a reasonable plan for job creation to self-sponsor under *Schedule A.* AILA further suggested we add persons with exceptional ability in business to Group II of *Schedule A* because business is a subset of science.

Whether or not a given application or alien beneficiary qualifies for *Schedule A* pre-certification is determined by DHS. We believe the criteria for aliens of exceptional ability in the sciences or arts at § 656.15(d)(1) are clear and do not need to be revised. Except for the recommendation we add a criterion for other comparable evidence of exceptional ability, the commenter made no specific suggestions as to how these criteria should be revised. We do not adjudicate *Schedule A* applications, and DHS rarely contacts our office for advisory opinions on these cases. If, as AILA claims, DHS has failed to adhere to the appropriate regulatory standards in reviewing applications for aliens of exceptional ability, recommendations for procedural changes should be made to DHS, not to DOL.

We have determined that we will not add any new occupations or occupational categories to *Schedule A* in this final rule not included in the Notice of Proposed Rulemaking. To add an occupation to *Schedule A,* we believe it is advisable to issue a proposed rule and provide an opportunity for public comment.

Four university commenters urged DOL to include college and university teachers under *Schedule A.* The commenters claimed because virtually all such cases are certified under the current special handling requirements of § 656.21(a), these occupations should be moved to *Schedule A.* The commenters asserted this would allow DOL to focus its resources on other, less meritorious cases.

We have no evidence of a lack of qualified, willing, and available U.S. workers in the occupation of college and university teacher. Absent evidence of a lack of available workers, we see no compelling reason why this occupational category should be added to *Schedule A.* If a college or university teacher can be considered an alien of exceptional ability in the sciences or arts, such an individual may be eligible for *Schedule A* pre-certification under § 656.5(b)(1). Further, we note special recruitment procedures for college and university teachers are available under this final rule.

AILA also suggested DOL create a provision for *Schedule A* that would incorporate a flexible, just-in-time system for occupation shortages. As

proposed by AILA, DOL would expand the use of technology already inherent in the new system to collect real-world data on job needs in particular job markets. DOL could then allow for flexible opening and closing of a special *Schedule A* group in response to acute, localized labor shortages.

As with the other proposals to expand the categories of workers covered under *Schedule A*, the just-in-time system proposed by AILA would require additional rule making. We are also unsure whether data would be available to successfully implement such a system. While we anticipate the automated system will capture data regarding occupations being sponsored for labor certification, it is not clear all occupations being sponsored for labor certification are experiencing a lack of available workers.

4. Prevailing Wage Determination Requirement

Two commenters objected to the rule's requirement that an employer must obtain a prevailing wage determination for *Schedule A* occupations. One commenter asserted the current regulations do not require a prevailing wage determination for professional nurses, and this practice should continue. Similarly, AILA reasoned the wage determination requirement was unwarranted and would impose an unnecessary burden on the employer and the SWAs. AILA also contended DOL has already determined that hiring of foreign workers for *Schedule A* occupations will not depress wages for U.S. workers. As an alternative, AILA suggested DOL amend the application form to include an attestation that the employer is filing a *Schedule A* application, and then add language exempting the employer from the requirement of obtaining a SWA-issued prevailing wage. According to AILA, DHS requires an employer offer letter or similar documentation describing the position and offered wage.

This final rule retains the prevailing wage requirement for a number of reasons. First, the employer has always been required to certify that it is offering at least the prevailing wage for the occupation. Second, the current as well as the proposed regulation require an Immigration Officer to determine whether the employer and alien have complied with § 656.10, General Instructions, including whether the employer has attested to the conditions listed on the *Application for Permanent Employment Certification* form (ETA 9089), which includes a requirement the employer attest it is offering at least the prevailing wage. Third, the fact DHS asks for documentation describing the position and offered wage has nothing to do with whether the employer is actually offering the prevailing wage.

5. Technical Correction

We have corrected the reference at the end of the first paragraph in § 656.5, *Schedule A* from § 656.19 to § 656.15.

F. Elimination of Schedule B

We proposed to eliminate *Schedule B* because our program experience indicated it has not contributed any measurable protection to U.S. workers. Once an employer files a Schedule B waiver, the application is processed the same as any other application processed under the basic process. Whether or not an application for a *Schedule B* occupation is certified is dependent upon the results of the labor market test detailed in § 656.21 of the current regulations.

A few commenters addressed the proposed change. Two commenters supported the elimination of *Schedule B.* Both of these commenters pointed out *Schedule B* occupations require little or no experience, and employees can be trained quickly to perform them. Two commenters opposed the elimination of *Schedule B* and suggested eliminating the *Schedule B* waiver instead.

We can not maintain *Schedule B* without a provision for a waiver. *Schedule B* is a list of occupations in which there generally are sufficient U.S. workers who are able, willing, qualified and available. It is not a blanket determination there are sufficient workers for the occupations on *Schedule B* in every area of intended employment in which employers may wish to employ foreign workers. Therefore, there must be a waiver for employers located in areas in which the general determination may not apply. Accordingly, this final rule does not contain a provision for *Schedule B* occupations.

G. General Instructions

General instructions for filing applications, representation, attestations, notice, and submission of evidence are provided in § 656.10.

1. Financial Involvement

One commenter noted alien beneficiaries, not employers, drive the labor certification process. The commenter suggested this final rule require documentation of the employer's financial involvement, or, alternatively, prohibit employers, agents, or attorneys from requiring aliens to pay the costs of the labor certification process and provide for penalties for imposing these costs on the alien beneficiary.

While the suggestion to have the employer provide documentation of financial involvement may be of some merit, it was not included in the NPRM, and is a major departure from past practice; consequently, we believe we would have to issue a new proposed rule before we could promulgate a rule requiring such documentation. We believe it is more important to issue a final rule at this time to achieve the benefits under this final rule than to substantially delay realization of such benefits that would result by the issuance of another NPRM.

It should be noted, however, evidence that the employer, agent, or attorney required the alien to pay costs could be used under the regulation at § 656.10(c)(8) to determine whether the job has been and clearly is open to U.S. workers.

2. Representation

a. Attorneys and Agents

The NPRM did not propose any modifications to the provision in the current regulation at 20 CFR 656.20(b)(1) (found in this final rule at 656.10) that allows employers and aliens to be represented by agents or attorneys. However, two attorneys urged we eliminate representation of employers and/or aliens by agents as provided in the current regulation. The commenters advanced three reasons for their recommendations. They maintained that:

- Allowing representation by agents was contrary to statutes in all 50 states prohibiting the unauthorized practice of law;
- Unlicensed agents are the ones most prone to perpetuate fraud on the Department of Labor and clutter the labor certification processing system with frivolous or poorly prepared cases; and
- DOL should issue a regulation similar to the one issued by DHS at 8 CFR 292 that governs the representation of employers and aliens before the DHS.

Amending the regulations at 20 CFR 656.10(b) as proposed by the commenters would be a major departure from our longstanding practice allowing representation by attorneys and agents, and may have serious consequences for those individuals who are now allowed to represent employers and/or aliens in the capacity of an agent. We believe it would be prudent before making such a major change in our longstanding practice and procedures to issue another

proposed rule and consider the comments we would receive on the proposal.

b. Notice of Entry of Appearance (Form G–28)

Another commenter recommended employers as well as attorneys be required to sign the Notice of Entry of Appearance (Form G–28). The commenter maintained not requiring the employer to sign the Form G–28 encourages fraudulent practices, as employers at times have no knowledge of the labor certification application or of the attorney purporting to represent them.

The labor certification process provided by this final rule does not require a Form G–28 if the employer is represented by an attorney. Requiring a Form G–28 would be incompatible with the electronic filing system provided for in this final rule. Elimination of the G–28 will not inhibit or impede efforts to combat fraud. Under this final rule, employers will be required to sign in section N of the *Application for Permanent Employment Certification* an employer declaration which, among other things, states the employer has designated the agent or attorney identified in section E of the application form to represent it, and by virtue of its signature, takes full responsibility for the accuracy of any representations made by the employer's attorney or agent.

c. Retention of Documents by Attorney

One attorney believed some immigration attorneys admonish their employer-clients to retain the enumerated recruitment documents for their records but not supply the documents to the attorney so the attorney can maintain plausible deniability for any document violation. The commenter recommended the attorney of record should be required to maintain copies of recruitment documents so he or she may be held accountable for the content of the application form. We believe it is sufficient under this final rule that the employer will be required to furnish recruitment documentation in the event of an audit or as otherwise required by a CO.

3. Attestations

Two commenters challenged the proposal in the NPRM to remove the regulatory requirements that the employer attest to the ability to pay the wage or salary offered to the alien worker and to place the alien on the payroll on or before the date of the alien's entrance into the United States. We have been informed that DHS is planning to amend its regulation at 8 CFR 204.5(g), which currently focuses on the ability to pay the proffered wage in the course of processing the employment-based immigrant petition, to require evidence focusing on the bona fides of the employer.

DHS does not have a regulation that focuses specifically on the employer's ability to place the alien on the payroll on or before the date of the alien's proposed entrance into the United States. Ability to pay and the ability to place the alien on the payroll are not necessarily the same. An employer can be fiscally solvent but it may not be realistic, for example, to expect the plant or restaurant that is in the planning stage or under construction at the time the application is filed to be completed when the alien or U.S. worker is available to be employed in the certified job opportunity.

After reviewing the comments and considering DHS' planned revisions to its regulation, we have concluded that, in an attestation-based program where in the majority of cases the employer's supporting documentation will not be available to the reviewer, it is appropriate to require the employer to attest to its ability to pay the alien and to place the alien on the payroll. It should also be noted the employer's ability to place the alien on the payroll is not addressed by DHS regulations.

Similarly, although rejection of U.S. workers for lawful, job-related reasons is dealt with in the regulation section on the recruitment report, and although the permanent full-time nature of the job opportunity, and required documentation is included in the definition of ''employment,'' we have concluded it would be beneficial in the context of an attestation-based system to add certifications addressing these issues. We have revised the final rule accordingly.

4. Notice

a. Expansion of Notice Requirement

Several commenters addressed the expansion of the posting requirement to require, in addition to posting a notice of the filing of the ETA Form 9089 in conspicuous places at the employer's place of employment, the employer publish the posting in any and all in-house media, whether electronic or printed, in accordance with the normal procedures generally used in recruiting for other positions in the employer's organization.

Several commenters expressed concerns about the expansion of the posting requirement in the NPRM. One commenter expressed the view the information in proposed § 656.10(d)(3) informing employees how they can furnish documentary evidence bearing on the application to the CO is not in accordance with normal recruitment procedures.

AILA stated employers do not normally post via in-house media for certain positions, such as senior or executive positions, because of confidentiality concerns. AILA suggested DOL amend the rule to provide that an employer post internally through any and all media normally used for other similar positions. A large employer asserted publishing an employment posting in any and all in-house media is extraordinarily broad and could be construed to include training films, publicity postings, and a myriad of unrelated and unhelpful venues. This employer suggested the requirement in § 656.10(d)(ii) of the proposed rule be changed to read ''(i)n addition, the employer must publish the posting in accordance with the normal procedures used for the recruitment of other positions in the employee's organization,'' thereby assuring that regular and accepted industry practices are followed in the labor certification process.

Three universities were of the view the expanded posting requirements would not yield many applicants for highly specialized research and faculty positions. One university indicated it posted jobs in on-line and in-house publications normally read by current or potential employees. However, it did not publish faculty and academic research positions at those locations, as it did not see any positive result from doing so.

A SWA supported expanding the posting requirement to include any and all in-house media. The SWA noted its experience indicated employment postings are poorly presented and often virtually invisible on employer bulletin boards.

Another SWA noted the current posting requirement has not provided any applicants for job openings, and noted the expanded posting requirement does not provide any incentive for current employees to refer friends or relatives to the employer. The SWA recommended that employers should be encouraged to include a finder's or referral fee in the posted notice.

With respect to the comment concerning the requirements at § 656.10(d)(3) in the proposed and final rule concerning the furnishing of documentary evidence bearing on the application, § 656.10(d)(3) was drafted to implement the statutory requirement

provided by Section 122(b) of IMMACT 90 that provided for the current notice requirement and provided, in relevant part, ''any person may submit documentary evidence bearing on the application for certification (such as information on available workers, information on wages and working conditions, and information on the employer's failure to meet the terms and conditions with respect to the employment of alien workers and co-workers).'' It should also be noted the provision at § 656.10(d)(3) is similar to the provision in the current regulation at 20 CFR 656.20(g)(3).

With respect to comments regarding the occupations subject to the posting requirement and the requirement the employer post internally through any and all media, it should be understood, as indicated above, the notice requirement in the regulations has been a statutory requirement since the passage of IMMACT 90. Section 122(b)(1) of IMMACT 90 provides no certification may be made unless the employer-applicant, at the time of filing the application, has provided notice of the filing to the bargaining representative or, if there is no bargaining representative, to employees employed at the facility through posting in conspicuous places. In our view, Congress' primary purpose in promulgating the notice requirement was to provide a way for interested parties to submit documentary evidence bearing on the application for certification rather than to provide another way to recruit for U.S. workers. See 8 U.S.C. 1182 note.

Because the notice requirement is statutory, we do not believe that exceptions to the notice requirement could be based on the occupation involved in the application. As one SWA noted, printed postings on bulletin boards under the current regulation at 20 CFR 656.20(g) are poorly presented and often virtually invisible. The posting regulation at § 656.10(d)(1)(ii) in this final rule provides, in relevant part, the posting must be published in any and all in-house media in accordance with the normal procedures used for the recruitment of other similar positions. For example, we would not expect a posting in a publication devoted to health and safety issues if job vacancies were not normally included in that publication.

With respect to the recommendation by one SWA employee that employers should be required to include a finder's or referral fee, we believe it is inappropriate to provide such an incentive under the posting regulations, because, as indicated above, the posting requirement is not designed to be a recruitment vehicle. We have, however, included referral incentives as one of the options employers may use in recruiting for professional workers in § 656.17(e)(1)(ii) of this final rule.

b. Notice for Schedule A Applications

AILA questioned our basis for requiring employers to comply with the notice requirement for applications filed with DHS on behalf of *Schedule A* occupations. AILA pointed out that *Schedule A* occupations are by definition those for which DOL has already determined that there are not sufficient U.S. workers who are able, willing, qualified, and available for the occupations listed, and the wages and working conditions of U.S. workers similarly employed will not be adversely affected by the employment of aliens. Therefore, no recruitment is required for *Schedule A* applications, and the adjudication of such applications has been placed by the DOL under the jurisdiction of DHS. AILA indicated it would serve no purpose for employers of *Schedule A* applications to provide notice, and DOL should consider eliminating the unnecessary posting burden for employers.

We have concluded employers must comply with the posting requirement to file applications under *Schedule A* with DHS. As we point out above, the statute provides no certification can be issued unless the employer has provided the required notice. Second, as stated previously, in our view Congress' primary purpose in promulgating the notice requirement was to provide a means for persons to submit documentary evidence bearing on the application. This could, for example, include documentation concerning wage or fraud issues. Requiring employers to provide notice of their *Schedule A* applications is consistent with the practice under the current regulation at 20 CFR 656.20(g)(1). We have required employers to provide notice in connection with their *Schedule A* applications since the passage of IMMACT 90. See 56 FR at 54924.

c. Wage Range and Inclusion of Wage in Notice

AILA noted the NPRM proposed that items required to be included in the recruitment advertisement (§ 656.17(f)), including the wage offered, must also be included in the notice. AILA maintained the salary ''is often not provided by most employers when using 'in house media' or is simply referred to by a grade level.'' AILA also maintained an employer should be able to use a salary range in the posting as long as the bottom of the range meets the prevailing wage.

AILA also said, after analyzing the interplay between §§ 656.21(b)(6), 656.21(g)(6), and 656.21(g)(8) under the current regulations, they construed the ''no less favorable than offered the alien'' language in § 656.21(g)(8) to require the employer to advertise a wage offer no less than the alien's wage when initially hired; assuming, of course, the wage offer also meets or exceeds the prevailing wage.

Employers can use a wage range in the required notice. It is longstanding DOL policy that the employer may offer a wage range as long as the bottom of the range is no less than the prevailing rate. See page 114 of *Technical Assistance Guide No. 656 Labor Certifications* (TAG). However, the prevailing wage, which provides the floor for the wage range, must be the prevailing wage at the time the recruitment was conducted for the application for which the employer is seeking certification, not the prevailing wage when the alien beneficiary was initially hired.

The advertising requirements at § 656.17(f) of this final rule no longer include wage or salary information; however, the wage offered must be included in the notice. The regulations implement the statute, which provides ''no certification may be made unless the applicant for certification has at the time of filing the application, provided notice of the filing.'' Because the ETA Form 9089 includes the offered wage, the employer must include in the notice the wage offered to the alien beneficiary at the time the application is filed. Alternatively, the employer may include a salary range in the notice, as long as the bottom of the range is no less than the prevailing wage rate. The wage paid to the alien when initially hired is irrelevant.

5. Timing and Duration of the Notice

A few comments addressed when notice must be provided and the duration of the notice if it is accomplished by posting at the employer's facility.

a. When the Notice Must Be Provided

AILA indicated the requirement in the NPRM that the notice must be posted between 45 and 180 days before filing the application was confusing in light of the recruitment provisions at § 656.17(d) of the NPRM, which requires recruitment be undertaken not less than 30 days or more than 180 days before filing the application. AILA

recommended the timing of the notice be consistent with the other ''advertising'' requirements. Another commenter also recommended that notices of filing be posted 30 to 180 days prior to filing the application.

As explained above, the notice requirement is primarily a medium to obtain documentary evidence bearing on the application. We have concluded it makes little sense to require notice be provided 45 days before the application is filed when employers have 6 months to complete the recruitment required under the regulations. Further, making the time frames consistent with the timing requirements for conducting recruitment in § 656.17(e) would make the program easier to administer and reduce the potential for confusion and error on the part of employers filing applications for permanent alien employment certification. Accordingly, this final rule provides notice should be provided between 30 and 180 days before filing the ETA Form 9089.

b. Duration of the Notice

Two commenters observed the NPRM proposed the period the notice must be posted be increased from 10 consecutive days to 10 consecutive business days. One commenter indicated this increase was reasonable because it would maximize viewing by U.S. workers. This commenter also noted the notice requirement had been expanded to require posting in any and all in-house media, whether electronic or printed, but the proposed rule did not specify for how long. The commenter suggested the additional in-house media ''advertising'' be required for 10 days. We agree and the final rule provides that notice provided by posting to the employer's employees at the facility or location of employment must be posted for 10 consecutive business days. Posting in any in-house media, whether electronic or printed, should be posted for as long as other positions in those media are normally posted.

6. Notice to Certified Collective Bargaining Representative

The AFL–CIO maintained when a union has been certified as a collective bargaining representative for workers employed by the employer-applicant, the new regulations should require the union receive notice when a labor certification application is filed. Moreover, the union should be consulted to ascertain if there was an organizing campaign or other labor disturbance, because the employer may be attempting to thwart union efforts by replacing U.S. workers with foreign workers. The interests of workers seeking to exercise their rights to organize and bargain are indisputably harmed when employers attempt to pack bargaining units with foreign workers during an organizing campaign. For that reason, the AFL–CIO believed the regulations should include a requirement that DOL obtain certification from the National Labor Relations Board (NLRB) that there is no labor dispute as defined in the DHS operating instructions at 287.3. The AFL–CIO noted this definition of a labor dispute is broader than that described under the permanent labor certification regulations. The commenter also proposed if such a labor dispute arises after the labor certification is filed, the employer should be required to inform DOL. The AFL–CIO maintained DOL should also find a way for a union representing workers in the same occupation for which a foreign labor certification application was filed to have a formal and substantial role in the process.

This final rule provides, pursuant to Section 122(b)(1) of IMMACT 90, and similar to the current regulations, that notice of the filing of the labor certification application must be given by the employer to the bargaining representative(s) (if any) of the employer's employees in the occupational classification for which certification of the job opportunity is sought in the employer's locations in the area of intended employment.

We proposed no substantive changes to our current regulations regarding the showing the employer must make with respect to a labor dispute. Our program experience has not brought to light any reason why the current regulations should be changed. This rule has been in effect for over 20 years and our operating experience with this provision has demonstrated it is adequate for the protection of U.S. workers. Moreover, because our program experience points to the adequacy of the current regulations with respect to labor disputes, we are reluctant to make any changes to the labor dispute regulation that may not be compatible with our efforts to streamline the labor certification process.

With respect to having the employer inform us of a labor dispute after the labor certification is filed, we do not believe such a provision will be necessary in the new system. In the new system, we do not contemplate in the majority of cases any significant delay between the filing of a labor certification and its adjudication thus notice is not necessary.

With respect to finding a way for the unions representing workers in the same occupation to have a formal and substantial role in the process, the AFL–CIO did not provide any suggestions as to what such a role would be beyond the statutory notice requirement or the suggestion that the union should be consulted to ascertain whether there was an organizing campaign or other labor disturbance the employer may be attempting to thwart by replacing U.S. with foreign workers, which we have commented on above. Accordingly, this final rule makes no provision for unions to have a formal role in the labor certification process other than what was provided in the proposed rule.

7. Inclusion of Posting Requirements in Recruitment Advertisement

A SWA found the proposed expansion of posting provisions to be insufficient to provide workers with a complaint system. The SWA maintained the rule needs a mechanism to balance what the commenter views as employer bias in favor of foreign workers and against U.S. worker interests. The SWA recommended requiring that the wording of at least one of the mandatory recruitment advertisements under proposed § 656.17(d) conform to the language of the in-house posting, thereby giving U.S. workers who may be interested in or qualified for jobs offered to aliens the opportunity to submit complaints to DOL. This recommendation could be qualified by an exception for employers who can document programs to train and develop U.S. workers for the types of positions submitted for alien labor certification. On the topic of complaints, another SWA recommended the final rule enable an applicant to file a grievance against an employer within 30 days of an interview. This SWA further suggested the employer give each applicant a comment card for DOL's use if a complaint is filed.

Regarding the suggestion to include the notice information in one of the required recruitment advertisements at § 656.17(e), we do not believe this is appropriate. As described above, this final rule implements the statutory notice provision consistent with Congress' intent. To require employers to place statutory notice requirements in their recruitment advertising would be counterproductive, as it would alert U.S. workers to the likelihood that the employer had selected an alien worker for the advertised job opportunity. Consequently, U.S. workers would likely be reluctant to expend the time and resources to apply for jobs for which they believe the employer has pre-selected the alien beneficiary of a labor certification application.

With respect to the SWA's comment suggesting we implement a grievance system against the employer, the commenter did not explain how such a system would work or what role we would play in the process. We will accept documentary evidence about labor certification applications and consider the evidence in deciding whether or not to certify. We do not believe any more formal process is needed.

8. Retention of Documents

The Notice of Proposed Rulemaking did not contain any specific record retention requirements. Record retention requirements were implicit in the NPRM since it was stated, for example, in the preamble that ''(t)he employer would not be required to provide any supporting documentation with its application but would be required to furnish supporting documentation to support the attestations and other information provided on the form if the application were selected for audit.'' See 67 FR at 30466. In discussing the audit process it was indicated employers would be expected to have assembled and have on hand all documentation necessary to support their applications before they were submitted. 67 FR at 30475.

Additionally, the changes to the revocation regulation discussed below strengthen the need for specific record retention requirements in this final rule. As discussed below, because this final rule allows certifications to be revoked if the certification was not justified, a time limit has not been placed on the authority of the Certifying Officer to revoke a labor certification. It is also our understanding that DHS may want to review the employer's supporting documentation in the course of processing the Form I–140 petition or for the purpose of investigating possible violations of the Immigration and Nationality Act. On the other hand, it would not be reasonable to require employers to maintain supporting documentation indefinitely.

To resolve these competing considerations, in § 656.10(f), this final rule requires employers to retain supporting documentation for 5 years from the date the *Application for Permanent Employment Certification* is filed with the Department. Currently, it takes approximately 5 years to obtain a labor certification and an approved I–140 petition.

H. Fees

The proposed rule contains a provision outlining how fees would be implemented in the event Congress passes legislation implementing the fee-charging language in the President's Fiscal Year 2005 Budget.

We received a variety of comments on the proposal to collect fees to process applications for alien employment certification. Most of the commenters supported fees only if they were reasonable, related to actual costs, and used solely for the labor certification program. One commenter opposed any fees that would seem to impose a penalty on hiring aliens. At least one commenter supported fees as long as services were delivered timely. Some commenters supported fees only if they could be implemented in conjunction with electronic filing.

Two commenters opposed the imposition of fees. One commenter objected because DOL has never imposed fees in the past. Another commenter, who characterized DOL's role in the labor certification process as adversarial, felt it was inappropriate to pay fees to a hostile agency.

This final rule does not currently provide for collection of fees because legislation has not been passed that would allow DOL to collect fees and use the proceeds to process applications for alien labor certification. However, in the event Congress does pass such legislation, DOL will provide adequate notice and reserves the right to collect program fees within this rule.

I. Labor Certification Applications for Schedule A Occupations

1. Filing Requirements

The only modification made to the proposed filing requirements for *Schedule A* applications was to require the employer to file only one form, the ETA Form 9089, rather than two.

2. Documentation Requirements for Nurses

As discussed above, proof of passage of the CGFNS examination will not qualify an alien for *Schedule A* certification under the new system; a CGFNS Certificate will be required instead. However, passage of the NCLEX–RN examination will also qualify an alien for *Schedule A* certification. Accordingly, § 656.15(c) of this final rule provides that an employer seeking a *Schedule A* labor certification as a professional nurse must file, as part of its labor certification application, documentation the alien has a CGFNS Certificate, has passed the NCLEX–RN exam, or holds a full and unrestricted (permanent) license to practice nursing in the state of intended employment.

3. Documentation Requirements for Aliens of Exceptional Ability

We received no comments objecting to the documentation requirements for aliens of exceptional ability in the sciences or arts. Therefore, the requirements in the NPRM are incorporated into this final rule.

J. Labor Certification Applications for Sheepherders

We received no comments on the proposed regulations for sheepherders. The only modification made to the proposed filing requirements for sheepherders is to require the employer to file only one form, the ETA Form 9089, rather than two.

K. Basic Process

1. Filing Applications

Employers will be required to file a completed ETA Form 9089 electronically or by mail with a designated ETA application processing center. Applications filed and certified electronically must, upon receipt of the labor certification, be signed immediately by the employer in order to be valid. Applications submitted by mail must contain the original signature of the employer, alien, attorney, and/or agent when they are received by the application processing center. DHS will not process petitions unless they are supported by an original certified ETA Form 9089 that has been signed by the employer, alien, attorney and/or agent.

Supporting documentation will not have been filed with the application, but the employer must provide the required supporting documentation if its application is selected for audit or if the CO otherwise requests it.

The Department of Labor may issue or require the use of certain identifying information, including user identifiers, passwords, or personal identification numbers (PINS). The purpose of these personal identifiers is to allow the Department of Labor to associate a given electronic submission with a single, specific individual. Personal identifiers can not be issued to a company or business. Rather, a personal identifier can only be issued to a specific individual. Any personal identifiers must be used solely by the individual to whom they are assigned and can not be used or transferred to any other individual. An individual assigned a personal identifier must take all reasonable steps to ensure his or her personal identifier can not be compromised. If an individual assigned a personal identifier suspects, or becomes aware, that his or her personal identifier has been compromised or is

being used by someone else, then the individual must notify the Department of Labor immediately of the incident and cease the electronic transmission of any further submissions under that personal identifier until such time as a new personal identifier is provided. Any electronic transmissions submitted with a personal identifier will be presumed to be a submission by the individual assigned that personal identifier. The Department of Labor's system will notify those making submissions of these requirements at the time of each submission.

The new system will limit the role of the SWA in the permanent labor certification process to providing PWDs. In the new system, the employer will still be required to obtain a PWD from the SWA, although the timing will change from a post-filing action to a pre-filing action.

2. Processing

As explained in the section on fraud and abuse above, applications, at a minimum, will be initially reviewed, on receipt, to verify the employer exists and has employees on its payroll. Applications will be checked to make sure the employer is aware of the application being submitted on its behalf.

3. Filing Date and Refiling of Pending Cases to New System

Commenters addressed the conversion of pending cases to the new system. Two commenters addressed a potential relationship between the proposed rule and Section 245(i) of the INA. There were also comments on how the proposed prevailing wage determination requirement could affect the filing date. One commenter addressed the issue of whether an incomplete application should be date-stamped and accepted for processing.

a. Filing Date

One commenter recommended all applications be date-stamped, instead of only those accepted for processing.

The NPRM made a distinction between cases denied and cases not accepted for processing. We have decided there are no practical differences in the consequences of denying an application compared to returning an application because it is unacceptable. We have abandoned the distinction between cases denied and cases not accepted for processing in the final rule. Under this final rule, incomplete applications will be denied and not processed.

In the preamble to the NPRM (see 67 FR at 30470), we stated applications that are not accepted for processing will not be date-stamped to minimize the administrative burden and to discourage employers from filing incomplete applications merely to obtain a filing date. We do not believe it is unreasonable to require the employer to enter all required information on the application form. Further, employers could immediately refile any application that is rejected for processing, so any delay in obtaining a filing date will be minimal and largely in the employer's control.

(1) Possible Reinstatement of Section 245(i)

Section 245(i) of the INA enables many individuals who qualify for permanent residency to adjust their status to permanent resident in the U.S., rather than having to leave the U.S. and apply at a consulate. One way aliens could qualify for eligibility under Section 245(i) was to have a labor certification application filed on their behalf by April 30, 2001, which was the sunset date for Section 245(i). Commenters were concerned about possible legislation that would reinstate Section 245(i) and believed the proposed procedures for conducting pre-filing recruitment would be so time consuming that many individuals would not be able to file completed applications in time to meet a new filing deadline.

We can not base our decisions about the design of the labor certification process on the possibility of legislative action extending Section 245(i). Moreover, an extension of the Section 245(i) deadline is not relevant to the determination the Secretary of Labor must make under § 212(a)(5)(A) of the INA.

(2) Prevailing Wage Determination Requirement

Sections 656.15 through 656.19 of the proposed rule would require an employer to obtain a PWD from the SWA before filing a labor certification application. One commenter suggested this could delay filing the application if there is disagreement about the prevailing wage. The commenter recommended employers be allowed to submit the application to DOL before receiving the PWD. Another commenter recommended the filing date should be established when the PWDR (ETA Form 9088) is filed with the SWA, rather than when the labor certification application is filed with DOL. A third commenter noted information on the PWDR form, such as the job description and special requirements, also should go to the DHS.

The recommendation to use the date the PWDR is filed with the SWA as the filing date is not practical under this final rule. As indicated above, we will have only one form in the streamlined labor certification system. We have combined the PWDR (ETA Form 9088) with the *Application for Permanent Employment Certification* (ETA Form 9089). Employers will not be submitting a DOL form to the SWAs to obtain a prevailing wage determination. Instead, employers will make a request to the SWAs for a PWD, and will receive the wage determination from the SWA as they do now. This final rule does not require a particular form for employers to submit requests for wage determinations to SWAs or for SWAs to use in responding to requests for wage determinations. Employers will, however, be expected to provide the PWD they received from the SWAs in the event of an audit or other request from the CO.

Further, we do not believe it prudent to depart from our longstanding practice of assigning the filing date at the time an application is accepted. Basing the filing date on the date a request for a PWD is made with the SWA may lead to program abuses. For example, such a change could encourage employers to file more wage requests than needed to obtain an earlier filing date, or encourage employers to file many applications at the end of the year, before the upcoming year's Occupational Employment Statistics (OES) wages are released. Also, due to local variations in the time it takes SWAs to issue wage determinations, the wage determination would be an inconsistent source of a filing date.

b. Refiling of Pending Cases in New System

Several commenters expressed concern about the proposed provisions that would allow employers to withdraw applications for alien employment certification filed under the current regulations and file an application for the identical job opportunity under the proposed rule without loss of the filing date of the original application.

(1) Identical Job Opportunity

One commenter noted because of the proposed elimination of business necessity, elimination of the use of alternative job requirements, and disallowance of experience gained with the employer to be used as qualifying experience, many pending labor certification applications would not be able to be refiled under the proposed rule with identical job qualifications

and salary. This commenter suggested broadening the definition of identical job opportunity to include a job opportunity by the same employer (or its successor in interest) for the same alien in the same field of endeavor, even if the duties, salary, skill level and educational or experience requirements are not identical. Another commenter emphasized an applicant should be able to amend, add, or delete information, such as job duties and requirements, in the new application. The commenter claimed because the employer must recruit under the new regulations, the employer should be able to use the SWA's initial review and make changes.

In determining whether the job opportunity is ''identical'' to the job opportunity as described in the employer's application filed under the current regulations, the employer, alien, job title, job location, and job description must be identical to those in the original application, including any amendments made in response to an assessment notice from the SWA under § 656.21(h) of the regulation as it existed prior to the effective date of this final rule.

We have not broadened the definition of identical job opportunity as suggested by commenters. As discussed below, this final rule provides for requirements based on business necessity, alternate experience requirements, and in certain limited circumstances, to allow experience gained with the employer to be used as qualifying experience. See our discussion of job requirements, alternate experience requirements, and actual minimum requirements below.

(2) Withdrawing and Refiling Cases

One commenter recommended employers not be allowed to withdraw cases from the current system and refile under the new system if recruitment of U.S. workers has already begun. The commenter stated DOL should be consistent with the RIR conversion regulations, which prohibit employers from converting pending applications to RIR if a job order has been filed by the SWA. The commenter also warned that U.S. workers who are willing, qualified, and available would not be referred when the application converts to the new system.

In establishing a limit on when a pending application may be refiled in the streamlined system, we reviewed our regulation governing when cases filed under the current basic process may be converted to RIR processing. As noted by the commenter, in our final rule regarding conversion of pending cases to RIR applications, we allowed employers to request an RIR conversion up to the point the SWA had placed a job order under § 656.21(f)(1) of the current regulation.

Similarly, the final rule has been revised at § 656.17(d) to provide that an employer may withdraw an existing application, refile under this final rule and retain the original filing date up until the placement of a job order under § 656.21(f)(1) of the current regulations. As indicated in the preamble to the proposed rule for the RIR conversion regulations, it would be incongruous to permit withdrawal and retention of the filing date from an employer who had already commenced the mandated recruitment. If an employer withdraws an existing application after a job order has been placed, the employer may file an application under this final rule for the same job opportunity; however, the original filing date can not be retained. See 65 FR at 46083 and 66 FR at 40586.

A filing date on a withdrawn application can only be used one time to support an *Application for Permanent Employment Certification* filed under this final rule. Such a refiling must be made within 210 days of the withdrawal; the 210-day period is intended to allow time for the employer to conduct the recruitment required by this final rule. If the refiled application is determined not to be identical to the original application in accordance with § 656.17(d), the refiled application will be processed using the new filing date, and the original application will be treated as withdrawn. If the refiled application filed under this final rule is denied, the filing date on the withdrawn application can not be used on another application for permanent employment certification.

(3) Test of the Labor Market

Several commenters discussed retesting the labor market and re-recruiting for the refiled application. The commenters addressed the financial burden of re-recruitment, and backlog reduction.

Three commenters emphasized requiring an employer to undertake another recruitment campaign to comply with the requirements of the streamlined labor certification system is unduly burdensome. The commenters stated it is unfair to require employers to invest more of their resources for retesting the market solely for the purpose of using the new system. AILA contended employers should not be required to expend resources on additional recruitment unless there is a compelling Governmental interest to support additional recruitment.

Two commenters also asserted an employer should be allowed to refile a pending application under the new system without having to re-test the market, if the applicant complied with all the filing and recruiting requirements under the regulations effective at the time it filed the application, to alleviate the backlog of cases. The commenters noted the backlog has prevented many applications that complied with existing rules from being approved.

We do not believe the requirements for refiling cases are burdensome. Employers are not required to refile existing cases under the new system, so if an employer does not wish to incur the expense of additional recruitment efforts, it need not do so. There is no guarantee an employer's prior recruitment effort was an adequate test of the labor market, and additional recruitment would not have been required under the current regulations. It would be administratively unwieldy to have multiple standards for reviewing recruitment information, and would be incompatible with a streamlined system.

We have concluded employers should not obtain the benefits of the new system if they have not complied with all of its requirements.

(4) Transition to the New System

One commenter requested guidance on how applications being prepared for filing under the RIR process would be transitioned to the new system. The commenter requested all labor certification applications that placed advertisements before the effective date of the final rule be allowed to proceed under the standards of regulations in effect when the advertisements were placed, unless the employer elects to proceed under the new system. Another commenter inquired about the transition process and schedule that will be followed to implement the proposal. Specifically, the commenter requested a target implementation date and clear guidance on the transition of cases to the new system. A third commenter noted it is unclear how cases filed under the old regulation will be transitioned. The commenter noted employers will be required to obtain the *Application for Alien Employment Certification* (ETA 750), Part A from the SWA to show documentary proof that the job opportunities are identical. One commenter suggested, to reduce the backlog, DOL eliminate the second phrase of proposed § 656.17(c)(3)(i), ''if the employer has complied with all of the filing and recruiting requirements of the current regulations.'' Another commenter suggested when an employer converts an application to the new system, the employer should

identify whether it has conducted recruitment as a part of the original application. The commenter recommended the converted application be selected for an audit if the original recruitment yielded applicants. The commenter contended DOL should not lose the recruitment information in an application when it converts to the new system.

AILA suggested employers not be required to obtain a new prevailing wage, and the employer should be able to use all supporting documentation submitted with the original application.

As of the effective date of this final rule, all applications for labor certification must be filed in accordance with this final rule. While we will continue to process applications filed under the current regulations, the SWAs will not accept any applications filed under the current regulations after the effective date of this final rule. Because this final rule will not become effective until 90 days after publication in the **Federal Register**, we believe the 90 day delayed effective date for this final rule will provide employers, including those employers contemplating filing RIR applications, with sufficient time to adjust their recruitment programs to the requirements of the new system.

In response to commenters' concerns about how proof of filing under the current regulations will be obtained, the regulation has been revised to provide, that if requested by the CO under § 656.20, the employer must send a copy of the original application together with any amendments to the appropriate ETA application processing center. Specific instructions for the withdrawing of cases that are to be refiled under this final rule, will be posted at *http://workforcesecurity.doleta.gov/foreign/*.

Employers that have already begun supervised recruitment may not refile under this final rule and maintain the original application's filing date. Therefore, the commenter's concern about losing recruitment information when applications are converted is not an issue.

If operating experience indicates further guidance on refiling cases is needed, we will issue to the SWAs and COs a policy directive, which we will publish in the **Federal Register**, outlining in further detail the procedures to be followed in adjudicating such requests.

(5) Priority in Processing Applications

One commenter addressed the priority of applications filed before this final rule's effective date. The commenter believed we should give these pending applications priority in processing because a majority of them would fail to meet the standards contained in the Notice of Proposed Rulemaking.

AILA suggested we process conversion applications ahead of new applications to avoid further delays. AILA asserted many employers will not convert their cases to the new system unless restrictions are changed or the applicants' cases are ''grandfathered.''

We will process applications, including properly refiled applications, in the order in which they were filed under this final rule.

4. Pre-Filing Recruitment Requirements

Under the proposed rule, the employer must recruit during the 6-month period before filing the application. Recruitment for professional occupations consists of a job order and two print advertisements plus three additional steps. Recruitment for nonprofessional occupations consists of a job order and two print advertisements. We specifically invited comment on the advertising requirements, and the different requirements for professional and nonprofessional occupations.

We received more than 40 comments on the proposed recruitment requirements. Comments came from SWAs, employers, attorneys, organizations, and private individuals. The SWAs, FAIR, and the AFL–CIO were supportive, and even suggested additional requirements.

The remaining commenters were generally opposed to the pre-filing recruitment requirements outlined in the NPRM. Commenters objected to the requirements on the grounds that employers would not have enough discretion in their choice of recruitment methods and the requirements were excessive. A number of commenters specifically compared the proposed rule to current RIR requirements. AILA and ACIP, among others, suggested the new requirements be the same as for RIR processing. This, they felt, would allow employers to use real-world recruitment methods and prevent DOL from micro-managing the recruitment process. Other commenters did not specifically mention RIR processing, but stated the proposed requirements were not real-world.

Comparing the requirements in the new system to RIR requirements presents only part of the picture. Employers may use RIR processing only for occupations for which few or no U.S. workers are available. Employers who file under the basic labor certification process have always been required to follow a specific recruitment regimen. In addition, although RIR processing allows the employer more discretion in its recruitment methods than allowed in the proposed regulations, it requires a hands-on, case-by-case review. This type of review is incompatible with a uniform, streamlined system. In this final rule, we have prescribed a recruitment regimen in § 656.17(e) that, based on our program experience, is the most appropriate for all occupations.

a. Job Order and Two Print Advertisements

In addition to the more general comments about the recruitment regimen, we received specific comments about the requirements for a job order and two Sunday print advertisements. With few exceptions, commenters focused on professional occupations and did not specifically address the appropriateness of the requirements for nonprofessional occupations.

(1) Job Order

Relatively few commenters specifically addressed the requirement for a job order. FAIR and the AFL–CIO supported a job order for all occupations. Almost all others who commented on the requirement opposed it, mostly because they felt it was ineffective.

For the past 25 years, employers have been required to place a job order as part of their supervised recruitment efforts. Placing a job order requires no fee, and minimal effort from the employer. SWAs encourage everyone who is unemployed or looking for work to search the Job Bank for openings. We see no compelling reason to delete the requirement for a job order, which reaches a large pool of applicants who are actively seeking work.

(2) Newspaper Advertisements

Very few commenters discussed the requirement for a Sunday advertisement versus a midweek advertisement. One SWA called it an extremely important change, noting many employers deliberately avoid Sunday advertisements because they are more costly and more likely to yield a response.

Many commenters addressed the requirement for two print advertisements. Of these, the vast majority opposed the requirement. Some commenters were concerned about the cost. Most of these commenters worried that a long, detailed advertisement would be far more costly than an RIR-style advertisement. A couple of these commenters also felt that our estimate of

$500 per advertisement was much too low.

A more common objection was that the proposed requirements did not reflect real-world practice. Most of the commenters who objected to print advertisements focused on the high-tech industry, although several referred to university research positions. These commenters, who rely heavily on online advertising, contended newspaper advertisements are ineffective. ACIP, among others, felt that print advertisements were anachronistic. The Society for Human Resource Management (SHRM) stated the most effective and cost-efficient ways to recruit are not through print advertisements, but through alternatives such as notices in job centers and job-search websites. One university felt a journal devoted to the specific academic field was more effective than a newspaper of general circulation. This commenter also believed for jobs requiring experience and an advanced degree, two journal advertisements in two separate months should be allowed in lieu of the two newspaper advertisements. Another university proposed that colleges and universities be allowed to use professional journals, announcements on the websites of professional organizations, mailings to academic peers, and internal human resources websites.

Some of the commenters who favored no print advertisements suggested, in the alternative, only one Sunday print advertisement, consistent with current RIR requirements. SHRM favored one Sunday newspaper advertisement plus the option of either a second Sunday newspaper advertisement or an advertisement with an alternate source appropriate to the occupation and to the workers likely to apply for the job.

AILA raised a concern about advertising for nonprofessional occupations. Noting the major source of recruitment for some nonprofessional jobs is a trade or professional organization or a job fair, AILA proposed that either of these two recruitment sources be allowed in lieu of the second newspaper advertisement.

Commenters did not specifically object to placing Sunday, versus midweek, advertisements, although a couple of commenters who objected to advertising costs noted Sunday advertisements were more costly. SHRM, however, pointed out not all suburban and rural newspapers publish a Sunday edition. Referring to language in the NPRM, SHRM noted it would be appropriate to advertise in a suburban newspaper of general circulation for certain nonprofessional occupations. Therefore, SHRM asked that publication in a newspaper that does not have a Sunday edition be allowed if that newspaper is the most appropriate to the occupation and the workers likely to apply for the job opportunity in the area of intended employment.

A number of commenters objected to the proposed requirement that the two print advertisements be placed at least 28 days apart.

Commenters who compare the cost of print advertising under the proposed rule to the cost under RIR processing make an inappropriate analogy. They use one RIR-style advertisement as the current standard rather than the relatively detailed, three-day advertisement required under basic processing. We believe the cost of two Sunday advertisements is not an unreasonable expense. See our discussion of advertisement contents below for a more comprehensive discussion of cost.

Although commenters claimed newspaper advertisements are highly ineffective, our program experience has shown these arguments are overstated. Unlike other forms of recruitment, newspaper advertisements are appropriate for all job categories. A review of the classifieds, especially Sunday editions, shows that newspaper advertisements are still customary for both high-tech and non-high-tech jobs. Carving out exceptions for employers who prefer to rely on other sources of recruitment is inconsistent with the streamlined system. The requirement that print advertisements appear in the Sunday edition of a newspaper of general circulation most appropriate for the occupation and the workers likely to apply for the job ensures the advertisement will reach the widest possible pool of potentially qualified applicants.

No serious objections were raised to requiring Sunday, in lieu of midweek, advertisements for professional occupations; therefore, this requirement is retained. However, we recognize an exception is needed in limited circumstances. Therefore, this final rule provides in those cases in which advertising in a rural newspaper would be appropriate but for the fact that the newspaper has no Sunday edition in the area of intended employment; the employer may use the edition with the widest circulation in the area of intended employment. However, the employer must be able to document the edition chosen has the widest circulation. This exception applies to rural newspapers only; if a suburban newspaper has no Sunday edition, the employer must publish a Sunday advertisement in the most appropriate city newspaper that serves the suburban area.

We have also concluded there is no compelling reason to require the two Sunday advertisements be 28 days apart. Therefore, we have deleted this requirement. The two advertisements must be placed on different Sundays, but the Sundays may be consecutive. The only timing requirement is the two advertisements (as well as the job order) must be placed more than 30 days but less than 180 days before filing the application.

(3) Professional Journals

A number of commenters addressed the requirement for an advertisement in a professional journal if the job requires experience and an advanced degree. One SWA prevailing wage specialist supported the requirement that professional jobs be advertised in professional journals. This commenter claimed that computer companies' web advertising is easy to post on the internet, print, and then take off the internet. FAIR suggested requiring a professional journal advertisement in addition to the two Sunday newspaper advertisements. FAIR also felt that more restrictive requirements in the job opportunity should require more extensive recruitment. One university, although not specifically addressing the requirement for a journal advertisement, felt a journal devoted to the specific academic field was more effective than newspapers of general circulation. This commenter also felt that for jobs requiring experience and an advanced degree, two journal advertisements in two separate months should be allowed in lieu of the two newspaper advertisements.

On the other hand, at least one commenter felt the journal requirement was excessive. This commenter stated that most labor certification positions are for experienced workers, and many positions in the technology sector require a master's degree; therefore the requirement would apply to a very large number of applications. This commenter also stated that professional journals are a customary source of recruitment only for high-level managerial, executive, and scientific positions; therefore, we should not expand the journal requirement to cover mid-level, journeyman positions. AILA pointed out in some cases there is no appropriate professional journal or it is not industry practice to advertise in a professional journal. At least one commenter objected to a journal advertisement because it was more costly than advertising in a newspaper.

We have concluded although professional journals are an appropriate source of recruitment for many jobs that require an advanced degree, the requirement in the NPRM is too broad. Therefore, this final rule in § 656.17(e)(1)(i)(B)(4) allows the employer discretion in using a professional journal. If a journal advertisement is appropriate for the job opportunity, the employer may choose, but is not required, to use a journal advertisement in lieu of one of the Sunday print advertisements.

b. Additional Recruitment Steps for Professional Occupations

We received numerous comments about the three additional steps required for professional occupations. With few exceptions, commenters opposed either the number of additional steps or the limited list of alternatives.

Most commenters felt requiring three additional recruitment steps was too burdensome, especially on smaller employers. One commenter stated the additional recruitment steps were a drastic increase over RIR requirements. AILA stated DOL had failed to address how much the additional steps would cost and whether they were more effective than the employers' normal recruiting practices. Another commenter felt the additional steps would discourage employers from applying for labor certification. Many commenters recommended eliminating or decreasing the number of additional steps.

A number of commenters felt the list of six additional recruitment steps was too narrow, and employers should have more flexibility to select steps that are consistent with the employer's standard recruiting procedures. Another commenter noted all employers may not be able to take advantage of all six steps; some steps may be too costly and others may not always be available. This commenter suggested that alternate recruitment steps include notification to campus placement offices, postings at continuing education seminars, and recruitment at companies with recent layoffs. Other commenters suggested expanding the list of additional steps to include employee referrals, help-wanted signs, signage on the company building, employee referral programs, other media (such as radio, billboards, or television), print advertisements in any publication (such as local and ethnic papers), searching commercial résumé databases, and open houses. More than one commenter felt a job posting on a newspaper-sponsored job search website should count as an additional step, even though the web posting was made in conjunction with the print advertisement.

A few commenters objected to the time requirements for the additional recruitment steps. AILA noted employers may want to blitz the marketplace in a relatively short period (*e.g.*, 1 to 2 months). AILA also requested clarification concerning when the recruitment steps must be taken.

We recognize not all of the additional recruitment steps are available or appropriate for all employers; however, employers are required to select only three of the additional steps listed in the NPRM. The list of alternatives was based on what our program experience has shown are real-world methods normally used by businesses to recruit workers.

Although we are retaining the requirement for three alternative steps, we agree the list of alternatives is too narrow. Some of the suggested alternatives, such as searches of résumé databases, we have rejected because they are too difficult to verify; however, others are appropriate as well as easily verifiable. Therefore, we have expanded the list of alternatives in § 656.17(e)(1)(ii) of this final rule to include the following forms of recruitment: an employee referral program, if it includes identifiable incentives; a notice of the job opening at a campus placement office, if the job requires a degree but no experience; local and ethnic newspapers, to the extent they are appropriate for the job opportunity; and radio and television advertisements. A sufficient number of the alternatives are free or low in cost so as not to impose an undue financial hardship on the employer.

In addition to expanding the list of alternatives, this final rule incorporates changes to two of the alternatives listed in the NPRM. An online job listing, even if posted in conjunction with a print advertisement, qualifies as an additional recruitment step. The use of a professional or trade organization is still acceptable, but must be documented by copies of pages of newsletters or trade journals containing advertisements for the job opportunity involved in the application.

We believe the additional recruitment steps represent real world alternatives. The overwhelming majority of employers seriously recruiting for U.S. workers would routinely use one or more of the listed additional recruitment steps. Additionally, it should be noted the alternative recruitment steps only require employers to advertise for the occupation involved in the application rather then for the job opportunity involved in the application as is required for the newspaper advertisement. Allowing employers to recruit for the occupation involved in the application should also work to minimize employer costs to conduct special recruitment efforts solely to satisfy the alternative recruitment steps. In sum, we do not believe the cost to employers of the additional recruitment steps will be significant.

The timing requirements in this final rule are the same as those in the NPRM. All additional recruitment steps must be taken within 6 months of filing; however, employers are not required to take a different step each month. Only one of the additional steps may be taken within 30 days of filing.

c. Recruitment for Occupations in Appendix A to the Preamble

In Appendix A to the preamble, we have published a list of occupations for which a bachelor's or higher degree is a customary requirement, and for which the employer must recruit under the standards for professional occupations set forth in § 656.17(e)(1). We are not codifying this list of occupations so that we can appropriately and timely modify it as necessary without having to engage in the rulemaking process.

(1) Definition of Professional and Nonprofessional Occupations

AILA maintained the definition of professional occupation should not be limited to an occupation for which the attainment of a bachelor's degree is a usual requirement because it neglects individuals who gain professional expertise through work experience instead of education. To set the standard between professional and nonprofessional based on whether the person has a bachelor's degree or not is arbitrary and does not reflect the real world or take into account individuals who have gained professional expertise through work experience instead of education. AILA suggested we should create a broader, more realistic definition for professional and nonprofessional occupations, such as an occupation for which the attainment of a bachelor's or equivalent is the usual requirement for the position. The nonprofessional occupation definition should also reflect this more realistic understanding: ''an occupation for which the attainment of a bachelor's or equivalent is not the usual requirement for the position.''

AILA's comments indicate a misunderstanding of how the list of occupations will be applied and include a suggestion for defining a professional occupation we do not have any way to

administer. The list of occupations on Appendix A is a list of occupations for which a bachelor's or higher degree is the usual requirement for entry into the occupation. The fact the alien does not hold a bachelor's degree has no bearing on the recruitment regimen to be followed by employers. The primary purpose of the list of occupations is to provide employers with the necessary information to determine whether to recruit under the standards provided in the regulations for professional occupations or for nonprofessional occupations.

Publishing a list of occupations we consider appropriate for recruiting under the standards for professional occupations provides employers a degree of certainty they would not have if we adopted the proposal advanced by AILA. They proposed to simply define the terms professional and nonprofessional and allow employers to seek to demonstrate the position for which certification is sought meets the regulatory definition of professional or nonprofessional and therefore the employer has chosen the proper recruitment regimen for that position. Certainty is desirable as employers are required to recruit before they file an *Application for Alien Employment Certification*. If the occupation involved in the application is listed on Appendix A, the employer simply follows the recruitment requirements for professional occupations at § 656.17(e)(1). For all other occupations employers can simply recruit under the requirements for nonprofessional occupations at § 656.17(e)(2).

Although the occupation involved in a labor certification application may be a nonprofessional occupation, the regulations do not prohibit employers from conducting more recruitment than is specified for such occupations. Employers that conduct more recruitment than is required will not have their applications denied for that reason. Employers filing applications involving nonprofessional occupations are free to recruit under the requirements for professional occupations if they believe by so doing it will yield more applications from willing, able, and qualified U.S. workers.

With respect to the definition of professional occupation suggested by AILA, we do not have any standards or information that would allow us to make the equivalency determination called for under the definition suggested by AILA. We have never determined in administering the permanent labor certification program what work experience or combination of work experience and education is equivalent to a bachelor's or higher degree.

(2) Presumptions and Preferences

AILA also opposed the publication of the Appendix A listing of occupations, whether it was codified or not, because publishing such a list immediately creates a presumption that the listed occupations are the only occupations that the CO should consider as ''professional.'' AILA noted several ''professional occupations'' that may well require bachelor's degrees or equivalent experience as a minimum requirement, such as highly-trained gourmet chefs, hotel managers, and graphic artists, are not on the list at all. Last, AILA was concerned the list of occupations would be used by DHS for the purpose of classifying occupations into preference categories.

In our view, the only presumption the list of occupations should create is that if the occupation involved in the application is on the list of occupations in Appendix A, employers must follow the recruitment regiment for professional occupations at § 656.17(e) of this final rule. On the other hand, if the occupation is not on the list in Appendix A, the employer is free to use the recruitment regimen for professional occupations if it believes it is likely to bring more responses from, able, willing and qualified U.S. workers than would the recruitment regiment for nonprofessional occupations.

We believe AILA overstates the possibility DHS will use the occupations listed on Schedule A for the purpose of classifying positions into preference categories. Rather, we have every indication the DHS will continue to make preference classifications according to the job requirements that have been entered on the application for the certified job opportunity. Employers will still be free to provide supporting documentation to the DHS during the petition process, as they do now, to demonstrate the alien's work experience is equivalent to a bachelor's or higher degree if they have specified such on the *Application for Permanent Employment Certification*. We also note this list is not intended to be used to qualify an alien for purposes of eligibility under the H–1B and H–1B1 program. It should also be noted the list of occupations is not part of the *Application for Permanent Employment Certification* (Form 9089).

With respect to the several occupations noted by AILA that may well require a bachelor's degree or equivalent experience, it should be recognized the list is based on work done by the Bureau of Labor Statistics (BLS) to describe the educational requirements of occupations that appear in the *Occupational Outlook Handbook*. In an attempt to improve the classification system used to describe the educational requirements of occupations, the BLS conducted an extensive analysis of the education and training required of all 513 occupations in the national-industry matrix for which employment projections are developed by BLS, not just the 250 occupations covered in the *Occupational Outlook Handbook* As stated in Chapter 1 of the 1996 edition of *Occupational Projections and Training Data*:

> The task proved difficult for several reasons, but principally because for most occupations there is more than one way to qualify for a job. For example, registered nurses may obtain their training in bachelor's degree or hospital diploma programs. The challenge was to determine the training category that best reflects the typical conditions and the preference of most employers.

We are not aware of a more comprehensive data base of occupations that require a bachelor's or higher degree as an entry requirement than the one used to develop the list of occupations in Appendix A. The NPRM published May 6, 2002, at 57 FR 30471, provides background on how the list was developed. (See also *Occupational Outlook Quarterly*, Winter 1995–96, Volume 39, Number 4.) Additional information about the occupations, including their definitions, can also be obtained from O*Net online at *http://onetcenter.org.*

(3) Recruiting and Advertising Requirements

AILA and at least one other commenter were concerned that the designation of an occupation as professional or nonprofessional would restrict the ability of the employer to identify specific education and experience requirements when completing the *Application for Permanent Employment Certification* (Form ETA 9089).

The fact an occupation involved in a labor certification application is listed on Appendix A should have no bearing on the minimum job requirements employers specify for the job opportunity. The job requirements listed on the application form will be determined in accordance with sections 656.17(h) and (i) of the final rule that sets forth the standards for determining the appropriate requirements for a job opportunity. It should also be noted the final rule, unlike the proposed rule, provides standards for the use of

''business necessity,'' alternative requirements, and when experience gained with the employer may be used as qualifying experience. Consequently, the final rule does not contain a provision, as was proposed in the NPRM, that a job requirement for a bachelor's or higher degree does not have to be justified if:

- The occupation involved in the employer's application is on a list of occupations from ETA for which a bachelor's or higher degree is the normal entry requirement for the occupation; and
- The education and training requirements for the employer's job opportunity is consistent with the education and training required for the occupation involved in the employer's application.

5. Required Advertisement Contents

Under the proposed rule, employers were required to place advertisements that apprise U.S. workers of the job opportunity, include a description of the geographic area of employment and any travel requirements, and the offered rate of pay. The advertisement must also include the name of the employer and direct applicants to apply to the employer. The proposed rule was drafted to ensure employers conduct an adequate test of the labor market and document that qualified U.S. workers are unavailable for the job opportunity.

We received comments from more than 30 individuals and organizations addressing the proposed language of the advertisement. Most of the commenters objected to the advertising contents as proposed in the regulation. Comments were also submitted by SWAs and FAIR, which generally supported the proposed requirements for advertisements.

a. Level of Specificity

The most common objection to the proposed rule was that it requires too much detail in the print advertisements. Many commenters echoed AILA's arguments that employers rarely place advertisements that contain a full job description, the employer's name, and the offered salary, but instead place general, less-detailed job search advertisements. AILA further questioned whether we had any proof that this level of detail in advertisements has been found to be more effective than employers' standard practices in recruiting U.S. workers. One law firm commented their experience has been that advertisements with long, detailed job descriptions are seen as legal notices rather than as real advertisements, leading potential job applicants to ignore these detailed advertisements. Another commenter voiced a similar opinion, claiming advertisements designed to satisfy labor certification requirements tell the reader the position is not really available. Instead of a detailed job advertisement, several commenters suggested permitting the use of large catch-all advertisements that cover many occupations but do not include much detail regarding each job opportunity. Because many employers already place these types of advertisements, commenters felt our acceptance of them as qualifying recruitments would allow employers to use pre-existing advertisements that encompass the employer's past recruiting efforts. AILA, as well as several individual attorneys, commented that general job advertisements will attract more applicants than job-specific, detailed advertisements. Employers have used these types of advertisements for applications under the RIR process, and many commenters objected that the proposed regulation would make the use of this format impossible.

In contrast to the commenters who criticized the proposed regulation as requiring too much specificity in the advertisements, a number of commenters expressed concerns that the regulation's language was too vague, and employers would not know what information must be included in the advertisements. Several commenters felt the regulation's use of the term ''apprise'' was ambiguous and could produce confusion among employers. One commenter suggested the proposed regulation's language be changed to reflect that statement of the job title alone is enough, so long as the job title provides enough information to clearly identify the job opportunity. Another commenter inquired whether an employer's recruitment advertisements have to be exact matches with regard to content and salary, or whether they need only match the general terms and conditions of the sponsored position. AILA opined that the regulation's requirement that the advertisement ''describe the vacancy sufficient enough to apprise U.S. workers of the job opportunity'' was too subjective, and proposed an alternative wording of ''provide the occupation, job title, or a description of the position for which certification is sought.''

We believe the proposed regulatory language gives employers flexibility to draft appropriate advertisements that comply, and that lengthy, detailed advertisements are not required by the regulation. The regulation does not require employers to run advertisements enumerating every job duty, job requirement, and condition of employment; rather, employers need only apprise applicants of the job opportunity. As long as the employer can demonstrate a logical nexus between the advertisement and the position listed on the employer's application, the employer will meet the requirement of apprising applicants of the job opportunity. An advertisement that includes a descriptive job title, the name of the employer, and the means to contact the employer might be sufficient to apprise potentially qualified applicants of the job opportunity. Employers need not specify the job site, unless the job site is unclear; for example, if applicants must respond to a location other than the job site (*e.g.*, company headquarters in another state) or if the employer has multiple job sites. If an employer wishes to include additional information about the job opportunity, such as the minimum education and experience requirements or specific job duties, the employer may do so, provided these requirements also appear on the ETA Form 9089.

Employers should note, however, that while they will have the option to place broadly written advertisements with few details regarding job duties and requirements, employers must prepare a recruitment report that addresses all minimally qualified applicants for the job opportunity. If an employer places a generic advertisement, the employer may receive a large volume of applicants, all of whom must be addressed in the recruitment report. Employers placing general advertisements may wish to include a job identification code or other information to assist the employer in tracking applicants to the job opportunity.

b. Advertisement Cost

Several commenters objected to the requirements for the advertisements on the basis of cost, and disagreed with our cost estimate of $500 to place an advertisement that would fulfill the regulation's requirements. AILA commented that suitable advertisements can easily cost over $1,500 each, and would be a significant economic burden for employers. A medical research center commented it has limited funds for advertising, and requiring long advertisements will only benefit publications, not find more qualified workers.

We believe the costs of the mandatory advertisement do not constitute an unreasonable expense. The current regulations already require employers to place advertisements at the employer's expense, whether the employer

conducts recruitment under the auspices of the SWA, or whether the employer submits its application under the RIR process. While Sunday advertising rates are generally higher than rates on other days of the week, the employer may publish a shorter advertisement under this final rule than is required under the current system. Employers also are only required to place two 1-day advertisements, unlike the current system's requirement of a 3-day placement. A representative from DOL contacted major newspapers in various U.S. cities and inquired about advertising rates for Sunday and midweek advertisements. Estimated costs for placing two 10-line Sunday advertisements in these papers ranged from $400 to $1,100, whereas a 3-day midweek advertisement of the same length would cost between $330 and $1,100. The Sunday advertisement costs do not appear to be as high as claimed by the commenters. Further, our program experience is that most 3-day advertisements under the current system are longer than 10 lines, indicating that the two Sunday advertisements will cost less than the 3-day advertisement requirement under the current regulations.

c. Wage Offer in the Advertisement

The vast majority of commenters objected to the inclusion of the wage in the print advertisement. Many contended few real-world employment advertisements include a wage, particularly for professionals and executives. These commenters noted if a salary is included in an advertisement, it is typically for a nonprofessional position and is listed as an hourly amount.

AILA strongly opposed any inclusion of the rate of pay in the advertisement, but proposed if the wage requirement is retained, we allow employers to insert a pay range in the advertisement, provided the bottom of the range is no less than the prevailing wage rate. A number of universities opposed inclusion of the wage, as their normal recruitment efforts often do not include the salary. These commenters noted if the employer wishes to sponsor a foreign worker immediately following the initial recruitment, the employer would not be able to use the advertisements from the original competitive recruitment, as those advertisements would not include the wage. The universities contended that requiring a second round of advertisements merely to include the wage would appear to be punitive. A few commenters noted the wage requirement could create a burden for employers if it is determined the prevailing wage rate used in the advertisement was incorrect and the employer must readvertise with the correct prevailing wage rate. One attorney addressed the issue of confidentiality of salaries, which may vary among the workers in the same position in the same department within the same organization; salary is often discussed last in the interview process and is subject to negotiation. This commenter felt requiring employers to post the offered salary in the advertisement was an unreasonable deviation from the standard practice of professional recruitment.

After review and consideration of both the comments and our program experience reviewing employment advertisements, we have revised this final rule to eliminate the requirement that the wage offer must be included in the advertisement. Lengthy program experience reviewing employment advertisements has indicated that most employment advertisements do not include a wage offer. If an employer chooses to include the wage in the advertisement, the employer may do so; however, inclusion of the wage is not mandatory. If the employer does include a wage in the advertisement, the wage rate must be equal to the prevailing wage rate or higher. Regarding wage ranges, we have not modified the regulation to specifically permit wage ranges; however, consistent with our longstanding policy, the employer may advertise with a wage range as long as the bottom of the range is no less than the prevailing wage rate.

d. Employer's Name in the Advertisement

Commenters also discussed the inclusion of the employer's name in the advertisement. A few commenters claimed requiring employers to include their name on advertisements would conflict with standard practice in many industries, and could lead to disclosure of confidential company information. AILA asserted in certain industries, such as advertising agencies and investment banks, it is routine for employers to place advertisements that do not include the employer's name. AILA suggested as long as the industry, place of employment, and type of position is identified, the employer name need not be included in the advertisement.

FAIR expressed strong support for including the employer's name in the advertisement, asserting most U.S. workers recognize advertisements naming the employer are more likely to represent bona fide openings or vacancies, as opposed to employment advertisements placed for other purposes, such as to test wage rates or identify competitors' key staff. Several SWAs supported inclusion of the employer's name in the advertisement.

Despite the objections of some commenters, the employer's name must appear in the advertisement. Review of employment advertisements clearly indicates the vast majority of these advertisements include the employer's name. The employer's name allows potential applicants to identify the employer, and applicants will be able to better determine if they wish to apply for the advertised position. Applicants also may be unwilling to submit résumés to a blind advertisement, as they can not tell who will receive their résumé. Requiring the employer's name in the advertisement also allows us to match the employer's advertisement to the sponsored job opportunity in the event of an audit. We have concluded these benefits outweigh confidentiality concerns of employers. In addition, we note employers are required by statute to provide notice that the employer is seeking a labor certification for the job opportunity, making it unlikely any of the job information is in fact confidential in nature. See 8 U.S.C. 1182 note.

e. Placement of Advertisement in Newspaper

One commenter recommended the regulation contain language clarifying where in the classified advertisements the advertisement must be placed, to avoid the problem of advertisements being ''buried'' under an inappropriate heading or job title. This commenter noted if an employer places a job advertisement under the wrong keyword or heading, potentially qualified U.S. workers may never see the employer's advertisement. The commenter suggested the regulation be amended to add a requirement that ''the advertisement must be placed where advertisements for the same type of occupation are normally located.''

We have concluded a specific prohibition on buried advertisements need not be included in this final rule. Employers are still required to recruit in good faith and placement of the employer's advertisement under an inappropriate heading or keyword would be considered a failure to make good-faith efforts to recruit U.S. workers. See *H.C. LaMarche Enterprises, Inc.,* (87–INA–607, October 27, 1988)(en banc), *Wailua Associates,* (88–INA–533, June 14, 1989), *Quality Rebuilders Corporation,* (93–INA–144, June 28, 1994). If an application is selected for

audit, we will review the employer's recruitment effort, and if an employer's advertisement were placed under a clearly inappropriate keyword or in the wrong section of the classifieds (such as under ''legal notices,'' rather than ''employment opportunities'' or ''help wanted''), we would conclude the employer's recruitment was not done in good faith and either deny the application or direct the employer to complete additional recruitment under our supervision.

f. Inclusion of Physical Address in the Advertisement

An SWA commenter recommended advertisements be required to include the employer's physical address, in addition to the employer's name. AILA questioned the regulation's requirement that applicants be directed to report to or send résumés to the employer. AILA proposed applicants be directed to report or write to a place, post office box, or e-mail location, and this site need not be the employer's, provided the geographic location of the employer is identified.

As the name of the employer will appear in the advertisement, we see no need to require the employer's physical address in the advertisement. Employers may designate a central office or post office box to receive résumés from applicants, provided the advertisement makes clear where the work will be performed.

g. Inclusion of Posting Requirements in One Advertisement

Another SWA commenter proposed at least one of the mandatory advertisements include the language of the posted notice requirements at § 656.10(d) with respect to furnishing of documentary evidence bearing on the application. The commenter suggested this would provide an opportunity for interested U.S. workers to provide comments or complaints to the DOL, and would balance employers' bias towards the sponsored foreign worker.

This recommendation is inconsistent with this final rule's goal of using the advertisement for recruitment of potentially qualified U.S. workers. Potential job applicants might see the advertisement not as a job opportunity, but as a legal or information notice for the employer, and would be discouraged from applying to the advertisement. Also, a number of other commenters noted advertisements that were clearly for labor certification purposes drew little or no applicants compared to non-labor certification advertisements.

6. Recruitment Report

The final rule continues to provide for pre-filing recruitment, and requires employers to prepare a recruitment report that must be submitted to the CO if requested in an audit or otherwise. The employer's recruitment report must describe the recruitment steps undertaken and the results achieved, the number of hires, and, if applicable, the number of U.S. workers rejected, summarized by the lawful job-related reasons for such rejections. After reviewing the employer's recruitment report, the CO may request the résumés or applications of the U.S. workers sorted by the reasons they were rejected.

We received comments from 40 individuals and organizations about this section of the proposed regulations.

a. Concerns About Preparing Recruitment Report

Several employers and attorneys and organizations representing employers submitted comments expressing concerns about the feasibility of large companies tracking recruitment results with the level of detail required by the proposed regulation. These commenters recommended employers be allowed to submit an RIR-style recruitment report that would discuss the employer's recruitment in general terms.

ACIP claimed the administrative burden of tracking individual job applications against specific positions would be overly burdensome on the employer, and recommended employers instead be allowed to submit a summary of the employer's overall recruitment results. A high-tech company echoed these comments, and requested the rule be clarified to state that employers need not report on every résumé received and need not track résumés to specific recruitment sources.

AILA asserted the proposed recruitment report's one-job-at-a-time approach is far removed from the business reality of modern businesses, and the proposed rule fails to take into account the added expense for employers to assess job applicants in this fashion. AILA favored adoption of an RIR-style recruitment report, whereby an employer would report the number of openings for the occupation at the beginning and end of the recruitment report, the number of résumés received, the number of applicants interviewed, and the number of hires by the employer for the occupation in the same period. AILA further recommended the level of detail in the employer's recruitment report should depend on whether the employer has recruited for an individual job or recruited for multiple open positions, asserting employers with multiple openings should not have to match every résumé received to an individual job and track its outcome. AILA asserted it was burdensome to require an employer who is constantly recruiting and filing positions to have to summarize the lawful job-related reasons for rejecting each applicant.

In contrast to the recommendations from AILA and ACIP for less-detailed recruitment reports, a union commenter recommended employers be required to submit the recruitment report and copies of applicants' résumés when the application is filed with DOL. FAIR asserted the proposed summary recruitment report fails to provide minimum adequate protection to U.S. worker applicants, who could not determine from the report if they were rejected for legitimate reasons. FAIR proposed employers be required to provide the summary recruitment report to all applicants, with a notice describing how the applicant could file an appeal to the CO. FAIR also recommended the summary recruitment report be subject to the same posting requirements of 20 CFR 656.10(d), so other U.S. workers at the employer's job location are informed about the results of the recruitment process.

A SWA commenter praised the proposed content for the recruitment report, noting under the current RIR process, many large employers avoid providing specific information about numbers of applicants and the employer's reasons for rejecting U.S. workers who apply. This commenter stated large employers claim they have no way to extract position-specific information, because they accumulate résumés from all around the country. The commenter recommended the rule be amended to require applicants to mail their résumés directly to the employer's job site, rather than to a national location, or require employers to include a job identification code with each advertisement, to ensure the employer can match applicants to each job opportunity. This commenter concluded without some type of job-identification system, national employers will make little effort to prepare a breakdown of recruitment results by state and job. Another SWA commenter inquired how the employer's recruitment report would incorporate the results of the job order. The commenter asked if SWAs will be required to provide the employer with a copy of the job order as well as a list of referrals.

The employer has always been required to document that U.S. workers

are unavailable for a sponsored job opportunity. This outcome is compelled by the statutory requirement that the Secretary of Labor certify that qualified U.S. workers are unavailable for the job opportunity. Each application is for a single, specific job opportunity, not for general job opportunities with the employer. Without a nexus between the recruitment report and the application, the Secretary is unable to fulfill the statutory obligation to certify that qualified U.S. workers are unavailable. While it is undoubtedly easier for employers to prepare a general recruitment report that does not track every applicant to a specific position, this type of report is useless for determining whether the employer rejected qualified U.S. workers in favor of the sponsored foreign worker.

We note most of the objections to the recruitment report are based on a comparison of the proposed rule to the type of recruitment report we have accepted under the RIR process. RIR processing rests on a determination there is little or no availability of U.S. workers in an occupation; however, the new system does not contemplate any such front-end determination being made. All applications, including ones for which there may be considerable U.S. worker availability, are treated the same.

In response to numerous comments from employers who receive a large volume of unsolicited resumes, we are not including in the final rule the requirement that the recruitment report identify the individual U.S. workers who applied for the job opportunity. However, the employer retains the responsibility for proving that U.S. workers are not available for the job opportunity. The recruitment report does not impose a new requirement, only a new means by which recruitment information must be submitted when and if we request it. For those employers who run generic help wanted advertisements and are concerned about tracking applicants, employers may run advertisements more closely matched to the relevant labor certification application or include a job code that the employer may use to track responses to the advertisement.

With regard to the recommendations that employers submit copies of the recruitment report and résumés when the application is filed, this proposal is not compatible with the attestation system we have adopted. We believe we can appropriately obtain these materials through the use of the audit letter or other request from the CO. Further, because an employer's failure to submit the recruitment report in response to the audit letter will result in the denial of the employer's application, and may result in the employer being required to undergo supervised recruitment for up to 2 years, we believe employers will have a strong incentive to prepare the recruitment report and promptly submit it if requested during an audit. The employer must provide lawful job-related reasons for rejecting each applicant as part of the recruitment report, which addresses the AFL–CIO's comment that the employer provide a rationale for not hiring U.S. workers who applied for the job opportunity.

FAIR's recommendations are so novel they would require another opportunity for notice and comment before any such rules could be imposed. Moreover, these rules appear to be inconsistent with real-world recruitment practices, in which most employers only tell each applicant the result of his or her individual application. Providing applicants with a report on the decisions made on all applicants to a job opportunity would appear to be problematic due to confidentiality issues.

b. Job Qualification Through Reasonable Period of On-the-Job Training

A few commenters expressed support for the provision in § 656.17(f)(2) of the NPRM, providing that a U.S. worker is able and qualified for the job opportunity if the worker can acquire the skills necessary to perform the duties involved in the occupation during a reasonable period of on-the-job training, as a sensible means to protect the interests of U.S. workers. Two SWAs, an attorney, and FAIR supported designating a U.S. worker as qualified if the necessary skills can be acquired during a reasonable period of on-the-job training. FAIR additionally recommended if an occupation has an SVP of 1 year or less, that 1 year be presumptively considered a reasonable period for training, and thus render the labor certification application ineligible for approval if any U.S. workers apply.

A SWA commenter additionally noted many employers will recognize an alien as having the functional equivalent of a college degree, based on a combination of education, training, and experience. This commenter felt employers rarely apply this educational equivalency standard to U.S. workers who apply for the job opportunity, and instead automatically eliminate workers from consideration if their résumés do not list a college degree. The commenter suggested we address this issue when employers reject U.S. workers who lack a college degree.

The overwhelming majority of commenters objected to the proposed language in § 656.17(f)(2) of the NPRM. AILA expressed strong opposition to this proposed language, claiming this rule was derived from DOL's suspicion that employers inflate job requirements when filing labor certifications.

AILA further asserted the proposed rule mandates that every U.S. worker is potentially qualified for a position even if he or she does not meet every minimum requirement, resulting in an over-broad and unmanageable definition of the term ''qualified'' U.S. worker. AILA claimed the proposed rule attempts to reverse the long-accepted rule that an employer may reject a U.S. worker who lacks a stipulated minimum requirement for the position. This would result in a subjective and unmanageable standard of labor certification adjudications and would encourage a substantial volume of litigation over the issue of whether training is feasible.

Requiring employers to consider as qualified U.S. workers who can learn the necessary skills in a reasonable period of on-the-job-training is an important corollary to the long standing regulation, at § 656.24(b)(ii), that provides U.S. workers will be deemed qualified if ''the worker, by education, training, experience, or a combination thereof, is able to perform in the normally accepted manner the duties involved in the occupation as customarily performed by other U.S. workers similarly employed * * *.'' This corollary has been affirmed at the circuit court level in *Ashbrook-Simon Hartley* v. *McLaughlin,* 863 F.2d 410 (5th Cir. 1989), which stated DOL ''can discount * * * job requirements listed by the employer which constitute skills * * * which can be acquired during a reasonable period of on-the job training.''

Most of the commenters erroneously read the proposed rule as stating a U.S. worker who failed to meet the employer's stated minimum requirements, such as educational background, training, or years of employment experience, must be deemed qualified. Under the final rule, as in the current regulations, an applicant's failure to meet the employer's stated minimum requirements is a lawful reason for rejection; however, if a worker lacks a skill that may be acquired during a reasonable period of on-the-job training, the lack of that skill is not a lawful basis for rejecting an otherwise qualified worker. This final rule does not specify what constitutes a reasonable period, as it will vary by occupation, industry, and

job opportunity. The COs are experienced in assessing the qualifications of applicants, and we do not believe this rule will present any difficulty. We disagree with the comments that suggested the rule creates disparate hiring standards for U.S. workers and foreign nationals. Many employers hire applicants with the expectation the applicant will have to undergo some amount of on-the-job training.

Regarding educational equivalencies, we lack adequate information to determine whether a given worker's combination of education, training and experience is the functional equivalent of a college degree. While we are aware some employers will accept a specified degree or its equivalent, we do not see a need to add a requirement that employers consider whether a U.S. worker's experience, training and education is the equivalent of a required degree.

7. Job Requirements

a. Business Necessity Standard and Job Duties

The NPRM proposed retention of the current standard that the employer's job requirements must be those normally required for jobs in the United States and the employer's job requirements must not exceed the number of months or years of training, education and/or experience defined for the SVP level assigned to the occupation as shown in the O*NET. The NPRM also sought to modify the current regulations by eliminating the use of business necessity to justify requirements not normal for the occupation. The NPRM instead proposed that job requirements other than the number of months or years of training, education and/or experience in the occupation would not be permitted unless it could be shown that the employer employed a U.S. worker to perform the job opportunity with the special requirements within 2 years of the filing date of the application, or the special requirements are normal to the occupation.

We received over 50 comments on the proposed elimination of business necessity. Most of the commenters, including AILA and ACIP, were opposed to the proposal. The most common objection was the elimination of business necessity would hurt the economy because the failure to staff positions with qualified workers would prevent employers from meeting marketplace demands and put employers at a competitive disadvantage by causing them to lose out to foreign competitors. One commenter observed the market often demands that new positions be formed or old positions be reformulated, and U.S. businesses should not be hindered by limiting new positions to ones previously held by a U.S. worker. Another commenter, a high-tech employer, viewed the proposal as effectively blocking all emerging technology and evolving positions that did not exist previously.

A few commenters observed that requiring an employer to show it has previously employed a U.S. worker in the position would hurt new companies because these companies may not have had a position open prior to the current position. Other commenters saw the proposal to eliminate business necessity as especially harmful to small businesses that may not have enough work to support more than one person in the position. Some universities noted academic research and original publication would be harmed because a degree and a designated number of years of experience do not capture the full complement of necessary qualifications.

AILA and several others commented there was no factual basis for our rationale for eliminating business necessity. AILA also commented the elimination of business necessity would unjustifiably renounce the legacy of BALCA and the Federal courts, and the proposal ignores a quarter century of cumulative business necessity experience. Another commenter noted the proposed rule contravened the long-held view that ETA would not impose its judgment on business by limiting an employer's actual job requirements for a particular position. SHRM observed the current regulations, coupled with relevant case law, provide U.S. workers with ample protection against illegitimate job requirements. On the other hand, comments by FAIR, a few unions, and SWAs were highly supportive of the proposal to eliminate business necessity, and regarded the proposal as a salutary effort to address employer abuses in the program.

We agree with the majority of commenters that the business necessity standard should be retained in the permanent labor certification program. For the past 25 years, we have permitted employers to use specialized job requirements as long as they could demonstrate their importance to the performance of the job. The administrative difficulties associated with implementation of the business necessity test, although problematic, do not form a sufficient basis for depriving employers of their ability to address legitimate business requirements. While we considered trying to develop a middle ground between the approach in the NPRM and business necessity, commenters did not suggest any solution nor could we identify a middle ground solution. Any alternative to business necessity is likely to be equally subjective, and business necessity is a concept with which we and the employer community are familiar. This final rule marks a return to the status quo by incorporating the standard for business necessity adopted by BALCA in *Information Industries* (88–INA–92, February 9, 1989) (en banc). This final rule provides in § 656.17(h)(1) to establish business necessity an employer must demonstrate the job requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform, in a reasonable manner, the job duties as described by the employer.

This final rule also clarifies our long-held position that the regulatory provisions that deal with unduly restrictive requirements and business necessity also apply to unduly restrictive job duties. It has always been our position that applications for labor certification may not describe the job opportunity in an overly restrictive manner, thereby artificially excluding U.S. workers who are minimally qualified for the position. Such restrictions can manifest themselves both as demands that applicants satisfy unnecessary job requirements or they be able to immediately perform every potential job duty, however tangential to the basic occupation.

The O*NET job zones will show the SVP level assigned to the occupation. This final rule provides the job opportunity's duties and requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation and must not exceed the SVP level assigned to the occupation as shown in the O*NET job zones. While O*NET may arguably contain broader occupational categories than the DOT, COs have traditionally exercised their judgment in determining whether the job requirements are normally required for the occupation involved in the employer's application and in applying the SVP to specific case situations, and they will continue to make such judgments with O*NET. Employers should be aware that job duties and requirements other than those normal for the occupation must be supported by evidence of business necessity and such evidence will be required in an audit. The language in the NPRM about the justification of a bachelor's or higher degree has been eliminated in this final rule. The inclusion of the business

necessity test, along with the retention of our current policies about what is normally required for the job in the United States, make these provisions unnecessary.

b. Foreign Language Requirement

The NPRM proposed that a foreign language requirement must be supported by a showing that the foreign language was not merely for the convenience of the employer or its customers, but was required based upon the nature of the occupation or the need to communicate with a large majority of the employer's customers or contractors. The use of the business necessity standard for foreign language requirements in the current system produced a well-understood and generally accepted body of case law that has been developed over 2 decades about when and how language requirements can be used. The business necessity standards contained in these established principles were reflected in the proposed rule. Since we are retaining the business necessity standard in the final rule we have modified this final rule in § 656.17(h)(2) by simply providing that a foreign language cannot be included as a job requirement unless it is justified by business necessity.

We received seven comments that specifically addressed the proposed rule on foreign language requirements. FAIR and the AFL–CIO expressed their strong support of the proposed rule. The majority of commenters (employers and attorneys/interest groups representing employers), while generally favoring the proposal, suggested we expand the rule to include other possible business justifications for foreign language requirements. The most frequently cited example was the need to communicate with co-workers or subordinates. AILA, for example, strongly recommended we include the employer's own employees as a potential class of individuals necessitating a language requirement, noting our recognition of the linguistic difficulties of an employer's contractors, but not of the employer's own staff, appeared inexplicable. After careful consideration, we have concluded these comments have merit. Lastly, we think there are working environments where safety considerations would support a foreign language requirement. In some industries and occupations language impediments could contribute to injuries to workers. Accordingly, this final rule adds the need to communicate with co-workers or subordinates to the ways for justifying business necessity for a foreign language requirement. Lastly, we think there are working environments where safety considerations would support a foreign language requirement.

c. Combination Occupations

The NPRM proposed two changes to the current regulations concerning combination of duties. First, it proposed the term ''combination of occupations'' replace ''combination of duties'' because most jobs involve a combination of duties. Second, it proposed a combination of occupations may be justified only by a showing of previous employment of a U.S. worker within 2 years of filing and/or that workers customarily perform the combination of occupations in the area of intended employment. Proof of business necessity, one of three alternative bases to support a combination of duties under current regulations, would not justify a combination of occupations.

We received eight comments on the proposed rule on combination jobs. Two commenters, FAIR and a SWA, supported the proposal. The remaining commenters were opposed to the elimination of business necessity as a basis for justifying a combination of occupations. These commenters maintained the proposed rule would harm U.S. businesses by failing to give employers needed flexibility to merge occupations in a rapidly changing technological and global marketplace. AILA recommended we restore an employer's ability to set forth unusual requirements or combinations of duties via attestation subject to later verification of business necessity in the course of an audit or investigation. Another commenter noted the proposed rule would hurt small employers because many small companies expect their employees to ''multi-task,'' and the smaller the company the more likely an employee would perform a combination of duties.

After careful evaluation, we have determined these concerns are addressed by our decision to retain business necessity in the permanent labor certification program. Therefore, this final rule continues the current standard in § 656.17(h)(3). Combination occupations can be justified in the same way as is presently required for a combination of duties, *i.e.*, the employer must prove it has normally employed persons for that combination and/or workers customarily perform the combination in the area of intended employment and/or the combination job opportunity is based upon a business necessity.

8. Alternative Experience Requirements

We received over 35 comments in response to the proposal to eliminate the use of alternative experience requirements as a means of qualifying for the employer's job opportunity. The vast majority of commenters were opposed to the proposal. These commenters noted alternative experience and educational requirements are a necessary part of recruitment and their elimination would prevent employers from staffing positions in accordance with real-world business practices whereby employers typically interview job candidates and evaluate their skill sets to determine whether the candidate can perform the job. One commenter observed today's résumés do not list past positions, but rather the skills and accomplishments of the individual candidate. ACIP commented that large employers normally use alternative experience or educational requirements when hiring both foreign nationals and U.S. workers because, in their experience, there is more than one possible route to gain the education and skills needed to perform the duties of a position. A university and a high-tech company noted emerging technology and cutting-edge research thrive in an interdisciplinary environment where individuals from seemingly different backgrounds may occupy the same position.

Several commenters observed the proposal seemed counter-productive to protecting the U.S. labor force. AILA and other commenters noted by eliminating alternative requirements, DOL was actually limiting the pool of U.S. workers who may qualify for a position. A few commenters, including AILA, thought it unfair that the proposed rule would prohibit employers from considering any alternative experience possessed by foreign nationals, while at the same time force employers to consider an alternate array of experience and education possessed by U.S. workers, thereby ignoring the reality of the international job market.

Several commenters, including AILA, a high-tech employer, and a few universities, disagreed with DOL's statement in the NPRM that alternative requirements are a phenomenon of lesser-skilled positions. Other commenters stated the NPRM was drawn more broadly than necessary to address DOL's concerns about individuals circumventing the Other Worker visa quota limits. These commenters suggested DOL deal directly with the Other Worker problem by examining whether an alternative requirement was bona fide, reasonable,

and/or normal for the occupation and not by eliminating alternatives altogether.

An immigration law firm pointed out the issue of alternative requirements was addressed by BALCA in the *Matter of Francis Kellogg,* (94–INA–465, February 2, 1998) (en banc). *Kellogg* adopted a reasonable solution that required the employer to accept any and all experience that would reasonably prepare an applicant for the position and not permit an employer to accept only the specific related experience the alien might have, without regard to whether the other experience would prepare the applicant for the position in question. This commenter observed DOL has never implemented the rationale expressed by BALCA in *Kellogg* on a nationwide basis.

Six commenters supported the elimination of the alternate experience requirement. Several SWAs stated that alternative experience requirements enabled foreign workers to easily qualify for available job openings and should be eliminated. FAIR commented that alternative requirements have almost always been used by employers to disguise what are really unskilled jobs as skilled positions in order to promote alien relatives and cronies ahead of law-abiding U.S. applicants. The AFL–CIO said alternative requirements allowed employers to tailor job requirements to the qualifications and experience of the foreign worker rather than the requirements of the job.

We are persuaded by the majority of commenters that there may be legitimate instances when alternative job requirements, including experience in a related occupation, can and should be permitted in the permanent labor certification process. However, we do not agree that proposed § 656.17(g)(4)'s limitations on what an employer may require as an alternative experience requirement must be consistent with the definition of related occupation in § 656.17(j) of the NPRM, because these two sections have distinctly different purposes. Section 656.17(j), now (k) addresses the qualifications of U.S. workers laid off by the employer-applicant. Section 656.17(g), now (h), on the other hand, addresses the qualifications of the alien beneficiary and is designed to prevent an employer from allowing the alien beneficiary to benefit from training and/or experience opportunities not offered to U.S. workers.

Under § 656.17(h)(4) of this final rule, an employer may specify alternative requirements provided the alternative requirements meet the criteria set forth by BALCA in the *Kellogg* case. In *Kellogg,* BALCA indicated that alternative requirements and primary requirements must be substantially equivalent to each other with respect to whether the applicant can perform the proposed job duties in a reasonable manner. There may also be other equally suitable combinations of education, training or experience which could qualify an applicant to perform the job duties in a reasonable manner, but which the employer has not listed on the application as acceptable alternatives. Therefore, even when the employer's alternative requirements are substantially equivalent but the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements, the alternative requirements will be considered unlawfully tailored to the alien's qualifications unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable.

9. Actual Minimum Requirements

Under the proposed rule, employers would be prohibited without exception from requiring any experience gained by the alien while working for the employer in any capacity, including working as a contract employee or for an overseas company.

DOL received over 40 comments on the proposal to prohibit any experience gained with the employer. The vast majority of commenters, including AILA and ACIP, were opposed to the proposed rule. The objection most frequently made was the proposed rule would significantly harm American businesses and have a chilling effect upon U.S. workers and the economy. These commenters believed the proposed rule would force talented foreign nationals to change employment because they would be unable to obtain permanent residence through their long-term employer. Losing these employees after a substantial investment would undermine the employer's competitive edge because the employees would likely be lost to competing businesses. Several commenters specifically stated the proposed rule inadvertently encourages a system in which only entry level or new employees could be sponsored for labor certification. One university commented the proposal would eliminate the ability of colleges and universities to retain exemplary post-docs, junior researchers, faculty members, and other highly skilled employees who would end up leaving the universities for jobs in industry. Another commenter stated the proposed rule would in particular penalize large medical research centers.

AILA commented that our rationale for the proposed rule lacked supporting statistics, citations, or evidence, empirical or otherwise. ACIP commented that DOL's justification undermined the economic viability of American employers who provide the jobs. These commenters and others recommended the longstanding exceptions to the current rule be retained. In particular, AILA commented that BALCA in *Delitizer Corp. of Newton* (88–INA–482, May 9, 1990)(en banc) already established a mechanism to protect U.S. workers in this situation. In *Delitizer,* BALCA listed a number of factors that could be analyzed, such as the relative job duties and supervisory responsibilities, job requirements, and the positions of the jobs in the employer's hierarchy, to determine whether the alien's experience with the employer should be allowed. Some commenters contended that experience gained on the job should be allowed when it is infeasible for the employer to train a new worker.

Other commenters objected to the inclusion of contract employees within the scope of the proposed rule. One commenter observed that many U.S. companies hire start-up contract employees whom they train and who grow with the business. One commenter stated the inclusion of contract employees was difficult to understand because contracting employers who place contract employees at another firm are, by definition, separate employers.

Relatively few commenters supported the proposed change. These commenters, including FAIR, the AFL–CIO, and several SWAs, complained that U.S. workers had been disadvantaged by the current regulations because employers are not required to recruit for the positions until after the aliens received the full benefit of employer-provided training and experience.

A few commenters proposed DOL take a middle position and retain in some form the exceptions contained in the current regulations. One of these commenters suggested experience gained on the job should be allowed if the alien obtained the experience in a materially different position. Another commenter suggested an exception be made for businesses with 100 or more employees.

a. Dissimilar Jobs

We have concluded that some modification to the proposed rule should be made to accommodate the

legitimate interests of the business community. The inclusion of exceptions to the ban on using experience gained on the job in the 1977 regulations reflected our view that employers filing for labor certification may very well be able to show appropriate instances when the prohibition should not be applied. We agree with the commenters that if the jobs are truly distinct, U.S. workers are not denied training opportunities unfairly gained by foreign nationals with the same employer. Foreign workers, including those working as contractors, are not being trained on the job when they are gaining experience in a truly different job. However, in our experience, the specific *Delitizer* criteria are unnecessarily complex and in practice difficult to administer.

In order to reconcile these competing considerations, this final rule in § 656.17(i) allows the employer to show the alien was hired in or contracted to work in a different job for the employer, but the employer must prove the job in which the alien gained the experience is not substantially comparable to the job for which certification is being sought. A ''substantially comparable'' job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

b. Infeasibility to Train

With respect to the second exception, we note the ''infeasibility to train'' argument is rarely claimed in practice. Consequently, we have concluded the reinstatement of this exception in this final rule will have little programmatic or operational impact, would acknowledge the legitimate interests of the business community, and would not be inconsistent with our longstanding interpretation of our statutory mandate.

c. Definition of Employer

Concerning the definition of ''employer,'' the proposed rule adopted the position taken by BALCA in *Matter of Haden, Inc.* (88–INA–245, August 30, 1998). We proposed that employer be defined more broadly to include predecessor organizations, successors in interest, a parent, branch or subsidiary, or affiliate, whether located in the U.S. or another country. The comments that spoke to this issue were overwhelmingly negative, particularly with regard to DOL's intention to include overseas employment. One commenter characterized the proposed change as harsh and inflexible. Other commenters pointed out that the broad prohibition against experience obtained overseas would have a wide-ranging negative economic and competitive impact. These commenters asserted many large companies have a global workforce and move talent and personnel as necessary, and the proposed rule would shut U.S. doors to global talent by precluding promotion from within the organization. One commenter claimed excluding experience gained by the alien while working for an affiliate company abroad would actually harm U.S. workers by forcing multinational corporations to consolidate research, development, and manufacturing jobs overseas, instead of transferring these positions to the U.S.

With regard to the prohibition of experience gained with an acquired company, a commenter noted in most instances there is no relationship between the acquiring and acquired company; consequently, the alien has no expectation that he or she would have greater qualifications for the eventual job than an employee working anywhere else. This commenter also observed the proposed rule would impede business expansion and that one of the most valuable tangible assets of a business acquisition is the talent and creative energy of the employees in the acquired company. One SWA expressed concern about the administration of the proposal and questioned how DOL would be able to track and/or separate the different legal relationships (predecessor organizations, successors in interest, etc.) enumerated in the proposed rule.

There were a few commenters that supported the proposed change. FAIR commented it is entirely appropriate for U.S workers to ''pierce the corporate veil'' in the contemporary workplace and commended DOL for adopting the *Haden* standard, which bars permanent certification where a position requires proprietary training or knowledge that only a foreign employee of the employer possesses.

After reviewing the comments, we agree the proposed definition of employer was too broad. Consequently, this final rule in § 656.17(i)(5)(i) has been simplified to provide an employer is ''an entity with the same Federal Employer Identification Number (FEIN), provided it meets the definition of an employer at § 656.3.'' The simpler definition will be easier to administer and strikes an appropriate balance between the legitimate interests of the U.S. business community and DOL's statutory mandate to protect U.S. workers.

10. Layoffs by the Employer

The proposed rule provided that, if there has been a layoff by the employer-applicant in the area of intended employment within 6 months of filing the application, either in the occupation for which certification is sought or in a related occupation, the employer must document it has notified and considered all potentially qualified laid-off U.S. workers of the job opportunity involved in the application and the results of the notification.

For the purposes of § 656.17(j) in the NPRM (§ 656.17(k) of this final rule), a ''related occupation'' is any occupation that requires workers to perform a majority of the essential duties involved in the occupation for which certification is sought.

Several commenters had concerns about proposed § 656.17(j) and discussed issues such as industry and statewide layoffs, CO's knowledge of the layoffs, laid off U.S. workers, contract employees, and the definitions of ''related occupation,'' ''similar jobs,'' ''contract employees,'' and ''layoffs.''

a. Industry and Statewide Layoffs

Two commenters addressed industry or statewide layoffs. A SWA prevailing wage specialist stated Item 10 of Part IV (Recruitment Efforts Information) of the ETA Form 9089 implies the layoffs were only the employer's layoffs. One commenter questioned how the CO would monitor layoffs by other employers as well as the employer-applicant's layoffs.

Under this final rule, the employer-applicant is required to document it has notified and considered only those workers it laid off, not those workers laid off by other employers. The employer must attest on the application form to whether it has laid off employees in the occupation involved in the application in the past 6 months. We do not believe it is reasonable to place such requirements on employer-applicants with respect to workers laid off by other employers in the area of intended employment.

It should be noted that under § 656.21, if the employer is directed to complete supervised recruitment, the CO may take notice of industry layoffs in directing the employer to make additional recruitment efforts; however, the petitioning employer is not required to make attestations about layoffs by other employers in the industry or area of intended employment. This is consistent with our past practices.

b. Knowledge of Layoffs

One commenter questioned how the CO would know whether there were

layoffs if the employer does not inform the CO directly. We note the employer must attest on the application whether it has laid off workers in the occupation in the 6 months immediately prior to filing the application. Further, our program experience has shown that COs are able to determine whether an employer has laid off workers by relying on various sources of information such as Worker Adjustment and Retraining Notification (WARN) notices, newspaper articles, and internet search tools.

c. Laid-off U.S. Workers

One commenter recommended the employer be required to document that all of its laid-off workers (who are actively seeking work) are employed. The commenter indicated the minimum standard for protection of U.S. workers would be to require the employer to document that all of its laid-off U.S. workers (who are actively seeking work) are now employed and working at a wage that is equal to or higher than the prevailing wage rate on the ETA Form 9089.

The final rule requires the employer to document only that it notified and considered potentially qualified U.S. workers. Employers must document they offered the position to those laid-off workers who are able, willing, and qualified for the job opportunity and the results of their consideration of such workers.

Employers are not required to document that all of their laid-off employees are actively seeking work, or have obtained employment at a wage that is equal to or higher than the prevailing wage on the ETA Form 9089. It is not feasible to require an employer to document that its laid-off workers are currently employed and the wages at which the workers are currently employed. For example, laid-off staff may be unreachable, and may be unwilling to cooperate with former employers seeking information about their current employment or salary.

d. Contract Workers

A commenter noted the proposed rule provides an opportunity to require that, when a consulting firm submits a permanent alien labor application, the sponsored workers can not be sent to firms where they would replace U.S. workers. The commenter suggested DOL add a section to the rule requiring consulting firms to document they are not referring workers to a place of employment at which U.S. workers have been laid off from positions similar to the position the foreign worker will occupy.

We are not adding a provision to this final rule requiring consulting firms to document that they are not referring workers to a place of employment at which U.S. workers have been laid off from similar positions. Although this suggestion has merit, we have concluded such a marked departure from current policy and practice should be the subject of another NPRM before it is implemented. We will consider it in future rulemaking to amend the permanent labor certification program.

It should be noted if the employer-applicant is a consulting firm, it, as must any other employer, must attest to any layoffs of its staff in the sponsored occupation in the 6 months prior to filing. We also note contract staff of the employer-applicant are not employees, and need not be included in any assessment of qualifications of laid off U.S. workers.

e. Definition of Related Occupation

One commenter inquired whether § 656.17(j)(2)'s definition of ''related occupation'' was inconsistent with § 656.17(h)'s ban on experience gained with the employer, and suggested DOL redefine related occupation to resolve this inconsistency.

AILA objected to the proposed definition of related occupation. Because the definition includes any occupation that requires workers to perform a ''majority of the essential duties,'' AILA questioned why an employer must consider a worker qualified if he or she can only perform a majority of essential duties of the position offered. AILA contended many of the essential skills may constitute less than half of the job duties, but are required for performing the job. AILA stated DOL's new standard for recruiting U.S. workers, including laid off workers, renders meaningless the longstanding principle that the employer use minimum entry requirements on a labor certification.

We do not consider employment in a different but related occupation, as defined in § 656.17(k), to be inconsistent with § 656.17(i)'s limits on experience gained with the petitioning employer, as these two sections have distinctly different purposes. Section 656.17(k) addresses the qualifications of U.S. workers laid off by the employer-applicant. Section 656.17(i), on the other hand, addresses the qualifications of the alien beneficiary and is designed to prevent an employer from providing the alien beneficiary with training opportunities not offered to U.S. workers. In addition, we note due to the changes made to § 656.17(h) and (i) of this final rule (§ 656.17(g) and (h) of the NPRM), employers may be able to specify experience in a related occupation as qualifying for the job opportunity. See our discussion of alternate experience requirements and actual minimum requirements above.

With regard to the definition of related occupation, some commenters erroneously believed DOL would deem any laid-off employee in a related occupation, who can perform the majority of the job duties, to be qualified. The regulation does not state workers in a related occupation are qualified for the job opportunity, only the employer must notify those workers and consider whether they are qualified.

Similar to the determinations that have to be made under §§ 656.17(g) and 656.24(a)(2)(i), a U.S. worker will be deemed qualified only if the worker, by education, training, experience, or a combination thereof, is able to perform in the normally accepted manner the duties involved in the occupation as customarily performed by other U.S. workers similarly employed; or if the U.S. worker can acquire the skills necessary to perform the duties involved in the occupation during a reasonable period of on-the-job training. If audited, an employer may be required to document the lawful job-related reasons for not hiring U.S. workers laid off in a related occupation for the job opportunity for which certification is sought.

f. Definition of Layoff

One commenter suggested DOL expand the term ''layoff'' to include layoff or reduction-in-force or downsizing. The commenter warned employers might attest that the term layoff does not apply to their personnel actions, for example, if workers voluntarily resign and the company reorganizes so the job no longer exists.

We have modified this final rule to clearly define, for purposes of § 656.17(k), a layoff is any involuntary separation of one or more workers without cause or prejudice. This definition includes, but is not limited to, personnel actions characterized by an employer as reductions-in-force, restructuring, or downsizing.

11. Alien Influence and Control Over the Job Opportunity

The proposed rule provided that, if the employer is a closely held corporation or partnership in which the alien has an ownership interest, or if there is a familial relationship between the stockholders, corporate officers, incorporators, or partners and the alien, the employer must furnish documentation that would allow the CO

to determine whether the job has been and is clearly open to U.S. workers.

a. Number of Employees

Two commenters recommended adding an attestation on the ETA Form 9089 regarding the number of employees. The commenters noted if the alien is one of a few employees, the job may not be open to U.S. workers.

We agree with the comments addressing the possible influence of the alien as one of a small number of employees, and we have added the *Modularsesa Modular Container Systems'* (89–INA–228, July 16, 1991) (en banc) criterion of whether the alien is one of a small number of employees to the regulation at § 656.17(l) (§ 656.17(k) in the NPRM–67 FR at 30474). This factor was listed in the preamble to the proposed rule, but was not included in the regulation at § 656.17(l). We have also added a question to the ETA Form 9089 that asks for the number of employees in the area of intended employment.

b. Familial Relationship Between Alien and Employer

AILA commended DOL for the proposed rule's limitations regarding a beneficiary's ownership interest in the company or familial relationship with the stockholders or the owners. AILA noted, however, a familial relationship alone should not invalidate the job opportunity, and suggested the regulations allow the employer to provide evidence on the issue of undue influence and bona fide job opportunity beyond the topics listed.

In determining whether the job is subject to the alien's influence and control, we will evaluate the totality of the employer's circumstances, using the *Modular Container Systems* criteria listed in the preamble to the proposed rule (see 67 FR at 30474). No single factor, such as a familial relationship between the alien and the employer or the size of the employer, shall be controlling.

c. Ability To Pay the Salary for the Position

One commenter contended questions about the employer's ability to pay should not be eliminated. The commenter stated in cases where the job itself is in question (*e.g.*, there may not be a real company or the employer has been in business for years without any employees), the question of the ability to pay the salary for the labor certification position might become significant in reviewing the case. The commenter suggested a section be added to the proposed rule that specifically addresses the nonexistent or marginal employer. This section, the commenter recommended, should mirror General Administrative Letter No. 1–97, dated October 1, 1996, *Subject: Measures for Increasing Efficiency in the Permanent Labor Certification Process* (GAL 1–97), and state jobs that did not exist before the alien was offered the position may be considered not truly open to U.S. workers unless the employer can clearly demonstrate a change in business operation caused the position to be created after the alien was hired.

As addressed in our discussion of the employer's ability to pay above, we believe the employer's obligation to document and attest that the job is open to U.S. workers provides the CO with sufficient basis to inquire whether an employer is able to pay the offered salary and to place the alien on the payroll and to deny the application on the basis that the job is not truly open to U.S. workers if the employer does not furnish the appropriate documentation. We also noted DHS will assess the employer's financial status as part of the immigrant visa process, and we do not see a need to request duplicative information from the employer. Further, we note GAL 1–97, Change 1, dated May 11, 1999, does not state jobs that did not exist before the alien was offered the position may be considered not truly open to U.S. workers. We have determined such a provision is not realistic with respect to the requirements and operations of newly formed business entities. Consequently, we have not included the language proposed by the commenter in this final rule.

12. Multiple-Beneficiary and National Applications

Under both the current and proposed rules, a separate application must be filed for each alien beneficiary. Two commenters suggested changing the scope of the applications. ACIP and AILA suggested DOL establish a procedure under which one application could be used for multiple beneficiaries. AILA also suggested DOL establish a system for national applications.

a. Multiple-Beneficiary Applications

ACIP believed employers with multiple job openings within the same occupational classification should be allowed to file a single application for multiple positions with unnamed alien beneficiaries. Under the current system, the employer submits individual applications for each alien beneficiary, but often uses exactly the same evidence to support each of the applications. The current process burdens the employers with preparation and submission of multiple applications—identical except for the details concerning the alien beneficiary—and burdens DOL with review of such duplicative applications. A multiple-beneficiary application process would reduce the burden on both the employer and DOL without compromising the protection of U.S. workers afforded under the current system.

AILA recommended DOL consider establishing a procedure under which a single ETA form could be used for a number of openings for the same position. The employer would designate the number of openings and the number of alien beneficiaries on the ETA Form 9089, and would also submit information for each alien beneficiary. DOL would adjudicate the filing as one case, thereby increasing efficiency and avoiding inconsistent results.

Creating a new category of application would conflict with our goal of streamlining processing. This would create more duplication at DOL, and would require development of new regulations, criteria, and means of reviewing such applications.

However, the need for a multiple beneficiary application is largely obviated by the option provided employers by the e-filing process that permits employers who frequently file permanent labor certification applications to set up secure files within the ETA electronic filing system containing information common to any permanent application they may wish to file. As explained above, under this option, each time an employer files an ETA Form 9089, the information common to all of its applications, *e.g.* employer name and address, etc. will be entered automatically, and the employer will have to enter only the data specific to the application at hand.

b. National Applications

AILA recommended DOL consider establishing a procedure for national labor filings. We have concluded it would be inappropriate to authorize national applications. Even if the suggestion could be considered a logical outgrowth of the proposed rule, the concept of a national application appears to conflict with several existing sections of the regulations. While workers in a given occupation may be unavailable in much of the U.S., there often are local or regional areas in which qualified workers are available in that occupation. A national certification could result in the placement of an alien worker in a geographic area that has many available workers in the sponsored occupation. Consequently, a

national certification could adversely affect the wages and working conditions of U.S. workers in the area of actual employment. Additionally, we note certifying national applications using a national average wage could have an adverse effect on the wages of U.S. workers in the occupation, as this wage would be lower than the local wage rate in many areas of employment. Finally, occupations for which there is a national shortage may be appropriately considered for inclusion on *Schedule A.* See our discussion of *Schedule A* above.

L. Optional Special Recruitment and Documentation Procedures for College and University Teachers

The only modification made to the proposed regulations for the optional recruitment and documentation procedures for college and university teachers in this final rule was to revise § 656.18(a) to reflect the elimination of the proposed *Prevailing Wage Determination Request* form and certain elements being incorporated back into the *Application for Permanent Labor Certification.*

Other commenters recommended the expansion of the optional recruitment procedures for college and university teachers to include additional occupations. These recommendations are discussed below.

1. Expansion of the Optional Recruitment Procedures To Include Additional Occupations

a. Inclusion of High-Level Positions

Some commenters urged DOL to expand the scope of § 656.18 beyond college and university teaching positions. A large employer noted the proposed regulation continues the dichotomy between labor certifications for colleges and universities and labor certifications for other employers, under which universities and colleges can select the best qualified candidate while other employers must select a ''minimally qualified'' candidate. This commenter was of the opinion it was no more important in academia than in U.S. industry to pick the best-qualified candidate. The commenter suggested DOL either eliminate the special procedures for academia, or expand § 656.18 to include ''high-level and research positions'' within private companies.

We cannot eliminate the special procedures for academia or expand § 656.18 to include high level and research positions as suggested by the commenter. The current regulations implement the October 20, 1976 amendments to the INA, which provided, as a limited exception to the generally applicable rule, that in the case of aliens who are members of the teaching profession or of exceptional ability in the sciences or arts, the U.S. worker must be equally qualified with respect to the alien. Thus, we cannot expand the scope of § 656.18 to include high-level and research positions within private companies. As noted above in our discussion of *Schedule A,* aliens of exceptional ability in the sciences or arts are included on *Schedule A.*

b. Inclusion of Primary and Secondary School Teachers

A few of the commenters urged DOL to expand the category of college and university teachers to include primary and secondary school teachers. These commenters cited the growing shortage of primary and secondary school teachers in both public and private institutions as more teachers reach retirement, the difficulty in attracting and retaining qualified teachers, and the need for the best and brightest teachers at the pre-college level.

A law firm contended the failure to include primary and secondary teachers in the same category as college and university teachers was unlawful. Citing the INA provisions on certification of U.S. workers, this commenter maintained the Secretary of Labor must certify the availability of ''equally qualified'' rather than ''qualified'' U.S. workers in the case of an alien who is a ''member of the teaching profession,'' and noted the term ''profession'' is defined in the INA to include ''* * *teachers in elementary or secondary schools, colleges, academies, or seminaries.'' The commenter maintained DOL must apply the same certification requirements for both college and university teachers and for elementary and secondary teachers.

The commenter cited a BALCA decision *(In the Matter of Dearborn Public School on Behalf of Anthony Bumbaca,* (91–INA–222, December 7, 1993) to support the argument there is a conflict between the DOL regulations and the plain language of the statute. According to the commenter, BALCA cited an unpublished decision of the United States District Court for Alaska *(Mastroyanis* v. *U.S. Department of Labor,* No. A 98–089 Civil (D.C. AK. May 5, 1989)), which found DOL's regulations limiting the application of the ''equally qualified'' standard to college and university teachers and not applying it to a secondary school teacher were in conflict with the plain language of the INA.

With respect to expanding § 656.18 to include primary and secondary teachers, we have reviewed the statute, the legislative history, and the *Mastroyanis* decision, and have determined not to apply the court's language in Federal court districts outside the District of Alaska. As indicated above, the equally qualified language was added to Section 212(a)(14) (now Section 212(a)(5)(A)(i)) by the INA amendments of 1976. The Judiciary Committee of the House of Representatives stated on passage of the bill that:

> The committee believes the Department of Labor has impeded the efforts of colleges and universities to acquire outstanding educators or faculty members who possess specialized knowledge or a unique combination of administrative and teaching skills. As a result, the legislation included an amendment to section 212(a)(14) [now 212(a)(5)(A)], which required the Secretary of Labor to first determine that ''equally qualified'' American workers are available in order to deny a labor certification for members of the teaching profession * * *. (See H. Rep. No. 1553, 94th Cong., 2d Sess. 11 (Sept. 15, 1976))

In addition, Congressman Eilberg stated during the debate on the amendments to the INA the new language was intended to apply to teachers only at the college and university level.

> Another provision contained in this legislation would address the serious problem that has confronted a large number of colleges and universities in this country. That provision—contained in an amendment to the labor certification section of the Immigration and Nationality Act (section 212(a)(14))—would require the Secretary of Labor to determine that ''equally qualified'' American teachers are available in order to deny a labor certification.

(See 122 Cong. Rec., Part 126, p. 33633 (Sept. 29, 1976))

Reasonably, contemporaneously and consistent with this stated Congressional intent on January 18, 1977, we promulgated regulations to implement the amendment (42 FR 3440 (January 18, 1977)). In the preamble to that rule, we stated we were responding to comments on the proposed rule submitted by the House Committee on Immigration, Citizenship, and International Law, which commented that the provision with respect to teachers was intended by Congress to apply only to educators at the college and university level, not to all members of the teaching profession. This interpretation of the equally qualified provision, which is in the current regulations and the proposed rule, is unchanged for purposes of this final rule because it is more in accord with Congressional intent than the above comments and better serves to protect

U.S. workers from adverse effects than would an expansion of the category to teaching jobs at the elementary and secondary school levels.

M. Live-in Household Domestic Service Workers

Most of the documentation requirements for live-in household domestic service workers are unchanged from the requirements contained in the current regulation. However, certain documentation required on the ETA 750 form will no longer be collected during the application process; instead the regulations provide that employers will be required to supply this documentation if their labor certification applications are audited or as otherwise requested by a CO. Employers will be required to maintain all required documentation and, in the event of an audit or CO request, the employer will be required to submit this documentation to DOL, as well as any other documentation required in order to complete the review.

1. Modifications to the Proposed Rule

We have made two modifications to the proposed rule in this final rule. First, we have made a technical change to the regulations at § 656.19(a) to clarify, consistent with the general instructions at § 656.10(a)(1), that applications for live-in household domestic service workers must be filed under the basic process at § 656.17. Second, we have changed the language in § 656.19(b)(1)(iv) of the proposed regulation from ''whether or not'' a private room and board will be provided to ''that'' a private room and board will be provided, to eliminate an apparent inconsistency with § 656.19(b)(2)(ix), which requires a statement that the employer will provide a private room and board at no cost to the worker.

2. Oversight and Audit of Domestic Service Worker Applications

We received very few comments on the issue of live-in household domestic service workers under § 656.19. One commenter stressed the need for comprehensive auditing of this category of alien workers. Another commenter recommended retaining the SWAs to manage the application process because their staff could be fully dedicated to managing these applications promptly and reducing the current backlog. We anticipate applications submitted on behalf of domestic service workers will be carefully reviewed at ETA's application processing centers. While SWAs are no longer involved in the processing of applications, the SWAs are always free to provide any information they feel appropriate about job offers for live-in domestic workers. As indicated in our discussion of the audit letter process below, we have retained the flexibility to adjust auditing emphasis, as necessary, under this final rule.

3. One (1) Year Experience Requirement

Some commenters suggested maintaining the requirement in the current regulations for live-in domestic workers to have at least 1 year of work experience with someone other than the employer-applicant. One commenter observed, prior to this requirement, applications for alien employment certification were filed on behalf of professionals (*i.e.*, doctors, lawyers, etc.) with no experience in domestic service occupations as a quick way to get into the U.S.

We agree with the commenters who proposed live-in domestic workers should have at least 1 year of paid experience in the occupation. For more than 25 years, we have required proof of 1 year of full-time, paid experience for live-in domestic workers to ensure the alien knows the demands unique to household domestic service work, has some attachment to the occupation, and will likely continue working in this occupation after arrival in the U.S. Our experience has shown persons not previously employed in the occupation for a reasonable length of time generally do not remain in that employment in the U.S. Therefore, we have retained this requirement in the final rule. This requirement does not correlate to the minimum training and/or experience required to perform the job and should not be shown as a requirement for the job opportunity.

N. Audit Letters

We proposed to eliminate the current procedure of issuing Notices of Findings (NOFs). Section 656.20 of the proposed rule provides for the issuance of audit letters, which will be primarily standardized computer-generated documents. This section also provides that the CO's review of a labor certification application may lead to an audit, or other request by the CO, and certain applications also may be selected for audit for quality control purposes. If an application is selected for either reason, the CO will issue an audit letter.

We received approximately 50 comments on the proposed audit letter procedure from SWAs, attorneys, academic employers, and other organizations. Only one commenter suggested retaining the existing NOF procedure. Most of the commenters recommended clarifications or changes to the proposal, including clarification about how audits would be targeted, extension of the 21 day period for reply to an audit letter, and inclusion of specific requirements as to how the audit letters should be delivered to the applicants. Several commenters also discussed the consequences of failure to respond to an audit letter, with most opposing a presumption of a material misrepresentation.

1. Elimination of the Notice of Findings and Contents of the Audit Letter

AILA stated the proposed audit system would leave employers with no reasonable procedure through which they can obtain help in correcting deficiencies or receive guidance on what the CO views the deficiency to be. The absence of a NOF process would in particular hurt employers not represented by counsel. Such employers may have their applications denied because of a single mistake. AILA urged DOL to consider either restoring the NOF or expanding the audit process to allow an audit to be used to identify and resolve labor certification mistakes and deficiencies.

AILA further asserted a standardized, computer-generated audit letter would be essentially useless for the employer, because it would not tell the employer what documentation is truly needed or indicate to the employer if there was a particular problem with the application that needed to be addressed by the submission of additional evidence.

One commenter stated unless the audit letters are drafted on an individual basis and do not rely on boilerplate language, they qualify as data collections under the Paperwork Reduction Act and will require OMB clearance. This would be true, according to the commenter, both for a list of standard templates or situations in which the regional office drafts its own set of templates, as long as the data collector is used more than 10 times in a year.

Another commenter suggested changing the text of the proposed regulation to read: ''Request supplemental information and/or documentation; *and/or* require the employer to conduct recruitment under * * *'' (emphasis added) to ensure the CO can both request additional documentation and simultaneously require the employer to conduct supervised recruitment.

We believe the system outlined in this final rule is more transparent and user-friendly than the current process. The regulations indicate what documentation employers are required

to assemble, maintain, and submit to respond to an audit letter. (Also see 67 FR at 30466 and 30475). We believe a prudent employer would gather the documentation before filing the application and have it available in anticipation of a possible audit. Further, employers will be able to contact DOL if they have questions about the audit letter. It should be considerably easier for employers to prepare an acceptable response to an audit letter than to rebut a NOF.

An audit letter will not be a ''fishing expedition'' as characterized by AILA. We will only request information necessary to make a determination on a specific case or to monitor the system effectively. Not all audit letters will request the same amount of information from employers. Some audit letters will be directed toward specific deficiencies in the employer's application. Others will be issued for general quality control purposes. Both types of audits are necessary to maintain the integrity of the labor certification system.

With respect to one commenter's contention that the audit letters will require OMB clearance, we have concluded the audit letters to be used under this final rule will be within the scope of 5 CFR 1320.4(a)(2) and 1320.4(c), which exclude information collected pursuant to an audit from a ''collection of information'' as defined at 5 CFR 1320.3(c). Because the audit letters are not considered a collection of information, they do not require OMB clearance.

One commenter suggested changing the regulatory language to ensure the CO can request supplemental information and simultaneously require supervised recruitment. No change is warranted because a determination as to whether supervised recruitment is required would not be made until the initial required documentation that the employer must submit in response to the audit letter is received and reviewed.

2. Criteria for Audits

Some commenters stated DOL should establish and publish criteria for when audit letters would be issued. AILA, among other commenters, criticized the proposed rule for not containing any criteria for audits, and contended the type of criteria that might flag a case for audit should be specified so that employers may have a reasonable expectation of the factors that might lead to an audit.

Other commenters, however, opposed making the audit process predictable. FAIR stated immigration attorneys and consultants will quickly be able to learn how to avoid audit triggers by checking a ''safe'' pattern of responses, and thus will manipulate the computer-scanned review process. Another commenter stated employers, attorneys, or their consultants will soon learn to make entries on the application that will pass the scrutiny of the audit process.

Some commenters suggested specific audit criteria. One commenter suggested that 100 percent of applications pertaining to live-in household domestic service workers should be audited, to avoid worker abuse. The AFL–CIO suggested a number of triggers.

Two commenters were concerned that a job already filled by the alien beneficiary would be considered encumbered, and this factor would be important, and perhaps controlling, in prompting an audit. Another commenter stated this would create a particular burden for academic employers.

We believe making the process predictable would defeat the purpose of the audits. Further, we want to retain the flexibility to change audit criteria, as needed, to focus on certain occupations or industries when information leads us to believe program abuse may be occurring in those areas. For these reasons, we are not including audit criteria in this final rule.

The AFL–CIO made a number of suggestions for criteria to use in selecting applications for audit, such as a history of unfair labor practices, workforce composition, or, layoffs in the past 6 months. Currently, when we become aware of such issues, they are considered in determining whether to issue a NOF. Similarly, under the new system, if we become aware of similar issues, they will be considered in determining whether to issue individualized audit letters. It should also be noted employers are required to indicate on the application form whether there is a strike, lockout, or work stoppage in the course of a labor dispute in the occupation in which the alien beneficiary would be employed at the place of employment. Regarding encumbered positions, the fact the job for which the application is filed is encumbered is not a controlling factor in prompting an audit because the overwhelming percentage of these jobs are encumbered.

We anticipate using random-sampling techniques to produce a representative sample of the entire universe of applications. In addition, we will target for audit other applications that appear to have problematic issues. We do not believe it is appropriate to include sampling standards in this final rule because we want the flexibility to change them over time to reflect what we learn through our administration of the program.

3. Sending and Responding to the Audit Letter

Some commenters supported the proposed 21 day time limit for applicants to produce documentation. One commenter stated anyone who had prepared for the application would be able to produce proof, but that 21 days was not enough time to assemble false documentation.

Other commenters were concerned that audit letters would be delayed in the postal system. AILA stated because DOL typically sends its decisions by U.S. mail, they may take from 3 to 10 days to arrive at the employer's or attorney's office. Two academic commenters stated the audit letter should be sent as quickly as possible by fax or e-mail in addition to U.S. mail. Other commenters urged the letters be sent by certified mail, not standard U.S. mail, with one claiming a confirmed delivery requirement is not an unreasonable burden to place on DOL.

To account for possible delays in mail delivery, and for other delays caused by circumstances beyond the control of the employer, we have extended the response time to 30 days. Employers' responses must be sent within the 30-day time limit, but need not be received by DOL by that date. As stated in the preamble to the proposed rule, the employer is expected to have assembled the documentation required before filing the application. None of the commenters stated this expectation is unreasonable.

One commenter stated some records may be purged in the state systems after a short period of time, such as 30 or 60 days, making it impossible to retrieve information by the time an audit is requested.

The *Application for Permanent Employment Certification* requires the employer to provide the start and end date of the job order on the application form to document the job order has been placed. Gathering additional information on the job order from the SWA will not be necessary; therefore, no extension of the response time is warranted for this purpose.

One commenter urged that absent allegations of fraud or misrepresentation, a 90-day limit from the date of the certification decision should be established for when DOL can issue an audit letter. Otherwise, an employer may have obtained an I–140 from the DHS based on an approved labor certification and be proceeding through the adjustment of status process

with the DHS when the audit letter is issued. Another commenter noted the rule provides no guidance on the length of time an employer must maintain documentation. Because the proposed rule authorizes revocation of a labor certification, the commenter recommended DOL specify the time period in which an audit letter may be sent, so employers do not mistakenly assume that once a certification is granted they no longer need to maintain the documentation.

The commenter's proposal that audit letters must be issued no more than 90 days after the certification date is unnecessary. This final rule clearly states audit letters are issued before a final determination is made under § 656.24.

Regarding the retention of supporting documentation, as discussed above such documentation must be maintained for five years from the date of filing.

4. Extensions

Several commenters supported allowing extensions of time to respond to audit letters. AILA stated not allowing extensions under any circumstances is too harsh. Other commenters also supported extensions in appropriate circumstances. One commenter stated the elimination of any possibility of extension of time would deny employers due process.

We have concluded it would be appropriate for this final rule to provide that COs may in their discretion, for good cause, grant one extension up to 30 days for the employer to provide requested documentation.

5. Penalties for Failure To Respond Timely to the Audit Letter

The proposed rule authorized a CO to deem an employer's failure to submit ocumentation in response to an audit letter a material misrepresentation of the employer's attestations that it complied with all documentation requirements. As proposed, if the CO determines a material misrepresentation was made, the employer may be required to undergo supervised recruitment.

Some commenters objected to the proposed rule's definition of a material misrepresentation. One commenter maintained the rule should clarify the definition of ''material misrepresentation'' as used in § 656.20(a)(3)(ii) and recommended DOL use the common law definition of the term to develop the rule definition.

ACIP stated the presumption of material misrepresentation if the 21 day deadline is missed is unduly harsh for good-faith employers and an insufficient deterrent to those trying to defraud the system. ACIP suggested that instead DOL adopt fines and penalties for various levels of misrepresentation similar to those employed in the H–1B context. Another commenter suggested consequences similar to those in the LCA program used in connection with H–1B filings. A SWA recommended that failure to submit information in a timely way be penalized by barring the employer from refiling for at least 6 months.

One commenter stated the automatic presumption of a material misrepresentation is unreasonable. AILA stated the rule's presumption of material misrepresentation ''violates fundamental precepts of fairness.'' AILA noted the audit letter may not be received, the employer may be on vacation, or the response may be lost in transit. After reviewing the comments, we have decided failure to provide supporting documentation will not be deemed a material misrepresentation. Instead, this final rule provides in § 656.20(a)(3) that failure to provide required documentation in response to an audit letter will result in denial of the pending application and may result in an order to conduct supervised recruitment under sections 656.20(b) or 656.24(e) in future filings of labor certification applications. Several commenters mistakenly asserted an employer's failure to provide supporting documentation when requested in an audit letter would invariably result in an order to conduct supervised recruitment for a period of two years; however, we believe it is more reasonable to provide the CO with discretion to review the circumstances in each case to determine whether this penalty will be imposed. For this reason, both §§ 656.21(a) and 656.24(f) state the employer ''may'' be required to conduct supervised recruitment, not that an employer ''shall'' be required to conduct supervised recruitment.

With respect to the recommendations by some commenters to impose fines and penalties (such as debarment of an employer) similar to those employed in the H–1B program, we have concluded that before making such fundamental changes we should publish any fines and penalties we may be considering for notice and comment in a proposed rule. Therefore, we have not included any new fines or penalties in this final rule.

O. Supervised Recruitment

The proposed rule provides in any case in which the CO considers it to be appropriate, post-filing supervised recruitment may be required of the employer. The supervised recruitment will be directed by the CO.

We received approximately 20 comments on this proposal. Commenters suggested the criteria for when a CO may require supervised recruitment should be made more specific. Several commenters questioned whether the CO would have the information and resources necessary to adequately supervise the recruitment. A few commenters discussed the details of the supervised recruitment process itself, including the time limits for an employer to respond to a request from the CO for a report on the supervised recruitment. One commenter questioned the effectiveness of supervised recruitment in general and suggested abandonment of supervised recruitment.

1. Criteria for Requiring Supervised Recruitment

AILA claimed the proposed regulations do not set out any standards or guidelines for when and in what circumstances a CO may order supervised recruitment. The commenter stated this will lead to inconsistent practices. Another commenter contended the proposed rule was unclear about whether supervised recruitment may be required outside the audit process. If so, the criteria used to make the determination should be specified. If not, the text of the proposed rule should be amended to remove the word ''including'' from § 656.20(a)(3)(ii).

One commenter noted the preamble to the proposed rule stated supervised recruitment could be required on the basis of labor market information. However, the commenter suggested there was a potential conflict between the layoff provisions of the proposed rule and the rule's preamble concerning the type of labor market information the CO could rely upon to order supervised recruitment. According to the commenter, the layoff provision (§ 656.17(k) of this final rule) refers to a layoff by the employer applicant, while the preamble includes strongly worded language that the CO may rely upon generic labor market information, including information about layoffs by other companies within the same industry or geographic region.

One commenter noted if the CO believes there is worker availability at the time of adjudication, the CO can order a current test of the labor market although there was no worker availability when the application was filed. The commenter indicated an employer should have the right to request a retest of the labor market in those situations where U.S. workers were available at the time it conducted a test of the labor market. This is

particularly a problem when there has been a lengthy interval between the filing of the application by the employer and the adjudication by the CO and labor market conditions have changed in the interim.

Under the final rule at § 656.21, post-filing supervised recruitment may be ordered in any case where the CO deems it appropriate. As we stated in the preamble to the proposed rule, we anticipate the decision to order supervised recruitment will usually be based on labor market information. However, it is impossible to determine in advance every reason why supervised recruitment may be appropriate. We do not wish to limit the authority of the COs in this regard.

We see no conflict between the layoff provisions of § 656.17(k) (§ 656.17 (j)(1) of the NPRM) and the preamble to the NPRM concerning the type of labor market information the CO may consider in ordering supervised recruitment. While the layoff provision addresses a required part of the employer's recruitment process, layoffs in the area of intended employment may indicate additional recruitment is needed to make an adequate test of the labor market. The main point of the preamble language in our discussion of the layoff provisions is to indicate the proposed rule requiring employers to consider workers they have laid off within a reasonably contemporaneous period of time is consistent with our longstanding position that COs have the authority to consider such workers. See §§ 656.24(b)(2) and 656.24(b)(2)(iii) in the current regulations.

2. Resources of the Certifying Officer

Several commenters questioned whether the CO would have the resources necessary to conduct supervised recruitment. One SWA recommended the proposal to have the CO conduct supervised recruitment should be deleted, because of the lack of resources on the part of the CO. Two SWAs said the COs may not have the capacity to process large volumes of cases requiring supervised recruitment. One SWA stated that given the number of applications filed annually and the small number of regional offices, there was reason for concern about the extent to which regional office staff will be able to assist employers, or to continue to supply the same level of service currently supplied by state and local offices.

Administrative decisions about the way DOL allocates resources are outside the scope of this rule. Therefore, this final rule does not specify how resources shall be used. However, we do believe the COs will be able to handle whatever supervised recruitment is required.

3. Knowledge of the Certifying Officer

Several SWAs felt the CO would not have adequate knowledge of local labor market conditions, experience with the details of state employment service systems, or knowledge of local newspapers. One SWA stated DOL would need to set up an information conduit with the SWAs so DOL will have the necessary information to conduct supervised recruitment. Another SWA stated the knowledge and experience of the SWAs with respect to labor conditions will be entirely ignored under the proposed system, and the rules offer no guidelines by which DOL would be able to make determinations that U.S. workers could acquire the skills of a particular job for a particular employer in a particular area.

The knowledge of the CO and coordination with the SWA is covered in our discussion of the role of the SWA in Section B above. Regarding the lack of guidelines for determining whether U.S. workers could acquire the skills for a particular job opportunity, see our discussion of on-the-job training above.

4. Supervised Recruitment Process

One commenter contended the proposed rule fails to place limits on the CO's ability to designate appropriate sources of workers where the employer must recruit. The commenter claimed there must be some limits imposed on the amount of recruitment required, to avoid multiple rounds of recruitment and even different types of recruitment in different parts of the country, depending on what the CO believes is appropriate.

Two commenters suggested time limits should be established for the CO to approve advertisements, stating that time limits are particularly important when the employer is required to publish in the next-available publication. Another commenter stated supervised recruitment should be required to be completed within 60 days or the application be denied. AILA stated in light of the potential for the CO to require extensive supervised recruitment, the proposed 21 day response period is not sufficient. AILA urged DOL to adopt a longer response period, or, at a minimum, give the CO discretion to extend the 21 day period.

ACIP stated the proposed rule mandates outdated recruitment methods that studies have shown are ineffective at finding qualified workers. This commenter recommended DOL-supervised recruitment be eliminated, and RIR be made the standard for all labor certification applications.

One commenter noted advertising is required prior to filing an application. Because supervised recruitment will take place after filing, the commenter believed the advertising under supervised recruitment will be needlessly repetitive, and could create conflicting descriptions and requirements of the job between the first unsupervised round of advertising and the second supervised round of advertising.

We will not place limits on the CO's authority to designate appropriate sources for recruiting U.S. workers. However, we agree the CO should notify the employer of all appropriate recruitment sources at the outset of the recruitment process, so employers will not be required to go through multiple rounds of recruitment. By and large, this is not a problem under the current system. As we gain more experience with the program, we will issue administrative guidance if appropriate.

There are no statutory requirements that we approve advertisements within any specified time frame; therefore, this final rule does not impose any time limits by which the CO must approve advertisements. One commenter suggested all recruitment be completed within 60 days. We will not impose an overall time limit for the recruitment process; however, we do believe there should be limits at various stages of the process so we can attain closure in the case. This final rule imposes the following time limits: the employer must supply a draft advertisement to the CO for review and approval within 30 days of being notified that supervised recruitment is required. As directed in the letter from the CO approving the advertisement, the employer must advise the CO when the advertisement will be published. The employer must provide to the CO a detailed written report of the employer's supervised recruitment within 30 days of the CO's request for such a report (§ 656.21(e)). This final rule provides in the event required documentation or information is not provided within the 30 days of the date of the CO's request, the CO will deny the application. However, COs in their discretion, for good cause shown, may grant one extension to any request for documentation or information.

The commenter's concern that post-filing supervised recruitment will be needlessly repetitive is misplaced. Post-filing supervised recruitment routinely occurs under the current system; *e.g.*, after a NOF or when an employer's request for RIR processing is denied. Changes in job descriptions and

requirements are routinely needed to correct deficiencies in the original test of the labor market. Program experience has shown these types of changes do not create confusion among employers or job seekers.

Regarding the suggestion that DOL-supervised recruitment be eliminated, we think supervised recruitment is a reasonable quality control measure in an attestation-based system.

5. Technical Correction

We have made a technical correction in § 656.21(b), which now reads: ''If placed in a newspaper of general circulation, the advertisement must be published for 3 consecutive days, one of which must be a Sunday; or, if placed in a professional, trade, or ethnic publication, the advertisement must be published in the next available published edition.''

P. Labor Certification Determinations

1. Referral of Applications to the Division of Foreign Labor Certification

The Notice of Proposed Rulemaking did not provide for referral of applications presenting special or unique problems to the National Certifying Officer for determination, or for the possibility of directing that certain types of applications or specific applications be handled in the national office as provided for in the current rule. We have concluded, however, it would be prudent to retain similar authority in this final rule. Accordingly, this final rule provides for the handling of permanent labor certification applications in certain circumstances at § 656.24(a). We have determined the handling of certain applications in the national office is a matter of agency procedure under the Administrative Procedure Act.

2. Comments on Determination Process

The commenters focused on four issues: able and qualified U.S. workers, time to file requests for reconsideration, whether new information could be included in requests for reconsideration, and material misrepresentations.

a. Able and Qualified U.S. Workers

Comments on able and qualified U.S. workers are essentially covered in our discussion of the recruitment report above. Employers, as well as the CO, must consider a U.S. worker qualified for the job opportunity if the worker can acquire the skills necessary to perform the duties involved in the occupation during a reasonable period of on-the-job training.

b. Time to File Requests for Review and Reconsideration

The proposed rule would have reduced the time for an employer to file a request for reconsideration of a denied labor certification application from 35 calendar days to 21 days. Two commenters emphasized the reduction should be eliminated. AILA maintained 21 days is insufficient time to prepare a request for reconsideration because the CO may in his or her discretion treat it as a request for review. Therefore, we agree as much time has to be given to preparing a request for reconsideration as to preparing a request for review.

As with other 21 day deadlines in the proposed rule, we have increased this period from 21 to 30 days in this final rule. We believe this increase in time is warranted because requests for reconsideration may be treated as a request for review by the CO. Additionally, final determinations may be delayed in the mails, and circumstances may arise that are beyond the control of the employer.

c. Submittal of New Information in Reconsideration Requests

One commenter pointed out the proposed rule did not specify whether an employer may submit new information when making a request for reconsideration. The commenter favored allowing employers to provide new information in the request for reconsideration.

Practice under the current regulations does not contemplate consideration of new evidence in requests for reconsideration. This final rule merely codifies the current practice.

d. Material Misrepresentation

If the CO determines the employer made a material misrepresentation with respect to the application for any reason, the employer may be required to conduct supervised recruitment in future filings of labor certification applications for up to 2 years.

As noted above, this final rule has been revised to provide that failure to provide supporting documentation will not automatically be deemed a material misrepresentation. The final rule states that failure to provide supporting documentation in response to an audit letter may result in supervised recruitment under § 656.21(a) or § 656.24(e). Accordingly, § 656.24(f) of this final rule has been revised to provide that the employer may be required to conduct supervised recruitment pursuant to § 656.21 in future filings of labor certification applications for up to 2 years, if the CO determines that the employer substantially failed to produce supporting documentation, or the documentation was inadequate, or a material misrepresentation was made with respect to the application, or it is appropriate for other reasons. It should be noted, however, a CO may determine that supervised recruitment should be conducted, although the 2-year period for which an employer was required to conduct supervised recruitment has expired, for reasons unrelated to those supporting the original supervised recruitment requirement.

Three commenters recommended stricter penalties for material misrepresentations, including debarment.

Since we did not propose stricter penalties in the proposed rule, the final rule does not provide for any such penalties, such as debarment. As indicated above, we have concluded that before making major changes with respect to the imposition of penalties, we should publish any penalties we may be considering for notice and comment in a proposed rule. We will consider the imposition of stricter penalties in any future rulemakings involving the permanent labor certification program.

We have also decided not to make supervised recruitment mandatory for up to 2 years if the CO determines the employer made a material misrepresentation with respect to an application. Such a requirement would result in a determination of how resources would be allocated in the future, possibly resulting in a loss of flexibility to target audits in accordance with program experience, resources, and volume of applications to process.

Q. Board of Alien Labor Certification Appeals Review, Consideration, and Decision Process

1. Technical Changes

Technical Changes were made to § 656.27 to conform to § 656.41 which provides a request for review of a prevailing wage determination of a CO may be made to the Board of Alien Labor Certification Appeals (BALCA) within 30 days of the date of the decision of the CO. Section 656.27 specifically provides that BALCA must review the denial of a labor certification under § 656.24, a revocation of certification under § 656.32, or an affirmation of a prevailing wage determination issued by the SWA under § 656.41.

2. Comments on Proposed Rule

We received six comments on §§ 656.26 and 656.27 regarding the role of BALCA under the proposed system. The comments dealt with three issues: elimination of remands, the time allowed for filing requests for review, and enforcement.

a. Elimination of Remands

We received three comments opposed to the proposal to eliminate BALCA's authority to remand cases to a CO for further consideration or fact-finding and determinations. AILA maintained eliminating BALCA's authority to remand a case would violate the Administrative Procedure Act (APA), which requires every adjudicatory decision to be accompanied by a statement of findings and conclusions. Removing BALCA's remand capability will violate basic, fundamental due process rights by removing the right of parties to be given notice and an opportunity to be heard concerning government decisions affecting their interests. AILA also noted we provided no basis for our stated reason for eliminating remands in the NPRM; namely, that cases would be sufficiently developed by the time they got to BALCA. AILA indicated its experience was just the opposite, and it is not uncommon for BALCA to reverse a CO's decision and then remand the case because it had insufficient information in the record to simply approve it.

Another commenter was of the opinion that cases under the proposed labor certification system will be less developed than they are in the current system when they reach BALCA, as the new system will eliminate assessment letters by the SWAs and NOFs, increasing the chance that cases will need further development when they are reviewed by BALCA.

One commenter indicated if BALCA does not have remand capability, cases involving good faith but inadequate recruitment will be denied instead of being remanded for additional recruitment as they would be in the current system.

After reviewing all of the comments, we have concluded BALCA should not have authority to remand cases to the CO. The processing model that underlies this rule does not contemplate the type of interchange between the employer and the Certifying Officer that is reflected in the current process; thus, it is not apparent what the Certifying Officer would do if a case were ''remanded.'' Accordingly, the final rule does not allow for remands.

b. Time Allowed to File Request for Review

All those who commented on the issue opposed the proposal to reduce the time allowed for an employer to file a request with BALCA for review of a denial or revocation of certification from 35 to 21 days. One commenter noted the reduced time may result in more cases being refiled because of missed filing dates for requesting review. AILA expressed the view that allowing 21 days to file a request for review would not allow sufficient time to craft a proper request for review in light of the time lost in the mail between issuance of a denial and its receipt by an employer. AILA recommended the 35-day period provided in the current regulations to file a request for review be retained.

Another commenter noted one major purpose of the new system is to provide a mechanism for the adjudication of labor certifications, and observed employers are required to meet various 35-day deadlines throughout the current regulations. This commenter suggested to make the entire system responsive, DOL should consider specific time limits for completing its review.

As with the other 21 day deadlines in the proposed rule, we have increased the time allowed to file a request for review to 30 days in this final rule. We believe the time that may be lost in the mail and the time and effort to craft a request for review justifies such an increase. We have concluded 30 days should be sufficient time to file requests for review because employers should have the factual material to support a request for review readily at hand.

We have decided not to impose deadlines on our review activity. There is no statutory requirement that we complete our review activity within a specified period of time. Further, we do not have control over the allocation of resources that might be necessary to adequately respond to an increase in the number of applications filed by employers.

c. Only Employer Can Request Review

We received no comments opposing our proposal that only employers be allowed to request review of a denial or revocation of a labor certification. Accordingly, this final rule provides, as did the NPRM, that only the employer may request review of a denial or revocation of a certification.

d. Debarment of Employers

The AFL–CIO believed in cases where employers using the labor certification program violate labor and employment laws, they should be debarred from using the permanent labor certification program for a period of years. We have concluded providing for a penalty such as debarment should not be made without publishing it for notice and comment in a proposed rule. Therefore, we are not making the requested change in this final rule.

R. Validity of and Invalidation of Labor Certification: Substitution of Alien Beneficiaries and Issuance of Duplicate Labor Certifications

1. Substitution of Alien Beneficiaries

The proposed regulations would conform the provisions of 20 CFR 656.30(c) to the decision of the U.S. Court of Appeals for the District of Columbia in *Kooritzky* v. *Reich*, 17 F.3rd 1509 (DC Cir. 1994) and DOL's operating practice after the U.S. Court of Appeals decision striking down the no substitution rule.

Our program experience, however, indicates the current practice of allowing substitution of alien beneficiaries on approved labor certifications may provide an incentive for fraudulent labor certification applications to be filed with the Department. For example, labor certifications have been submitted on behalf of nonexistent employers, submitted without the knowledge of the employer, or submitted on behalf of employers who are paid for the use of their name. In many cases, the named alien on the application may be fictitious or the same named alien may be used on many labor certification applications. Once an application is certified, it can be marketed to an alien who is willing to pay a considerable sum of money to be substituted for the named alien on the certified application.

The sale, barter or purchase of labor certifications is not condoned or approved by the Department. The Department has concluded the secondary market in approved labor certifications that has developed merely to facilitate the entry of an alien who is willing to pay a substantial sum of money to obtain permanent resident status is not consistent with the purpose of the labor certification statute at section 212(a)(5)(A) of the INA and the Department's labor certification regulations at 20 CFR part 656. The Department will be exploring in the near future regulatory solutions to address this issue. In the interim, we plan to implement the measures described in this final rule to check the bona fides of the employer applicant.

We received a few comments in support of allowing substitution of alien beneficiaries.

2. Issuance of Duplicate Labor Certifications

AILA requested DOL revise the process for obtaining copies of approved labor certifications. Currently, the employer, alien, or agent may request a copy of the approved labor certification only through DHS or a Consular Officer.

AILA stated it understood DOL needs to ensure labor certifications are safeguarded from fraudulent uses, but noted the current process takes an inordinately long time. We agree with AILA that a more efficient system for issuing duplicate labor certifications can be developed without losing existing safeguards to prevent the fraudulent use of duplicate certifications. Therefore, this final rule amends the existing regulation at § 656.30(e) by adding an additional means of requesting a duplicate labor certification. The CO may issue a duplicate labor certification to a Consular or Immigration Officer at the request of the employer or the employer's attorney. The employer's request for a duplicate labor certification must be addressed to the CO who issued the labor certification. The employer's request must (1) contain documentary evidence from the Consular or Immigration Officer that a visa application or visa petition, as appropriate, has been filed and (2) include a Consular Office or DHS tracking number.

S. Labor Certification Applications Involving Fraud or Willful Misrepresentation

Most of the comments on the section of the proposed rule dealing with labor certification applications involving fraud or willful misrepresentation have been discussed above.

The proposed regulation carried over the provisions of the current regulations and included an alternative provision that provided ''(i)f 90 days pass without * * * receipt of a notification from [DHS] that an investigation is being conducted, the CO must continue to process the application.'' However, we are broadening this section to encompass investigations being conducted by other appropriate authorities.

We received two comments about the procedures to be followed with respect to applications that are referred to DHS for investigation. AILA was under the impression that processing of applications would be suspended indefinitely, pending a formal notification from DHS as to whether it will be pursuing a formal prosecution; however, this is not the case. The proposed rule clearly provided that processing is continued if 90 days pass without the filing of a criminal indictment or information, or without being advised by DHS that an investigation is being conducted.

FAIR believed the proposed regulation providing for a 90-day suspension of processing (as in the current regulations) should be eliminated. FAIR maintained it is arbitrary to expect investigations sufficient for criminal investigation or civil suits to be completed in 90 days. FAIR's comments are consistent with our program experience in administering the current regulation requiring processing of an application that has been referred to DHS. In the overwhelming majority of cases, DHS does not provide us with any information as to what action it may have taken with respect to the application we referred for investigation. Our experience indicates it may take DHS longer than 90 days to investigate a matter involving possible fraud or misrepresentation and to determine whether to file a criminal indictment or information. Due to the concerns expressed about fraud by many commenters, and because it is conceivable another investigatory agency could be investigating a matter referred for investigation, this final rule provides that after a matter is referred to DHS for investigation, if 90 days pass without the filing of a criminal indictment or information, or receipt of a notification from DHS or any other investigatory body that an investigation is being conducted or that it intends to start an investigation in the foreseeable future, the CO may continue to process the application.

In light of the general concerns voiced about fraud by commenters we have deleted the requirement that if a matter is referred to the DHS for investigation, the CO must notify the employer, and send a copy of the notification to the alien. Such notification may undermine the purpose of the investigation.

T. Revocation of Approved Labor Certifications

Under the proposed rule, the CO would have limited authority to revoke labor certifications within 1 year of the date the certification was granted or before a visa number becomes available to the alien beneficiary, whichever occurs first (see § 656.32 in this final rule). The proposed rule specified the steps the CO who issued the certification, in consultation with the Chief, Division of Foreign Labor Certification, would have to take to revoke a labor certification improvidently granted.

Several commenters urged DOL to reconsider this provision. Most of the commenters objected to the provision either in whole or in part. Some felt the provision was unnecessary because sufficient enforcement measures are currently in place. Others felt revocation should be limited to cases involving fraud or willful misrepresentation. Most of the commenters asked DOL to articulate the procedural and substantive standards under which certification could be revoked.

1. Criteria for Revoking Labor Certifications

Many commenters requested we develop standards and criteria for revoking labor certifications and define ''improvidently granted.'' Some of these commenters also expressed concern that employers would have no certainty in the workplace unless they knew the criteria by which this provision will be enforced.

A few commenters suggested the only valid reason for revoking a labor certification once it has been granted is if the employer had submitted a fraudulent application or willfully misrepresented its case. One commenter suggested DOL should not be allowed to revoke a labor certification based upon layoffs or changes in market conditions after the certification. Another commenter stated there are innumerable reasons why a visa might not be received within 1 year, including increasing delays at the DHS and U.S. consulates, and that it is unfair to have the fate of an application depend on circumstances beyond the control of the petitioner and beneficiary.

After reviewing all the concerns expressed about possible fraud in the permanent labor certification program by commenters, we have determined it would be inappropriate for Certifying Officers to have only a limited right to revoke a labor certification. Therefore, this final rule provides that a labor certification can be revoked if the Certifying Officer finds the labor certification was not justified, instead of improvidently granted as would have been provided by the proposed rule. This change in the final rule will allow the CO to revoke a labor certification for any ground that would have resulted in a denial of the *Application for Permanent Employment Certification,* whether unintentional or willful.

2. Time Limit for Revocation

One commenter pointed out the time limit for revocation should not be ''until

the visa number becomes available,'' because all employment-based preferences are now current. This commenter suggested the limit should be ''until the I–140 is approved'' or ''until the I–485 is filed'' or ''until a change of status is granted.'' In addition, FAIR urged us to eliminate the 1-year limit on revocation.

We have determined since this final rule will provide the Certifying Officer with the authority to take steps to revoke a labor certification for fraud and willful misrepresentation, obvious errors, or for grounds or issues associated with the labor certification process, there should not be any time limit on the authority of the Certifying Officer to revoke a labor certification.

3. Consultation With National Certifying Officer

We have also determined that a provision in the regulations for consultation with the National Certifying Officer before steps to revoke be taken by the Certifying Officer is not necessary since communication and oversight of application processing and granting of certifications will be greatly enhanced under the new permanent labor certification system. Applications for permanent employment certification will not be processed in regional offices, but in two ETA application processing centers. The Directors of the ETA application processing centers will report directly to the Chief, Division of Foreign Labor Certification rather than to regional administrators. Accordingly, this final rule does not provide that steps to revoke a labor certification have to be taken in consultation with the National Certifying Officer. Provision for such consultation, if it is necessary, can be provided for administratively.

U. Prevailing Wages

The NPRM proposed a number of changes to the regulations governing the determination of prevailing wages. These changes apply to both the permanent labor certification program and the H–1B and H–1B1 nonimmigrant programs. The specific changes are discussed below.

1. Application Process

The NPRM proposed to standardize the prevailing wage determination process by requiring employers to submit a PWDR to the SWA on a standardized form, the ETA Form 9088. A number of commenters had questions about the contents of the ETA Form 9088. Most questions concerned how changes would be made to the job description and how the ETA Form 9088 would be matched to the *Application for Permanent Employment Certification* (ETA Form 9089).

As explained in our discussion to consolidate the ETA 9088 and ETA 9089 into a single application form, under this final rule, the employer will request a prevailing wage determination using the form required by the state where the job opportunity is located. Information from the proposed PWDR form, such as the prevailing wage, occupational code and level of skill, job title, state prevailing wage tracking number, and the date the determination was made will be included on the ETA Form 9089. The state workforce agency PWDR form must be retained by the employer, and will be submitted only if the application is selected for an audit or as requested by the CO.

2. Prevailing Wage Determination Response Time

A few commenters stated the proposed rule should incorporate various time limits for the processing of PWDR's.

One commenter expressed concern that the proposed rule favors the OES survey over published salary surveys, because it will most likely take longer for an employer to get a PWD if the employer relies on a published salary survey. As a result, employers would be pushed into using the OES survey to obtain an earlier immigrant visa priority date for their employees.

We are not imposing specific timeframes on SWAs for making their PWD, as recommended by several commenters. Because there is no set level of resources for funding this activity, and because it is unclear how many challenges and requests for PWD will be received, we believe imposing specific timeframes would be inappropriate. We anticipate SWAs will operate in as expeditious a manner as is possible.

Regarding the concern that a PWD based on employer-provided surveys will take longer than determinations based on OES surveys, we believe the difference is warranted. It takes SWA staff much longer to complete a determination based upon employer-provided wage data. A determination based on an alternative survey requires a review by the SWA of the statistical methodology used in conducting the survey, including a determination as to whether the survey data is based upon a representative sample.

3. Validity Period of Prevailing Wage Determinations

A few commenters requested DOL address the validity period for PWDs. One commenter questioned allowing SWAs to establish validity periods between 90 and 365 days. The commenter stated employers could not be expected to conduct and complete recruitment within 90 days of receipt of a PWD, particularly when involved in ongoing recruitment for multiple positions. The commenter urged DOL to amend the proposed rule so all PWDs remained valid for at least 1 year.

Another commenter asked about the validity period for a PWD based on the Davis Bacon Act (DBA), Service Contract Act (SCA), a collective bargaining agreement (CBA), or an employer-provided or published survey. A SWA strongly recommended all prevailing wage determinations, whether based on the OES, DBA, SCA, a CBA, or employer-provided or published survey, be valid for the same amount of time.

This final rule makes no substantive changes with respect to validity dates as proposed in the NPRM. The SWA must specify the validity of the prevailing wage, which in no event may be less than 90 days or more than 1 year from the date of the determination. Employers are required to file their applications or commence the required pre-filing recruitment within the validity period specified by the SWA.

One commenter believed the proposed rule was ambiguous about the prevailing wage to be paid to employees who immigrate based on a permanent labor certification. The commenter stated it appears that the intent of the proposed rule was for the prevailing wage to be paid upon the employee's immigration or adjustment of status, but it was unclear whether the wage to be paid is the prevailing wage determined pursuant to § 656.40 or the prevailing wage at the time of immigration or adjustment of status.

With respect to this last comment, we note the employer must certify on the ETA Form 9089 (see item N.1 under Employer Declaration) as follows: ''The offered wage equals or exceeds the prevailing wage and the employer will pay the prevailing wage from the time permanent residency is granted or from the time the alien is admitted to take up the certified employment''. This is essentially the same policy expressed on page 34 of *Technical Assistance Guide No. 656 Labor Certifications.*

4. Collective Bargaining Agreement, Davis Bacon Act, and Service Contract Act

The proposed rule eliminated the mandatory use of DBA and SCA wages, where applicable. Several commenters, including some SWAs and AILA, supported this proposal. These

commenters felt the DBA and SCA were suitable for government contracts but not for other situations, and the OES was a more realistic basis for making a PWD. Labor unions and other commenters, on the other hand, believed the proposed approach would undercut protections for U.S. workers.

The AFL–CIO and the Laborers' International Union of North America (LIUNA) contended that, despite DOL's assertions to the contrary, the proposed approach would decrease administrative convenience for SWAs and DOL. The International Brotherhood of Bricklayers and Allied Craftworkers added administrative convenience was but one reason for using the DBA and SCA wage determinations, the other being to ensure offers of employment do not undercut local wages.

The AFL–CIO also disputed DOL's assertion that BALCA's decision in *El Rio Grande on behalf of Galo M. Narea* (1998–INA–133, February 4, 1998; Reconsideration July 28, 2000) compelled DOL to reconsider its practice of using DBA and SCA wage determinations for alien labor certifications. The AFL–CIO argued BALCA's reference in *El Rio Grande* to the availability of ''other information'' that was a better source for determining prevailing wages than the SCA did not justify a change in DOL practice, and maintained determinations based on the SCA wage are more reliable than those based solely on OES wages.

The International Union of Operating Engineers (IUOE) and LIUNA pointed to DOL presentations and public information describing the strengths and weaknesses of the OES survey and the National Compensation Survey (NCS) to support its argument that the NCS is superior to OES. The IUOE noted problems with using the OES survey: OES data does not provide occupational work levels, use of OES data results in the underestimation of wages of workers in seasonal jobs, and OES data does not include fringe benefit data. The IUOE also suggested employers would choose the methodology that produced the lowest wage rates. LIUNA identified other concerns about the OES survey's reliability, capacity for determining median and mean wages, and ability to collect data for work levels. LIUNA also provided specific examples in which OES wages would undercut the SCA or DBA wage determinations.

The AFL–CIO defended use of the DBA, stating that DBA surveys produce a true ''prevailing wage,'' that is, a wage rate paid more frequently to workers employed in the same job than any other wage rate paid in the same locality. LIUNA added DBA ''universe'' surveys of the construction trades are more reliable than the OES survey because DBA surveys collect wage data not only by job classification, but by type of construction job, which varies widely.

One SWA supported condensing surveys into collective bargaining-derived wages and OES-derived wages. However, the commenter cautioned that until OES could provide coverage for more occupations, particularly in domestic service, SCA determinations should continue.

Two commenters agreed with the provision in the proposed rule that employers be allowed to use DBA and SCA wage rates as alternatives to OES wages. AILA asked the final rule specify that SCA and DBA wages be prima facie evidence of the prevailing wage, should the employer choose to rely on either of these two sources.

We have concluded that, while the use of DBA and SCA as wage data sources of first resort should be eliminated as proposed, employers should have the option of using this data at their discretion. We believe the continued mandatory use of SCA and DBA determinations would continue to complicate the operation of the prevailing wage system because of the differing occupational taxonomies between OES and DBA/SCA.

The suggestion that SCA determinations be retained because SCA wages are more ''accurate'' is not compelling. In many instances SCA determinations are based upon data from the NCS. While the NCS is an excellent, albeit very expensive, source of wage data based on on-site data collection by trained staff, it is limited in scope. Only about 450 occupations in approximately 85 geographic locations are covered, and not all occupations are included in each geographic area. Thus, the NCS is inadequate as a sole source for prevailing wages for the permanent labor certification program, which must deal with a myriad of occupations across the nation. In addition, SCA wage determinations start with data from the NCS, but also incorporate OES data. The SCA also uses a concept known as ''slotting'' when determining a wage for an occupation/area combination for which they have no data. In slotting, wage rates for an occupational classification are based on a comparison of equivalent or similar job duties and skill characteristics between the classification studied and those for which no survey data is available. It would be difficult, if not impossible, to segregate those SCA surveys that are ''better;'' i.e., purely NCS-based from those that use slotting. We do not believe retaining this level of complexity in the prevailing wage determination process is warranted.

We have adopted AILA's recommendation that if an employer chooses to rely on a SCA or DBA wage, that wage generally will be considered prima facie evidence of the prevailing wage. The SWA will not question the employer's use of the SCA or DBA survey as long as it is applied in an appropriate manner. However, should an employer attempt to apply a SCA or DBA wage in an inappropriate manner (e.g., by using the wrong occupational classification, geographic area, or level of skill), the SWA will not accept it as an alternative to the OES wage. At that point, the employer will be free to challenge the SWA's rejection of the SCA or DBA determination by requesting a review by the Certifying Officer.

5. Elimination of 5 Percent Variance

The overwhelming majority of the commenters opposed the proposed elimination of the 5 percent variance. Much of the opposition was driven by the commenters' viewpoint that a margin of error is required when dealing with large surveys, such as the OES survey, that consolidate various sampling points for simplification and are based on historical data that may not represent present market conditions. Commenters believed a variance is needed to compensate for sampling errors, to enable employers to take into account varying levels of worker experience and qualifications, and to allow employers to tailor wages to current economic conditions.

FAIR and a SWA prevailing wage specialist supported the proposed elimination of the 5 percent variance. Two other commenters suggested the variance be increased to incorporate discretionary bonuses and commissions that are included as part of the wages paid in OES surveys. Two commenters requested clarification on whether the regulations eliminate the 5 percent variance for employer-conducted wage surveys and other published surveys.

Several commenters emphasized that eliminating a variance may compel employers to pay foreign workers more than U.S. workers. A university medical center commented the 5-percent variance amounted to a substantial part of its limited funding. Another university observed that elimination of the variance would result in decreased hiring of post-doctoral research fellows.

A few commenters stated a 5 percent variance was essential for the nonprofit sector, given the absence of realistic prevailing wage figures for nonprofit

organizations in current surveys. These commenters alleged that, because DOL has not created a separate wage system database for nonprofits, institutions should be allowed to use private surveys. A few academic institutions also requested DOL recognize alternative wage surveys.

Some commenters predicted a rise in complaints and disputes over PWDs, resulting in increased work for SWAs. Other commenters viewed the elimination of the variance as an unfair burden on small businesses struggling to meet current wage determinations and that they will be unable to remain competitive.

Evaluation of these comments has been rendered unnecessary by the enactment of the Consolidated Appropriations Act of 2005 which amended the INA (Section 212(p)(3), 8 U.S.C. 1182(p)(3)) to require, ''the prevailing wage required to be paid pursuant to (a)(5)(A), (n)(1)(A)(i)(II) and (t)(1)(A)(i)(II) shall be 100 percent of the wage determined pursuant to those sections.'' Therefore, the Department must eliminate the practice of allowing a 5 percent variance of the wage actually paid.

6. Skill Levels in Prevailing Wage Determinations

a. Number of Skill Levels

The NPRM generated considerable comments concerning the fact that the OES wage surveys provide only two levels of wages. Many commenters criticized the OES survey for arbitrarily dividing salary data into two wage levels. Several commenters (including AILA and ACIP) suggested existing OES wage data would be more useful if the number of wage levels were expanded to appropriately differentiate among various occupational groupings.

Evaluation of these comments is rendered unnecessary by the enactment of the Consolidated Appropriations Act of 2005 which amended the INA (Section 212(p), 8 U.S.C. 1182(p)) to provide:

> Where the Secretary of Labor uses, or makes available to employers, a governmental survey to determine prevailing wage, such survey shall provide at least 4 levels of wages commensurate with experience, education, and the level of supervision. Where an existing government survey has only 2 levels, 2 intermediate levels may be created by dividing by 3 the difference between the two levels offered, adding the quotient thus obtained to the first level, and subtracting that quotient from the second level.

b. Inconsistency Among State Workforce Agencies in Assigning Skill Levels

Several commenters alleged there was inconsistency among SWAs in assigning wage levels. To address this issue, we have provided training sessions to SWA staff involved in making PWDs. We have also issued several policy directives to inform SWA staff and other interested parties how the regulations governing the prevailing wage process should be interpreted on this particular issue. We will continue to issue guidance to the field as necessary, including guidance concerning the requirements of the recently enacted legislation.

c. Academic Institutions

A few universities felt the criteria currently used by SWAs to differentiate between Level I and Level II wage level positions, as well as OES survey methodology were inappropriate for academic settings. According to the commenters, for academic positions, OES data are inapplicable because (1) occupational ranking is a foundational element, (2) advanced degrees do not necessarily correlate with practical experience, and (3) entry-level personnel operate with a great degree of independence and little supervision. Several academic institutions also challenged the SWA's automatic designation of Level II to jobs that require an advanced degree.

Evaluation of these comments is rendered unnecessary by the enactment of the Consolidated Appropriations Act of 2005 which amended the INA (Section 212(p), 8 U.S.C. 1182(p)) and mandates the use of 4 levels.

7. Employer-Provided Wage Data

Some commenters applauded DOL's proposal to consider employer-provided alternative wage surveys, and offered alternative surveys they felt DOL should promote for use in determining prevailing wages.

ACIP requested DOL clarify what survey methodologies would be acceptable and what latitude employers would be allowed in using published surveys, particularly regarding survey data gathered for uses other than alien labor certification. Both AILA and ACIP remarked the responsibility for determining whether an employer-provided survey is suitable should not rest with the SWA. ACIP requested DOL authorize SWAs to automatically accept applicable surveys if they had been submitted and approved for use in previous applications.

ACIP also recommended the Bureau of Labor Statistics (BLS) be considered a viable source for prevailing wages for cases in which the job classification is included in the BLS survey. ACIP contended SWAs currently reject the BLS survey as a prevailing wage source primarily because the data include only one skill level for each occupation, and the survey uses a median wage rather than a weighted average. However, ACIP observed this one-wage level BLS survey provides more accurate prevailing wage rate estimates for a given occupation than the two-level OES system.

ACIP criticized the OES survey for violating DOL standards for acceptable employer-provided surveys. Therefore, ACIP requested that such flexibility be afforded employers; *e.g.*, that employers be allowed to use mathematical modeling to generate data for the current timeframe or for a particular location. Similarly, AILA also considered the OES survey to be flawed because it includes discretionary bonuses, commissions, cost-of-living allowances, incentive pay, and piece rates, all of which are contrary to DOL's protocol for determining prevailing wages. Furthermore, AILA criticized the OES survey for failing to provide a weighted average or median of wages, and for listing the number of workers that fit into pre-defined wage ranges rather than including specific salaries of each surveyed worker.

AILA suggested that in cross-industry surveys, DOL should also endorse the use of other reliable surveys. One commenter suggested any standard published survey should be accepted so that employers do not need to wait for extended periods to get their surveys reviewed.

One commenter urged DOL to distinguish between employer-generated and independent surveys, stating only credible independent surveys ought to be recognized, along with prevailing wage surveys conducted by reputable employers. Another commenter opposed the use of employer-provided alternative surveys unless the employer could guarantee that the surveys were as accurate as the current OES data. One commenter expressed the view that SWA personnel were not qualified to review employer-provided wage data.

We do not agree with the comments from AILA and ACIP suggesting responsibility for determining the suitability of employer-provided surveys be taken away from the SWAs. SWAs have historically had a direct role in determining the prevailing wage for each application filed under the permanent labor certification program. This role has always encompassed not only the application of DBA or SCA or

CBA wage determinations, but also review of any employer-provided alternative wage data. Even though the SWAs will no longer process individual labor certification applications under the new system, employers will continue to request SWA review of alternative sources of wage data under the nonimmigrant programs administered by DOL. This will require DOL to fund and maintain individuals with the necessary expertise at the SWA level. At this time, we consider continuing the SWA role in the prevailing wage determination process useful in maintaining the integrity of the labor certification program and to permit the Secretary of Labor to fulfill her statutory responsibility to certify that the employment of the alien will not adversely affect the wages and working conditions of workers similarly employed. However, it is possible that the results of our audit experience under the streamlined labor certification system and the program experience we will obtain may provide information that will help us to determine whether the role of the SWA in reviewing employer-provided surveys and in other aspects determining prevailing wages should be modified or eliminated.

We will continue to provide training opportunities and materials to the appropriate SWA staff on a periodic basis, and will issue administrative policy clarification and procedural guidance as necessary to insure the prevailing wage determination process operates efficiently and consistent with established policies and procedures.

Similarly, we reject the suggestion that alternative sources should not be permitted because SWA personnel are not qualified to gauge the statistical acceptability of surveys. On the contrary, SWA personnel involved in the prevailing wage determination process are individuals with expertise in this program area.

We believe as long as the employer-provided survey meets the criteria outlined in § 656.40(g) of the regulations, or that were described in section J of GAL 2–98 or other guidance issued by ETA, the survey should be accepted by the SWA. It would be extremely difficult, if not impossible, to make any blanket determinations as to what published surveys are or are not credible and independent, or which employers are believed to be reputable or not.

With respect to the suggestion by ACIP that previously submitted and approved surveys be automatically accepted for future applications, we believe that even if the use of a particular survey has been approved in the past, the SWA will still be required to do some minimal review to ensure the survey is being applied appropriately with regard to the occupational classification, geographic area, level of skill, etc. in the current application. However, we encourage SWAs to maintain records of approved surveys and to keep the review of previously accepted surveys to the absolute minimum necessary, without an extensive review of the statistical methodology and other factors that are not likely to differ across multiple reviews of the same survey.

We have accepted ACIP's recommendation that SWAs should accept those BLS surveys that include only one skill level for each occupation and use a median wage rather than a weighted average. A private survey that provides one overall average for an occupation is acceptable under the new system (as it is under the current system). If the survey contains usable wage data for varying levels of skill or responsibility within the occupation, then the appropriate wage level must be used. The SWAs should be following the same policy with respect to BLS surveys as with any other employer-provided wage data submitted for review. We will furnish appropriate guidance to the SWAs so they will accept BLS surveys, as well as private surveys, that include only one skill level for each occupation and use a median wage rather than weighted average.

We do not agree with the assertion by ACIP that the OES survey methodology violates the standards currently in force governing the acceptability of alternative sources of wage data. Along similar lines, we reject AILA's contention that the OES survey is flawed due to the inclusion of discretionary bonuses, commissions, cost-of-living allowances, etc. The wage component of the OES survey measures the average rate of wages that were actually paid to workers in the area of intended employment in the survey year's sample. Under the current policy, as long as payments to a worker that is the beneficiary of a labor certification application are guaranteed by the employer, they can be included in determining whether the wage offered by the employer equals or exceeds the prevailing wage then in effect.

With respect to AILA's criticism that the OES survey fails to provide a weighted average or median and that it does not include the specific salaries of each surveyed worker, we believe the methodology employed in the OES survey is statistically rigorous and defensible. The OES calculated mean wage is the estimated total wages for an occupation divided by its weighted survey employment. With the exception of the upper-ended wage interval, a mean wage value is calculated for each wage interval based on the occupational wage data collected by the BLS Office of Compensation and Working Conditions. The mean wage value for the upper open-ended interval is its lower bound (Winsorized mean). These interval mean wage values are then attributed to all workers reported in the interval. For each occupation, total weighted averages in each interval are summed across all intervals and divided by the occupation's weighted survey employment. Collecting wage data by interval allows BLS to survey a large number of employers while minimizing the burden on those employers. The distribution of workers within the wage ranges is used in both the calculation of the mean wages, and the calculation of relative errors. These reliability statistics are published with the wage estimates.

We further reject the suggestion that employers guarantee alternative sources of wage data are as accurate as current OES data. When we adopted use of the OES survey (with a dramatically smaller number of occupational categories than were available under the DOT), we felt it was vitally important to provide employers with alternative choices of data sources.

The final rule provides, at § 656.40(g), that unless the job opportunity is covered by a CBA, or by a professional sports league's rules or regulations, the SWA must consider employer-provided wage data in determining the prevailing wage. The use of such employer-provided data is an employer option. The SWA's role is merely to determine, based upon whether the survey meets the acceptability criteria set forth in the regulations and that were in section J of GAL 2–98 or other guidance issued by DOL, whether the employer-provided survey is adequate, not whether it is more (or less) accurate than the OES survey.

8. Use of Median

Several commenters commended DOL's proposal to allow the use of surveys that provide median prevailing wages in the absence of the currently required mean or weighted average under current regulation. One commenter opposed the use of a median prevailing wage, stating it would not necessarily represent the average wage of the workers surveyed.

The median is an acceptable measure of central tendency widely used by organizations, including statistical agencies such as BLS, in determining

average rates of wages. Use of the median will only be permitted in the absence of an arithmetic mean. We do not wish to rule out wage surveys that are otherwise acceptable in terms of the statistical methodology employed, but were unacceptable under current regulations solely due to the use of the median (as opposed to the mean) wage.

9. Definition of Similarly Employed

Under the proposed rule, use of a geographic area broader than the commuting distance is acceptable if a representative sample of ''similarly employed'' workers in the area of intended employment can not be obtained. AILA considered this proposal beneficial, because it allows employers to default to CMSA or statewide data when a corresponding MSA survey has an inadequate sample size. Despite this proposed change, AILA believed further adjustments would be needed because many reputable surveys start with the CMSA as the lowest geographical area. AILA also maintained although employees may not commute within the entire CMSA, these are wages that are reasonably uniform and therefore tend not to vary significantly from MSA data. AILA therefore requested that CMSA surveys be considered acceptable.

AILA's recommendation concerning the CMSA is generally consistent with existing policy regarding the area of intended employment. However, we can not agree that CMSAs should always be considered as reflecting the area of intended employment and thus, an appropriate geographic scope for employer-provided wage data. Based on operational experience, we have determined that CMSAs can be too geographically broad to be used in this manner when more specific surveys are available.

Although any location within a CMSA is not automatically deemed to be within normal commuting distance of the place of intended employment, as are locations within a PMSA, there are instances in which the use of a CMSA-based survey would be appropriate; *e.g.,* if an employer can demonstrate it was not possible to obtain a representative sample of similarly employed workers within the MSA or PMSA based upon standard survey practices. Furthermore, if an employer is unable to obtain a representative sample at the MSA or PMSA level, the geographic base of the survey should be expanded. A CMSA survey will be accepted if the employer can demonstrate that all points on a particular survey are within normal commuting distance of the employer. Last, as noted in the response to question 16 from Attachment A to General Administrative Letter No. 1–00, *Prevailing Wage Policy ''Q's & A's''* (May 16, 2000), if the OES survey uses a Level 2 (contiguous) area or, by implication, a Level 3 (statewide) or 4 (nationwide) geographic area, a CMSA would be considered to be a reasonable alternative. We acknowledge that the terminology CMSAs and PMSAs are being replaced by OMB. However, we will continue to recognize use of these area concepts as well as their replacements.

10. Transition of H–1B Workers from Inexperienced to Experienced

Section 212(n)(1) of the INA (8 U.S.C. 1182(n)(1)) requires an employer seeking to employ H–1B workers to attest it will comply with prescribed labor conditions. With respect to wages, the employer agrees it is offering and will offer during the period of authorized employment to H–1B workers wages that are at least the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the application. The corresponding provision regarding H–1B1 workers is in 8 U.S.C. 1182(t)(1). As explained in the statutory section above, DOL's H–1B regulations were recently extended to the new H–1B1 program. The statutory wage obligation is described at 20 CFR 655.731(a)(1), in part, as follows:

> The actual wage is the wage rate paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question. In determining such wage level, the following factors may be considered: Experience, qualifications, education, job responsibility and function, specialized knowledge, and other legitimate business factors.
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> * * * * *
>
> Where there are other employees with substantially similar experience and qualifications in the specific employment in question, *i.e.*, they have substantially the same duties and responsibilities as the H–1B nonimmigrant, the actual wage shall be the amount paid to these other employees.

The regulation continues: ''The prevailing wage for the occupational classification in the area of intended employment must be determined as of the time of filing the application. The employer shall base the prevailing wage on the best information as of the time of filing the application.'' 20 CFR 655.731(a)(2).

In the NPRM, the Department proposed to amend § 655.731(a)(2) to establish an additional requirement where an employer's prevailing wage determination was based on a survey that set more than one wage rate for an occupation listed on the employer's LCA. The Department proposed if an employer, in establishing its prevailing wage determination for the occupational classification, utilizes a survey that provides more than one wage rate or level for that classification, the employer is required to pay the H–1B worker at least the applicable wage rate for the level of work as described by the employer. In making this proposal, the Department stated that if, during the life of the LCA, an entry-level H–1B worker gains experience and the nature of his/her work grows in responsibility, the applicable prevailing wage would be the wage set by the survey for the experienced level.

Twenty-three commenters responded to the Department's proposal. Although there was general support for the premise underlying the proposal, *i.e.,* an H–1B worker should be paid at the wage level appropriate to his duties, the commenters generally opposed the notion that the H–1B wage attestation requirement relating to an employer's prevailing wage obligation mandated the payment of multiple levels of wages. Commenters expressed the following views on the Department's proposal:

- The statute requires only the payment of the prevailing wage appropriate to the position at the time the determination is made; it remains static, not dynamic, as the proposal would require.
- The appropriate response to a material change or increase in the duties of the H–1B worker is to obtain a new prevailing wage determination and LCA and file a new I–129 petition, not the response proposed by the Department.
- The actual wage requirement of the wage attestation, not its prevailing wage prong, addresses the employer's obligation to increase an H–1B worker's pay where the worker gains experience.
- The proposal would require constant out-of-cycle review of H–1B wage rates by employers, perpetually ratcheting up H–1B salaries, with significant economic and paperwork concerns not addressed by the proposal.
- The proposal is ambiguous as to whether a fixed time requirement for paying higher level wages would be imposed.
- Employers are hampered by the predominant use of a two-level system in surveys, which often overstates the salary differential between the levels for some occupations.

• Multi-tiered wage levels should be set for each occupation to better reflect ''real world'' experience. A two-tier wage level is unrealistic where an entry level job by its nature requires considerable independence (e.g., a teacher) or the salary for the second level is markedly higher, e.g., post-doctoral research fellow, medical resident, college instructor, marketing manager.

• The proposed regulation would serve to elevate wages for H–1B nonimmigrant workers while doing nothing to elevate the wages of U.S. workers (treating aliens differently from U.S. workers).

• The Department should preserve this and other H–1B issues for future rulemaking.

As noted, AILA and Microsoft criticized the proposal as exceeding the Department's statutory authority. As stated by AILA: ''The statute clearly contemplates that the prevailing wage determination is made based on the information available at the time of filing the application, and NOT thereafter.'' AILA continued: ''[u]nder the statute, the higher of the actual wage or the prevailing wage as determined at the time of filing is the wage that is paid to the H–1B worker during the period of authorized employment. The statute neither authorizes, nor contemplates, review of the applicability of the prevailing wage to the position after the time of filing.'' In a similar vein, Microsoft objected to the proposal as contrary to statute: ''The statute specifically calls for the prevailing wage determination to be based on information that is available when the application is filed—not information that becomes available later during the life of the petition, if the H–1B nonimmigrant worker's duties change. If the change in duties is sufficiently great, the employer should file a new H–1 petition.'' Microsoft also noted, however, that ''DOL regulations already require the employer to pay the higher of the prevailing wage and actual wage. The employer is obligated to provide H–1B nonimmigrant workers with any pay increases that its actual compensation system provides, and this obligation is ongoing throughout the life of the H–1B petition and LCA. The actual wage obligation is sufficient to ensure that employees receive pay increases in skill level.''

Based on its review of the comments, the Department has decided not to implement the proposal. The Department does not share the view that the proposal would be inconsistent with the statute or necessarily pose all of the practical problems suggested by some of the comments. The Department does, however, believe the ''actual wage'' requirement in the current regulation and the requirement to file a new H–1B petition when the workers' duties change are adequate to ensure that H–1B workers receive the wages appropriate to their duties. In this regard, the Department notes the regulation expressly provides: ''Where the employer's pay system or scale provides for adjustments during the period of the LCA—e.g., cost of living increases or other periodic adjustments, or the employee moves to a more advanced level in the same occupation—such adjustments shall be provided to similarly employed H–1B nonimmigrants (unless the prevailing wage is higher than the actual wage).'' 20 CFR § 655.731(a)(1). The Department also notes the prevailing wage, even if it remains the required wage during an H–1B worker's placement, will be adjusted upon the expiration of the LCA applicable to his or her employment. Since an LCA has a maximum length of three years, upon renewal a new prevailing wage will be established.

We believe the current regulation will protect H–1B and H–1B1 workers and U.S. workers. By ensuring H–1B and H–1B1 workers receive the full wages due them under the attestation, the Department protects against the erosion of wage or other conditions of employment available to U.S. workers. The regulations provide flexibility to employers in choosing from among the accepted survey methodologies in establishing the prevailing wage for a position to be filled under an LCA, thus eliminating or minimizing any concerns about the difficulties of establishing multiple levels of pay. The Department expects most employers are and will continue to be attentive to their obligation to adjust wages paid to the H–1B or H–1B1 worker if and when their duties and experience require an increase from their beginning required wage. If, upon investigation, questions arise about the appropriateness of the wage paid to an H–1B or H–1B1 worker, the Department will consider all the circumstances bearing on the questions, including the actual and written duties of the worker (at the time the employment began and as they may have changed over time), documentation submitted by the employer in connection with obtaining a prevailing wage determination, the data provided to the employer through the survey it utilized, and the effect upon an H–1B or H–1B1 worker's wages, if any, of adjustments in the employer's actual wage system. As appropriate, the Department will order an employer to pay back wages, and direct further relief to remedy any violation of the wage attestation.

11. Submission of Supplemental Information

One commenter stated that allowing limited opportunities to resubmit PWDR's would save time, as employers currently submit repeated requests in order to secure a different PWD. Another commenter stated the proposed regulations encourage employers to resubmit cases to get better prevailing wage rates, overburdening SWA staff, while in the past, the loss of priority dates discouraged repeat submission of cases. The commenter suggested employers be required to wait a certain amount of time before being allowed to submit a new job description on behalf of the same alien worker. Two commenters asked whether the supplemental filing allowed under the proposed rule (see § 656.40(h)) meant the employer could submit a second survey rather than a supplement to the initial survey.

We believe the concerns of SWA commenters are addressed by the proposed requirement that employers may only submit supplemental information to the SWA one time about the skill level of the job opportunity, the survey it provided for the SWA's consideration, or some other legitimate basis for further review by the SWA. Another commenter suggested the proposed rule at § 656.40(h) should include a provision for handling changes in Standard Occupational Classification (SOC) code due to the inclusion of supplemental information by employers. The commenter also suggested the section include provisions for situations in which there are disputes over issues other than skill level or acceptability of surveys.

In response to the question about the employer's ability to submit supplemental information to a SWA, we note this provision was meant to address situations where the employer disagrees with the SWA about the skill level assigned to the job opportunity, or where there is a need to address issues concerning the rejection of an employer-provided survey or the improper application by the SWA of the appropriate skill level from such a survey. It was not intended to serve as a means for an employer to submit a completely different survey. The submission of a wholly different alternative wage survey by an employer will be considered a new request for a prevailing wage determination and a new review process will be initiated.

Last, it should be noted if the employer submits its own published survey in response to a prevailing wage determination from the SWA that was derived from the OES survey, this submission would not be considered to be the single opportunity the employer has under § 656.40(h) to submit supplemental information regarding a prevailing wage determination. Rather, the submission of an alternative survey by the employer in this situation would be considered a new request for a prevailing wage determination and should be reviewed by the SWA under § 656.40(g), as if the employer had submitted the alternative survey with its initial request. If the SWA then rejects the employer-provided survey as inadequate or unacceptable for any reason, the employer may then submit supplemental information on the survey under § 656.40(h). If, after a review of the employer's supplemental information, the SWA determines the survey is still unacceptable, the employer would then have the opportunity to request a review of the SWA's prevailing wage determination by the CO under § 656.41.

12. Prevailing Wages for Certain Academic, Nonprofit, and Research Entities

A number of commenters, largely university representatives, addressed prevailing wage issues pertinent to nonprofit institutions. Some commenters were concerned DOL had failed to meet its statutory obligation to calculate prevailing wages for the academic community. One commenter urged DOL to meet that obligation by accepting and using wage scales already in place, and suggested a number of sources, including the National Institutes of Health and similar Government agencies, the Journal Academe, and the Council on Teaching Hospitals.

The American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), Pub. L.105–277, 112 Stat. 2681–641, amended the INA (Section 212(p)(1), 8 U.S.C. 1182(p)(1)) to require the computation of the prevailing wage for employees of institutions of higher education, nonprofit entities related to or affiliated with such institutions, nonprofit research organizations, and Governmental research organizations only take into account the wages paid by such institutions and organizations in the area of intended employment. With respect to commenters' suggestions that DOL has yet to fully comply with the ACWIA mandate in determining prevailing wages for the affected institutions, we continue to believe it may not be feasible to identify the different kinds of entities that might comprise educational institutions' related or affiliated nonprofit entities, or nonprofit research organizations. If those entities can not be identified, it may not be possible for DOL to properly define the universe that should be surveyed to determine the appropriate prevailing wages. It should be noted that despite these difficulties in identifying the appropriate entities to be surveyed, employers are always free to submit alternative sources of wage data that survey individuals employed by the affected entities.

In order to comply with these requirements in the absence of a solution to this issue, the OES data we currently make available is broken out into two data sets. In the absence of a better alternative, we will continue to use the prevailing wage data OES currently collects in surveying institutions of higher education to determine a prevailing wage for one universe consisting of institutions of higher education, affiliated or nonprofit research institutions, and nonprofit research organizations.

We continue to discuss with BLS the possibility of obtaining data for ''Governmental research organizations,'' because pay scales for Governmental research laboratories and other related activities are established by the Federal Government and do not necessarily correspond with the other three types of entities set forth under ACWIA. For this reason, we do not contemplate including Governmental research organizations in the same universe unless the technical problems in determining the prevailing wages for such entities prove to be insurmountable. Although BLS has data from the Office of Personnel Management on Federal wages, it must be determined whether we can extract from that data those wages paid in organizations in which the primary function is research. Until that analysis occurs and it is determined if that information can be used, the prevailing wage data obtained from surveys of institutions of higher education will continue to be used for these types of organizations as well.

13. Role of the SWA in the Prevailing Wage Process

For various reasons, some commenters recommended the elimination of SWAs from the PWD process. AILA asserted that prevailing wage determinations vary widely from SWA to SWA, and suggested regional determinations would produce greater reliability and uniformity for employers. AILA suggested DOL amend the proposed rule to allow employers to obtain prevailing wage data from published, acceptable Government sources, such as OES. The employer's prevailing wage and wage source could then be reviewed at the CO level. The commenters stated this procedure would improve the PWD process by eliminating the expensive step of SWAs determining and assigning wage rates.

Two commenters stated that by requiring a SWA-endorsed PWDR, DOL is missing an opportunity to reduce the resource burden on SWAs. The commenters emphasized that DOL is shifting to an attestation-based labor certification system, and suggested the prevailing wage requirements also shift to such a system. The commenters noted employers are not required to secure a PWD from a SWA in connection with H'1B nonimmigrant applications, and believed they should not be required to do so in the context of permanent labor certification either.

For the reasons provided above in our discussion of employer-provided wage data, we can not agree with the suggestion that the SWA's role in the prevailing wage process be eliminated. The results of our audit experience under the streamlined labor certification system and the program experience we will obtain in administering the prevailing wage function will be considered in considering whether the role of the SWA in determining prevailing wages should be modified or eliminated.

14. Occupational Wage Library

Several commenters discussed issues relating to electronic processing of PWD. A few commenters believed DOL's Online Wage Library (OWL) could be a useful tool in streamlining the PWD process. The commenters all discussed modifying the proposed rule to take advantage of OWL. One of the commenters stated that, by using OWL, employers could bypass direct processing of PWDR's by SWAs, saving both time and resources. The commenter suggested employers could submit computer-generated PWDR forms created by OWL along with the labor certification application. The computer-generated forms could include date stamping or other embedded codes to allow DOL to verify the date the form was generated. The commenter believed such automation of PWDR forms would lead to improved efficiency at the SWA level.

We strongly encourage interested parties to make use of the OWL as a means of identifying prevailing wage rates for positions for which an

employer seeks to employ foreign workers. However, for the reasons provided above in the sections on employer provided wage surveys and the role of the SWA, we do not believe it would be appropriate to automate the prevailing wage determination process in its entirety at this time.

15. Technical Correction

One commenter indicated there was a typographical error at § 656.40(b)(3). The commenter also stated that in § 656.40(g)(2) there is potential confusion in referring to ''other wage data.'' As the term could be open to interpretation, the commenter suggested DOL delete the term ''other wage data'' throughout the section and substitute ''surveys.''

We have corrected the error in § 656.40(b)(3) in accordance with the commenter's suggestion. With respect to the concern with the phrase ''other wage data'' in § 656.40(g)(2), we do not believe it necessary to modify the regulation. This language predates the NPRM and was taken directly from section J of GAL 2–98. The provision in the regulation is intended to highlight the fact that an alternative source of wage data need not be a formally conducted and published wage survey, but could also be an ad hoc set of wage data from a survey that has been conducted or funded by the employer, as long as each of the criteria from section J were met.

16. Miscellaneous Matters

AILA asserted the proposed regulations at §§ 655.731 and 656.40 establish two different standards for determining prevailing wage rates for essentially the same occupations. AILA stated the involvement of two different agencies in the PWD process constitutes an unnecessary two-tier wage system, doubling processing times, opportunities for delay, and the likelihood of errors and inconsistencies. The Immigration Act of 1990 (IMMACT 90), Public Law 101–649, 104 Stat. 4978, first established the attestation process for H–1B ''specialty occupation'' nonimmigrants, and included a prevailing wage requirement under that process. The Conference Report on IMMACT 90 did indeed suggest that ''the prevailing wage to which an employer must attest is expected to be interpreted by the Department of Labor in a like manner as regulations currently guiding section 212(a)(14)'' [now at section 212(a)(5)(A)]. The regulations referred to are the provisions at § 656.40 that govern the prevailing wage process under the permanent labor certification program. However, while the prevailing wage processes under the two programs are as similar as is functionally possible, they have different legislative and programmatic histories. For example, under the permanent program, the employer is required to obtain a prevailing wage determination from the SWA, whether through the use of a CBA, the OES survey, or the submission of alternative sources of data for SWA review. In contrast, under the H–1B program, SWA approval of any particular source of prevailing wage data is not required. As stated in the current regulations at § 655.731(a)(2) ''the employer is not required to use any specific methodology to determine the prevailing wage and may utilize a SESA, an independent authoritative source, or other legitimate sources of wage data.'' While it is correct that under the current regulation, the involvement of both SWAs and ETA regional offices in the prevailing wage determination process constitutes a two-tiered process, with this final rule the process will be streamlined whereby appeals of SWA PWDs will be handled by COs located in ETA processing centers as discussed below.

One commenter recommended DOL institute controls to ensure employers use the correct prevailing wages in job orders and advertisements during recruitment. The commenter also suggested on-site wage and hour audits be conducted to ensure employers are following through and paying employees prevailing wages. While this final rule does not require the employer to include the wage offer in advertisements placed as part of the required pre-filing recruitment, if the wage offer is included, it will be reviewed in the event of audit to ensure it meets or exceeds the prevailing wage for the job opportunity for which certification is sought. With respect to the recommendation that the Wage and Hour Division conduct on-site audits to ensure employer compliance, we have no statutory authority to require this activity.

V. Certifying Officer Review of Prevailing Wage Determinations

The NPRM proposed establishing a Prevailing Wage Panel (PWP) that does not exist under the current regulations. The national PWP would have adjudicated complaints arising from PWD made by SWAs.

Commenters generally supported the creation of the PWP. For example, one prevailing wage specialist considered the PWP to be an excellent idea, stating the PWP would improve consistency of wage determination review and simultaneously would support the efforts of SWAs. Likewise, AILA stated a single adjudicative body would improve resolution of prevailing wage issues. The PWP would help resolve differences in alternative sources of prevailing wage data, for instance, by determining the acceptability of particular surveys and applying the OES survey to wage determinations. While expressing support for the proposed PWP, many commenters also suggested modifications to the proposed rule.

However, because the processing of applications for permanent employment certification will occur in one of two processing centers, we have concluded the establishment of a PWP is not necessary. Each center will be managed by a center director who will report to the Chief, Division of Foreign Labor Certification. Case determinations will be made by COs assigned to the processing centers. The COs will also make determinations with respect to appeals of the prevailing wage determinations issued by the SWAs. It will be considerably easier for the national office to review and provide oversight of the determinations issued by COs located in ETA processing centers. This change in reporting is different than under the former system when the national office did not have line authority over case processing and decisions made by COs with respect to PWDs. Accordingly, uniformity in decision-making with respect to appeals will be enhanced and § 656.41 provides in this final rule, appeals of PWDs issued by SWAs will be decided by a CO rather than by a PWP.

We can not accept the recommendations of several commenters to impose specific time frames on SWAs and the PWP (now the COs in this final rule) in taking actions under the prevailing wage determination and review process. Because it is not possible to anticipate the number of challenges that will be directed to the COs for review, and because there is no set level of resources, we do not believe it would be appropriate to constrain the COs in such fashion at the infancy of the new process. We do, however, anticipate that SWAs and the COs will operate in as expeditious a manner as is possible. Further, in response to comments that the 21 day period during which a request for review must be initiated by an employer is unreasonable and unduly burdensome, we have amended the proposed § 656.41(a) to state an employer requesting a review of a SWA prevailing wage determination must make such a request within 30 days of the date of the determination.

We have also amended § 656.41(a) to correct an inconsistency as to when the period during which the employer may request review of a prevailing wage determination commences. The first sentence stated the employer must make a request for such a review ''within 21 days of receiving a determination from the SWA,'' while the next sentence stated the request for review must be sent to the SWA that issued the prevailing wage determination ''within 21 days of the date of the PWD.'' To remove this inconsistency and to provide greater clarity as to the date upon which the request for review period commences, the final rule has been modified to state in both places it appears that the employer must make a request for review within 30 days from the date the prevailing wage determination was first issued by the SWA. Similarly, we have modified this final rule to provide that a request for review of the determination by BALCA must be made within 30 days of the date of the decision of the CO.

Last, it should be noted the appeal stage of the process is not intended to serve as an avenue for the employer to submit new materials relating to a prevailing wage determination. The employer's submittal of an employer-provided alternative survey subsequent to a prevailing wage determination based upon the OES survey, and the single opportunity to submit supplemental information to the SWA, represent the employer's only opportunities beyond the initial filing to include materials in the record that will be before the CO in the event of an employer request for review under § 656.41.

Executive Order 12866

Several commenters suggested we had not adequately assessed the potentially increased costs the NPRM could impose on employers. Some maintained these costs singularly or collectively would have an economic impact of $100 million or more. These commenters asserted we had not adequately addressed a number of issues in certifying that this rule was not an economically significant regulatory action within the meaning of Executive Order 12866. These issues are discussed below:

1. Impact of Fraud and Abuse

FAIR maintained we are required to conduct a full cost/benefit analysis of the proposed regulatory changes to determine if the regulatory scheme can be tailored to remove or significantly reduce the impermissible burden on society that fraud and abuse in employment-based immigration represents. FAIR, however, did not allege that any fraud or abuse that may exist in the permanent labor certification program would be greater under the new system than it is under the current system. Moreover, the information FAIR provided about the impact of fraud and abuse was not supported by any factual data, was speculative in nature or couched in hypothetical terms. For example, FAIR stated it ''had received indications of a 40 percent fraud and misrepresentation rate of permanent labor certification applications filed in at least one jurisdiction.'' FAIR did not provide any factual information to support a 40 percent fraud rate in any jurisdiction. We do not believe FAIR's unsupported allegations provide a sufficient basis to conclude this final rule is likely to have an annual effect on the economy of $100 million or more.

2. Cost of Advertisements

Several commenters maintained the $500.00 cost per advertisement over all types of publications and geographic locations specified in the Paperwork Reduction Act statement in the NPRM was too low. For the purpose of assessing the economic impact of advertising costs, however, it is not the absolute level of such costs that is important, but the comparison of the costs under the current rule versus this final rule. Our analysis indicates that advertising costs will be lower under this final rule than under the current regulations. As indicated in the preamble on the contents of advertising, employers have the option of writing a considerably less detailed advertisement under this final rule than they do under the current system.

A review of advertising costs was conducted by contacting major newspapers in various U.S. cities and inquiring about advertising rates for Sunday and midweek advertisements. The basis for assessing the costs of the advertisements was two 10-line advertisements. Ten-line advertisements would be permissible under this final rule. Estimated costs for placing two 10-line Sunday advertisements ranged from $400 to $1,100, whereas a 3-day advertisement would cost between $330 and $1,100. It is highly unlikely the cost of Sunday advertisement will be as high as claimed by commenters. Further, we conclude on the basis of our program experience the 3-day advertisements typically placed by employers under the current regulations are considerably longer than 10 lines. Consequently, the two Sunday advertisements required under this final rule will cost less than the 3-day advertisement under the current regulations.

3. Recruitment Reports

AILA maintained we did not address in the NPRM the added expense of a recruitment report that would require employers to track each and every applicant for a position, so the process by which an applicant was deemed qualified or unqualified for the position can be reported on an applicant by applicant basis. AILA indicated this would be particularly troublesome for larger employers.

Requiring employers to track each and every applicant for a position is not a new requirement. This is what the current basic process requires at § 656.21(j). The Department has required this since 1981. Admittedly, we have for the last few years permitted a simplified recruitment report, which did not require employers to track every applicant for a job opportunity, which was the subject of an RIR application. The RIR procedure, however, only applies to those occupations for which there is little or no availability. This procedure is the exception rather than the rule.

However, in response to comments raised with respect to this issue, we have revised our recruitment report requirements by removing the requirement that each individual U.S. worker who applied for the job opportunity be identified on the report. However, the employer retains the responsibility for proving that U.S. workers are not available for the job opportunity and any U.S. worker rejections were for lawful reasons.

It should be noted, however, that we did address the cost of preparing the required recruitment report in the Information Collection Request (ICR) that was submitted to the Office of Management and Budget in connection with publication of the NPRM on May 6, 2002. In the ICR we estimated on average it would take 1 hour for an employer to prepare a recruitment report for each application it files. This estimate included employers preparing recruitment reports under the regular basic process and the RIR process.

The NPRM at 67 FR 30483 indicated how to request copies of the ICR and where to submit comments on the ICR. We did not receive any comments on the average of one burden hour we allocated to the preparation of the recruitment report.

4. Additional Recruitment Steps

AILA maintained DOL failed to address the cost of required additional recruitment steps. According to AILA,

''(p)articipation in job fairs, use of placement agencies, and internet ads can be extremely costly recruitment tools, thus imposing significant additional expenses upon employers who wish to participate in the labor certification process, particularly small employers.''

Under the procedures in this final rule, employers may select from a more extensive list of additional recruitment steps than were listed in the proposed rule. Two of the additional recruitment steps—employer's website and campus placement offices—would require no more than nominal expenditures on the part of the employer-applicant. While some of the other alternative recruitment steps can be expensive, they are not always expensive. Employers can, for example, recruit using a low cost job fair instead of an expensive job fair. Further, we believe the additional recruitment steps represent real world alternatives. The overwhelming majority of employers seriously recruiting workers for U.S. jobs would routinely use one or more of the listed additional recruitment steps. Additionally, it should be noted the alternative recruitment steps only require employers to advertise for the occupation involved in the application rather than the job opportunity involved in the application as is required for the newspaper advertisement. Allowing employers to recruit for the occupation involved in the application should also work to minimize employers costs to conduct special recruitment efforts solely to satisfy the alternative recruitment steps. In sum, we do not believe the cost of additional recruitment steps to the employer will be significant.

5. RIR Recruitment Costs

Some commenters expressed concerns about differences in the cost to prepare and submit an RIR application as compared to the new system would be due to differences in advertising requirements. RIR recruitment efforts and concomitant costs vary with economic conditions. In light of the current labor market and the substantially increased availability of U.S. workers, COs scrutinize applications and the recruitment efforts supporting them more closely than they did during more favorable economic conditions characterized by lower unemployment rates. In the current economic environment, employers are supporting their RIR applications with more extensive recruitment documentation than they were when labor markets were considerably tighter. Our program experience leads us to believe the pre-filing recruitment efforts currently being conducted by employers under the RIR process compare favorably with the pre-filing recruitment required under this final rule. Regardless of whether economic conditions are characterized by tight or loose labor markets, COs require employers to show a pattern of recruitment which requires the employer, as a practical matter, to conduct one or more of the alternative steps required under this final rule. Many employers, regardless of the state of the labor market, place two print advertisements to support their RIR applications. In our judgment, the time and resources employers are expending to conduct recruitment to support their RIR applications is about the same as the time and resources they would have to spend on such activities to obtain the documentation necessary to support their application under the new streamlined program.

6. Business Necessity, Alternative Job Requirements, Combination Occupations, and Experience Gained With the Employer

AILA maintained we failed to assess the economic consequences of the proposed elimination of the use of the business necessity standard, alternative job requirements, combination occupations and experience gained with the employer. However, as discussed above, DOL has decided to retain the business necessity test and allow the appropriate use of these standards and criteria by employers applying for permanent alien employment certifications. Therefore, there is no economic impact from the continued use of business necessity, alternative job requirements, combination occupations and experience gained with the employer that needs to be discussed in this final rule.

7. Elimination of the Five (5) Percent Variance From the Prevailing Wage

AILA maintained that this final rule must explore and discuss the economic effect of the proposed elimination of the provision in the current rule under which the wage offered in a labor certification application is considered as meeting the prevailing wage standard if it is within 5 percent of the average rate of wages. AILA stated the 5 percent variance ''was significant, because it helped to compensate for the fact that DOL's prevailing wage data is outdated, and artificial by comparison [sic] by elements such as bonuses and commissions (elements under the DOL rule, may not be included in the employer's offered wage).''

The policy of not including bonuses in calculating the prevailing wage is a longstanding policy and was not a factor in the decision to permit employers to set forth a wage on the labor certification that was within 95 percent of the prevailing wage. It should also be noted employers were always allowed to base the offered wage on commissions, bonuses or other incentives as long as the employer guaranteed a wage paid on a weekly, biweekly, or monthly basis. (See 20 CFR 656.20(c)(3) of the current regulation and page 34 of *Technical Assistance Guide No. 656—Labor Certifications*.)

The reason for allowing employers to offer a wage that was within 95 percent of the prevailing wage was because we could not always be confident of the statistical precision of the ad hoc telephone surveys of employers that were often conducted by the SWAs to determine the prevailing wage. Since the statistical precision of these ad hoc surveys varied greatly, we believed it necessary to allow some variance in the rate offered by the employer. In reviewing this policy we have determined the basic premise was in one respect flawed as the ad hoc surveys conducted by SWAs were as likely to be inaccurate on the low side as on the high side.

As indicated in the preamble, since the introduction of the OES program in 1998, we have determined it is no longer necessary to provide the 5 percent variance. The wage component of the OES survey is conducted by BLS and with the exception of the Decennial Census is the most comprehensive survey conducted by an agency of the Federal Government. The OES program surveys approximately 400,000 establishments per year, taking 3 years to fully collect the sample of 1.2 million establishments. This sample covers over 70 percent of the employment in the U.S. See 67 FR at 30479. The comprehensive nature of the OES program and resulting degree of statistical precision make it unnecessary to provide a 5 percent variance which was, as indicated above, based on a flawed premise.

Further, we have determined that, in view of the greater accuracy of PWD under the OES program, the Secretary would not be fulfilling her statutory responsibility to certify that the employment of the beneficiary of a labor certification application will not adversely affect the wages and working conditions of U.S. workers similarly employed if she continued to certify applications whereby employers were allowed to pay 95 percent of the

prevailing wage as determined by the SWA.

8. Attorney Fees

One commenter stated the proposed rule will add up to 10 hours of additional attorney time and will cost from $800.00 to $2,500 per case. Legal fees are not appropriate to include in any estimate of financial impact. Attorney representation is not necessary to file an *Application for Permanent Employment Certification.*

9. Cost of In-House Compliance

One commenter stated the cost of $25.00 per hour for the 557,429 burden hours provided in item 12 of the supporting statement to the Information Collection Request submitted to OMB significantly understates the true costs of such employees by at least 100 percent. We believe the $25.00 an hour used in the ICR to compute the cost for burden associated with this rulemaking is fair and reasonable. According to the 2001 National Occupational Employment and Wage estimates published by BLS, the national average wage for employment recruitment and placement specialists amounted to $21.31. In the main, we believe employment recruitment and placement specialists fairly represent the skills and work experience required to comply with the paperwork requirements of this final rule.

Based on the foregoing, we certify, as in the NPRM, that this final rule is not an ''economically significant regulatory action'' within the meaning of Executive Order 12866. The direct incremental costs employers will incur because of this rule, above business practices required by the current rule of employers that are applying for permanent alien workers, will not amount to $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local or tribal governments or communities. DOL believes any potential increase in recruitment and recordkeeping costs associated with the proposed rule will be more than offset by the combination of eliminating the role of the SWAs in the recruitment process and, consequently, eliminating the time employers currently spend in working with SWAs to meet regulatory requirements. Further, the expected large reduction in the time to process applications will lead to a reduction in the resources employers spend on processing applications and will eliminate DOL's need to periodically institute special, resource intensive efforts to reduce backlogs, which have been a recurring problem under the current process. Any cost savings realized, however, will not be greater than $100 million.

While it is not economically significant, the Office of Management and Budget (OMB) reviewed the proposed rule because of the novel legal and policy issues raised by this rulemaking.

Regulatory Flexibility Act

We have notified the Chief Counsel for Advocacy, Small Business Administration, and made the certification under the Regulatory Flexibility Act at 5 U.S.C. 605(b), that the rule will not have a significant impact on a substantial number of small entities. The final rule will affect only those employers seeking immigrant workers for permanent employment in the United States. Since any employer can file a permanent application for permanent employment, the Department considers the appropriate universe to determine the impact of the final rule on a substantial number of small entities in the United States is the universe of small businesses in the United States. The Department estimates in the upcoming year 60,000 employers will file approximately 100,000 applications for permanent employment certification. Some large employers file several hundred applications in a year. Therefore, the number of small entities that file applications is significantly less than the 60,000 employers that will file applications in the coming year. According to the Small Business Administration's publication The Regulatory Flexibility Act; An Implementation Guide for Federal Agencies, there were 22,400,000 small businesses in the United States in 2001. Thus the percentage of small businesses that file applications for permanent alien employment certification is 0.27 percent (60,000 22,400,000 = 0.27%). The Department of Labor asserts a small business pool of 0.27% does not represent a substantial proportion of small entities.

When the proposed rule was published, the Department notified the Chief Counsel for Advocacy, Small Business Administration, and made the certification pursuant to the Regulatory Flexibility Act at 5 U.S.C. 605(b), that the rule would not have a significant impact on a substantial number of small entities. The Chief Counsel did not submit a comment.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by state, local and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any 1 year, and it will not significantly or uniquely affect small governments. Therefore, no actions are deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996 (SBREFA). The standards for determining whether a rule is a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act are similar to those used to determine whether a rule is an ''economically significant regulatory action'' within the meaning of Executive Order 12866. Because we certified this final rule is not an economically significant rule under Executive Order 12866, we certify that the final rule is not a major rule under SBREFA. It will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Executive Order 13132

We received one comment maintaining that a summary impact statement should be required prior to any passage of these rules. The commenter maintained the impact of an increased number of aliens entering the various states will be substantial. The commenter went on to state: ''If, for example, in California there are 10,000 aliens and their spouses and minor children entering the state each year as a result of fraudulent and misrepresented labor certifications, U.S. workers will have fewer job opportunities and community resources will be additionally taxed for the provision of various services at the expense of lawful state residents.'' The permanent alien labor certification regulations do not affect the numbers of immigrants entering the United States each year under various visa categories, including work-based visas. Those numbers are fixed by statute. Further, the Department sees no basis for the speculation the rule will result in an increase in fraudulently obtained labor certifications. For those reasons, we have determined the rule will not have a substantial and direct impact on the

states, on the relationship between the Federal Government and the states, or on the distribution of power and responsibilities among the various levels of government.

Assessment of Federal Regulations and Policies on Families

The proposed regulation does not affect family well-being.

Paperwork Reduction Act

Summary: This final rule contains revised paperwork requirements that are necessary to the implementation of the revised labor certification program. The revised paperwork requirements are discussed in detail in section V of the preamble that addresses the comments received on the proposed rule and in the section that discusses the comments relevant to the Department's certification under Executive Order 12866 that this final rule is not an ''economically significant regulatory action.''

Respondents and frequency of response: Employers submit an *Application for Permanent Employment Certification* when they wish to employ an immigrant alien worker. ETA estimates, based on its operating experience that in the upcoming year employers will file approximately 100,000 applications for alien employment certification (including an estimated 5,300 applications filed with the DHS on behalf of aliens who qualify for Schedule A or who are immigrating to work as sheepherders), for a total burden of 125,000 hours (100,000 applications for permanent employment certification × 1.25 hours = 125,000 hours).

The Department estimates the total annual burden for all information collections in the final rule amounts to 255,980 hours. Employers filing applications for permanent employment certifications come from a wide variety of industries. Personnel costs for employers and/or their employees who perform the reporting and recordkeeping functions required by this regulation may range from several hundred dollars to several thousand dollars where the corporate executive officer of a large company performs some or all of these functions themselves. Absent specific wage data regarding such employers and employees, respondent costs were estimated in the proposed rule at an average of $25.00 an hour. Based on the forgoing, the total annual respondent costs for all information collections are estimated at $6,399,500.

The Department estimates that 5,000 employers will be required to conduct supervised recruitment. The Department estimates the cost of an advertisement over all types of publications and geographic locations will average $500.00 for a total annual burden of approximately $2,500,000.

The paperwork requirements discussed in the preamble to this final rule will not become effective until OMB has reviewed and approved these requirements and assigned an OMB approval number. A copy of the current draft of ETA Form 9089 and instructions follow this final rule.

Catalogue of Federal Domestic Assistance Number

This program is listed in the Catalog of Federal Domestic Assistance at Number 17.203, ''Certification for Immigrant Workers.''

List of Subjects in 20 CFR Parts 655 and 656

Administrative practice and procedure, Agriculture, Aliens, Crewmembers, Employment, Employment and Training, Enforcement, Forest and forest products, Fraud, Guam, Health professions, Immigration, Labor, Longshore and harbor work, Migrant Labor, Passports and visas, Penalties, Reporting and Recordkeeping requirements, Students, Unemployment, Wages, Working Conditions.

Appendix A to the Preamble—Education and Training Categories by O*Net–SOC Occupation

Note: Appendix A will not be codified in the Code of Federal Regulations.

BILLING CODE 4510–30–P

Appendix A to the Preamble-Professional Recruitment Occupations - Education and Training Categories by O*NET – SOC Occupation

Code	Education and training category
1	1st professional degree
2	Doctoral degree
3	Master's degree
4	Work experience plus bachelor's or higher degree
5	Bachelor's degree

O*NET-SOC code	O*NET-SOC title	Education & training category code
21-2011.00	Clergy	1
23-1011.00	Lawyers	1
29-1011.00	Chiropractors	1
29-1021.00	Dentists, General	1
29-1022.00	Oral and Maxillofacial Surgeons	1
29-1023.00	Orthodontists	1
29-1024.00	Prosthodontists	1
29-1041.00	Optometrists	1
29-1051.00	Pharmacists	1
29-1061.00	Anesthesiologists	1
29-1062.00	Family and General Practitioners	1
29-1063.00	Internists, General	1
29-1064.00	Obstetricians and Gynecologists	1
29-1065.00	Pediatricians, General	1
29-1066.00	Psychiatrists	1
29-1067.00	Surgeons	1
29-1081.00	Podiatrists	1
29-1131.00	Veterinarians	1
15-1011.00	Computer and Information Scientists, Research	2
19-1021.01	Biochemists	2
19-1021.02	Biophysicists	2
19-1022.00	Microbiologists	2
19-1042.00	Medical Scientists, Except Epidemiologists	2

Appendix A to the Preamble-Professional Recruitment Occupations - Education and Training Categories by O*NET – SOC Occupation

19-2011.00	Astronomers	2
19-2012.00	Physicists	2
19-3031.00	Clinical, counseling, and school psychologists	2
19-3031.01	Educational Psychologists	2
19-3031.02	Clinical Psychologists	2
19-3031.03	Counseling Psychologists	2
25-1021.00	Computer Science Teachers, Postsecondary	2
25-1022.00	Mathematical Science Teachers, Postsecondary	2
25-1032.00	Engineering Teachers, Postsecondary	2
25-1041.00	Agricultural Sciences Teachers, Postsecondary	2
25-1042.00	Biological Science Teachers, Postsecondary	2
25-1043.00	Forestry and Conservation Science Teachers, Postsecondary	2
25-1052.00	Chemistry Teachers, Postsecondary	2
25-1054.00	Physics Teachers, Postsecondary	2
25-1071.00	Health Specialties Teachers, Postsecondary	2
25-1072.00	Nursing Instructors and Teachers, Postsecondary	2
25-1121.00	Art, Drama, and Music Teachers, Postsecondary	2
25-1191.00	Graduate Teaching Assistants	2
15-2021.00	Mathematicians	3
15-2031.00	Operations Research Analysts	3
15-2041.00	Statisticians	3
19-1041.00	Epidemiologists	3
19-2041.00	Environmental Scientists and Specialists, Including Health	3
19-2042.00	Geoscientists, Except Hydrologists and Geographers	3
19-2042.01	Geologists	3
19-2043.00	Hydrologists	3
19-3011.00	Economists	3
19-3021.00	Market Research Analysts	3
19-3022.00	Survey Researchers	3
19-3032.00	Industrial-Organizational Psychologists	3
19-3041.00	Sociologists	3
19-3051.00	Urban and Regional Planners	3
19-3091.01	Anthropologists	3
19-3091.02	Archeologists	3
19-3092.00	Geographers	3
19-3093.00	Historians	3
19-3094.00	Political Scientists	3

Appendix A to the Preamble-Professional Recruitment
Occupations - Education and Training Categories
by O*NET – SOC Occupation

21-1011.00	Substance Abuse and Behavioral Disorder Counselors	3
21-1012.00	Educational, Vocational, and School Counselors	3
21-1013.00	Marriage and Family Therapists	3
21-1014.00	Mental Health Counselors	3
21-1015.00	Rehabilitation Counselors	3
21-1023.00	Mental Health and Substance Abuse Social Workers	3
21-1091.00	Health Educators	3
25-4011.00	Archivists	3
25-4012.00	Curators	3
25-4021.00	Librarians	3
25-9031.00	Instructional Coordinators	3
29-1121.00	Audiologists	3
29-1123.00	Physical Therapists	3
29-1127.00	Speech-Language Pathologists	3
11-1011.00	Chief Executives	4
11-1011.01	Government Service Executives	4
11-1011.02	Private Sector Executives	4
11-1021.00	General and Operations Managers	4
11-2011.00	Advertising and Promotions Managers	4
11-2021.00	Marketing Managers	4
11-2022.00	Sales Managers	4
11-2031.00	Public Relations Managers	4
11-3011.00	Administrative Services Managers	4
11-3021.00	Computer and Information Systems Managers	4
11-3031.00	Financial Managers	4
11-3031.01	Treasurers, Controllers, and Chief Financial Officers	4
11-3031.02	Financial Managers, Branch or Department	4
11-3040.00	Human Resources Managers	4
11-3041.00	Compensation and Benefits Managers	4
11-3042.00	Training and Development Managers	4
11-3061.00	Purchasing Managers	4
11-9011.00	Farm, Ranch, and Other Agricultural Managers	4
11-9011.01	Nursery and Greenhouse Managers	4
11-9011.02	Agricultural Crop Farm Managers	4
11-9011.03	Fish Hatchery Managers	4
11-9031.00	Education Administrators, Preschool and Child Care Center/Program	4
11-9032.00	Education Administrators, Elementary and Secondary School	4

Appendix A to the Preamble-Professional Recruitment Occupations - Education and Training Categories by O*NET – SOC Occupation

11-9033.00	Education Administrators, Postsecondary	4
11-9041.00	Engineering Managers	4
11-9111.00	Medical and Health Services Managers	4
11-9121.00	Natural Sciences Managers	4
13-1011.00	Agents and Business Managers of Artists, Performers, and Athletes	4
13-1111.00	Management Analysts	4
15-2011.00	Actuaries	4
23-1021.00	Administrative Law Judges, Adjudicators, and Hearing Officers	4
23-1022.00	Arbitrators, Mediators, and Conciliators	4
23-1023.00	Judges, Magistrate Judges, and Magistrates	4
25-2023.00	Vocational Education Teachers, Middle School	4
25-2032.00	Vocational Education Teachers, Secondary School	4
27-1011.00	Art Directors	4
27-2012.00	Producers and Directors	4
27-2012.01	Producers	4
27-2012.02	Directors - Stage, Motion Pictures, Television, and Radio	4
27-2012.03	Program Directors	4
27-2012.04	Talent Directors	4
27-2012.05	Technical Directors/Managers	4
27-2041.00	Music Directors and Composers	4
27-2041.01	Music Directors	4
27-2041.02	Music Arrangers and Orchestrators	4
27-2041.03	Composers	4
27-3020.00	News analysts, reporters and correspondents	4
27-3021.00	Broadcast News Analysts	4
27-3022.00	Reporters and Correspondents	4
11-3051.00	Industrial Production Managers	5
11-9021.00	Construction Managers	5
11-9141.00	Property, Real Estate, and Community Association Managers	5
11-9151.00	Social and Community Service Managers	5
13-1071.00	Employment, Recruitment, and Placement Specialists	5
13-1071.01	Employment Interviewers, Private or Public Employment Service	5
13-1071.02	Personnel Recruiters	5
13-1072.00	Compensation, Benefits, and Job Analysis Specialists	5
13-1073.00	Training and Development Specialists	5
13-1121.00	Meeting and Convention Planners	5
13-2011.01	Accountants	5

Appendix A to the Preamble-Professional Recruitment Occupations - Education and Training Categories by O*NET – SOC Occupation

13-2011.02	Auditors	5
13-2031.00	Budget Analysts	5
13-2041.00	Credit Analysts	5
13-2051.00	Financial Analysts	5
13-2052.00	Personal Financial Advisors	5
13-2053.00	Insurance Underwriters	5
13-2061.00	Financial Examiners	5
13-2071.00	Loan Counselors	5
13-2072.00	Loan Officers	5
13-2081.00	Tax Examiners, Collectors, and Revenue Agents	5
15-1021.00	Computer Programmers	5
15-1031.00	Computer Software Engineers, Applications	5
15-1032.00	Computer Software Engineers, Systems Software	5
15-1051.00	Computer Systems Analysts	5
15-1061.00	Database Administrators	5
15-1071.00	Network and Computer Systems Administrators	5
15-1071.01	Computer Security Specialists	5
15-1081.00	Network Systems and Data Communications Analysts	5
17-1011.00	Architects, Except Landscape and Naval	5
17-1012.00	Landscape Architects	5
17-1021.00	Cartographers and Photogrammetrists	5
17-1022.00	Surveyors	5
17-2011.00	Aerospace Engineers	5
17-2021.00	Agricultural Engineers	5
17-2031.00	Biomedical Engineers	5
17-2041.00	Chemical Engineers	5
17-2051.00	Civil Engineers	5
17-2061.00	Computer Hardware Engineers	5
17-2071.00	Electrical Engineers	5
17-2072.00	Electronics Engineers, Except Computer	5
17-2081.00	Environmental Engineers	5
17-2111.00	Health and Safety Engineers, Except Mining Safety Engineers and Inspectors	5
17-2111.01	Industrial Safety and Health Engineers	5
17-2111.02	Fire-Prevention and Protection Engineers	5
17-2111.03	Product Safety Engineers	5
17-2112.00	Industrial Engineers	5
17-2121.00	Marine Engineers and Naval Architects	5

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17-2121.01	Marine Engineers	5
17-2121.02	Marine Architects	5
17-2131.00	Materials Engineers	5
17-2141.00	Mechanical Engineers	5
17-2151.00	Mining and Geological Engineers, Including Mining Safety Engineers	5
17-2161.00	Nuclear Engineers	5
17-2171.00	Petroleum Engineers	5
19-1010.00	Agricultural and food scientists	5
19-1011.00	Animal Scientists	5
19-1012.00	Food Scientists and Technologists	5
19-1013.01	Plant Scientists	5
19-1013.02	Soil Scientists	5
19-1020.00	Biological Scientists	5
19-1020.01	Biologists	5
19-1023.00	Zoologists and Wildlife Biologists	5
19-1031.00	Conservation Scientists	5
19-1031.01	Soil Conservationists	5
19-1031.02	Range Managers	5
19-1031.03	Park Naturalists	5
19-1032.00	Foresters	5
19-2021.00	Atmospheric and Space Scientists	5
19-2031.00	Chemists	5
19-2032.00	Materials Scientists	5
21-1021.00	Child, Family, and School Social Workers	5
21-1022.00	Medical and Public Health Social Workers	5
21-1092.00	Probation Officers and Correctional Treatment Sp	5
21-2021.00	Directors, Religious Activities and Education	5
23-2092.00	Law Clerks	5
25-2012.00	Kindergarten Teachers, Except Special Education	5
25-2021.00	Elementary School Teachers, Except Special Education	5
25-2022.00	Middle School Teachers, Except Special and Vocational Education	5
25-2031.00	Secondary School Teachers, Except Special and Vocational Education	5
25-2041.00	Special Education Teachers, Preschool, Kindergarten and Elementary	5
25-2042.00	Special Education Teachers, Middle School	5
25-2043.00	Special Education Teachers, Secondary School	5
25-3011.00	Adult Literacy, Remedial Education, and GED Teachers and Instructors	5
25-4013.00	Museum Technicians and Conservators	5

Appendix A to the Preamble-Professional Recruitment Occupations - Education and Training Categories by O*NET – SOC Occupation

25-9021.00	Farm and Home Management Advisors	5
27-1014.00	Multi-Media Artists and Animators	5
27-1021.00	Commercial and Industrial Designers	5
27-1022.00	Fashion Designers	5
27-1024.00	Graphic Designers	5
27-1025.00	Interior Designers	5
27-1027.00	Set and Exhibit Designers	5
27-1027.01	Set Designers	5
27-1027.02	Exhibit Designers	5
27-3031.00	Public Relations Specialists	5
27-3041.00	Editors	5
27-3042.00	Technical Writers	5
27-3043.00	Writers and Authors	5
27-4032.00	Film and Video Editors	5
29-1031.00	Dietitians and Nutritionists	5
29-1071.00	Physician Assistants	5
29-1122.00	Occupational Therapists	5
29-1125.00	Recreational Therapists	5
29-2011.00	Medical and Clinical Laboratory Technologists	5
29-2091.00	Orthotists and Prosthetists	5
29-9010.00	Occupational health and safety specialists and technicians	5
29-9091.00	Athletic Trainers	5
33-3021.03	Criminal Investigators and Special Agents	5
39-9032.00	Recreation Workers	5
41-3021.00	Insurance Sales Agents	5
41-3031.01	Sales Agents, Securities and Commodities	5
41-3031.02	Sales Agents, Financial Services	5
41-9031.00	Sales Engineers	5
53-2011.00	Airline Pilots, Copilots, and Flight Engineers	5

Appendix A to the Preamble-Professional Recruitment Occupations - Education and Training Categories by O*NET – SOC Occupation

Education & Training Category Code	
1	First professional degree. Completion of the academic program usually requires at least 6 years of full-time equivalent academic study, including college study prior to entering the professional degree program.
2	Doctoral degree. Completion of the degree program usually requires at least 3 years of full-time equivalent academic work beyond the bachelor's degree.
3	Master's degree. Completion of the degree program usually requires 1 or 2 years of full-time equivalent study beyond the bachelor's degree.
4	Work experience, plus a bachelor's or higher degree. Most occupations in this category are managerial occupations that require experience in a related nonmanagerial position.
5	Bachelor's degree. Completion of the degree program generally requires at least 4 years but not more than 5 years of full-time equivalent academic work.

Final Rule

Accordingly, for the reasons stated in the Preamble, Parts 655 and 656 of Chapter V of Title 20 of the Code of Federal Regulations are amended as follows:

PART 655—TEMPORARY EMPLOYMENT OF ALIENS IN THE UNITED STATES

■ 1. The authority citation for part 655 continues to read as follows:

Authority: Section 655.0 issued under 8 U.S.C. 1101(a)(15)(H)(i) and (ii), 1182(m), (n), and (t), 1184, 1188, and 1288(c) and (d); 29 U.S.C. 49 *et seq.*; sec. 3(c)(1), Pub. L. 101–238, 103 Stat. 2099, 2102 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); Title IV, Pub. L. 105–277,112 Stat. 2681; and 8 CFR 213.2(h)(4)(i).

Section 655.00 issued under 8 U.S.C. 1101(a)(15)(H)(ii), 1184, and 1188; 29 U.S.C. 49 *et seq.*; and 8 CFR 214.2(h)(4)(i).

Subparts A and C issued under 8 U.S.C. 1101(a)(15)(H)(ii)(b) and 1184; 29 U.S.C. 49 *et seq.*; and 8 CFR 214.2(h)(4)(i).

Subpart B issued under 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184, and 1188; and 29 U.S.C. 49 *et seq.*

Subparts D and E issued under 8 U.S.C. 1101(a)(15)(H)(i)(a), 1182(m), and 1184; 29 U.S.C. 49 *et seq.*; and sec. 3(c)(1), Pub. L. 101–238, 103 Stat. 2099, 2103 (8 U.S.C. 1182 note).

Subparts F and G issued under 8 U.S.C. 1184 and 1288(c); and 29 U.S.C. 49 *et seq.*

Subparts H and I issued under 8 U.S.C. 1101(a)(15)(H)(i)(b) and (b1), 1182(n), 1182(t), and 1184; 29 U.S.C. 49 *et seq.*; sec 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1182 note); and Title IV, Pub. L. 105–277, 112 Stat. 2681.

Subparts J and K issued under 29 U.S.C. 49 *et seq.*; and sec 221(a), Pub. L 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note).

Subparts L and M issued under 8 U.S.C. 1101(a)(15)(H)(1)(c), 1182(m), and 1184, 29 U.S.C. 49 *et seq.*

Subpart H—Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H–1B Visas in Specialty Occupations and as Fashion Models, and Labor Attestation Requirements for Employers Using Nonimmigrants on H–1B1 Visas in Specialty Occupations

■ 2. Section 655.731 is amended by:
■ (a) Revising paragraph (a)(2);
■ (b) Redesignating paragraphs (b)(3)(iii)(B)(*2*) and (*3*) as (b)(3)(iii)(B)(*3*) and (*4*), respectively;
■ (c) Adding new paragraph (b)(3)(iii)(B)(*2*);
■ (d) Redesignating paragraphs (b)(3)(iii)(C)(*2*) and (*3*) as paragraphs (b)(3)(iii)(C)(*3*) and (*4*), respectively;
■ (e) Adding new paragraph (b)(3)(iii)(C)(*2*);
■ (f) Revising paragraph (d)(1);
■ (g) Revising paragraph (d)(2) introductory text;
■ (h) Revising paragraph (d)(2)(i); and
■ (i) Removing paragraph (d)(4).

§ 655.731 What is the first LCA requirement regarding wages?

* * * * *

(a) * * *

(1) * * *

(2) The prevailing wage for the occupational classification in the area of intended employment must be determined as of the time of filing the application. The employer shall base the prevailing wage on the best information available as of the time of filing the application. Except as provided in this section, the employer is not required to use any specific methodology to determine the prevailing wage and may utilize a State Employment Security Agency (SESA) (now known as State Workforce Agency or SWA), an independent authoritative source, or other legitimate sources of wage data. One of the following sources shall be used to establish the prevailing wage:

(i) A collective bargaining agreement which was negotiated at arms-length between a union and the employer which contains a wage rate applicable to the occupation;

(ii) If the job opportunity is in an occupation which is not covered by

paragraph (a)(2)(i) of this section, the prevailing wage shall be the arithmetic mean of the wages of workers similarly employed, except that the prevailing wage shall be the median when provided by paragraphs (a)(2)(ii)(A), (b)(3)(iii)(B)(*2*), and (b)(3)(iii)(C)(*2*) of this section. The prevailing wage rate shall be based on the best information available. The Department believes the following prevailing wage sources are, in order of priority, the most accurate and reliable:

(A) *SESA (now known as State Workforce Agency or SWA) determination.* Upon receipt of a written request for a prevailing wage determination, the SESA will determine whether the occupation is covered by a collective bargaining agreement which was negotiated at arms length, and, if not, determine the arithmetic mean of wages of workers similarly employed in the area of intended employment. The wage component of the Bureau of Labor Statistics Occupational Employment Statistics survey shall be used to determine the arithmetic mean, unless the employer provides an acceptable survey. If an acceptable employer-provided wage survey provides a median and does not provide an arithmetic mean, the median shall be the prevailing wage applicable to the employer's job opportunity. In making a prevailing wage determination, the SESA will follow § 656.40 of this chapter and other administrative guidelines or regulations issued by ETA. The SESA shall specify the validity period of the prevailing wage determination which in no event shall be for less than 90 days or more than 1 year from the date of the determination.

(*1*) An employer who chooses to utilize a SESA prevailing wage determination shall file the labor condition application within the validity period of the prevailing wage as specified in the state's prevailing wage determination. Any employer desiring review of a SESA prevailing wage determination, including judicial review, shall follow the appeal procedures at § 656.41 of this chapter. Employers which challenge a SESA prevailing wage determination under § 656.41 must obtain a ruling prior to filing an LCA. In any challenge, the Department and the SESA shall not divulge any employer wage data which were collected under the promise of confidentiality. Once an employer obtains a prevailing wage determination from the SESA and files an LCA supported by that prevailing wage determination, the employer is deemed to have accepted the prevailing wage determination (as to the amount of the wage) and thereafter may not contest the legitimacy of the prevailing wage determination by filing an appeal with the CO (see § 656.41 of this chapter) or in an investigation or enforcement action.

(*2*) If the employer is unable to wait for the SESA to produce the requested prevailing wage for the occupation in question, or for the CO and/or the Board of Alien Labor Certification Appeals to issue a decision, the employer may rely on other legitimate sources of available wage information as set forth in paragraphs (a)(2)(ii)(B) and (C) of this section. If the employer later discovers, upon receipt of the prevailing wage determination from the SESA, that the information relied upon produced a wage below the prevailing wage for the occupation in the area of intended employment and the employer was paying below the SESA-determined wage, no wage violation will be found if the employer retroactively compensates the H–1B nonimmigrant(s) for the difference between wage paid and the prevailing wage, within 30 days of the employer's receipt of the prevailing wage determination.

(*3*) In all situations where the employer obtains the prevailing wage determination from the SESA, the Department will accept that prevailing wage determination as correct (as to the amount of the wage) and will not question its validity where the employer has maintained a copy of the SESA prevailing wage determination. A complaint alleging inaccuracy of a SESA prevailing wage determination, in such cases, will not be investigated.

(B) *An independent authoritative source.* The employer may use an independent authoritative wage source in lieu of a SESA prevailing wage determination. The independent authoritative source survey must meet all the criteria set forth in paragraph (b)(3)(iii)(B) of this section.

(C) *Another legitimate source of wage information.* The employer may rely on other legitimate sources of wage data to obtain the prevailing wage. The other legitimate source survey must meet all the criteria set forth in paragraph (b)(3)(iii)(C) of this section. The employer will be required to demonstrate the legitimacy of the wage in the event of an investigation.

(iii) For purposes of this section, ''similarly employed'' means ''having substantially comparable jobs in the occupational classification in the area of intended employment,'' except that if a representative sample of workers in the occupational category can not be obtained in the area of intended employment, ''similarly employed'' means:

(A) Having jobs requiring a substantially similar level of skills within the area of intended employment; or

(B) If there are no substantially comparable jobs in the area of intended employment, having substantially comparable jobs with employers outside of the area of intended employment.

(iv) A prevailing wage determination for LCA purposes made pursuant to this section shall not permit an employer to pay a wage lower than required under any other applicable Federal, state or local law.

(v) Where a range of wages is paid by the employer to individuals in an occupational classification or among individuals with similar experience and qualifications for the specific employment in question, a range is considered to meet the prevailing wage requirement so long as the bottom of the wage range is at least the prevailing wage rate.

(vi) The employer shall enter the prevailing wage on the LCA in the form in which the employer will pay the wage (*e.g.*, an annual salary or an hourly rate), except that in all cases the prevailing wage must be expressed as an hourly wage if the H–1B nonimmigrant will be employed part-time. Where an employer obtains a prevailing wage determination (from any of the sources identified in paragraphs (a)(2)(i) and (ii) of this section) that is expressed as an hourly rate, the employer may convert this determination to a yearly salary by multiplying the hourly rate by 2080. Conversely, where an employer obtains a prevailing wage (from any of these sources) that is expressed as a yearly salary, the employer may convert this determination to an hourly rate by dividing the salary by 2080.

(vii) In computing the prevailing wage for a job opportunity in an occupational classification in an area of intended employment in the case of an employee of an institution of higher education or an affiliated or related nonprofit entity, a nonprofit research organization, or a Governmental research organization as these terms are defined in 20 CFR 656.40(e), the prevailing wage level shall only take into account employees at such institutions and organizations in the area of intended employment.

(viii) An employer may file more than one LCA for the same occupational classification in the same area of employment and, in such circumstances, the employer could have H–1B employees in the same occupational classification in the same area of employment, brought into the

U.S. (or accorded H–1B status) based on petitions approved pursuant to different LCAs (filed at different times) with different prevailing wage determinations. Employers are advised that the prevailing wage rate as to any particular H–1B nonimmigrant is prescribed by the LCA which supports that nonimmigrant's H–1B petition. The employer is required to obtain the prevailing wage at the time that the LCA is filed (see paragraph (a)(2) of this section). The LCA is valid for the period certified by ETA, and the employer must satisfy all the LCA's requirements (including the required wage which encompasses both prevailing and actual wage rates) for as long as any H–1B nonimmigrants are employed pursuant to that LCA (§ 655.750). Where new nonimmigrants are employed pursuant to a new LCA, that new LCA prescribes the employer's obligations as to those new nonimmigrants. The prevailing wage determination on the later/subsequent LCA does not ''relate back'' to operate as an ''update'' of the prevailing wage for the previously-filed LCA for the same occupational classification in the same area of employment. However, employers are cautioned that the actual wage component to the required wage may, as a practical matter, eliminate any wage-payment differentiation among H–1B employees based on different prevailing wage rates stated in applicable LCAs. Every H–1B nonimmigrant is to be paid in accordance with the employer's actual wage system, and thus is to receive any pay increases which that system provides.

* * * * *

(b) * * *

(3) * * *

(iii) * * *

(B) * * *

(*2*) Reflect the median wage of workers similarly employed in the area of intended employment if the survey provides such a median and does not provide a weighted average wage of workers similarly employed in the area of intended employment;

* * * * *

(C) * * *

(*2*) Reflect the median wage of workers similarly employed in the area of intended employment if the survey provides such a median and does not provide a weighted average wage of workers similarly employed in the area of intended employment;

* * * * *

(d) (1) In the event that a complaint is filed pursuant to subpart I of this part, alleging a failure to meet the ''prevailing wage'' condition or a material misrepresentation by the employer regarding the payment of the required wage, or pursuant to such other basis for investigation as the Administrator may find, the Administrator shall determine whether the employer has the documentation required in paragraph (b)(3)of this section, and whether the documentation supports the employer's wage attestation. Where the documentation is either nonexistent or is insufficient to determine the prevailing wage (*e.g.*, does not meet the criteria specified in this section, in which case the Administrator may find a violation of paragraph (b)(1), (2), or (3), of this section); or where, based on significant evidence regarding wages paid for the occupation in the area of intended employment, the Administrator has reason to believe that the prevailing wage finding obtained from an independent authoritative source or another legitimate source varies substantially from the wage prevailing for the occupation in the area of intended employment; or where the employer has been unable to demonstrate that the prevailing wage determined by another legitimate source is in accordance with the regulatory criteria, the Administrator may contact ETA, which shall provide the Administrator with a prevailing wage determination, which the Administrator shall use as the basis for determining violations and for computing back wages, if such wages are found to be owed. The 30-day investigatory period shall be suspended while ETA makes the prevailing wage determination and, in the event that the employer timely challenges the determination (see § 655.731(d)(2)), shall be suspended until the challenge process is completed and the Administrator's investigation can be resumed.

(2) In the event the Administrator obtains a prevailing wage from ETA pursuant to paragraph (d)(1) of this section, and the employer desires review, including judicial review, the employer shall challenge the ETA prevailing wage only by filing a request for review under § 656.41 of this chapter within 30 days of the employer's receipt of the prevailing wage determination from the Administrator. If the request is timely filed, the decision of ETA is suspended until the CO issues a determination on the employer's appeal. If the employer desires review, including judicial review, of the decision of the CO, the employer shall make a request for review of the determination by the Board of Alien Labor Certification Appeals (BALCA) under § 656.41(e) of this chapter within 30 days of the receipt of the decision of the CO. If a request for review is timely filed with the BALCA, the determination by the CO is suspended until the BALCA issues a determination on the employer's appeal. In any challenge to the wage determination, neither ETA nor the SESA shall divulge any employer wage data which was collected under the promise of confidentiality.

(i) Where an employer timely challenge an ETA prevailing wage determination obtained by the Administrator, the 30-day investigative period shall be suspended until the employer obtains a final ruling. Upon such a final ruling, the investigation and any subsequent enforcement proceeding shall continue, with ETA's prevailing wage determination serving as the conclusive determination for all purposes.

* * * * *

PART 656—LABOR CERTIFICATION PROCESS FOR PERMANENT EMPLOYMENT OF ALIENS IN THE UNITED STATES

■ 3. Part 656 is revised to read as follows:

Subpart A—Purpose and Scope of Part 656

Subpart B—Occupational Labor Certification Determinations

Subpart C—Labor Certification Process

Subpart D—Determination of Prevailing Wage

Authority: The Authority citation for part 656 is revised to read as follows: 8 U.S.C. 1182(a)(5)(A), 1189(p)(1); 29 U.S.C. 49 *et seq.*; section 122, Pub. L. 101–649, 109 Stat. 4978; and Title IV, Pub. L. 105–277, 112 Stat. 2681.

Subpart A—Purpose and Scope of Part 656

§ 656.1 Purpose and scope of part 656.

(a) Under section 212(a)(5)(A) of the Immigration and Nationality Act (INA or Act) (8 U.S.C. 1182(a)(5)(A)), certain aliens may not obtain immigrant visas for entrance into the United States in order to engage in permanent employment unless the Secretary of Labor has first certified to the Secretary of State and to the Secretary of Homeland Security that:

(1) There are not sufficient United States workers who are able, willing, qualified and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work; and

(2) The employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

(b) The regulations under this part set forth the procedures through which such immigrant labor certifications may be applied for, and granted or denied.

(c) Correspondence and questions about the regulations in this part should be addressed to: Division of Foreign Labor Certification, Employment and Training Administration, 200 Constitution Avenue, NW., Room C–4312, Washington, DC 20210.

§ 656.2 Description of the Immigration and Nationality Act and of the Department of Labor's role thereunder.

(a) *Description of the Act.* The Act (8 U.S.C. 1101 *et seq.*) regulates the admission of aliens into the United States. The Act designates the Secretary of Homeland Security and the Secretary of State as the principal administrators of its provisions.

(b) *Burden of proof under the Act.* Section 291 of the Act (8 U.S.C. 1361) provides, in pertinent part, that:

> Whenever any person makes application for a visa or any other documentation required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this Act * * *.

(c)(1) *Role of the Department of Labor.* The permanent labor certification role of the Department of Labor under the Act derives from section 212(a)(5)(A) (8 U.S.C. 1182(a)(5)(A)), which provides that any alien who seeks admission or status as an immigrant for the purpose of employment under paragraph (2) or (3) of section 203(b) of the Act may not be admitted unless the Secretary of Labor has first certified to the Secretary of State and to the Secretary of Homeland Security that:

(i) There are not sufficient United States workers who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor; and

(ii) The employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

(2) This certification is referred to in this part 656 as a ''labor certification.''

(3) We certify the employment of aliens in several instances: For the permanent employment of aliens under this part; and for temporary employment of aliens for agricultural and nonagricultural employment in the United States classified under 8 U.S.C. 1101(a)(15)(H)(ii), under the DHS regulation at 8 CFR 214.2(h)(5) and (6) and sections 101(a)(15)(H)(ii), 214, and 218 of the Act. See 8 U.S.C. 1101(a)(15)(H)(ii), 1184, and 1188. We also administer labor attestation and labor condition application programs for the admission and/or work authorization of the following nonimmigrants: Specialty occupations and fashion models (H–1B visas), specialty occupations from countries with which the U.S. has entered agreements listed in the INA (H–1B1 visas), registered nurses (H–1C visas), and crewmembers performing longshore work (D visas), classified under 8 U.S.C. 1101(a)(15)(H)(i)(b), 1101(a)(15)(H)(i)(b1), 1101(a)(15)(H)(i)(c), and 1101(a)(15)(D), respectively. See also 8 U.S.C. 1184(c), (m), and (n), and 1288.

§ 656.3 Definitions, for purposes of this part, of terms used in this part.

Act means the Immigration and Nationality Act, as amended, 8 U.S.C. 1101 *et seq.*

Agent means a person who is not an employee of an employer, and who has been designated in writing to act on behalf of an alien or employer in connection with an application for labor certification.

Applicant means a U.S. worker (see definition of U.S. worker below) who is applying for a job opportunity for which an employer has filed an *Application for Permanent Employment Certification* (ETA Form 9089).

Application means an *Application for Permanent Employment Certification* submitted by an employer (or its agent or attorney) in applying for a labor certification under this part.

Area of intended employment means the area within normal commuting distance of the place (address) of intended employment. There is no rigid measure of distance which constitutes a normal commuting distance or normal commuting area, because there may be widely varying factual circumstances among different areas (*e.g.*, normal commuting distances might be 20, 30, or 50 miles). If the place of intended employment is within a Metropolitan Statistical Area (MSA) or a Primary Metropolitan Statistical Area (PMSA), any place within the MSA or PMSA is deemed to be within normal commuting distance of the place of intended employment; however, not all locations within a Consolidated Metropolitan Statistical Area (CMSA) will be deemed automatically to be within normal commuting distance. The borders of MSA's and PMSA's are not controlling in the identification of the normal commuting area; a location outside of an MSA or PMSA (or a CMSA) may be within normal commuting distance of a location that is inside (*e.g.*, near the border of) the MSA or PMSA (or CMSA). The terminology CMSAs and PMSAs are being replaced by the Office of Management and Budget (OMB). However, ETA will continue to recognize the use of these area concepts as well as their replacements.

Attorney means any person who is a member in good standing of the bar of the highest court of any state, possession, territory, or commonwealth of the United States, or the District of Columbia, and who is not under suspension or disbarment from practice before any court or before DHS or the United States Department of Justice's Executive Office for Immigration Review. Such a person is permitted to act as an agent, representative, or attorney for an employer and/or alien under this part.

Board of Alien Labor Certification Appeals (BALCA or Board) means the permanent Board established by this part, chaired by the Chief Administrative Law Judge, and consisting of Administrative Law Judges assigned to the Department of Labor and designated by the Chief Administrative Law Judge to be members of the Board of Alien Labor Certification Appeals. The Board of Alien Labor Certification

Appeals is located in Washington, DC, and reviews and decides appeals in Washington, DC.

Certifying Officer (CO) means a Department of Labor official who makes determinations about whether or not to grant applications for labor certifications.

Closely-held Corporation means a corporation that typically has relatively few shareholders and whose shares are not generally traded in the securities market.

Division of Foreign Labor Certification means the organizational component within the Employment and Training Administration that provides national leadership and policy guidance and develops regulations and procedures to carry out the responsibilities of the Secretary of Labor under the Immigration and Nationality Act, as amended, concerning alien workers seeking admission to the United States in order to work under section 212(a)(5)(A) of the Immigration and Nationality Act, as amended.

Employer means:

(1) A person, association, firm, or a corporation that currently has a location within the United States to which U.S. workers may be referred for employment and that proposes to employ a full-time employee at a place within the United States, or the authorized representative of such a person, association, firm, or corporation. An employer must possess a valid Federal Employer Identification Number (FEIN). For purposes of this definition, an ''authorized representative'' means an employee of the employer whose position or legal status authorizes the employee to act for the employer in labor certification matters. A labor certification can not be granted for an *Application for Permanent Employment Certification* filed on behalf of an independent contractor.

(2) Persons who are temporarily in the United States, including but not limited to, foreign diplomats, intra-company transferees, students, and exchange visitors, visitors for business or pleasure, and representatives of foreign information media can not be employers for the purpose of obtaining a labor certification for permanent employment.

Employment means:

(1) Permanent, full-time work by an employee for an employer other than oneself. For purposes of this definition, an investor is not an employee. In the event of an audit, the employer must be prepared to document the permanent and full-time nature of the position by furnishing position descriptions and payroll records for the job opportunity involved in the *Application for Permanent Employment Certification*.

(2) Job opportunities consisting solely of job duties that will be performed totally outside the United States, its territories, possessions, or commonwealths can not be the subject of an *Application for Permanent Employment Certification*.

Employment and Training Administration (ETA) means the agency within the Department of Labor (DOL) that includes the Division of Foreign Labor Certification.

Immigration Officer means an official of the Department of Homeland Security, United States Citizenship and Immigration Services (USCIS) who handles applications for labor certifications under this part.

Job opportunity means a job opening for employment at a place in the United States to which U.S. workers can be referred.

Nonprofessional occupation means any occupation for which the attainment of a bachelor's or higher degree is not a usual requirement for the occupation.

Non-profit or tax-exempt organization for the purposes of § 656.40 means an organization that:

(1) Is defined as a tax exempt organization under the Internal Revenue Code of 1986, section 501(c)(3), (c)(4), or (c)(6) (26 U.S.C. 501(c)(3), (c)(4) or (c)(6)); and

(2) Has been approved as a tax-exempt organization for research or educational purposes by the Internal Revenue Service.

*O*NET* means the system developed by the Department of Labor, Employment and Training Administration, to provide to the general public information on skills, abilities, knowledge, work activities, interests and specific vocational preparation levels associated with occupations. O*NET is based on the Standard Occupational Classification system. Further information about O*NET can be found at *http://www.onetcenter.org*.

Prevailing wage determination (PWD) means the prevailing wage provided by the State Workforce Agency.

Professional occupation means an occupation for which the attainment of a bachelor's or higher degree is a usual education requirement. A beneficiary of an application for permanent alien employment certification involving a professional occupation need not have a bachelor's or higher degree to qualify for the professional occupation. However, if the employer is willing to accept work experience in lieu of a baccalaureate or higher degree, such work experience must be attainable in the U.S. labor market and must be stated on the application form. If the employer is willing to accept an equivalent foreign degree, it must be clearly stated on the *Application for Permanent Employment Certification form*.

Secretary means the Secretary of Labor, the chief official of the U.S. Department of Labor, or the Secretary's designee.

Secretary of Homeland Security means the chief official of the U.S. Department of Homeland Security or the Secretary of Homeland Security's designee.

Secretary of State means the chief official of the U.S. Department of State or the Secretary of State's designee.

Specific vocational preparation (SVP) means the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation. Lapsed time is not the same as work time. For example, 30 days is approximately 1 month of lapsed time and not six 5-day work weeks, and 3 months refers to 3 calendar months and not 90 work days. The various levels of specific vocational preparation are provided below.

Level	Time
1	Short demonstration.
2	Anything beyond short demonstration up to and including 30 days.
3	Over 30 days up to and including 3 months.
4	Over 3 months up to and including 6 months.
5	Over 6 months up to and including 1 year.
6	Over 1 year up to and including 2 years.
7	Over 2 years up to and including 4 years.
8	Over 4 years up to and including 10 years.
9	Over 10 years.

State Workforce Agency (SWA), formerly known as *State Employment Security Agency (SESA)*, means the state agency that receives funds under the Wagner-Peyser Act to provide prevailing wage determinations to employers, and/or administers the public labor exchange delivered through the state's one-stop delivery system in accordance with the Wagner-Peyser Act.

United States, when used in a geographic sense, means the 50 states, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, and Guam.

United States worker means any worker who is:

(1) A U.S. citizen;

(2) A U.S. national;

(3) Lawfully admitted for permanent residence;

(4) Granted the status of an alien lawfully admitted for temporary residence under 8 U.S.C. 1160(a), 1161(a), or 1255a(a)(1);

(5) Admitted as a refugee under 8 U.S.C. 1157; or

(6) Granted asylum under 8 U.S.C. 1158.

Subpart B—Occupational Labor Certification Determinations

§ 656.5 Schedule A.

We have determined there are not sufficient United States workers who are able, willing, qualified, and available for the occupations listed below on *Schedule A* and the wages and working conditions of United States workers similarly employed will not be adversely affected by the employment of aliens in *Schedule A* occupations. An employer seeking a labor certification for an occupation listed on *Schedule A* may apply for that labor certification under § 656.15.

Schedule A

(a) Group I:

(1) Persons who will be employed as physical therapists, and who possess all the qualifications necessary to take the physical therapist licensing examination in the state in which they propose to practice physical therapy.

(2) Aliens who will be employed as professional nurses; and

(i) Who have received a Certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS);

(ii) Who hold a permanent, full and unrestricted license to practice professional nursing in the state of intended employment; or

(iii) Who have passed the National Council Licensure Examination for Registered Nurses (NCLEX–RN), administered by the National Council of State Boards of Nursing.

(3) Definitions of Group I occupations:

(i) *Physical therapist* means a person who applies the art and science of physical therapy to the treatment of patients with disabilities, disorders and injuries to relieve pain, develop or restore function, and maintain performance, using physical means, such as exercise, massage, heat, water, light, and electricity, as prescribed by a physician (or a surgeon).

(ii) *Professional nurse* means a person who applies the art and science of nursing which reflects comprehension of principles derived from the physical, biological and behavioral sciences. Professional nursing generally includes making clinical judgments involving the observation, care and counsel of persons requiring nursing care; administering of medicines and treatments prescribed by the physician or dentist; and participation in the activities for the promotion of health and prevention of illness in others. A program of study for professional nurses generally includes theory and practice in clinical areas such as obstetrics, surgery, pediatrics, psychiatry, and medicine.

(b) Group II:

(1) *Sciences or arts (except performing arts).* Aliens (except for aliens in the performing arts) of exceptional ability in the sciences or arts including college and university teachers of exceptional ability who have been practicing their science or art during the year prior to application and who intend to practice the same science or art in the United States. For purposes of this group, the term ''science or art'' means any field of knowledge and/or skill with respect to which colleges and universities commonly offer specialized courses leading to a degree in the knowledge and/or skill. An alien, however, need not have studied at a college or university in order to qualify for the Group II occupation.

(2) *Performing arts.* Aliens of exceptional ability in the performing arts whose work during the past 12 months did require, and whose intended work in the United States will require, exceptional ability.

Subpart C—Labor Certification Process

§ 656.10 General instructions.

(a) *Filing of applications.* A request for a labor certification on behalf of any alien who is required by the Act to be a beneficiary of a labor certification in order to obtain permanent resident status in the United States may be filed as follows:

(1) Except as provided in paragraphs (a)(2), (3), and (4) of this section, an employer seeking a labor certification must file under this section and § 656.17.

(2) An employer seeking a labor certification for a college or university teacher must apply for a labor certification under this section and must also file under either § 656.17 or § 656.18.

(3) An employer seeking labor certification for an occupation listed on *Schedule A* must apply for a labor certification under this section and § 656.15.

(4) An employer seeking labor certification for a sheepherder must apply for a labor certification under this section and must also choose to file under either § 656.16 or § 656.17.

(b) *Representation.* (1) Employers may have agents or attorneys represent them throughout the labor certification process. If an employer intends to be represented by an agent or attorney, the employer must sign the statement set forth on the *Application for Permanent Employment Certification* form: That the attorney or agent is representing the employer and the employer takes full responsibility for the accuracy of any representations made by the attorney or agent. Whenever, under this part, any notice or other document is required to be sent to the employer, the document will be sent to the attorney or agent who has been authorized to represent the employer on the *Application for Permanent Employment Certification* form.

(2)(i) It is contrary to the best interests of U.S. workers to have the alien and/or agents or attorneys for either the employer or the alien participate in interviewing or considering U.S. workers for the job offered the alien. As the beneficiary of a labor certification application, the alien can not represent the best interests of U.S. workers in the job opportunity. The alien's agent and/or attorney can not represent the alien effectively and at the same time truly be seeking U.S. workers for the job opportunity. Therefore, the alien and/or the alien's agent and/or attorney may not interview or consider U.S. workers for the job offered to the alien, unless the agent and/or attorney is the employer's representative, as described in paragraph (b)(2)(ii) of this section.

(ii) The employer's representative who interviews or considers U.S. workers for the job offered to the alien must be the person who normally interviews or considers, on behalf of the employer, applicants for job opportunities such as that offered the alien, but which do not involve labor certifications.

(3) No person under suspension or disbarment from practice before any court or before the DHS or the United States Department of Justice's Executive Office for Immigration Review is permitted to act as an agent, representative, or attorney for an employer and/or alien under this part.

(c) *Attestations.* The employer must certify to the conditions of employment listed below on the *Application for Permanent Employment Certification* under penalty of perjury under 18 U.S.C. 1621 (2). Failure to attest to any of the conditions listed below results in a denial of the application.

(1) The offered wage equals or exceeds the prevailing wage determined

pursuant to § 656.40 and § 656.41, and the wage the employer will pay to the alien to begin work will equal or exceed the prevailing wage that is applicable at the time the alien begins work or from the time the alien is admitted to take up the certified employment;

(2) The wage offered is not based on commissions, bonuses or other incentives, unless the employer guarantees a prevailing wage paid on a weekly, bi-weekly, or monthly basis that equals or exceeds the prevailing wage;

(3) The employer has enough funds available to pay the wage or salary offered the alien;

(4) The employer will be able to place the alien on the payroll on or before the date of the alien's proposed entrance into the United States;

(5) The job opportunity does not involve unlawful discrimination by race, creed, color, national origin, age, sex, religion, handicap, or citizenship;

(6) The employer's job opportunity is not:

(i) Vacant because the former occupant is on strike or locked out in the course of a labor dispute involving a work stoppage;

(ii) At issue in a labor dispute involving a work stoppage.

(7) The job opportunity's terms, conditions and occupational environment are not contrary to Federal, state or local law;

(8) The job opportunity has been and is clearly open to any U.S. worker;

(9) The U.S. workers who applied for the job opportunity were rejected for lawful job-related reasons;

(10) The job opportunity is for full-time, permanent employment for an employer other than the alien.

(d) *Notice.* (1) In applications filed under §§ 656.15 (*Schedule A*), 656.16 (Sheepherders), 656.17 (Basic Process), 656.18 (College and University Teachers), and 656.21 (Supervised Recruitment), the employer must give notice of the filing of the *Application for Permanent Employment Certification* and be able to document that notice was provided, if requested by the Certifying Officer, as follows:

(i) To the bargaining representative(s) (if any) of the employer's employees in the occupational classification for which certification of the job opportunity is sought in the employer's location(s) in the area of intended employment. Documentation may consist of a copy of the letter and a copy of the *Application for Permanent Employment Certification* form that was sent to the bargaining representative.

(ii) If there is no such bargaining representative, by posted notice to the employer's employees at the facility or location of the employment. The notice must be posted for at least 10 consecutive business days. The notice must be clearly visible and unobstructed while posted and must be posted in conspicuous places where the employer's U.S. workers can readily read the posted notice on their way to or from their place of employment. Appropriate locations for posting notices of the job opportunity include locations in the immediate vicinity of the wage and hour notices required by 29 CFR 516.4 or occupational safety and health notices required by 29 CFR 1903.2(a). In addition, the employer must publish the notice in any and all in-house media, whether electronic or printed, in accordance with the normal procedures used for the recruitment of similar positions in the employer's organization. The documentation requirement may be satisfied by providing a copy of the posted notice and stating where it was posted, and by providing copies of all the in-house media, whether electronic or print, that were used to distribute notice of the application in accordance with the procedures used for similar positions within the employer's organization.

(2) In the case of a private household, notice is required under this paragraph (d) only if the household employs one or more U.S. workers at the time the application for labor certification is filed. The documentation requirement may be satisfied by providing a copy of the posted notice to the Certifying Officer.

(3) The notice of the filing of an *Application for Permanent Employment Certification* must:

(i) State the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity;

(ii) State any person may provide documentary evidence bearing on the application to the Certifying Officer of the Department of Labor;

(iii) Provide the address of the appropriate Certifying Officer; and

(iv) Be provided between 30 and 180 days before filing the application.

(4) If an application is filed under § 656.17, the notice must contain the information required for advertisements by § 656.17(f), must state the rate of pay (which must equal or exceed the prevailing wage entered by the SWA on the prevailing wage request form), and must contain the information required by paragraph (d)(3) of this section.

(5) If an application is filed on behalf of a college and university teacher selected in a competitive selection and recruitment process, as provided by § 656.18, the notice must include the information required for advertisements by § 656.18(b)(2), and must include the information required by paragraph (d)(3) of this section.

(6) If an application is filed under the *Schedule A* procedures at § 656.15, or the procedures for sheepherders at § 656.16, the notice must contain a description of the job and rate of pay, and must meet the requirements of this section.

(e)(1)(i) *Submission of evidence.* Any person may submit to the Certifying Officer documentary evidence bearing on an application for permanent alien labor certification filed under the basic labor certification process at § 656.17 or an application involving a college and university teacher selected in a competitive recruitment and selection process under § 656.18.

(ii) Documentary evidence submitted under paragraph (e)(1)(i) of this section may include information on available workers, information on wages and working conditions, and information on the employer's failure to meet the terms and conditions for the employment of alien workers and co-workers. The Certifying Officer must consider this information in making his or her determination.

(2)(i) Any person may submit to the appropriate DHS office documentary evidence of fraud or willful misrepresentation in a *Schedule A* application filed under § 656.15 or a sheepherder application filed under § 656.16.

(ii) Documentary evidence submitted under paragraph (e)(2) of this section is limited to information relating to possible fraud or willful misrepresentation. The DHS may consider this information under § 656.31.

(f) *Retention of Documents.* Copies of applications for permanent employment certification filed with the Department of Labor and all supporting documentation must be retained by the employer for 5 years from the date of filing the *Application for Permanent Employment Certification.*

§ 656.15 Applications for labor certification for Schedule A occupations.

(a) *Filing application.* An employer must apply for a labor certification for a *Schedule A* occupation by filing an application in duplicate with the appropriate DHS office, and not with an ETA application processing center.

(b) *General documentation requirements.* A *Schedule A* application must include:

(1) An *Application for Permanent Employment Certification* form, which includes a prevailing wage

determination in accordance with § 656.40 and § 656.41.

(2) Evidence that notice of filing the *Application for Permanent Employment Certification* was provided to the bargaining representative or the employer's employees as prescribed in § 656.10(d).

(c) *Group I documentation.* An employer seeking labor certification under Group I of *Schedule A* must file with DHS, as part of its labor certification application, documentary evidence of the following:

(1) An employer seeking *Schedule A* labor certification for an alien to be employed as a physical therapist (§ 656.5(a)(1)) must file as part of its labor certification application a letter or statement, signed by an authorized state physical therapy licensing official in the state of intended employment, stating the alien is qualified to take that state's written licensing examination for physical therapists. Application for certification of permanent employment as a physical therapist may be made only under this § 656.15 and not under § 656.17.

(2) An employer seeking a *Schedule A* labor certification for an alien to be employed as a professional nurse (§ 656.5(a)(2)) must file as part of its labor certification application documentation that the alien has received a Certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS); that the alien holds a full and unrestricted (permanent) license to practice nursing in the state of intended employment; or that the alien has passed the National Council Licensure Examination for Registered Nurses (NCLEX–RN). Application for certification of employment as a professional nurse may be made only under this § 656.15(c) and not under § 656.17.

(d) *Group II documentation.* An employer seeking a *Schedule A* labor certification under Group II of *Schedule A* must file with DHS, as part of its labor certification application, documentary evidence of the following:

(1) An employer seeking labor certification on behalf of an alien to be employed as an alien of exceptional ability in the sciences or arts (excluding those in the performing arts) must file documentary evidence showing the widespread acclaim and international recognition accorded the alien by recognized experts in the alien's field; and documentation showing the alien's work in that field during the past year did, and the alien's intended work in the United States will, require exceptional ability. In addition, the employer must file documentation about the alien from at least two of the following seven groups:

(i) Documentation of the alien's receipt of internationally recognized prizes or awards for excellence in the field for which certification is sought;

(ii) Documentation of the alien's membership in international associations, in the field for which certification is sought, which require outstanding achievement of their members, as judged by recognized international experts in their disciplines or fields;

(iii) Published material in professional publications about the alien, about the alien's work in the field for which certification is sought, which shall include the title, date, and author of such published material;

(iv) Evidence of the alien's participation on a panel, or individually, as a judge of the work of others in the same or in an allied field of specialization to that for which certification is sought;

(v) Evidence of the alien's original scientific or scholarly research contributions of major significance in the field for which certification is sought;

(vi) Evidence of the alien's authorship of published scientific or scholarly articles in the field for which certification is sought, in international professional journals or professional journals with an international circulation;

(vii) Evidence of the display of the alien's work, in the field for which certification is sought, at artistic exhibitions in more than one country.

(2) An employer seeking labor certification on behalf of an alien of exceptional ability in the performing arts must file documentary evidence that the alien's work experience during the past twelve months did require, and the alien's intended work in the United States will require, exceptional ability; and must submit documentation to show this exceptional ability, such as:

(i) Documentation attesting to the current widespread acclaim and international recognition accorded to the alien, and receipt of internationally recognized prizes or awards for excellence;

(ii) Published material by or about the alien, such as critical reviews or articles in major newspapers, periodicals, and/or trade journals (the title, date, and author of such material shall be indicated);

(iii) Documentary evidence of earnings commensurate with the claimed level of ability;

(iv) Playbills and star billings;

(v) Documents attesting to the outstanding reputation of theaters, concert halls, night clubs, and other establishments in which the alien has appeared or is scheduled to appear; and/or

(vi) Documents attesting to the outstanding reputation of theaters or repertory companies, ballet troupes, orchestras, or other organizations in which or with which the alien has performed during the past year in a leading or starring capacity.

(e) *Determination.* An Immigration Officer determines whether the employer and alien have met the applicable requirements of § 656.10 and of *Schedule A* (§ 656.5); reviews the application; and determines whether or not the alien is qualified for and intends to pursue the *Schedule A* occupation. The *Schedule A* determination of DHS is conclusive and final. The employer, therefore, may not appeal from any such determination under the review procedures at § 656.26.

(f) *Department of Labor copy.* If the alien qualifies for the occupation, the Immigration Officer must indicate the occupation on the *Application for Permanent Employment Certification* form. The Immigration Officer then must promptly forward a copy of the *Application for Permanent Employment Certification* form, without attachments, to the Chief, Division of Foreign Labor Certification, indicating thereon the occupation, the Immigration Officer who made the *Schedule A* determination, and the date of the determination (see § 656.30 for the significance of this date).

(g) *Refiling after denial.* If an application for a *Schedule A* occupation is denied, the employer, except where the occupation is as a physical therapist or a professional nurse, may at any time file for a labor certification on the alien beneficiary's behalf under § 656.17. Labor certifications for professional nurses and for physical therapists shall not be considered under § 656.17.

§ 656.16 Labor certification applications for sheepherders.

(a) *Filing requirements and required documentation.* (1) An employer may apply for a labor certification to employ an alien (who has been employed legally as a nonimmigrant sheepherder in the United States for at least 33 of the preceding 36 months) as a sheepherder by filing an *Application for Permanent Employment Certification* form directly with DHS, not with an office of DOL.

(2) A signed letter or letters from each U.S. employer who has employed the alien as a sheepherder during the immediately preceding 36 months,

attesting the alien has been employed in the United States lawfully and continuously as a sheepherder for at least 33 of the immediately preceding 36 months, must be filed with the application.

(b) *Determination.* An Immigration Officer reviews the application and the letters attesting to the alien's previous employment as a sheepherder in the United States, and determines whether or not the alien and the employer(s) have met the requirements of this section.

(1) The determination of the Immigration Officer under this paragraph (b) is conclusive and final. The employer(s) and the alien, therefore, may not make use of the review procedures set forth at §§ 656.26 and 656.27 to appeal such a determination.

(2) If the alien and the employer(s) have met the requirements of this section, the Immigration Officer must indicate on the *Application for Permanent Employment Certification* form the occupation, the immigration office that made the determination, and the date of the determination (see § 656.30 for the significance of this date). The Immigration Officer must then promptly forward a copy of the *Application for Permanent Employment Certification* form, without attachments, to the Chief, Division of Foreign Labor Certification.

(c) *Alternative filing.* If an application for a sheepherder does not meet the requirements of this section, the application may be filed under § 656.17.

§ 656.17 Basic labor certification process.

(a) *Filing applications.* (1) Except as otherwise provided by §§ 656.15, 656.16, and 656.18, an employer who desires to apply for a labor certification on behalf of an alien must file a completed Department of Labor *Application for Permanent Employment Certification* form (ETA Form 9089). The application must be filed with an ETA application processing center. Incomplete applications will be denied. Applications filed and certified electronically must, upon receipt of the labor certification, be signed immediately by the employer in order to be valid. Applications submitted by mail must contain the original signature of the employer, alien, attorney, and/or agent when they are received by the application processing center. DHS will not process petitions unless they are supported by an original certified ETA Form 9089 that has been signed by the employer, alien, attorney and/or agent.

(2) The Department of Labor may issue or require the use of certain identifying information, including user identifiers, passwords, or personal identification numbers (PINS). The purpose of these personal identifiers is to allow the Department of Labor to associate a given electronic submission with a single, specific individual. Personal identifiers can not be issued to a company or business. Rather, a personal identifier can only be issued to specific individual. Any personal identifiers must be used solely by the individual to whom they are assigned and can not be used or transferred to any other individual. An individual assigned a personal identifier must take all reasonable steps to ensure that his or her personal identifier can not be compromised. If an individual assigned a personal identifier suspects, or becomes aware, that his or her personal identifier has been compromised or is being used by someone else, then the individual must notify the Department of Labor immediately of the incident and cease the electronic transmission of any further submissions under that personal identifier until such time as a new personal identifier is provided. Any electronic transmissions submitted with a personal identifier will be presumed to be a submission by the individual assigned that personal identifier. The Department of Labor's system will notify those making submissions of these requirements at the time of each submission.

(3) Documentation supporting the application for labor certification should not be filed with the application, however in the event the Certifying Officer notifies the employer that its application is to be audited, the employer must furnish required supporting documentation prior to a final determination.

(b) *Processing.* (1) Applications are screened and are certified, are denied, or are selected for audit.

(2) Employers will be notified if their applications have been selected for audit by the issuance of an audit letter under § 656.20.

(3) Applications may be selected for audit in accordance with selection criteria or may be randomly selected.

(c) *Filing date.* Non-electronically filed applications accepted for processing shall be date stamped. Electronically filed applications will be considered filed when submitted.

(d) *Refiling Procedures.* (1) Employers that filed applications under the regulations in effect prior to March 28, 2005, may, if a job order has not been placed pursuant to those regulations, refile such applications under this part without loss of the original filing date by:

(i) Submitting an application for an identical job opportunity after complying with all of the filing and recruiting requirements of this part 656; and

(ii) Withdrawing the original application in accordance with ETA procedures. Filing an application under this part stating the employer's desire to use the original filing date will be deemed to be a withdrawal of the original application. The original application will be deemed withdrawn regardless of whether the employer's request to use the original filing date is approved.

(2) Refilings under this paragraph must be made within 210 days of the withdrawal of the prior application.

(3) A copy of the original application, including amendments, must be sent to the appropriate ETA application processing center when requested by the CO under § 656.20.

(4) For purposes of paragraph (d)(1)(i) of this section, a job opportunity shall be considered identical if the employer, alien, job title, job location, job requirements, and job description are the same as those stated in the original application filed under the regulations in effect prior to March 28, 2005. For purposes of determining identical job opportunity, the original application includes all accepted amendments up to the time the application was withdrawn, including amendments in response to an assessment notice from a SWA pursuant to § 656.21(h) of the regulations in effect prior to March 28, 2005.

(e) *Required pre-filing recruitment.* Except for labor certification applications involving college or university teachers selected pursuant to a competitive recruitment and selection process (§ 656.18), *Schedule A* occupations (§§ 656.5 and 656.15), and sheepherders (§ 656.16), an employer must attest to having conducted the following recruitment prior to filing the application:

(1) *Professional occupations.* If the application is for a professional occupation, the employer must conduct the recruitment steps within 6 months of filing the application for alien employment certification. The employer must maintain documentation of the recruitment and be prepared to submit this documentation in the event of an audit or in response to a request from the Certifying Officer prior to rendering a final determination.

(i) *Mandatory steps.* Two of the steps, a job order and two print advertisements, are mandatory for all applications involving professional occupations, except applications for

college or university teachers selected in a competitive selection and recruitment process as provided in § 656.18. The mandatory recruitment steps must be conducted at least 30 days, but no more than 180 days, before the filing of the application.

(A) *Job order.* Placement of a job order with the SWA serving the area of intended employment for a period of 30 days. The start and end dates of the job order entered on the application shall serve as documentation of this step.

(B) *Advertisements in newspaper or professional journals.* (*1*) Placing an advertisement on two different Sundays in the newspaper of general circulation in the area of intended employment most appropriate to the occupation and the workers likely to apply for the job opportunity and most likely to bring responses from able, willing, qualified, and available U.S. workers.

(*2*) If the job opportunity is located in a rural area of intended employment that does not have a newspaper with a Sunday edition, the employer may use the edition with the widest circulation in the area of intended employment.

(*3*) The advertisements must satisfy the requirements of paragraph (f) of this section. Documentation of this step can be satisfied by furnishing copies of the newspaper pages in which the advertisements appeared or proof of publication furnished by the newspaper.

(*4*) If the job involved in the application requires experience and an advanced degree, and a professional journal normally would be used to advertise the job opportunity, the employer may, in lieu of one of the Sunday advertisements, place an advertisement in the professional journal most likely to bring responses from able, willing, qualified, and available U.S. workers. Documentation of this step can be satisfied by providing a copy of the page in which the advertisement appeared.

(ii) *Additional recruitment steps.* The employer must select three additional recruitment steps from the alternatives listed in paragraphs (e)(1)(ii)(A)–(J) of this section. Only one of the additional steps may consist solely of activity that took place within 30 days of the filing of the application. None of the steps may have taken place more than 180 days prior to filing the application.

(A) *Job fairs.* Recruitment at job fairs for the occupation involved in the application, which can be documented by brochures advertising the fair and newspaper advertisements in which the employer is named as a participant in the job fair.

(B) *Employer's Web site.* The use of the employer's Web site as a recruitment medium can be documented by providing dated copies of pages from the site that advertise the occupation involved in the application.

(C) *Job search Web site other than the employer's.* The use of a job search Web site other than the employer's can be documented by providing dated copies of pages from one or more website(s) that advertise the occupation involved in the application. Copies of web pages generated in conjunction with the newspaper advertisements required by paragraph (e)(1)(i)(B) of this section can serve as documentation of the use of a Web site other than the employer's.

(D) *On-campus recruiting.* The employer's on-campus recruiting can be documented by providing copies of the notification issued or posted by the college's or university's placement office naming the employer and the date it conducted interviews for employment in the occupation.

(E) *Trade or professional organizations.* The use of professional or trade organizations as a recruitment source can be documented by providing copies of pages of newsletters or trade journals containing advertisements for the occupation involved in the application for alien employment certification.

(F) *Private employment firms.* The use of private employment firms or placement agencies can be documented by providing documentation sufficient to demonstrate that recruitment has been conducted by a private firm for the occupation for which certification is sought. For example, documentation might consist of copies of contracts between the employer and the private employment firm and copies of advertisements placed by the private employment firm for the occupation involved in the application.

(G) *Employee referral program with incentives.* The use of an employee referral program with incentives can be documented by providing dated copies of employer notices or memoranda advertising the program and specifying the incentives offered.

(H) *Campus placement offices.* The use of a campus placement office can be documented by providing a copy of the employer's notice of the job opportunity provided to the campus placement office.

(I) *Local and ethnic newspapers.* The use of local and ethnic newspapers can be documented by providing a copy of the page in the newspaper that contains the employer's advertisement.

(J) *Radio and television advertisements.* The use of radio and television advertisements can be documented by providing a copy of the employer's text of the employer's advertisement along with a written confirmation from the radio or television station stating when the advertisement was aired.

(2) *Nonprofessional occupations.* If the application is for a nonprofessional occupation, the employer must at a minimum, place a job order and two newspaper advertisements within 6 months of filing the application. The steps must be conducted at least 30 days but no more that 180 days before the filing of the application.

(i) *Job order.* Placing a job order with the SWA serving the area of intended employment for a period of 30 days. The start and end dates of the job order entered on the application serve as documentation of this step.

(ii) *Newspaper advertisements.* (A) Placing an advertisement on two different Sundays in the newspaper of general circulation in the area of intended employment most appropriate to the occupation and the workers likely to apply for the job opportunity.

(B) If the job opportunity is located in a rural area of intended employment that does not have a newspaper that publishes a Sunday edition, the employer may use the newspaper edition with the widest circulation in the area of intended employment.

(C) Placement of the newspaper advertisements can be documented in the same way as provided in paragraph (e)(1)(i)(B)(*3*) of this section for professional occupations.

(D) The advertisements must satisfy the requirements of paragraph (f) of this section.

(f) *Advertising requirements.* Advertisements placed in newspapers of general circulation or in professional journals before filing the *Application for Permanent Employment Certification* must:

(1) Name the employer;

(2) Direct applicants to report or send resumes, as appropriate for the occupation, to the employer;

(3) Provide a description of the vacancy specific enough to apprise the U.S. workers of the job opportunity for which certification is sought;

(4) Indicate the geographic area of employment with enough specificity to apprise applicants of any travel requirements and where applicants will likely have to reside to perform the job opportunity;

(5) Not contain a wage rate lower than the prevailing wage rate;

(6) Not contain any job requirements or duties which exceed the job requirements or duties listed on the ETA Form 9089; and

(7) Not contain wages or terms and conditions of employment that are less favorable than those offered to the alien.

(g) *Recruitment report.* (1) The employer must prepare a recruitment report signed by the employer or the employer's representative noted in § 656.10(b)(2)(ii) describing the recruitment steps undertaken and the results achieved, the number of hires, and, if applicable, the number of U.S. workers rejected, categorized by the lawful job related reasons for such rejections. The Certifying Officer, after reviewing the employer's recruitment report, may request the U.S. workers' resumes or applications, sorted by the reasons the workers were rejected.

(2) A U.S. worker is able and qualified for the job opportunity if the worker can acquire the skills necessary to perform the duties involved in the occupation during a reasonable period of on-the-job training. Rejecting U.S. workers for lacking skills necessary to perform the duties involved in the occupation, where the U.S. workers are capable of acquiring the skills during a reasonable period of on-the-job training is not a lawful job-related reason for rejection of the U.S. workers.

(h) *Job duties and requirements.* (1) The job opportunity's requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation and must not exceed the Specific Vocational Preparation level assigned to the occupation as shown in the O*NET Job Zones. To establish a business necessity, an employer must demonstrate the job duties and requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform the job in a reasonable manner.

(2) A foreign language requirement can not be included, unless it is justified by business necessity. Demonstrating business necessity for a foreign language requirement may be based upon the following:

(i) The nature of the occupation, *e.g.*, translator; or

(ii) The need to communicate with a large majority of the employer's customers, contractors, or employees who can not communicate effectively in English, as documented by:

(A) The employer furnishing the number and proportion of its clients, contractors, or employees who can not communicate in English, and/or a detailed plan to market products or services in a foreign country; and

(B) A detailed explanation of why the duties of the position for which certification is sought requires frequent contact and communication with customers, employees or contractors who can not communicate in English and why it is reasonable to believe the allegedly foreign-language-speaking customers, employees, and contractors can not communicate in English.

(3) If the job opportunity involves a combination of occupations, the employer must document that it has normally employed persons for that combination of occupations, and/or workers customarily perform the combination of occupations in the area of intended employment, and/or the combination job opportunity is based on a business necessity. Combination occupations can be documented by position descriptions and relevant payroll records, and/or letters from other employers stating their workers normally perform the combination of occupations in the area of intended employment, and/or documentation that the combination occupation arises from a business necessity.

(4)(i) Alternative experience requirements must be substantially equivalent to the primary requirements of the job opportunity for which certification is sought; and

(ii) If the alien beneficiary already is employed by the employer, and the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements, certification will be denied unless the application states that any suitable combination of education, training, or experience is acceptable.

(i) *Actual minimum requirements.* DOL will evaluate the employer's actual minimum requirements in accordance with this paragraph (i).

(1) The job requirements, as described, must represent the employer's actual minimum requirements for the job opportunity.

(2) The employer must not have hired workers with less training or experience for jobs substantially comparable to that involved in the job opportunity.

(3) If the alien beneficiary already is employed by the employer, in considering whether the job requirements represent the employer's actual minimums, DOL will review the training and experience possessed by the alien beneficiary at the time of hiring by the employer, including as a contract employee. The employer can not require domestic worker applicants to possess training and/or experience beyond what the alien possessed at the time of hire unless:

(i) The alien gained the experience while working for the employer, including as a contract employee, in a position not substantially comparable to the position for which certification is being sought, or

(ii) The employer can demonstrate that it is no longer feasible to train a worker to qualify for the position.

(4) In evaluating whether the alien beneficiary satisfies the employer's actual minimum requirements, DOL will not consider any education or training obtained by the alien beneficiary at the employer's expense unless the employer offers similar training to domestic worker applicants.

(5) For purposes of this paragraph (i):

(i) The term ''employer'' means an entity with the same Federal Employer Identification Number (FEIN), provided it meets the definition of an employer at § 656.3.

(ii) A ''substantially comparable'' job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

(j) *Conditions of employment.* (1) Working conditions must be normal to the occupation in the area and industry.

(2) Live-in requirements are acceptable for household domestic service workers only if the employer can demonstrate the requirement is essential to perform, in a reasonable manner, the job duties as described by the employer and there are not cost-effective alternatives to a live-in household requirement. Mere employer assertions do not constitute acceptable documentation. For example, a live-in requirement could be supported by documenting two working parents and young children in the household, and/or the existence of erratic work schedules requiring frequent travel and a need to entertain business associates and clients on short notice. Depending upon the situation, acceptable documentation could consist of travel vouchers, written estimates of costs of alternatives such as babysitters, or a detailed listing of the frequency and length of absences of the employer from the home.

(k) *Layoffs.* (1) If there has been a layoff by the employer applicant in the area of intended employment within 6 months of filing an application involving the occupation for which certification is sought or in a related occupation, the employer must document it has notified and considered all potentially qualified laid off (employer applicant) U.S. workers of the job opportunity involved in the application and the results of the

notification and consideration. A layoff shall be considered any involuntary separation of one or more employees without cause or prejudice.

(2) For the purposes of paragraph (k)(1) of this section, a related occupation is any occupation that requires workers to perform a majority of the essential duties involved in the occupation for which certification is sought.

(l) *Alien influence and control over job opportunity.* If the employer is a closely held corporation or partnership in which the alien has an ownership interest, or if there is a familial relationship between the stockholders, corporate officers, incorporators, or partners, and the alien, or if the alien is one of a small number of employees, the employer in the event of an audit must be able to demonstrate the existence of a bona fide job opportunity, i.e. the job is available to all U.S. workers, and must provide to the Certifying Officer, the following supporting documentation:

(1) A copy of the articles of incorporation, partnership agreement, business license or similar documents that establish the business entity;

(2) A list of all corporate/company officers and shareholders/partners of the corporation/firm/business, their titles and positions in the business' structure, and a description of the relationships to each other and to the alien beneficiary;

(3) The financial history of the corporation/company/partnership, including the total investment in the business entity and the amount of investment of each officer, incorporator/partner and the alien beneficiary; and

(4) The name of the business' official with primary responsibility for interviewing and hiring applicants for positions within the organization and the name(s) of the business' official(s) having control or influence over hiring decisions involving the position for which labor certification is sought.

(5) If the alien is one of 10 or fewer employees, the employer must document any family relationship between the employees and the alien.

§ 656.18 Optional special recruitment and documentation procedures for college and university teachers.

(a) *Filing requirements.* Applications for certification of employment of college and university teachers must be filed by submitting a completed *Application for Permanent Employment Certification* form to the appropriate ETA application processing center.

(b) *Recruitment.* The employer may recruit for college and university teachers under § 656.17 or must be able to document the alien was selected for the job opportunity in a competitive recruitment and selection process through which the alien was found to be more qualified than any of the United States workers who applied for the job. For purposes of this paragraph (b), documentation of the ''competitive recruitment and selection process'' must include:

(1) A statement, signed by an official who has actual hiring authority from the employer outlining in detail the complete recruitment procedures undertaken; and which must set forth:

(i) The total number of applicants for the job opportunity;

(ii) The specific lawful job-related reasons why the alien is more qualified than each U.S. worker who applied for the job; and

(2) A final report of the faculty, student, and/or administrative body making the recommendation or selection of the alien, at the completion of the competitive recruitment and selection process;

(3) A copy of at least one advertisement for the job opportunity placed in a national professional journal, giving the name and the date(s) of publication; and which states the job title, duties, and requirements;

(4) Evidence of all other recruitment sources utilized; and

(5) A written statement attesting to the degree of the alien's educational or professional qualifications and academic achievements.

(c) *Time limit for filing.* Applications for permanent alien labor certification for job opportunities as college and university teachers must be filed within 18 months after a selection is made pursuant to a competitive recruitment and selection process.

(d) *Alternative procedure.* An employer that can not or does not choose to satisfy the special recruitment procedures for a college or university teacher under this section may avail itself of the basic process at § 656.17. An employer that files for certification of employment of college and university teachers under § 656.17 or this section must be able to document, if requested by the Certifying Officer, in accordance with § 656.24(a)(2)(ii), the alien was found to be more qualified than each U.S. worker who applied for the job opportunity.

§ 656.19 Live-in household domestic service workers.

(a) *Processing.* Applications on behalf of live-in household domestic service occupations are processed pursuant to the requirements of the basic process at § 656.17.

(b) *Required documentation.* Employers filing applications on behalf of live-in household domestic service workers must provide, in event of an audit, the following documentation:

(1) A statement describing the household living accommodations, including the following:

(i) Whether the residence is a house or apartment;

(ii) The number of rooms in the residence;

(iii) The number of adults and children, and ages of the children, residing in the household; and

(iv) That free board and a private room not shared with any other person will be provided to the alien.

(2) Two copies of the employment contract, each signed and dated prior to the filing of the application by both the employer and the alien (not by their attorneys or agents). The contract must clearly state:

(i) The wages to be paid on an hourly and weekly basis;

(ii) Total hours of employment per week, and exact hours of daily employment;

(iii) That the alien is free to leave the employer's premises during all non-work hours except the alien may work overtime if paid for the overtime at no less than the legally required hourly rate;

(iv) That the alien will reside on the employer's premises;

(v) Complete details of the duties to be performed by the alien;

(vi) The total amount of any money to be advanced by the employer with details of specific items, and the terms of repayment by the alien of any such advance by the employer;

(vii) That in no event may the alien be required to give more than two weeks' notice of intent to leave the employment contracted for and the employer must give the alien at least two weeks' notice before terminating employment;

(viii) That a duplicate contract has been furnished to the alien;

(ix) That a private room and board will be provided at no cost to the worker; and

(x) Any other agreement or conditions not specified on the *Application for Permanent Employment Certification* form.

(3) Documentation of the alien's paid experience in the form of statements from past or present employers setting forth the dates (month and year) employment started and ended, hours of work per day, number of days worked per week, place where the alien worked, detailed statement of duties performed on the job, equipment and appliances

used, and the amount of wages paid per week or month. The total paid experience must be equal to one full year's employment on a full-time basis. For example, two year's experience working half-days is the equivalent of one year's full time experience. Time spent in a household domestic service training course can not be included in the required one year of paid experience. Each statement must contain the name and address of the person who signed it and show the date on which the statement was signed. A statement not in English shall be accompanied by a written translation into English certified by the translator as to the accuracy of the translation, and as to the translator's competency to translate.

§ 656.20 Audit procedures.

(a) Review of the labor certification application may lead to an audit of the application. Additionally, certain applications may be selected randomly for audit and quality control purposes. If an application is selected for audit, the Certifying Officer shall issue an audit letter. The audit letter will:

(1) State the documentation that must be submitted by the employer;

(2) Specify a date, 30 days from the date of the audit letter, by which the required documentation must be submitted; and

(3) Advise that if the required documentation has not been sent by the date specified the application will be denied.

(i) Failure to provide documentation in a timely manner constitutes a refusal to exhaust available administrative remedies; and

(ii) The administrative-judicial review procedure provided in § 656.26 is not available.

(b) A substantial failure by the employer to provide required documentation will result in that application being denied § 656.24 under and may result in a determination by the Certifying Officer pursuant to § 656.24 to require the employer to conduct supervised recruitment under § 656.21 in future filings of labor certification applications for up to 2 years.

(c) The Certifying Officer may in his or her discretion provide one extension, of up to 30 days, to the 30 days specified in paragraph (a)(2) of this section.

(d) Before making a final determination in accordance with the standards in § 656.24, whether in course of an audit or otherwise, the Certifying Officer may:

(1) Request supplemental information and/or documentation; or

(2) Require the employer to conduct supervised recruitment under § 656.21.

§ 656.21 Supervised recruitment.

(a) *Supervised recruitment.* Where the Certifying Officer determines it appropriate, post-filing supervised recruitment may be required of the employer for the pending application or future applications pursuant to § 656.20(b).

(b) *Requirements.* Supervised recruitment shall consist of advertising for the job opportunity by placing an advertisement in a newspaper of general circulation or in a professional, trade, or ethnic publication, and any other measures required by the CO. If placed in a newspaper of general circulation, the advertisement must be published for 3 consecutive days, one of which must be a Sunday; or, if placed in a professional, trade, or ethnic publication, the advertisement must be published in the next available published edition. The advertisement must be approved by the Certifying Officer before publication, and the CO will direct where the advertisement is to be placed.

(1) The employer must supply a draft advertisement to the CO for review and approval within 30 days of being notified that supervised recruitment is required.

(2) The advertisement must:

(i) Direct applicants to send resumes or applications for the job opportunity to the CO for referral to the employer;

(ii) Include an identification number and an address designated by the Certifying Officer;

(iii) Describe the job opportunity;

(iv) Not contain a wage rate lower than the prevailing wage rate;

(v) Summarize the employer's minimum job requirements, which can not exceed any of the requirements entered on the application form by the employer;

(vi) Offer training if the job opportunity is the type for which employers normally provide training; and

(vii) Offer wages, terms and conditions of employment no less favorable than those offered to the alien.

(c) *Timing of advertisement.* (1) The advertisement shall be placed in accordance with the guidance provided by the CO.

(2) The employer will notify the CO when the advertisement will be placed.

(d) *Additional or substitute recruitment.* The Certifying Officer may designate other appropriate sources of workers from which the employer must recruit for U.S. workers in addition to the advertising described in paragraph (b) of this section.

(e) *Recruitment report.* The employer must provide to the Certifying Officer a signed, detailed written report of the employer's supervised recruitment, signed by the employer or the employer's representative described in § 656.10(b)(2)(ii), within 30 days of the Certifying Officer's request for such a report. The recruitment report must:

(1) Identify each recruitment source by name and document that each recruitment source named was contacted. This can include, for example, copies of letters to recruitment sources such as unions, trade associations, colleges and universities and any responses received to the employer's inquiries. Advertisements placed in newspapers, professional, trade, or ethnic publications can be documented by furnishing copies of the tear sheets of the pages of the publication in which the advertisements appeared, proof of publication furnished by the publication, or dated copies of the web pages if the advertisement appeared on the web as well as in the publication in which the advertisement appeared.

(2) State the number of U.S. workers who responded to the employer's recruitment.

(3) State the names, addresses, and provide resumes (other than those sent to the employer by the CO) of the U.S. workers who applied for the job opportunity, the number of workers interviewed, and the job title of the person who interviewed the workers.

(4) Explain, with specificity, the lawful job-related reason(s) for not hiring each U.S. worker who applied. Rejection of one or more U.S. workers for lacking skills necessary to perform the duties involved in the occupation, where the U.S. workers are capable of acquiring the skills during a reasonable period of on-the-job training, is not a lawful job-related reason for rejecting the U.S. workers. For the purpose of this paragraph (e)(4), a U.S. worker is able and qualified for the job opportunity if the worker can acquire the skills necessary to perform the duties involved in the occupation during a reasonable period of on-the-job training.

(f) The employer shall supply the CO with the required documentation or information within 30 days of the date of the request. If the employer does not do so, the CO shall deny the application.

(g) The Certifying Officer in his or her discretion, for good cause shown, may provide one extension to any request for documentation or information.

§ 656.24 Labor certification determinations.

(a)(1) The Chief, Division of Foreign Labor Certification is the National Certifying Officer. The Chief and the certifying officers in the ETA application processing centers have the authority to certify or deny labor certification applications.

(2) If the labor certification presents a special or unique problem, the Director of an ETA application processing center may refer the matter to the Chief, Division of Foreign Labor Certification. If the Chief, Division of Foreign Labor Certification, has directed that certain types of applications or specific applications be handled in the ETA national office, the Directors of the ETA application processing centers shall refer such applications to the Chief, Division of Foreign Labor Certification.

(b) The Certifying Officer makes a determination either to grant or deny the labor certification on the basis of whether or not:

(1) The employer has met the requirements of this part.

(2) There is in the United States a worker who is able, willing, qualified, and available for and at the place of the job opportunity.

(i) The Certifying Officer must consider a U.S. worker able and qualified for the job opportunity if the worker, by education, training, experience, or a combination thereof, is able to perform in the normally accepted manner the duties involved in the occupation as customarily performed by other U.S. workers similarly employed. For the purposes of this paragraph (b)(2)(i), a U.S. worker is able and qualified for the job opportunity if the worker can acquire the skills necessary to perform the duties involved in the occupation during a reasonable period of on-the-job training.

(ii) If the job involves a job opportunity as a college or university teacher, the U.S. worker must be at least as qualified as the alien.

(3) The employment of the alien will not have an adverse effect upon the wages and working conditions of U.S. workers similarly employed. In making this determination, the Certifying Officer considers such things as: labor market information, the special circumstances of the industry, organization, and/or occupation, the prevailing wage in the area of intended employment, and prevailing working conditions, such as hours, in the occupation.

(c) The Certifying Officer shall notify the employer in writing (either electronically or by mail) of the labor certification determination.

(d) If a labor certification is granted, except for a labor certification for an occupation on *Schedule A* (§ 656.5) or for employment as a sheepherder under § 656.16, the Certifying Officer must send the certified application and complete Final Determination form to the employer, or, if appropriate, to the employer's agent or attorney, indicating the employer may file all the documents with the appropriate DHS office.

(e) If the labor certification is denied, the Final Determination form will:

(1) State the reasons for the determination;

(2) Quote the request for review procedures at § 656.26 (a) and (b);

(3) Advise that failure to request review within 30 days of the date of the determination, as specified in § 656.26(a), constitutes a failure to exhaust administrative remedies;

(4) Advise that, if a request for review is not made within 30 days of the date of the determination, the denial shall become the final determination of the Secretary;

(5) Advise that if an application for a labor certification is denied, and a request for review is not made in accordance with the procedures at § 656.26(a) and (b), a new application may be filed at any time; and

(6) Advise that a new application in the same occupation for the same alien can not be filed while a request for review is pending with the Board of Alien Labor Certification Appeals.

(f) If the Certifying Officer determines the employer substantially failed to produce required documentation, or the documentation was inadequate, or determines a material misrepresentation was made with respect to the application, or if the Certifying Officer determines it is appropriate for other reasons, the employer may be required to conduct supervised recruitment pursuant to § 656.21 in future filings of labor certification applications for up to two years from the date of the Final Determination.

(g)(1) The employer may request reconsideration within 30 days from the date of issuance of the denial.

(2) The request for reconsideration may not include evidence not previously submitted.

(3) The Certifying Officer may, in his or her discretion, reconsider the determination or treat it as a request for review under § 656.26(a).

§ 656.26 Board of Alien Labor Certification Appeals review of denials of labor certification.

(a) *Request for review.* (1) If a labor certification is denied, or revoked pursuant to § 656.32, a request for review of the denial or revocation may be made to the Board of Alien Labor Certification Appeals by the employer by making a request for such an administrative review in accordance with the procedures provided in this paragraph (a). The request for review:

(i) Must be sent to the Certifying Officer who denied the application within 30 days of the date of the determination;

(ii) Must clearly identify the particular labor certification determination for which review is sought;

(iii) Must set forth the particular grounds for the request; and

(iv) Must include the Final Determination.

(2) The request for review, statements, briefs, and other submissions of the parties and amicus curiae must contain only legal argument and only such evidence that was within the record upon which the denial of labor certification was based.

(b) Upon the receipt of a request for review, the Certifying Officer immediately must assemble an indexed Appeal File:

(1) The Appeal File must be in chronological order, must have the index on top followed by the most recent document, and must have consecutively numbered pages. The Appeal File must contain the request for review, the complete application file, and copies of all the written material, such as pertinent parts and pages of surveys and/or reports upon which the denial was based.

(2) The Certifying Officer must send the Appeal File to the Board of Alien Labor Certification Appeals, Office of Administrative Law Judges, 800 K Street, NW., Suite 400–N, Washington, DC 20001–8002.

(3) The Certifying Officer must send a copy of the Appeal File to the employer. The employer may furnish or suggest directly to the Board of Alien Labor Certification Appeals the addition of any documentation that is not in the Appeal File, but that was submitted to DOL before the issuance of the Final Determination. The employer must submit such documentation in writing, and must send a copy to the Associate Solicitor for Employment and Training Legal Services, Office of the Solicitor, U.S. Department of Labor, Washington, DC 20210.

§ 656.27 Consideration by and decisions of the Board of Alien Labor Certification Appeals.

(a) *Panel designations.* In considering requests for review before it, the Board

of Alien Labor Certification Appeals may sit in panels of three members. The Chief Administrative Law Judge may designate any Board of Alien Labor Certification Appeals member to submit proposed findings and recommendations to the Board of Alien Labor Certification Appeals or to any duly designated panel thereof to consider a particular case.

(b) *Briefs and Statements of Position.* In considering the requests for review before it, the Board of Alien Labor Certification Appeals must afford all parties 30 days to submit or decline to submit any appropriate Statement of Position or legal brief. The Certifying Officer is to be represented solely by the Solicitor of Labor or the Solicitor's designated representative.

(c) *Review on the record.* The Board of Alien Labor Certification Appeals must review a denial of labor certification under § 656.24, a revocation of a certification under § 656.32, or an affirmation of a prevailing wage determination under § 656.41 on the basis of the record upon which the decision was made, the request for review, and any Statements of Position or legal briefs submitted and must:

(1) Affirm the denial of the labor certification, the revocation of certification, or the affirmation of the PWD; or

(2) Direct the Certifying Officer to grant the certification, overrule the revocation of certification, or overrule the affirmation of the PWD; or

(3) Direct that a hearing on the case be held under paragraph (e) of this section.

(d) *Notifications of decisions.* The Board of Alien Labor Certification Appeals must notify the employer, the Certifying Officer, and the Solicitor of Labor of its decision, and must return the record to the Certifying Officer unless the case has been set for hearing under paragraph (e) of this section.

(e) *Hearings.* (1) *Notification of hearing.* If the case has been set for a hearing, the Board of Alien Labor Certification Appeals must notify the employer, the alien, the Certifying Officer, and the Solicitor of Labor of the date, time, and place of the hearing, and that the hearing may be rescheduled upon written request and for good cause shown.

(2) *Hearing procedure.* (i) The ''Rules of Practice and Procedure For Administrative Hearings Before the Office of Administrative Law Judges,'' at 29 CFR part 18, apply to hearings under this paragraph (e).

(ii) For the purposes of this paragraph (e)(2), references in 29 CFR part 18 to: ''administrative law judge'' mean the Board of Alien Labor Certification Appeals member or the Board of Alien Labor Certification Appeals panel duly designated under § 656.27(a); ''Office of Administrative Law Judges'' means the Board of Alien Labor Certification Appeals; and ''Chief Administrative Law Judge'' means the Chief Administrative Law Judge in that official's function of chairing the Board of Alien Labor Certification Appeals.

§ 656.30 Validity of and invalidation of labor certifications.

(a) *Validity of labor certifications.* Except as provided in paragraph (d) of this section, a labor certification is valid indefinitely.

(b) *Validation date.* (1) A labor certification involving a job offer is validated as of the date the ETA application processing center date-stamped the application or the date an electronically filed application was submitted; and

(2) A labor certification for a *Schedule A* occupation is validated as of the date the application was dated by the Immigration Officer.

(c) *Scope of validity.* (1) A labor certification for a *Schedule A* occupation is valid only for the occupation set forth on the *Application for Permanent Employment Certification* form and throughout the United States unless the certification contains a geographic limitation.

(2) A labor certification involving a specific job offer is valid only for the particular job opportunity and for the area of intended employment stated on the *Application for Permanent Employment Certification* form.

(d) *Invalidation of labor certifications.* After issuance, a labor certification may be revoked by ETA using the procedures described in § 656.32. Additionally, after issuance, a labor certification is subject to invalidation by the DHS or by a Consul of the Department of State upon a determination, made in accordance with those agencies' procedures or by a court, of fraud or willful misrepresentation of a material fact involving the labor certification application. If evidence of such fraud or willful misrepresentation becomes known to the CO or to the Chief, Division of Foreign Labor Certification, the CO, or the Chief of the Division of Foreign Labor Certification, as appropriate, shall notify in writing the DHS or Department of State, as appropriate. A copy of the notification must be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.

(e) *Duplicate labor certifications.* (1) The Certifying Officer shall issue a duplicate labor certification at the written request of a Consular or Immigration Officer. The Certifying Officer shall issue such duplicate labor certifications only to the Consular or Immigration Officer who initiated the request.

(2) The Certifying Officer shall issue a duplicate labor certification to a Consular or Immigration Officer at the written request of an alien, employer, or an alien's or employer's attorney/agent. Such request for a duplicate labor certification must be addressed to the Certifying Officer who issued the labor certification; must include documentary evidence from a Consular or Immigration Officer that a visa application or visa petition, as appropriate, has been filed; and must include a Consular Office or DHS tracking number.

§ 656.31 Labor certification applications involving fraud or willful misrepresentation.

(a) *Possible fraud or willful misrepresentation.* If possible fraud or willful misrepresentation involving a labor certification is discovered before a final labor certification determination; the Certifying Officer will refer the matter to the DHS for investigation, and must send a copy of the referral to the Department of Labor's Office of Inspector General. If 90 days pass without the filing of a criminal indictment or information, or receipt of a notification from DHS, DOL OIG, or other appropriate authority that an investigation is being conducted, the Certifying Officer may continue to process the application.

(b) *Criminal indictment or information.* If the DOL learns an application is the subject of a criminal indictment or information filed in a court, the processing of the application must be halted until the judicial process is completed. The Certifying Officer must notify the employer of this fact in writing and must send a copy of the notification to the alien, and to the Department of Labor's Office of Inspector General.

(c) *Finding of no fraud or willful misrepresentation.* If a court finds there was no fraud or willful misrepresentation, or if the Department of Justice decides not to prosecute, the Certifying Officer shall decide the case on the merits of the application.

(d) *Finding of fraud or willful misrepresentation.* If as referenced in § 656.30(d), a court, the DHS or the Department of State determines there was fraud or willful misrepresentation involving a labor certification

application, the application will be considered to be invalidated, processing is terminated, a notice of the termination and the reason therefore is sent by the Certifying Officer to the employer, attorney/agent, as appropriate, and a copy of the notification is sent by the Certifying Officer to the alien and to the Department of Labor's Office of Inspector General.

§ 656.32 Revocation of approved labor certifications.

(a) *Basis for DOL revocation.* The Certifying Officer in consultation with the Chief, Division of Foreign Labor Certification may take steps to revoke an approved labor certification, if he/she finds the certification was not justified. A labor certification may also be invalidated by DHS or the Department of State as set forth in § 656.30(d).

(b) *Department of Labor procedures for revocation.* (1) The Certifying Officer sends to the employer a *Notice of Intent to Revoke* an approved labor certification which contains a detailed statement of the grounds for the revocation and the time period allowed for the employer's rebuttal. The employer may submit evidence in rebuttal within 30 days of receipt of the notice. The Certifying Officer must consider all relevant evidence presented in deciding whether to revoke the labor certification.

(2) If rebuttal evidence is not filed by the employer, the *Notice of Intent to Revoke* becomes the final decision of the Secretary.

(3) If the employer files rebuttal evidence and the Certifying Officer determines the certification should be revoked, the employer may file an appeal under § 656.26.

(4) The Certifying Officer will inform the employer within 30 days of receiving any rebuttal evidence whether or not the labor certification will be revoked.

(5) If the labor certification is revoked, the Certifying Officer will also send a copy of the notification to the DHS and the Department of State.

Subpart D—Determination of Prevailing Wage

§ 656.40 Determination of prevailing wage for labor certification purposes.

(a) *Application process.* The employer must request a prevailing wage determination from the SWA having jurisdiction over the proposed area of intended employment. The SWA must enter its wage determination on the form it uses and return the form with its endorsement to the employer. Unless the employer chooses to appeal the SWA's prevailing wage determination under § 656.41(a), it files the Application for Permanent Employment Certification either electronically or by mail with an ETA application processing center and maintains the SWA PWD in its files. The determination shall be submitted to an ETA application processing center in the event it is requested in the course of an audit.

(b) *Determinations.* The SWA determines the prevailing wage as follows:

(1) Except as provided in paragraphs (e) and (f) of this section, if the job opportunity is covered by a collective bargaining agreement (CBA) that was negotiated at arms-length between the union and the employer, the wage rate set forth in the CBA agreement is considered as not adversely affecting the wages of U.S. workers similarly employed, that is, it is considered the ''prevailing wage'' for labor certification purposes.

(2) If the job opportunity is not covered by a CBA, the prevailing wage for labor certification purposes shall be the arithmetic mean, except as provided in paragraph (b)(3) of this section, of the wages of workers similarly employed in the area of intended employment. The wage component of the DOL Occupational Employment Statistics Survey shall be used to determine the arithmetic mean, unless the employer provides an acceptable survey under paragraph (g) of this section.

(3) If the employer provides a survey acceptable under paragraph (g) of this section that provides a median and does not provide an arithmetic mean, the prevailing wage applicable to the employer's job opportunity shall be the median of the wages of workers similarly employed in the area of intended employment.

(4) The employer may utilize a current wage determination in the area under the Davis-Bacon Act, 40 U.S.C. 276a *et seq.*, 29 CFR part 1, or the McNamara-O'Hara Service Contract Act, 41 U.S.C. 351 *et seq.*

(c) *Validity period.* The SWA must specify the validity period of the prevailing wage, which in no event may be less than 90 days or more than 1 year from the determination date. To use a SWA PWD, employers must file their applications or begin the recruitment required by §§ 656.17(d) or 656.21 within the validity period specified by the SWA.

(d) *Similarly employed.* For purposes of this section, similarly employed means having substantially comparable jobs in the occupational category in the area of intended employment, except that, if a representative sample of workers in the occupational category can not be obtained in the area of intended employment, similarly employed means:

(1) Having jobs requiring a substantially similar level of skills within the area of intended employment; or

(2) If there are no substantially comparable jobs in the area of intended employment, having substantially comparable jobs with employers outside of the area of intended employment.

(e) *Institutions of higher education and research entities.* In computing the prevailing wage for a job opportunity in an occupational classification in an area of intended employment for an employee of an institution of higher education, or an affiliated or related nonprofit entity, a nonprofit research organization, or a Governmental research organization, the prevailing wage level takes into account the wage levels of employees only at such institutions and organizations in the area of intended employment.

(1) The organizations listed in this paragraph (e) are defined as follows:

(i) *Institution of higher education* means an institution of higher education as defined in section 101(a) of the Higher Education Act of 1965. Section 101(a) of that Act, 20 U.S.C. 1001(a)(2000), provides an institution of higher education is an educational institution in any state that:

(A) Admits as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate;

(B) Is legally authorized within such state to provide a program of education beyond secondary education;

(C) Provides an educational program for which the institution awards a bachelor's degree or provides not less than a two-year program that is acceptable for full credit toward such a degree;

(D) Is a public or other nonprofit institution; and

(E) Is accredited by a nationally recognized accrediting agency or association or, if not so accredited, is an institution that has been granted preaccreditation status by such an agency or association that has been recognized by the Secretary of Education for the granting of preaccreditation status, and the Secretary of Education has determined there is satisfactory assurance the institution will meet the accreditation standards of such an agency or association within a reasonable time.

(ii) *Affiliated or related nonprofit entity* means a nonprofit entity (including but not limited to a hospital and a medical or research institution) connected or associated with an institution of higher education, through shared ownership or control by the same board or federation, operated by an institution of higher education, or attached to an institution of higher education as a member, branch, cooperative, or subsidiary.

(iii) *Nonprofit research organization or Governmental research organization* means a research organization that is either a nonprofit organization or entity primarily engaged in basic research and/or applied research, or a United States Government entity whose primary mission is the performance or promotion of basic research and/or applied research. Basic research is general research to gain more comprehensive knowledge or understanding of the subject under study, without specific applications in mind. Basic research is also research that advances scientific knowledge, but does not have specific immediate commercial objectives although it may be in fields of present or commercial interest. It may include research and investigation in the sciences, social sciences, or humanities. Applied research is research to gain knowledge or understanding to determine the means by which a specific, recognized need may be met. Applied research includes investigations oriented to discovering new scientific knowledge that has specific commercial objectives with respect to products, processes, or services. It may include research and investigation in the sciences, social sciences, or humanities.

(2) *Nonprofit organization or entity*, for the purpose of this paragraph (e), means an organization qualified as a tax exempt organization under the Internal Revenue Code of 1986, section 501(c)(3), (c)(4), or (c)(6) (26 U.S.C. 501(c)(3), (c)(4) or (c)(6)), and which has received approval as a tax exempt organization from the Internal Revenue Service, as it relates to research or educational purposes.

(f) *Professional athletes.* In computing the prevailing wage for a professional athlete (defined in Section 212(a)(5)(A)(iii)(II) of the Act) when the job opportunity is covered by professional sports league rules or regulations, the wage set forth in those rules or regulations is considered the prevailing wage (see Section 212(p)(2) of the Act). INA Section 212(a)(5)(A)(iii)(II), 8 U.S.C. 1182(a)(5)(A)(iii)(II) (1999), defines ''professional athlete'' as an individual who is employed as an athlete by—

(1) A team that is a member of an association of six or more professional sports teams whose total combined revenues exceed $10,000,000 per year, if the association governs the conduct of its members and regulates the contests and exhibitions in which its member teams regularly engage; or

(2) Any minor league team that is affiliated with such an association.

(g) *Employer-provided wage information.* (1) If the job opportunity is not covered by a CBA, or by a professional sports league's rules or regulations, the SWA must consider wage information provided by the employer in making a prevailing wage determination. An employer survey can be submitted either initially or after SWA issuance of a prevailing wage determination derived from the OES survey. In the latter situation, the new employer survey submission will be deemed a new prevailing wage determination request.

(2) In each case where the employer submits a survey or other wage data for which it seeks acceptance, the employer must provide the SWA with enough information about the survey methodology, including such items as sample size and source, sample selection procedures, and survey job descriptions, to allow the SWA to make a determination about the adequacy of the data provided and validity of the statistical methodology used in conducting the survey in accordance with guidance issued by the ETA national office.

(3) The survey submitted to the SWA must be based upon recently collected data:

(i) A published survey must have been published within 24 months of the date of submission to the SWA, must be the most current edition of the survey, and the data upon which the survey is based must have been collected within 24 months of the publication date of the survey.

(ii) A survey conducted by the employer must be based on data collected within 24 months of the date it is submitted to the SWA.

(4) If the employer-provided survey is found not to be acceptable, the SWA must inform the employer in writing of the reasons the survey was not accepted.

(5) The employer, after receiving notification that the survey it provided for the SWA's consideration is not acceptable, may file supplemental information as provided in paragraph (h) of this section, file a new request for a prevailing wage determination, or appeal under § 656.41.

(h) *Submittal of supplemental information by employer.* (1) If the employer disagrees with the skill level assigned to its job opportunity, or if the SWA informs the employer its survey is not acceptable, or if there are other legitimate bases for such a review, the employer may submit supplemental information to the SWA.

(2) The SWA must consider one supplemental submission about the employer's survey or the skill level the SWA assigned to the job opportunity or any other legitimate basis for the employer to request such a review. If the SWA does not accept the employer's survey after considering the supplemental information, or affirms its determination concerning the skill level, it must inform the employer of the reasons for its decision.

(3) The employer may then apply for a new wage determination or appeal under § 656.41.

(i) *Wage can not be lower than required by any other law.* No prevailing wage determination for labor certification purposes made under this section permits an employer to pay a wage lower than the highest wage required by any applicable Federal, state, or local law.

(j) *Fees prohibited.* No SWA or SWA employee may charge a fee in connection with the filing of a request for a PWD, responding to such a request, or responding to a request for a review of a SWA prevailing wage determination under § 656.41.

§ 656.41 Certifying Officer review of prevailing wage determinations.

(a) *Review of SWA prevailing wage determinations.* Any employer desiring review of a SWA PWD must make a request for such review within 30 days of the date from when the PWD was issued by the SWA. The request for review must be sent to the SWA that issued the PWD within 30 days of the date of the PWD; clearly identify the PWD from which review is sought; set forth the particular grounds for the request; and include all the materials pertaining to the PWD submitted to the SWA up to the date of the PWD received from the SWA.

(b) *Transmission of request to processing center.* (1) Upon the receipt of a request for review, the SWA must review the employer's request and accompanying documentation, and add any material that may have been omitted by the employer, including any material sent to the employer by the SWA up to the date of the PWD.

(2) The SWA must send a copy of the employer's appeal, including any material added under paragraph (b)(1) of

this section, to the appropriate ETA application processing center.

(3) The SWA must send a copy of any material added by the SWA under paragraph (b)(1) of this section to the employer.

(c) *Designations.* The director(s) of the ETA application processing center(s) will determine which CO will review the employer's appeal.

(d) *Review on the record.* The CO reviews the SWA PWD solely on the basis upon which the PWD was made and, upon the request for review, may:

(1) Affirm the prevailing wage determination issued by the SWA;

(2) Modify the prevailing wage determination; or

(3) Remand the matter to the SWA for further action.

(e) *Request for review by BALCA.* Any employer desiring review of a CO prevailing wage determination must make a request for review of the determination by the Board of Alien Labor Certification Appeals within 30 days of the date of the decision of the CO.

(1) The request for review, statements, briefs, and other submissions of the parties and amicus curiae must contain only legal arguments and only such evidence that was within the record upon which the affirmation of the PWD by the SWA was based.

(2) The request for review must be in writing and addressed to the CO who made the determination. Upon receipt of a request for a review, the CO must immediately assemble an indexed appeal file in reverse chronological order, with the index on top followed by the most recent document.

(3) The CO must send the Appeal File to the Office of Administrative Law Judges, Board of Alien Labor Certification Appeals, 800 K Street, Suite 400–N, Washington, DC 20001–8002.

(4) The BALCA handles the appeals in accordance with § 656.26 and § 656.27 of this part.

Signed in Washington, DC, this 13th day of December, 2004.

Emily Stover DeRocco,

Assistant Secretary, Employment and Training Administration.

Editorial Note: The ETA Form 9089 and instructions will not appear in the Code of Federal Regulations.

BILLING CODE 4510–30–P

OMB Approval:
Expiration Date:

Application for Permanent Employment Certification
Form ETA 9089 - Instructions
U.S. Department of Labor

Appendix B
Draft

IMPORTANT: Please read these instructions carefully before completing Form ETA 9089 – Application for Permanent Employment Certification. These instructions contain full explanations of the questions and attestations that make up Form ETA 9089.

Any employer or alien, or their agent or attorney, who knowingly and willingly furnishes any false information in the preparation of Form ETA 9089 and any supporting documentation, or aids, abets, or counsels another to do so is committing a federal offense, punishable by fine or imprisonment up to five years or both (18 U.S.C. 2,1001). Other penalties apply as well to fraud or misuse of this immigration document and to perjury with respect to this form (18 U.S.C. 1621 (2)).

Employing or continuing to employ an alien unauthorized to work in the United States is illegal and may subject the employer to criminal prosecution, civil money penalties, or both.

Privacy Statement Information

In accordance with the Privacy Act of 1974, as amended (5 U.S.C. 552a), you are hereby notified that the information provided herein is protected under the Privacy Act. The Department of Labor (Department) maintains a System of Records titled Employer Application and Attestation File for Permanent and Temporary Alien Workers (DOL/ETA-7) that includes this record.

Under routine uses for this system of records, case files developed in processing labor certification applications, labor condition applications, or labor attestations, may be released as follows: in connection with appeals of denials before the DOL Office of Administrative Law Judges and Federal courts, records may be released to the employers that filed such applications, their representatives, to named alien beneficiaries or their representatives, and to the DOL Office of Administrative Law Judges and Federal courts; and in connection with administering and enforcing immigration laws and regulations, records may be released to such agencies as the DOL Office of Inspector General, Employment Standards Administration, the Department of Homeland Security's U.S. Citizenship and Immigration Services and Bureau of Immigration and Customs Enforcement, and Department of State.

Further relevant disclosures may be made in accordance with the Privacy Act and under the following circumstances: in connection with federal litigation; for law enforcement purposes; to authorized parent locator persons under Pub. L. 93-647; to an information source or public authority in connection with personnel, security clearance, procurement, or benefit-related matters; to a contractor or their employees, grantees or their employees, consultants, or volunteers who have been engaged to assist the agency in the performance of Federal activities; for Federal debt collection purposes; to the Office of Management and Budget in connection with its legislative review, coordination, and clearance activities; to a Member of Congress or their staff in response to an inquiry of the Congressional office made at the written request of the subject of the record; in connection with records management; and to the news media and the public when a matter under investigation becomes public knowledge, the Solicitor of Labor determines the disclosure is necessary to preserve confidence in the integrity of the Department, or the Solicitor of Labor determines that a legitimate public interest exists in the disclosure of information, unless the Solicitor of Labor determines that disclosure would constitute an unwarranted invasion of personal privacy.

OMB Notice ***Paperwork Reduction Act/Information Control Number 1205-0015***

Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number.

Respondent's obligation to reply to these reporting requirements are required to obtain the benefits of permanent employment certification. (INA Act, Section 212(a)(5)). Public reporting burden for this collection of information is estimated to average 1¼ hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate to the Division of Foreign Labor Certification * U.S. Department of Labor * Room C4312 * 200 Constitution Ave., NW * Washington, DC * 20210. **Do NOT send the completed application to this address.**

Regulatory Information

The Permanent labor certification program is governed by the Immigration and Nationality Act, 8 U.S.C. 1101 et seq. and 20 CFR part 656. This regulation can be found at http://workforcesecurity.doleta.gov/foreign/perm.asp. Employers applying for labor certification must comply with all regulatory and statutory requirements.

How to File

A. Who May File:
An employer who desires to apply for a labor certification on behalf of an alien must file Form ETA 9089.

B. How/Where to File

1. For all occupations other than Schedule A and Sheepherders, Form ETA 9089 must be submitted to the Department of Labor for processing in one of two ways:

   - Online. Employers can complete and submit their Permanent applications online at the following web address: http://www.plc.doleta.gov
   - Mail. Applications can be mailed to the DOL Application Processing Center serving the state where the job will be located. Addresses can be found at the following web address: http://workforcesecurity.doleta.gov/foreign/

2. Applications for Sheepherders and Schedule A occupations are granted or denied by the United States Citizenship and Immigration Service (USCIS). All applications for Sheepherders and Schedule A labor certifications must be mailed to the USCIS service center serving the state where the job will be located. Addresses can be found at: http://www.uscis.gov

3. All application information (certified Form ETA 9089, recruitment information, refiling information (if applicable), etc...) must be retained by the employer or their attorney/agent until the visa petition has been approved.

Section A
Refiling Instructions

Employers that filed applications under the previous regulations (Form ETA 750) may, if the employer has not yet commenced the recruitment process by filing a job order, refile applications under the current regulations (Form ETA 9089) without loss of the previous filing date by the following process:

A. The application must be for the identical job opportunity filed under the previous regulations, and the employer must comply with all of the filing and recruiting requirements of the current regulation.
B. The employer must withdraw the case involving the identical job opportunity under the previous regulations and refile under the current regulations. Withdrawal instructions can be found at http://workforcesecurity.doleta.gov/foreign/

1. If this application was previously submitted under the former Permanent application process (Form ETA-750), select *Yes* to keep your original filing date. Otherwise, select *No*.

1-A. Enter the date you filed the application under the former Permanent application process (Form ETA 750). Enter the date in *mm/dd/yyyy* format.
1-B. Enter the case number assigned to the application you submitted under the former Permanent application process (Form ETA 750).

Section B
Schedule A or Sheepherder Information

1. Select *Yes* or *No*. If *Yes*, do not send the application to the Department of Labor. All applications in support of Schedule A or Sheepherder Occupations must be sent directly to the United States Citizenship and Immigration Service (CIS). Consult the USCIS website (http://uscis.gov) or the blue pages in your local phone directory for the address of the USCIS Service Center that serves the area where the alien will work.

Section C
Employer Information (Headquarters or Main Office)

1. Enter the full legal name of the business, firm, or organization, or, if an individual, enter the name used on legal documents.

2. Enter the address of the employer's principal place of business. This should be the address of the headquarters or main office.

3. Enter the city, state or province, country and postal code of the principal place of business.

4. Enter the phone number, country or area code first, and extension (if applicable) of the employer.

5. Enter the number of employees currently employed by the employer in the area of intended employment.

6. Enter the year the employer commenced business or incorporated. If the employer is a private household employing a household domestic worker, this question may be skipped.

7. Enter the employer's nine-digit Federal Employer Identification Number (EIN), which is assigned by the Internal Revenue Service.

8. Enter the North American Industry Classification System (NAICS) code. This is a six-digit number. If you do not know the NAICS code, you can search for the correct code at http://www.naics.com/search.htm.

9. Select *Yes* or *No*. Closely Held Corporations are corporations that have relatively few shareholders and whose shares are not generally traded in the securities market.

Section D
Employer Contact Information

This information must be different than the agent or attorney information entered in Section E. The person listed in this section may be contacted for authentication of the application.

1. Enter the full legal name of the employer's point of contact.

2. Enter the business address of the employer's point of contact. P.O. Boxes are not acceptable.

3. Enter the city, state or province, country, and postal code of the employer's point of contact.

4. Enter the phone number, country or area code first, and extension (if applicable) of the employer's point of contact.

5. Enter the full business e-mail address of the employer's point of contact.

Section E
Agent or Attorney Information

This information must be different than the employer contact information entered in Section D.

1. Enter the full legal name of the agent or attorney designated to act on behalf of the employer for this application.

2. Enter the name of the company or law firm that employs the agent or attorney.

3. Enter the nine-digit Federal Employer Identification Number (EIN) assigned to the agent or attorney's company or law firm by the IRS.

4. Enter the phone number, country or area code first, and the extension (if applicable) of the agent or attorney.

5. Enter the complete mailing address of the agent or attorney.

6. Enter the city, state or province, country and postal code of the agent or attorney.

7. Enter the full business e-mail address of the agent or attorney.

Section F
Prevailing Wage Information

Before you can complete this section of the form, you must secure a Prevailing Wage Determination (PWD) from the State Workforce Agency (SWA) responsible for the state in which the work will be performed. A listing of SWAs and their contact information can be found at: http://workforcesecurity.doleta.gov/map.asp

1. Enter the prevailing wage tracking number assigned by the SWA. This field is optional as not all states assign a code.

2. Enter the Standard Occupational Classification (SOC) code (or O*NET/OES extension) specific to the occupation listed in the prevailing wage determination request. Further information concerning SOC codes can be found at: http://ows.doleta.gov/foreign/

3. Enter the occupational title associated with the SOC/O*NET(OES) code as determined by the SWA.

4. Enter the skill level of the job subject to this application as determined by the SWA.

5. Enter the prevailing wage rate for the job as assigned by the SWA in the PWD. Select whether the offered wage is in terms of hour, week, bi-weekly, month, or year.

6. Identify the source of the prevailing wage from among the following: Occupational Employment Statistics (OES), Collective Bargaining Agreement (CBA), Employer Conducted Survey, Davis-Bacon Act (DBA), McNamara-O'Hara Service Contract Act (SCA), or Other.

6-A. If *Other* is identified for question 6, enter the name of the prevailing wage source as determined by the SWA.

7. Enter the date the prevailing wage was issued by the appropriate state agency. Enter the date in *mm/dd/yyyy* format.

8. Enter the expiration date of the validity period of the PWD received from the appropriate state agency. Enter the date in *mm/dd/yyyy* format.

Section G
Wage Offer Information

1. Enter the wage rate to be paid to the employee. If the wage offer is expressed as a range, enter the bottom of the wage range to be paid in the From section and enter the top of the wage range to be paid into the optional To section.

   Identify whether the wage rate to be paid is in terms of per hour, week, bi-weekly, month, or year (you may only select one).

Section H
Job Opportunity Information

1. Enter the full address of the primary site or location where the work will actually be performed.

2. Enter the city, state, and postal code of the primary site or location where the work will actually be performed.

3. Enter the common name or payroll title of the job being offered.

4. Select the minimum level of education required to adequately perform the duties of the job being offered.

4-A. If *Other* was selected for question 4, identify the education required. Examples are MD and JD.
4-B. Enter the major field of study required in reference to Question 4. Skip this question if the answer to question 4 is *None or High School*.

5. Select Yes or No to identify whether or not training is required for the job. Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Do not include restrictive requirements that are not actual business necessities for performance of the job and that would limit consideration of other qualified U.S. workers.

5-A. If the answer to question 5 is *Yes*, enter the number of months of training that is required.
5-B. If the answer to question 5 is *Yes*, enter the field of training that is required for the job offered.

6. Select *Yes* or *No* to identify whether experience in the job offered is a requirement.

6-A. If the answer to question 6 is *Yes*, enter the number of months experience that are required for the job.

7. Select *Yes* or *No* to indicate if an alternate field of study is acceptable. This field of study is alternate to the major field of study indicated in question 4-B.

7-A. If the answer to question 7 is *Yes*, enter the alternate field of study that is acceptable for the job offered.

8. Select *Yes* or *No* to indicate if there is an alternate combination of education and experience in the job offered that will be accepted in lieu of the minimum education requirement identified in question 4 of this section. For example, if the requirement is bachelors + 2 years experience but the employer will accept a masters + 1 year experience, an alternate combination of education and experience exists.

8-A. If the answer to question 8 is *Yes*, select the alternate level of education that in combination with the number of months of experience specified in question 8-C is acceptable.
8-B. If the answer to question 8-A is *Other*, enter the alternate level of education that is acceptable.
8-C. If the answer to question 8 is *Yes*, enter the number of months of experience in the job offered that in combination with the level of education specified in question 8-A is acceptable.

9. Select *Yes* or *No*.

10. Select *Yes* or *No*.

Section H Continued

10-A. If the answer to question 10 is *Yes*, enter the number of months of experience in the alternate occupation that is required for the job offered.

10-B. If the answer to question 10 is Yes, enter the alternate occupation that is acceptable for the job offered.

11. Describe the job duties. Detail what would be performed by any worker filling the job. Specify equipment used and pertinent working conditions.

12. Select *Yes* or *No* to indicate if the job opportunity's requirements as specified in questions H-4 to H-11 are normal for the occupation being offered. If the answer to this question is No, the employer must be prepared to provide documentation demonstrating that the job requirements are supported by business necessity.

13. Select *Yes* or *No*. If the answer to this question is Yes, the employer must be prepared to provide documentation demonstrating that the language requirements are supported by business necessity.

14. Enter the job related requirements. Examples are shorthand and typing speeds, specific foreign language proficiency, and test results. Document business necessity for a foreign language requirement.

15. Select *Yes* or *No* to identify whether or not the job includes a combination of occupations. For example, engineer-pilot.

16. Select *Yes* or *No*.

17. Select *Yes* or *No*.

18. Select *Yes* or *No* to identify whether the application is for a live-in domestic service worker. Domestic service workers refer to "private household workers." The domestic service must be performed in or about the private home of the employer whether that home is a fixed place of abode or a temporary dwelling as in the case of an individual or family traveling on vacation. A separate and distinct dwelling maintained by an individual or a family in an apartment house, condominium, or hotel may constitute a private home.

18-A. If the answer to question 18 is *Yes*, select whether the employer and the alien have executed an employment contract and the employer has provided a copy of the contract to the alien. Select *NA (not applicable)* if the answer to question 18 is *No*.

Section I
Recruitment Information

1. Select *Yes* or *No*. Professional Occupations are defined as occupations for which the attainment of a bachelor's or higher degree is a usual education requirement for the occupation. ***For the purpose of this question, Professional Occupations do not include college or university teachers.*** If the answer to this question is *Yes*, you must complete questions 6 – 22 of this section.

2. Select *Yes* or *No to* identify whether or not the application is for a college or university teacher. If the answer to this question is *Yes*, you must answer questions 2-A and 2-B.

2-A. Select *Yes* or *No*. If the answer to this question is *Yes*, you must complete questions 3 – 5 of this section. In the event of an audit the employer will be required to provide documentation as defined by 20 CFR 656.18.

2-B. Select *Yes* or *No*. If the answer to this question is *Yes*, you must complete questions 6 – 22 of this section.

Section I Continued

Complete Questions 3 – 5 only if the answer to Section I/Question 2-A is Yes

3. Enter the date the alien was selected using the competitive recruitment and selection process. Enter the date in *mm/dd/*yyyy format.

4. Enter the name of the national professional journal in which the advertisement was placed.

5. Enter additional recruitment information. You may add an attachment if more space is necessary.

Complete Questions 6 – 12 only if the answer to Section I/Questions 1 or 2-B is Yes.

6. Enter the start date for the State Workforce Agency job order. Enter the date in *mm/dd/*yyyy format.

7. Enter the end date for the State Workforce Agency job order. Enter the date in *mm/dd/*yyyy format.

8. Select *Yes* or *No.*

9. Enter the name of the newspaper (of general circulation) in which the first advertisement was placed.

10. Enter the date of the first advertisement identified in question 9. Enter the date in *mm/dd/*yyyy format.

11. Enter the name of the newspaper or professional journal in which the second advertisement was placed (if applicable). Also, select a checkbox to indicate whether the ad ran in a Newspaper or Journal.

12. Enter the date of the second Sunday advertisement (if newspaper) or date of advertisement (if other than newspaper) identified in question 11. Enter the date in *mm/dd/*yyyy format.

If the answer to Section I/Questions I.1 or I.2-B is Yes, at least 3 of the items in this section must be completed. For questions 13-22, enter the dates in *mm/dd/*yyyy format.

13. Enter the dates advertised at a job fair (if applicable).

14. Enter the dates of on-campus recruiting (if applicable).

15. Enter the dates advertised on the employer's website (if applicable).

16. Enter the dates advertised with a trade or professional organization (if applicable).

17. Enter the dates listed with a job search website (if applicable).

18. Enter the dates listed with a private employment firm (if applicable).

19. Enter the dates advertised with an employee referral program (if applicable).

20. Enter the dates advertised with a campus placement office (if applicable).

21. Enter the dates advertised with a local or ethnic newspaper (if applicable).

22. Enter the dates advertised with radio and TV stations (if applicable).

All must complete this section

23. Select *Yes* or *No.*

23-A. If you answer *Yes* to question 23, please enter details of the payment for the submission of the application.

Section I Continued

24. Select *Yes*, *No*, or *NA*.

25. Select *Yes*, *No*, or *NA*.

26. Select *Yes* or *No*.

26-A. Select *Yes*, *No*, or *NA* if the answer to question 26 is *No*. A related occupation is defined as any occupation that requires workers to perform a majority of the essential duties involved in the occupation for which certification is sought.

Section J
Alien Information

This section must be different than the agent or attorney information in Section E.

1. Enter the alien's last name, first name, and full middle name.

2. Enter the alien's current address. This should be the address of the alien's current residence.

3. Enter the city, state or province, country, and postal code of the alien's current residence.

4. Enter the phone number for the alien's current residence.

5. Enter the country of current citizenship for the alien.

6. Enter the alien's country of birth.

7. Enter the alien's date of birth in *mm/dd/yyyy* format.

8. Enter the alien's class of admission if the alien has one. This is the current visa status of the alien (e.g., H-1B, H-2A, etc.).

9. Enter the alien registration number if the alien has one. This is a number assigned to the alien by USCIS.

10. Enter the alien admission number if the alien has one. This is a number assigned to the alien by USCIS.

11. Select the highest level of education received relevant to the requested occupation that has been achieved by the alien. If the highest level of education achieved by the alien is not shown on the form, select *Other.*

11-A. If *Other* was selected for question 11, identify the highest level of education relevant to the requested occupation achieved by the alien. (e.g. MD, JD)

12. Enter the major field(s) of study for the alien in reference to the highest level of relevant education achieved.

13. Enter the year the relevant education was completed by the alien. Enter the year in *yyyy* format.

14. Enter the name of the institution where the relevant education achieved by the alien, specified in question 11, was obtained.

15. Enter the address of the institution indicated in question 14.

16. Enter the city, state or province, country, and postal code of the institution indicated in question 14.

17. Select *Yes*, *No*, or *NA*.

Section J Continued

18. Select *Yes*, *No*, or *NA*.

19. Select *Yes*, *No*, or *NA*.

20. Select *Yes*, *No*, or *NA*.

21. Select *Yes*, *No*, or *NA*.

22. Select *Yes* or *No*.

23. Select *Yes* or *No*.

Section K
Alien Work Experience

List all jobs held by the alien in the past three years whether or not it's related to the job opportunity for which the employer is seeking certification. Also list all other experiences that qualify the alien for the job opportunity. If you need more space to complete this section, you may use additional pages as attachments, but you must list the primary jobs and experiences in these spaces.

Instructions for Section a – Job 1

1. Enter the full legal name of the business, firm, or organization that employed the alien.

2. Enter the address of the employer.

3. Enter the city, state or province, country and postal code for the business address.

4. Enter the type of business of the employer. For example, food service, landscaping, computer hardware manufacturing, etc.

5. Enter the title of the job held by the alien.

6. Enter the date the alien started to work for the employer.

7. Enter the date the alien stopped working for the employer.

8. Enter the number of hours per week the alien worked while employed.

9. Enter the details of the job performed by the alien while employed. Include the phone number of the employer and the name of the alien's supervisor. Job descriptions should also include specific details of the work performed, with emphasis on skills and knowledge required, managerial or supervisory functions performed, materials or products handled, and machines, tools, and equipment used or operated.

Instructions for Section b – Job 2

Same as instructions for Section a – Job 1.

Instructions for Section c – Job 3

Same as instructions for Section a – Job 1.

Section L
Alien Declaration

1. Enter the last name, first name, and middle initial of the alien signing the application.

2. The signature of the alien identified by question 1 and the date of signature are required. The date of signature must be in *mm/dd/yyyy* format.

   Note – The signature and date signed do not have to be filled out when electronically submitting to the Department of Labor for processing, but must be completed when submitting by mail. If submitted electronically, the application MUST be signed immediately upon receipt before it can be submitted to USCIS for final processing.

Section M
Declaration of Preparer

1. Select *Yes* or *No*. If you select *No*, questions 2 – 5 must be completed.

2. Enter the full legal name of the person who prepared the application.

3. Enter the job title held by the person who prepared the application.

4. Enter the e-mail address of the person who prepared the application.

5. The signature of the preparer identified by question 2 and the date of signature are required. The date of signature must be in *mm/dd/yyyy* format.

   Note – The signature and date signed do not have to be filled out when electronically submitting to the Department of Labor for processing, but must be completed when submitting by mail. If submitted electronically, the application MUST be signed immediately upon receipt before it can be submitted to USCIS for final processing.

Section N
Employer Declaration

1. Enter the full legal name of the employer signing the application.

2. Enter the job title held by the employer.

3. The signature of the employer identified by question 1 and the date of signature are required. The date of signature must be in *mm/dd/yyyy* format.

   Note – The signature and date signed do not have to be filled out when electronically submitting to the Department of Labor for processing, but must be completed when submitting by mail. If submitted electronically, the application MUST be signed immediately upon receipt before it can be submitted to USCIS for final processing.

Section O
U.S. Government Agency Use Only

Do not complete this section.

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Please read and review the filing instructions before completing this form. A copy of the instructions can be found at www.workforcesecurity.doleta.gov/foreign/

Employing or continuing to employ an alien unauthorized to work in the United States is illegal and may subject the employer to criminal prosecution, civil money penalties, or both.

A. Refiling Instructions

1. Are you seeking to utilize the filing date from a previously submitted Application for Alien Employment Certification (ETA 750)?	❑ Yes	❑ No
1-A. If Yes, enter the previous filing date		
1-B. Indicate the previous case number		

B. Schedule A or Sheepherder Information

1. Is this application in support of a Schedule A or Sheepherder Occupation?	❑ Yes	❑ No
If Yes, do NOT send this application to the Department of Labor. All applications in support of Schedule A or Sheepherder Occupations must be sent directly to the United States Citizenship and Immigration Services (CIS).		

C. Employer Information (Headquarters or Main Office)

1. Employer's name			
2. Address 1			
Address 2			
3. City	State/Province	Country	Postal code
4. Phone number		Extension	
5. Number of employees in area of intended employment		6. Year commenced business	
7. EIN number		8. NAICS code	
9. Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, incorporators, and the alien?		❑ Yes	❑ No

D. Employer Contact Information (This section must be filled out. This information must be different from the agent or attorney information listed in Section E).

1. Contact's last name	First name		Middle initial
2. Address 1			
Address 2			
3. City	State/Province	Country	Postal code
4. Phone number		Extension	
5. E-mail address			

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E. Agent or Attorney Information (If applicable)

1. Agent or attorney's last name	First name		Middle initial
2. Firm name			
3. Firm EIN	4. Phone number	Extension	
5. Address 1			
Address 2			
6. City	State/Province	Country	Postal code
7. E-mail address			

F. Prevailing Wage Information

1. Prevailing wage tracking number (if applicable)		2. SOC/O*NET(OES) code			
3. Occupation Title		4. Skill Level			
5. Prevailing wage $	Per: (Choose only one) ❑ Hour	❑ Week	❑ Bi-Weekly	❑ Month	❑ Year
6. Prevailing wage source (Choose only one) ❑ OES	❑ CBA	❑ Employer Conducted Survey	❑ DBA	❑ SCA	❑ Other
6-A. If Other is indicated in question 6, specify:					
7. Determination date		8. Expiration date			

G. Wage Offer Information

1. Offered wage From: $	To: (Optional) $	Per: (Choose only one) ❑ Hour	❑ Week	❑ Bi-Weekly	❑ Month ❑ Year

H. Job Opportunity Information (Where work will be performed)

1. Primary worksite (where work is to be performed) address 1							
Address 2							
2. City		State		Postal code			
3. Job title							
4. Education: minimum level required: ❑ None	❑ High School	❑ Associate's	❑ Bachelor's	❑ Master's	❑ Doctorate	❑ Other	
4-A. If Other is indicated in question 4, specify the education required:							
4-B. Major field of study							
5. Is training required in the job opportunity? ❑ Yes ❑ No	5-A. If Yes, number of months training required:						

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H. Job Opportunity Information Continued

5-B. Indicate the field of training:
6. Is experience in the job offered required for the job? ❑ Yes ❑ No 6-A. If Yes, number of months experience required:
7. Is there an alternate field of study that is acceptable? ❑ Yes ❑ No
7-A. If Yes, specify the major field of study:
8. Is there an alternate combination of education and experience that is acceptable? ❑ Yes ❑ No
8-A. If Yes, specify the alternate level of education required: ❑ None ❑ High School ❑ Associate's ❑ Bachelor's ❑ Master's ❑ Doctorate ❑ Other
8-B. If Other is indicated in question 8-A, indicate the alternate level of education required:
8-C. If applicable, indicate the number of years experience acceptable in question 8:
9. Is a foreign educational equivalent acceptable? ❑ Yes ❑ No
10. Is experience in an alternate occupation acceptable? ❑ Yes ❑ No 10-A. If Yes, number of months experience in alternate occupation required:
10-B. Indentify the job title of the acceptable alternate occupation:
11. Job duties – If submitting by mail, add attachment if necessary. Job duties description must begin in this space.

12. Are the job opportunity's requirements normal for the occupation? ***If the answer to this question is No, the employer must be prepared to provide documentation demonstrating that the job requirements are supported by business necessity.***	❑ Yes ❑ No
13. Is knowledge of a foreign language required to perform the job duties? ***If the answer to this question is Yes, the employer must be prepared to provide documentation demonstrating that the language requirements are supported by business necessity.***	❑ Yes ❑ No

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H. Job Opportunity Information Continued

14. Specific skills or other requirements – If submitting by mail, add attachment if necessary. Skills description must begin in this space.	
15. Does this application involve a job opportunity that includes a combination of occupations?	❑ Yes ❑ No
16. Is the position identified in this application being offered to the alien identified in Section J?	❑ Yes ❑ No
17. Does the job require the alien to live on the employer's premises?	❑ Yes ❑ No
18. Is the application for a live-in household domestic service worker?	❑ Yes ❑ No
18-A. If Yes, have the employer and the alien executed the required employment contract and has the employer provided a copy of the contract to the alien?	❑ Yes ❑ No ❑ NA

I. Recruitment Information

a. Occupation Type – All must complete this section.

1. Is this application for a **professional occupation**, other than a college or university teacher? Professional occupations are those for which a bachelor's degree (or equivalent) is normally required.	❑ Yes ❑ No
2. Is this application for a college or university teacher? **If Yes, complete questions 2-A and 2-B below.**	❑ Yes ❑ No
2-A. Did you select the candidate using a competitive recruitment and selection process?	❑ Yes ❑ No
2-B. Did you use the basic recruitment process for professional occupations?	❑ Yes ❑ No

b. Special Recruitment and Documentation Procedures for College and University Teachers – Complete only if the answer to question I.2-A is Yes.

3. Date alien selected
4. Name of national professional journal in which advertisement was placed:
5. Specify additional recruitment information in this space. Add an attachment if necessary.

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I. Recruitment Information Continued

c. Professional/Non-Professional Information –
Complete this section unless your answers to questions* I.a.1 *is NO and* I.a.2.B *is YES

6. Start date for the SWA job order	7. End date for the SWA job order
8. Is there a Sunday edition of the newspaper in the area of intended employment?	❑ Yes ❑ No
9. Name of newspaper (of general circulation) in which the first advertisement was placed:	
10. Date of first advertisement identified in question 9:	
11. Name of newspaper or professional journal in which second advertisement was placed (if applicable).	❑ Newspaper ❑ Journal
12. Date of second Sunday advertisement (if newspaper) or date of advertisement (if other than newspaper) identified in question 11:	

d. Professional Information – Complete if the answer to question I.1 is Yes or if the answer to I.2-B is Yes. Complete at least 3 of the items.

13. Dates advertised at job fair From: To:	14. Dates of on-campus recruiting From: To:
15. Dates posted on employer web site From: To:	16. Dates advertised with trade or professional organization From: To:
17. Dates listed with job search web site From: To:	18. Dates listed with private employment firm From: To:
19. Dates advertised with employee referral program From: To:	20. Dates advertised with campus placement office From: To:
21. Dates advertised with local or ethnic newspaper From: To:	22. Dates advertised with radio and TV ads From: To:

e. General Information – All must complete this section.

23. Has the employer received payment of any kind for the submission of this application?	❑ Yes ❑ No
23-A. If Yes, specify:	
24. Has the bargaining representative for workers in the occupation in which the alien will be employed been provided with notice of this filing at least 30 days but not more than 180 days before the date the application is filed?	❑ Yes ❑ No ❑ NA
25. If there is no bargaining representative, has a notice of this filing been posted for 10 business days in a conspicuous location at the place of employment, at least 30 days before but not more than 180 days before the date the application is filed?	❑ Yes ❑ No ❑ NA
26. Has the employer had a layoff in the area of intended employment in the occupation involved in this application or in a related occupation within the six months immediately preceding the filing of this application?	❑ Yes ❑ No
26-A. If Yes, were the laid off U.S. workers notified and considered for the job opportunity for which certification is sought?	❑ Yes ❑ No ❑ NA

J. Alien Information (This section must be filled out. This information must be different from the agent or attorney information listed in Section E).

1. Alien's last name	First name	Full middle name
2. Current address 1		
Address 2		

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J. Alien Information Continued

3. City	State/Province	Country	Postal code
4. Phone number of current residence			
5. Country of citizenship	6. Country of birth		
7. Alien's date of birth	8. Class of admission		
9. Alien registration number (A#)	10. Alien admission number (I-94)		
11. Education: highest level achieved relevant to the requested occupation: ❑ None ❑ High School ❑ Associate's ❑ Bachelor's ❑ Master's ❑ Doctorate ❑ Other			
11-A. If Other indicated in question 11, specify			
12. Specify major field(s) of study			
13. Year relevant education completed			
14. Institution where relevant education specified in question 11 was received			
15. Address 1 of conferring institution			
Address 2			
16. City	State/Province	Country	Postal code

17. Did the alien complete the training required for the requested job opportunity, as indicated in question H.5?	❑ Yes ❑ No ❑ NA
18. Does the alien have the experience as required for the requested job opportunity indicated in question H.6?	❑ Yes ❑ No ❑ NA
19. Does the alien possess the alternate combination of education and experience as indicated in question H.8?	❑ Yes ❑ No ❑ NA
20. Does the alien have the experience in an alternate occupation specified in question H.10?	❑ Yes ❑ No ❑ NA
21. Did the alien gain any of the qualifying experience with the employer in a position substantially comparable to the job opportunity requested?	❑ Yes ❑ No ❑ NA
22. Did the employer pay for any of the alien's education or training necessary to satisfy any of the employer's job requirements for this position?	❑ Yes ❑ No
23. Is the alien currently employed by the petitioning employer?	❑ Yes ❑ No

K. Alien Work Experience

List all jobs the alien has held during the past 3 years. Also list any other experience that qualifies the alien for the job opportunity for which the employer is seeking certification.

a. Job 1

1. Employer name
2. Address 1

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K. Alien Work Experience Continued

Address 2			
3. City	State/Province	Country	Postal code
4. Type of business		5. Job title	
6. Start date	7. End date	8. Number of hours worked per week	
9. Job details (duties performed, use of tools, machines, equipment, etc.)			

b. Job 2

1. Employer name			
2. Address 1			
Address 2			
3. City	State/Province	Country	Postal code
4. Type of business		5. Job title	
6. Start date	7. End date	8. Number of hours worked per week	
9. Job details (duties performed, use of tools, machines, equipment, etc.)			

c. Job 3

1. Employer name			
2. Address 1			
Address 2			

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K. Alien Work Experience Continued

3. City	State/Province	Country	Postal code
4. Type of business		5. Job title	
6. Start date	7. End date	8. Number of hours worked per week	
9. Job details (duties performed, use of tools, machines, equipment, etc.)			

L. Alien Declaration

I declare under penalty of perjury that Sections J and K are true and correct. *I understand that to knowingly furnish false information in the preparation of this form and any supplement thereto or to aid, abet, or counsel another to do so is a federal offense punishable by a fine or imprisonment up to five years or both (18 U.S.C. 2, 1001).*

In addition, I **further declare** under penalty of perjury that I intend to accept the position offered in Section H of this application if I am granted a labor certification or visa or an adjustment of status based on this application.

1. Alien's last name	First name	Full middle name
2. Signature	Date signed	

M. Declaration of Preparer

1. **Was the application completed by the employer?** If No, you must complete this section.	❑ Yes	❑ No

I hereby certify that I have prepared this application at the direct request of the employer listed in Section C and that to the best of my knowledge the information contained herein is true and correct. *I understand that to knowingly furnish false information in the preparation of this form and any supplement thereto or to aid, abet, or counsel another to do so is a federal offense punishable by a fine, imprisonment up to five years or both (18 U.S.C. 2, 1001).*

2. Preparer's last name	First name	Middle initial
3. Title		
4. E-mail address		
5. Signature	Date signed	

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N. Employer Declaration

By virtue of my signature below, ***I HEREBY CERTIFY*** *the following conditions of employment:*

1. The offered wage equals or exceeds the prevailing wage and the employer will pay the prevailing wage from the time Permanent residency is granted or from the time the alien is admitted to take up the certified employment.
2. The wage is not based on commissions, bonuses or other incentives, unless the employer guarantees a wage paid on a weekly, bi-weekly, or monthly basis that equals or exceeds the prevailing wage.
3. I have enough funds available to pay the wage or salary offered the alien.
4. I will be able to place the alien on the payroll on or before the date of the alien's proposed entrance into the United States.
5. The employer's job opportunity does not involve unlawful discrimination, by race, creed, color, national origin, age, sex, religion, handicap, or citizenship.
6. The employer's job opportunity is not:
   a. Vacant because the former occupant is on strike or is being locked out in the course of a labor dispute involving a work stoppage; or
   b. At issue in a labor dispute involving a work stoppage.
7. The job opportunity's terms, conditions, and occupational environment are not contrary to Federal, State or local law.
8. The job opportunity has been and is clearly open to any U.S. worker.
9. The U.S. workers who applied for the job opportunity were rejected for lawful job-related reasons.
10. The job opportunity is for full-time, permanent employment.

I hereby designate the agent or attorney identified in section E (if any) to represent me for the purpose of labor certification and, by virtue of my signature in Block 3 below, **I take full responsibility** for the accuracy of any representations made by my agent or attorney.

I declare under penalty of perjury that I have read and reviewed this application and that to the best of my knowledge the information contained therein is true and accurate. *I understand that to knowingly furnish false information in the preparation of this form and any supplement thereto or to aid, abet, or counsel another to do so is a federal offense punishable by a fine or imprisonment up to five years or both (18 U.S.C. 2, 1001).*

1. Last name	First name	Middle initial
2. Title		
3. Signature	Date signed	

Note – The signature and date signed do not have to be filled out when electronically submitting to the Department of Labor for processing, but must be complete when submitting. If submitted electronically, the application MUST be signed *immediately upon receipt* before it can be submitted to USCIS for final processing.

O. U.S. Government Agency Use Only

Pursuant to the provisions of Section 212 (a)(5)(A) of the Immigration and Nationality Act, as amended, I hereby certify that there are not sufficient U.S. workers available and the employment of the above will not adversely affect the wages and working conditions of workers in the U.S. similarly employed.

Signature of Certifying Officer

Date Signed

Case Number

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P. OMB Information *Paperwork Reduction Act Information Control Number 1205-0015*

Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number.

Respondent's obligation to reply to these reporting requirements are required to obtain the benefits of permanent employment certification. (INA Act, Section 212(a)(5)). Public reporting burden for this collection of information is estimated to average 1¼ hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate to the Division of Foreign Labor Certification * U.S. Department of Labor * Room C4312 * 200 Constitution Ave., NW * Washington, DC * 20210.
Do NOT send the completed application to this address.

Q. Privacy Statement Information

In accordance with the Privacy Act of 1974, as amended (5 U.S.C. 552a), you are hereby notified that the information provided herein is protected under the Privacy Act. The Department of Labor (Department) maintains a System of Records titled Employer Application and Attestation File for Permanent and Temporary Alien Workers (DOL/ETA-7) that includes this record.

Under routine uses for this system of records, case files developed in processing labor certification applications, labor condition applications, or labor attestations, may be released as follows: in connection with appeals of denials before the DOL Office of Administrative Law Judges and Federal courts, records may be released to the employers that filed such applications, their representatives, to named alien beneficiaries or their representatives, and to the DOL Office of Administrative Law Judges and Federal courts; and in connection with administering and enforcing immigration laws and regulations, records may be released to such agencies as the DOL Office of Inspector General, Employment Standards Administration, the Department of Homeland Security's U.S. Citizenship and Immigration Services and Bureau of Immigration and Customs Enforcement, and Department of State.

Further relevant disclosures may be made in accordance with the Privacy Act and under the following circumstances: in connection with federal litigation; for law enforcement purposes; to authorized parent locator persons under Pub. L. 93-647; to an information source or public authority in connection with personnel, security clearance, procurement, or benefit-related matters; to a contractor or their employees, grantees or their employees, consultants, or volunteers who have been engaged to assist the agency in the performance of Federal activities; for Federal debt collection purposes; to the Office of Management and Budget in connection with its legislative review, coordination, and clearance activities; to a Member of Congress or their staff in response to an inquiry of the Congressional office made at the written request of the subject of the record; in connection with records management; and to the news media and the public when a matter under investigation becomes public knowledge, the Solicitor of Labor determines the disclosure is necessary to preserve confidence in the integrity of the Department, or the Solicitor of Labor determines that a legitimate public interest exists in the disclosure of information, unless the Solicitor of Labor determines that disclosure would constitute an unwarranted invasion of personal privacy.

[FR Doc. 04–27653 Filed 12–23–04; 8:45 am]
BILLING CODE 4510–30–C

Federal Register

Monday,
December 27, 2004

Part III

Securities and Exchange Commission

17 CFR Parts 200, 201, 230, et al.
Regulation NMS; Proposed Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR PARTS 200, 201, 230, 240, 242, 249, and 270

[Release No. 34–50870; File No. S7–10–04]

RIN 3235–AJ18

Regulation NMS

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rules and amendments to joint industry plans.

SUMMARY: The Securities and Exchange Commission (''Commission'') is reproposing rules under Regulation NMS and two amendments to the joint industry plans for disseminating market information. In addition to redesignating the national market system rules previously adopted under Section 11A of the Securities Exchange Act of 1934 (''Exchange Act''), Regulation NMS would include new substantive rules that are designed to modernize and strengthen the regulatory structure of the U.S. equity markets. First, the ''Trade-Through Rule'' would require trading centers to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the execution of trades at prices inferior to protected quotations displayed by other trading centers, subject to an applicable exception. To be protected, a quotation must be immediately and automatically accessible. Second, the ''Access Rule'' would require fair and non-discriminatory access to quotations, establish a limit on access fees to harmonize the pricing of quotations across different trading centers, and require each national securities exchange and national securities association to adopt and enforce rules that prohibit their members from engaging in a pattern or practice of displaying quotations that lock or cross automated quotations. Third, the ''Sub-Penny Rule'' would prohibit market participants from accepting, ranking, or displaying orders, quotations, or indications of interest in a pricing increment smaller than a penny, except for orders, quotations, or indications of interest that are priced at less than $1.00 per share. Finally, the Commission is reproposing amendments to the ''Market Data Rules'' that would update the requirements for consolidating, distributing, and displaying market information, as well as amendments to the joint industry plans for disseminating market information that would modify the formulas for allocating plan revenues (''Allocation Amendment'') and broaden participation in plan governance (''Governance Amendment'').

DATES: Comments must be received on or before January 26, 2005. Given the advanced stage of this rulemaking initiative, the Commission anticipates taking further action as expeditiously as possible after the end of the comment period. It therefore strongly encourages the public to submit their comments within the prescribed comment period. Comments received after that point cannot be assured of full consideration by the Commission.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/proposed.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number S7–10–04 on the subject line; or
- Use the Federal eRulemaking Portal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

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 Number S7–10–04. This file number should be included on the subject line if e-mail is used. To help us 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/proposed.shtml*). Comments also are available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549. 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.

FOR FURTHER INFORMATION CONTACT: *Trade-Through Rule:* Heather Seidel, Attorney Fellow, at (202) 942–0788, Jennifer Colihan, Special Counsel, at (202) 942–0735, David Hsu, Special Counsel, at (202) 942–0731, or Raymond Lombardo, Attorney, at (202) 942–8080; *Access Rule:* Heather Seidel, Attorney Fellow, at (202) 942–0788, or David Liu, Attorney, at (202) 942–8085; *Sub-Penny Rule:* Michael Gaw, Senior Special Counsel, at (202) 942–0158, or Ronesha Butler, Special Counsel, at (202) 942–0791; *Market Data Rules, Allocation Amendment, and Governance Amendment:* Sapna C. Patel, Special Counsel, at (202) 942–0166, or David Hsu, Special Counsel, at (202) 942–0731; *Regulation NMS:* Yvonne Fraticelli, Special Counsel, at (202) 942–0197; all of whom are in the Division of Market Regulation, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–1001.

SUPPLEMENTARY INFORMATION:

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I. Introduction

The Commission is reproposing Regulation NMS, a series of initiatives designed to modernize and strengthen the national market system (''NMS'') for equity securities.[1] These initiatives include:

(1) A new Trade-Through Rule, which would establish for all NMS stocks the fundamental principle of price priority for automated quotations that are immediately accessible;

(2) A new Access Rule, which would promote fair and non-discriminatory access to quotations displayed by NMS trading centers through a private linkage approach;

(3) A new Sub-Penny Rule, which would establish a uniform quoting increment of no less than one penny for quotations in NMS stocks equal to or greater than $1.00 per share to promote greater price transparency and consistency;

(4) Amendments to the Market Data Rules and joint industry plans that would allocate plan revenues to self-regulatory organizations (''SROs'') for their contributions to public price discovery and promote wider and more efficient distribution of market data; and

(5) A reorganization of existing Exchange Act rules governing the NMS to promote greater clarity and understanding of the rules.

The NMS encompasses the stocks of more than 5000 listed companies, which collectively represent more than $14 trillion in U.S. market capitalization. NMS stocks are traded simultaneously at a variety of different venues, including national securities exchanges, alternative trading systems (''ATSs''), and market-making securities dealers. Fair and efficient trading of NMS stocks is essential if the equity markets are to meet the long-term investment needs of the public and to reduce the cost of capital for listed companies. Section 11A of the Exchange Act charges the Commission with facilitating the establishment of an NMS that links multiple trading centers into a unified system that promotes the fairest and most efficient equity markets possible. The reproposed rules are intended to assure that the NMS remains up to date and continues to serve the interests of investors, listed companies, and the public.

A. Need for Modernization of the NMS

The reproposed rules would implement a major overhaul of the existing structure of the NMS, much of which was originally designed in the 1970s and 1980s. This overhaul is necessary to respond to sweeping changes that have reshaped the equity markets in recent years. First, communications and trading technologies have greatly expanded the available options for routing and executing orders in NMS stocks. Establishing connectivity among all types of securities industry participants has become both less costly and more flexible. Order-routing systems can be programmed to monitor prices at multiple trading centers, assess the most effective trading strategy to meet the needs of a particular customer, and instantaneously route orders to one or more trading centers to implement that strategy. Trading centers, in turn, are able to offer a near instantaneous response to incoming orders seeking to access automated quotations.

Another significant change has been the intensified competition among different types of markets that simultaneously trade many of the same NMS stocks, regardless of the particular market where the stocks are listed. These include (1) Traditional exchanges with active trading floors, which even now are evolving to expand the range of choices that they offer investors for both automated and manual trading; (2) purely electronic markets, which offer both standard limit orders and conditional orders that are designed to facilitate complex trading strategies; (3) market-making securities dealers, which offer both automated execution of smaller orders and the commitment of capital to facilitate the execution of larger, institutional orders; (4) regional exchanges, many of which have adopted automated systems for executing smaller orders; and (5) automated matching systems that permit investors, particularly large institutions, to seek counter-parties to their trades with minimal publicity and price impact.

Finally, the initiation of trading in penny increments in 2001 transformed the equity markets. The number of quotation updates increased, and the quoted size at any particular price level dropped. The change clearly has benefited many investors, particularly retail investors that typically use smaller orders. Reducing the standard trading increment from 1/16ths to pennies allowed effective spreads to narrow for small orders.[2] As a result, the trading costs of small orders have dropped dramatically.[3]

For institutional investors that generally need to trade in large sizes, however, the results of decimal trading have been less clear cut. The primary component of trading costs for large orders is price impact—the change in stock price caused by the difficulty of executing large orders to buy (with rising prices) or to sell (with declining prices).[4] The price impact for large orders, which generally will be many times the effective spread for small orders in the same stock, is largely determined by market depth and liquidity. The greater the depth and liquidity, the less the price impact of large orders. Given that millions of individuals invest in NMS stocks indirectly through these institutions, it is vitally important for the NMS to promote depth and liquidity for the trading of large orders.

To respond to all of these changes, the Commission has undertaken a deliberate and systematic review of market structure. We actively have sought out the views of the public and securities industry participants. Even prior to formulating proposals, our review included multiple public hearings and roundtables, an advisory committee, three concept releases, the issuance of temporary exemptions intended in part to generate useful data on policy alternatives, and a constant dialogue with industry participants and investors. This process continued after

[1] The Commission originally proposed Regulation NMS in February 2004. Securities Exchange Act Release No. 49325 (Feb. 26, 2004), 69 FR 11126 (Mar. 9, 2004) (''Proposing Release''). It issued a supplemental request for comment in May 2004. Securities Exchange Act Release No. 49749 (May 20, 2004), 69 FR 30142 (May 26, 2004) (''Supplemental Release'').

[2] For small orders, the effective spread between bid and offer prices represents the most significant implicit trading cost. In addition to the implicit trading costs associated with the prices at which their orders are executed, investors must pay explicit costs of trading, such as broker commissions.

[3] Effective spreads declined substantially almost immediately after decimalization, and had declined an additional 40% by November 2003. Proposing Release, 69 FR at 11128, 11165.

[4] *See* Securities and Exchange Commission, Release Nos. 33–8349 (Dec. 18, 2003), 68 FR 74820, 74822 (Dec. 24, 2003) (concept release on measures to improve disclosure of mutual fund transaction costs; notes that estimates of price impact costs range from 0.18% to 1.0% of the principal amount of transactions).

the proposals were published for public comment.[5] We held a public hearing on the proposals in April 2004 (''NMS Hearing'').[6] To give the public an opportunity to respond to important developments at the hearing, we published a supplemental request for comment and extended the comment period on the proposals.[7] The public submitted more than 700 comment letters that encompassed a wide range of views. On one point, however, commenters agreed—the time has come to modernize the NMS.

The Commission believes that the insights of the commenters, as well as those of the NMS Hearing panelists, have contributed to significant improvements in the original proposals. Responding appropriately to these comments has caused the reproposed rules to differ in some respects from the rule text as originally proposed. As discussed extensively below, all of the changes address issues that were raised in the Proposing Release and Supplemental Release and that prompted substantial public comment. Rather than adopt rules at this point, however, the Commission is implementing a reproposal process to afford the public an additional opportunity to review and comment on the details of the rules. Given the advanced stage of rulemaking, it anticipates taking further action as expeditiously as possible after the end of the comment period. The Commission therefore strongly encourages the public to submit their comments within the comment period. Comments received after that point cannot be assured of full consideration by the Commission. In its evaluation of further rulemaking action, the Commission will consider, in addition to the comments received in response to this release, all comments received on the Proposing Release and Supplemental Release.

B. Objectives for Future NMS

The reproposed rules are designed to strengthen the NMS in three primary ways. First, they would update antiquated rules that no longer adequately serve the purposes for which they were adopted. Second, they would help level the competitive playing field by promoting equal regulation of different types of stocks and markets. Third, they would promote greater order interaction and displayed depth, of particular value for the large orders of institutional investors.

Taken together, the Commission believes the reproposed rules would significantly improve the fairness and efficiency of the NMS in the future. The NMS is premised on promoting fair competition among markets, while at the same time assuring that all of these markets are linked together, through facilities and rules, in a unified system that promotes interaction among the orders of buyers and sellers in a particular NMS stock. The NMS thereby incorporates two distinct types of competition—competition among individual markets and competition among individual orders—that together contribute to efficient markets. Vigorous competition among markets promotes more efficient and innovative trading services, while integrated competition among orders promotes more efficient pricing of individual stocks. Together, they produce markets that offer signal benefits for investors and listed companies.

The Commission has sought to avoid the extremes of (1) isolated markets that trade an NMS stock without regard to trading in other markets and thereby fragment the competition among buyers and sellers in that stock, and (2) a totally centralized system that loses the benefits of vigorous competition and innovation among individual markets. To achieve the appropriate degree of integration, the Commission primarily has relied on two tools. First, consolidated display of market data promotes transparency of the best prices for an NMS stock. Second, intermarket ''rules of the road'' establish a framework within which competition among individual markets can flourish on terms that ultimately benefit investors. The reproposed rules would continue this strategy. They are designed to strengthen and enhance the efficiency of linkages among the various competing markets, but without mandating any particular type of trading model. Investor choice and competition will determine the relative success or failure of the various competing markets.

Some have suggested that the Commission should move away from the fundamental NMS concept of promoting both competition among markets and competition among the buyers and sellers in a stock. They believe that, instead, markets should be allowed to trade in isolation from one another. This approach, of course, was in effect until 1975 when Congress directed the Commission to facilitate the establishment of an NMS. After fully considering the matter, Congress specifically found that linking the individual markets would ''foster efficiency, enhance competition, increase the information available to brokers, dealers, and investors, facilitate the offsetting of investors' orders, and contribute to the best execution of such orders.'' [8] The wisdom of this congressional finding has been proven by thirty years of practical experience. The NMS needs to be enhanced and modernized, not because it has failed investors, but because it has been so successful in promoting growth, efficiency, innovation, and competition that many of its old rules now are outdated. Since the NMS was created nearly thirty years ago, trading volume has exploded, competition among market centers has intensified, and investor trading costs have shrunk dramatically. The Commission preliminarily believes that the reproposed rules would contribute to further growth and efficiency in the NMS and thereby serve the interests of investors, listed companies, and the public in the future.

C. Overview of Reproposed Rules

1. Trade-Through Rule

The Trade-Through Rule (reproposed Rule 611 under Regulation NMS) [9] would establish intermarket protection against trade-throughs for all NMS stocks. A trade-through occurs when one trading center executes an order at a price that is inferior to the price of a protected quotation, often representing an investor limit order, displayed by another trading center.[10] Many commenters on the proposals, particularly large institutional investors, strongly supported the need for enhanced protection of limit orders against trade-throughs.[11] They

[5] Proposing Release, 69 FR at 11126.

[6] A full transcript of the NMS Hearing (''Hearing Tr.''), as well as an archived video and audio webcast, is available on the Commission's Internet Web site (*http://www.sec.gov*).

[7] Supplemental Release, 69 FR at 30142.

[8] Section 11A(a)(1)(D) of the Exchange Act.

[9] Although this release refers to reproposed Rule 611 as the ''Trade-Through Rule,'' the text of the Rule would be named ''Order Protection Rule'' if adopted. The term ''Trade-Through Rule'' is used in this release to avoid confusion, given that the term has been widely used in public debate. The term ''Order Protection Rule,'' however, better captures the Commission's purpose for the Rule. Specifically, it is designed to protect both (1) limit orders represented by displayed and automated quotations, by prohibiting trading centers from executing trades at inferior prices; and (2) market orders and marketable limit orders (which have limit prices that render them subject to immediate execution at market prices without display), by requiring trading centers either to execute the orders at the best, immediately accessible prices or to route the orders to trading centers displaying such prices.

[10] The nature and scope of quotations that would be protected under the Trade-Through Rule are discussed in detail in sections II.A.2 and II.B.1 below.

[11] *See infra*, note 38 (overview of commenters supporting trade-through proposal).

emphasized that limit orders are the building blocks of public price discovery and efficient markets. They stated that a uniform rule for all NMS stocks, by enhancing protection of displayed prices, would encourage greater use of limit orders and contribute to increased market liquidity and depth. The Commission preliminarily agrees that strengthened protection of displayed limit orders would help reward market participants for displaying their trading interest and thereby promote fairer and more vigorous competition among orders seeking to supply liquidity. It therefore has decided to repropose Rule 611 to strengthen the protection of displayed and automatically accessible quotations in NMS stocks. As discussed below, today we are proposing two alternatives that would each further this goal, and we are seeking public comment on which alternative is likely best to advance the principle of limit order protection while preserving intermarket competition and avoiding practical implementation problems.

As with the original proposal, the reproposed Trade-Through Rule would take a substantially different approach than the trade-through provisions currently set forth in the Intermarket Trading System (''ITS'') Plan,[12] which apply only to exchange-listed stocks. The ITS provisions are not promulgated by the Commission, but rather are rules of the markets participating in the ITS Plan. These rules were drafted decades ago and do not distinguish between manual and automated quotations. Moreover, they state that markets ''should avoid'' trade-throughs and require an after-the-fact complaint procedure pursuant to which, if a trade-through occurs, the aggrieved market may seek satisfaction from the market that traded through. Finally, the ITS provisions have significant gaps in their coverage, particularly for large, block transactions (10,000 shares or greater), that have seriously weakened their protection of limit orders.

[12] The full title of the ITS Plan is ''Plan for the Purpose of Creating and Operating an Intermarket Communications Linkage Pursuant to Section 11A(c)(3)(B) of the Securities Exchange Act of 1934.'' The ITS Plan was initially approved by the Commission in 1978. Securities Exchange Act Release No. 14661 (Apr. 14, 1978), 43 FR 17419 (Apr. 24, 1978). All national securities exchanges that trade exchange-listed stocks and the NASD are participants in the ITS Plan. It requires each participant to provide electronic access to its displayed best bid or offer to other participants and provides an automated mechanism for routing orders, called commitments to trade, to access those displayed prices. The participants also agreed to avoid trade-throughs and locked markets and to adopt rules addressing such practices.

In contrast, the reproposed Trade-Through Rule would only protect quotations that are immediately accessible through automatic execution. It thereby would address a serious weakness in the ITS provisions, which were drafted for a world of floor-based markets and fail to reflect the disparate speed of response between manual and automated quotations. By requiring order routers to wait for a response from a manual market, the ITS trade-through provisions can cause an order to miss both the best price of a manual quotation and slightly inferior prices at automated markets that would have been immediately accessible. The Trade-Through Rule would eliminate this potential inefficiency by protecting only automated quotations. It also would promote equal regulation and fair competition among markets by eliminating any potential advantage that the ITS trade-through provisions may have given manual markets over automated markets.

In addition, the reproposed Trade-Through Rule incorporates an approach to trade-throughs that is stricter and more comprehensive than the ITS provisions. First, it would require trading centers to establish, maintain, and enforce written policies and procedures that are reasonably designed to prevent trade-throughs, or, if relying on one of the rule's exceptions, that are reasonably designed to assure compliance with the exception. To assure effective compliance, such policies and procedures would need to incorporate objective standards that were coded into a trading center's automated systems. Moreover, a trading center would be required to regularly surveil to ascertain the effectiveness of its policies and procedures and to take prompt action to remedy deficiencies. Second, the Trade-Through Rule would eliminate very significant gaps in the coverage of the ITS provisions that have undermined the extent to which they protect limit orders and promote fair and orderly trading. In particular, the ITS provisions do not cover the large transactions of broker-dealers acting as block positioners in exchange-listed stocks. They also exclude trade-throughs of 100-share quotations, thereby allowing the limit orders of small investors to be bypassed. The Trade-Through Rule would close both of these gaps in coverage.

With respect to the scope of quotations to be protected, the Commission is proposing two alternatives, one of which would represent a more fundamental departure from the existing ITS provisions by potentially extending limit-order protection beyond the best limit orders on a market's book. The definition of ''protected bid'' or ''protected offer'' in paragraph (b)(57) of reproposed Rule 600 controls the scope of quotations that would be protected by the Trade-Through Rule. The first alternative (''Market BBO Alternative'') would protect only the best bids and offers (''BBOs'') of the nine self-regulatory organizations (''SROs'') and The Nasdaq Stock Market, Inc. (''Nasdaq'') whose members currently trade NMS stocks. The scope of quotations covered by this alternative is comparable to the ITS provisions. The second alternative (''Voluntary Depth Alternative'') also would protect the BBOs of the various SROs and Nasdaq, but would establish a mechanism for a market *voluntarily* to secure protection for its depth-of-book quotations at prices below its best bid or above its best offer. These alternatives are discussed in more detail in section II.A.5 below.

The rule text of the original proposal included a general ''opt-out'' exception that would have allowed market participants to disregard displayed quotations. Such an exception would have left a significant gap in protection of the best displayed prices and thereby severely reduced the proposal's potential benefits. The elimination of any protection for manual quotations is the principal reason that this broad exception is no longer necessary in the Trade-Through Rule as reproposed. In addition, the Rule adds a number of tailored exceptions that carve out those situations in which many investors may otherwise have felt they legitimately needed to opt-out of a displayed quotation. These exceptions are more consistent with the principle of protecting the best price than a general opt-out exception. The additional exceptions also would help assure that the Trade-Through Rule is workable for high-volume stocks. Examples of these exceptions include intermarket sweep orders, quotations displayed by markets that fail to meet the response requirements for automated quotations, and flickering quotations with multiple prices displayed in a single second.[13]

Some commenters questioned the need to extend a trade-through rule to Nasdaq stocks.[14] These commenters generally emphasized the much improved efficiency of trading in Nasdaq stocks in recent years. They particularly were concerned that extension of intermarket price protection to Nasdaq stocks, at least in

[13] Flickering quotations are discussed further in section II.A.3 below.

[14] *See infra*, notes 40–42 and accompanying text.

the absence of a general opt-out exception, would interfere with current trading methods.

The Commission preliminarily believes, however, that intermarket price protection would benefit investors and strengthen the NMS in all NMS stocks. It would contribute to the maintenance of fair and orderly markets and, thereby, promote investor confidence in the markets. As discussed below,[15] trade-through rates currently are significant in both Nasdaq and exchange-listed stocks. For example, approximately 1 of every 40 trades in both Nasdaq and NYSE stocks represents a significant trade-through of a displayed quotation. For hundreds of active Nasdaq stocks, approximately 1 of every 11 shares traded is a significant trade-through. The routine execution of trades at prices inferior to those offered by displayed and accessible limit orders is inconsistent with basic notions of fairness and orderliness, particularly for investors, both large and small, who post limit orders and see those orders routinely traded through. These trade-throughs can undermine incentives to display limit orders. Moreover, many of the investors whose market orders are executed at inferior prices may not, in fact, be aware they received an inferior price from their broker and executing market. In sum, the Commission preliminarily believes that a uniform rule establishing price protection on an order-by-order basis is needed to protect the interests of investors, promote the display of limit orders, and thereby improve the efficiency of the NMS as a whole.

2. Access Rule

The Access Rule (reproposed Rule 610 under Regulation NMS) would set forth new standards governing access to quotations in NMS stocks. As emphasized by many commenters on the proposals,[16] protecting the best displayed prices against trade-throughs would be futile if broker-dealers and trading centers were unable to access those prices fairly and efficiently. Accordingly, Rule 610 is designed to promote access to quotations in three ways. First, it would enable the use of private linkages offered by a variety of connectivity providers,[17] rather than mandating a collective linkage facility such as ITS, to facilitate the necessary access to quotations. The lower cost and increased flexibility of connectivity in recent years has made private linkages a feasible alternative to hard linkages, absent barriers to access. Using private linkages, market participants may obtain indirect access to quotations displayed by a particular trading center through the members, subscribers, or customers of that trading center. To promote this type of indirect access, Rule 610 would prohibit a trading center from imposing unfairly discriminatory terms that would prevent or inhibit the access of any person through members, subscribers, or customers of such trading center.

Second, reproposed Rule 610 would limit the fees that any trading center can charge (or allow to be charged) for accessing its protected quotations to no more than $0.003 per share. The purpose of the fee limitation is to ensure the fairness and accuracy of displayed quotations by establishing an outer limit on the cost of accessing such quotations. For example, if the price of a protected offer to sell an NMS stock is displayed at $10.00, the total cost to access the offer and buy the stock will be $10.00, plus a fee of no more than $0.003. The reproposed rule thereby would assure order routers that displayed prices are, within a limited range, true prices.

The reproposed fee limitation substantially simplifies the proposed limitation on fees, which, in general, would have limited the fees of individual market participants to $0.001 per share, with an accumulated cap of $0.002 per share. Perhaps more than any other single issue, the proposed limitation on access fees splintered the commenters.[18] Some supported the proposal as a worthwhile compromise on an extremely difficult issue. They believed that it would level the playing field in terms of who could charge fees, as well as give greater certainty to market participants that quoted prices will, essentially, be true prices. Others were strongly opposed to any limitation on fees, believing that competition alone would be sufficient to address high fees that distort quoted prices. Still others were equally adamant that all access fees of electronic communications networks (''ECNs'') charged to non-subscribers should be prohibited entirely, although they did not see a problem with fees charged to a market's members or subscribers. Although consensus could not be achieved on any particular approach, commenters expressed a strong desire for resolution of a difficult issue that has caused discord within the securities industry for many years.

The Commission preliminarily believes that a single, uniform fee limitation of $0.003 per share would be the fairest and most appropriate resolution of the access fee issue. First, it would not seriously interfere with current business practices, as trading centers have very few fees on their books of more than $0.003 per share or earn substantial revenues from such fees.[19] Second, the uniform fee limitation would promote equal regulation of different types of trading centers, where previously some had been permitted to charge fees and some had not. Finally and most importantly, the fee limitation of Rule 610 would be necessary to support the integrity of the price protection requirement established by the reproposed Trade-Through Rule. In the absence of a fee limitation, some ''outlier'' trading centers might take advantage of the requirement to protect displayed quotations by charging exorbitant fees to those required to access the outlier's quotations. Rule 610's fee limitation would preclude the initiation of this business practice, which would compromise the fairness and efficiency of the NMS.

Finally, reproposed Rule 610 would require SROs to establish and enforce rules that, among other things, prohibit their members from engaging in a pattern or practice of displaying quotations that lock or cross the automated quotations of other trading centers. Trading centers would be allowed, however, to display automated quotations that lock or cross the *manual* quotations of other trading centers. The reproposed rule thereby would reflect the disparity in speed of response between automated and manual quotations, while also promoting fair and orderly markets by establishing that the first automated quotation at a price, whether it be a bid or an offer, is entitled to an execution at that price instead of being locked or crossed by a quotation on the other side of the market.

3. Sub-Penny Rule

The Sub-Penny Rule (reproposed Rule 612 under Regulation NMS) would prohibit market participants from displaying, ranking, or accepting quotations in NMS stocks that are priced in an increment of less than $0.01, unless the price of the quotation is less than $1.00. If the price of the quotation is less than $1.00, the minimum increment would be $0.0001. A strong consensus of commenters supported the sub-penny proposal as a means to promote greater price

[15] *See infra*, notes 59–61 and accompanying text.

[16] *See infra*, section III.A.1.

[17] Private linkages are discussed further in section III.A.1 below.

[18] The comments on access fees are addressed in section III.A.2 below.

[19] *See infra,* section III.A.2.

transparency and consistency, as well as to protect displayed limit orders.[20] In particular, Rule 612 would address the practice of ''stepping ahead'' of displayed limit orders by trivial amounts. It therefore should further encourage the display of limit orders and improve the depth and liquidity of trading in NMS stocks.

4. Market Data Rules and Plans

The reproposed amendments to the Market Data Rules (reproposed Rules 601 and 603 under Regulation NMS) and joint industry plans (''Plans'') [21] are designed to promote the wide availability of market data and to allocate revenues to SROs that produce the most useful data for investors. They would strengthen the existing market data system, which provides investors in the U.S. equity markets with real-time access to the best quotations and most recent trades in the thousands of NMS stocks throughout the trading day. For each stock, quotations and trades are continuously collected from many different trading centers and then disseminated to the public in a consolidated stream of data. As a result, investors of all types have access to a reliable source of information for the best prices in NMS stocks. When Congress mandated the creation of the NMS in 1975, it noted that the systems for disseminating consolidated market data would ''form the heart of the national market system.'' [22] Accordingly, one of the Commission's most important responsibilities is to preserve the integrity and affordability of the consolidated data stream.

The reproposed amendments would promote this objective in several different respects. First, they would update the formulas for allocating revenues generated by market data fees to the various SRO participants in the Plans. The current Plan formulas are seriously flawed by an excessive focus on the number of trades, no matter how small the size, reported by an SRO. They thereby create an incentive for distortive behavior, such as wash sales and trade shredding,[23] and fail to reflect an SRO's contribution to the best displayed quotations in NMS stocks. The reproposed formula would correct these flaws. It also is much less complex than the proposal, primarily because, consistent with the approach of the Trade-Through Rule and Access Rule, the new formula would eliminate any reward for manual quotations. It therefore should promote an allocation of revenues to the various SROs that more closely reflects the usefulness to investors of each SRO's market information.

The reproposed amendments also are intended to improve the transparency and effective operation of the Plans by broadening participation in Plan governance. They would require the creation of advisory committees composed of non-SRO representatives. Such committees would give interested parties an opportunity to be heard on Plan business, prior to any decision by the Plan operating committees. Finally, the amendments would promote the wide availability of market data by authorizing markets to distribute their own data independently (while still providing their best quotations and trades for consolidated dissemination through the Plans) and streamlining outdated requirements for the display of market data to investors.

Many commenters on the market data proposals expressed frustration with the current operation of the Plans.[24] These commenters generally fell into two groups. One group, primarily made up of individual markets that receive market data fees, believed that the current model of consolidation should be discarded in favor of a new model, such as a ''multiple consolidator'' model under which each SRO would sell its own data separately. The other group, primarily made up of securities industry participants that pay market data fees, believed that the current level of fees is too high. This group asserted that, prior to modifying the allocation of market data revenues, the Commission should address the level of fees that generated those revenues.[25]

The Commission has considered these concerns at length in the recent past. As was noted in the Proposing Release,[26] a drawback of the current market data model, which requires all SROs to participate jointly in disseminating data through a single consolidator, is that it affords little opportunity for market forces to determine the overall level of fees or the allocation of those fees to the individual SROs. Prior to publishing the proposals, therefore, the Commission undertook an extended review of the various alternatives for disseminating market data to the public in an effort to identify a better model. These alternatives were discussed at length in the Proposing Release, but each has serious weaknesses. The Commission particularly is concerned that the integrity and reliability of the consolidated data stream must not be compromised by any changes to the market data structure.

For example, although allowing each SRO to sell its data separately to multiple consolidators may appear at first glance to subject the level of fees to competitive forces, this conclusion does not withstand closer scrutiny. If the benefits of a fully consolidated data stream are to be preserved, each consolidator would need to purchase the data of each SRO to assure that the consolidator's data stream in fact included the best quotations and most recent trade report in an NMS stock. Payment of every SRO's fees would effectively be mandatory, thereby affording little room for competitive forces to influence the level of fees.

The Commission also has considered the suggestion of many in the second group of commenters that market data fees should be cut back to encompass only the costs of the *Plans* to collect and disseminate market data. Under this approach, the individual SROs would no longer be allowed to fund any portion of their operational and regulatory functions through market data fees.[27] Yet, as discussed in the Commission's 1999 concept release on

[20] The comments on the sub-penny proposal are discussed in section IV.C below.

[21] The three joint-industry plans are (1) the CTA Plan, which is operated by the Consolidated Tape Association and disseminates transaction information for exchange-listed securities, (2) the CQ Plan, which disseminates consolidated quotation information for exchange-listed securities, and (3) the Nasdaq UTP Plan, which disseminates consolidated transaction and quotation information for Nasdaq-listed securities. The last restatements of the CTA Plan and the CQ Plan were approved in 1996. Securities Exchange Act Release No. 37191 (May 9, 1996), 61 FR 24842 (File No. SR–CTA/CQ–96–1). The amended versions of the CTA Plan and the CQ Plan were filed as attachments to File No. SR–CTA/CQ–96–1, which are available in the Commission's Public Reference Room. There have been several subsequent amendments to the CTA and CQ Plans; the Plans have not been republished in this connection. The Nasdaq UTP Plan was last published in its entirety in 2004. Securities Exchange Act Release No. 49137 (Jan. 28, 2004), 69 FR 5217 (Feb. 3, 2004).

[22] H.R. Rep. No. 94–229, 94th Cong., 1st Sess. 93 (1975).

[23] Trade shredding, or the splitting of large trades into a series of 100-share trades, is discussed further in section V.A below.

[24] Comments on the market data proposals are discussed in section V.A.2 below.

[25] Some commenters mistakenly believed that the level of market data fees had been left unreviewed for many years. In fact, the Commission comprehensively reviewed market data fees in 1999, which led to a 75% reduction in fees paid by retail investors for market data. *See infra,* note 295.

[26] Proposing Release, 69 FR at 11177.

[27] The U.S. equity markets are not alone in their reliance on market information revenues as a significant source of funding. All of the other major world equity markets currently derive large amounts of revenues from selling market information. *See infra*, note 308 and accompanying text.

market data,[28] nearly the entire burden of collecting and producing market data is borne by the individual markets, not by the Plans. If, for example, an SRO's systems fail on a high-volume trading day and it can no longer provide its data to the Plans, investors will suffer the consequences of a flawed data stream, regardless of whether the Plan is able to continue operating.

If the Commission were to limit market data fees to cover only Plan costs, SRO funding would have been cut by $386 million in 2003.[29] Given the potential harm if vital SRO functions are not adequately funded, the Commission believes that the level of market data fees is most appropriately addressed in a context that looks at SRO funding as a whole. It therefore has requested comment on this issue in its recent concept release on SRO structure.[30] In addition, the recently proposed rules to improve SRO transparency would, if adopted, assist the public in assessing the level and use of market data fees by the various SROs.[31]

In sum, there is inherent tension between assuring price transparency for investors, which is a fundamental objective of the Exchange Act,[32] and expanding the extent to which market forces determine market data fees and SRO revenues. Each alternative model for data dissemination has its particular strengths and weaknesses. The great strength of the current model, however, is that it benefits investors, particularly retail investors, by helping them to assess quoted prices at the time they place an order and to evaluate the best execution of their orders against such prices by obtaining data from a single source that is highly reliable and comprehensive. In the absence of full confidence that this benefit would be retained if a different model were adopted, the Commission has decided to repropose such immediate steps as are necessary to improve the operation of the current model.

II. Trade-Through Rule

The Commission is reproposing Rule 611 under Regulation NMS to establish protection against trade-throughs for all NMS stocks. Rule 611(a)(1) would require a trading center (which includes national securities exchanges, exchange specialists, ATSs, OTC market makers, and block positioners)[33] to establish, maintain, and enforce written policies and procedures that are reasonably designed to prevent trade-throughs of protected quotations and, if relying on an exception, that are reasonably designed to assure compliance with the terms of the exception. Rule 611(a)(2) would require a trading center to regularly surveil to ascertain the effectiveness of its policies and procedures and to take prompt action to remedy deficiencies in such policies and procedures. To qualify for protection, a quotation must be automated. Rule 600(b)(3) would define an automated quotation as one that, among other things, is displayed and immediately accessible through automatic execution. Rule 611 would not require market participants to route orders to access any manual quotations, which generally entail a much slower speed of response than automated quotations.

Reproposed Rule 611(b) would set forth a variety of exceptions to make intermarket price protection as efficient and workable as possible. These would include an intermarket sweep exception, which would allow market participants simultaneously to access multiple price levels at different trading centers—a particularly important function now that trading in penny increments has dispersed liquidity across multiple price levels. The intermarket sweep exception would enable trading centers that receive sweep orders to execute those orders immediately, without waiting for better-priced quotations in other markets to be updated. In addition, Rule 611 would provide exceptions for the quotations of trading centers experiencing, among other things, a material delay in providing a response to incoming orders and for flickering quotations with prices that have been displayed for less than one second. Both exceptions are designed to limit the application of Rule 611 to quotations that are truly automated and accessible.

By strengthening price protection in the NMS for quotations that can be accessed fairly and efficiently, reproposed Rule 611 is designed to further the interests of both investors who submit displayed limit orders and investors who submit marketable orders.[34] Price protection encourages the display of limit orders by increasing the likelihood that they will receive an execution in a timely manner. Limit orders typically establish the best prices for an NMS stock. Greater use of limit orders would increase market depth and liquidity, thereby improving the quality of execution for the large market orders of institutional investors. Moreover, strong intermarket price protection would offer greater assurance, on an order-by-order basis, to investors who submit market orders that their orders in fact will be executed at the best prices, which can be difficult for investors, particularly retail investors, to monitor.[35] Finally, market orders would need to be routed only to quotations that are truly accessible.

A. Response to Comments and Basis for Reproposed Rule

Rule 611 as reproposed reflects a number of changes to the rule as proposed. As discussed below, the Commission made these changes in response to substantial public comment on the proposed rule and on the issues arising out of the NMS Hearing that were addressed in the Supplemental Release. The public submitted more than 700 comments addressing the trade-through proposal.[36] Although the comments covered a very wide range of matters, they particularly focused on the following issues:

(1) Whether an intermarket trade-through rule is needed to promote fair

[28] Securities Exchange Act Release No. 42208 (Dec. 9, 1999), 64 FR 70613 (Dec. 17, 1999) (''Market Information Release'').

[29] *See* Proposing Release, 69 FR at 11179 (table setting forth revenue allocations for 2003).

[30] Securities Exchange Act Release No. 50700 (Nov. 18, 2004), 69 FR 71256 (Dec. 8, 2004) (''SRO Structure Release'').

[31] Securities Exchange Act Release No. 50699 (Nov. 18, 2004), 69 FR 71126 (Dec. 8, 2004) (''SRO Transparency Release'').

[32] Section 11A(a)(1)(C)(iii) of the Exchange Act.

[33] An ''OTC market maker'' in a stock is defined in reproposed Rule 600(b)(52) of Regulation NMS as, in general, a dealer that holds itself out as willing to buy and sell the stock, otherwise than on a national securities exchange, in amounts of less than block size (less than 10,000 shares). A block positioner in a stock, in contrast, limits its activity in the stock to transactions of 10,000 shares or greater.

[34] For ease of reference in this release, the term ''limit order'' generally will refer to a non-marketable order and the term ''marketable order'' will refer to both market orders and marketable limit orders. A non-marketable limit order has a limit price that prevents its immediate execution at current market prices. Because these orders cannot be executed immediately, they generally are publicly displayed to attract contra side interest at the price. In contrast, a ''marketable limit order'' has a limit price that potentially allows its immediate execution at current market prices. As discussed further below, marketable limit orders often cannot be filled at current market prices because of insufficient liquidity and depth at the market price. *See infra*, text accompanying note 49.

[35] Investors generally will know the best quoted prices at the time they place an order by referring to the consolidated quotation stream for a stock. In the interval between order submission and order execution, however, quoted prices can change. If the order execution price provided by a market differs from the best quoted price at order submission, it can be particularly difficult for retail investors to assess whether the difference was attributable to changing quoted prices or to an inferior execution by the market. The Trade-Through Rule would help assure, on an order-by-order basis, that markets effect trades at the best available prices.

[36] The Commission has considered the views of all commenters in formulating Rule 611 as reproposed, as well as the other rules and amendments reproposed today.

and efficient equity markets, particularly for Nasdaq stocks which have not been subject to the current ITS trade-through provisions;

(2) Whether only automated and immediately accessible quotations should be given trade-through protection and, if so, what is the best approach for defining such quotations;

(3) Whether intermarket protection against trade-throughs can be implemented in a workable manner, particularly for high-volume stocks;

(4) Whether the proposed exception allowing a general opt-out of protected quotations is necessary or appropriate, particularly if manual quotations are excluded from trade-through protection;

(5) Whether the scope of quotations entitled to trade-through protection should extend beyond the best bids and offers of the various markets; and

(6) Whether the benefits of an intermarket trade-through rule would justify its cost of implementation.

In the following sections, the Commission responds to comments on the trade-through proposal and discusses the basis for its reproposal of Rule 611.

1. Need for Intermarket Trade-Through Rule

Commenters were divided on the central issue of whether intermarket protection of displayed quotations is needed to promote the fairest and most efficient markets for investors.[37] Many commenters strongly supported the adoption of a uniform rule for all NMS stocks as necessary to protect the best displayed prices and encourage the public display of limit orders.[38] They stressed that limit orders are the cornerstone of efficient, liquid markets and should be afforded as much protection as possible. They noted, for example, that limit orders typically establish the ''market'' for a stock. In the absence of limit orders setting the current market price, there would be no benchmark for the submission and execution of marketable orders. Focusing solely on best execution of marketable orders (and the interests of orders that take displayed liquidity), therefore, would miss a critical part of the equation for promoting the most efficient markets (*i.e.*, the best execution of orders that *supply* displayed liquidity and thereby provide public price discovery). Commenters supporting the need for an intermarket trade-through rule also believed that a trade-through rule would increase investor confidence by helping to eliminate the impression of unfairness when an investor's order executes at a price that is worse than the best displayed quotation, or when a trade occurs at a price that is inferior to the investor's displayed order.[39]

Other commenters, in contrast, opposed any intermarket trade-through rule.[40] These commenters did not believe that such a rule is necessary to promote the protection of limit orders, the best execution of market orders, or efficient markets in general. They asserted that, given public availability of each market's quotations and ready access by all market participants to such quotations, competition among markets, a broker's existing duty of best execution, and economic self-interest would be sufficient to protect limit orders and produce the most fair and efficient markets. They therefore believed that any trade-through rule would be unnecessary and costly. These commenters also were concerned that any trade-through rule could interfere with the ability of competitive forces to produce efficient markets, particularly for Nasdaq stocks.

Commenters opposed to any trade-through rule also generally cited a lack of empirical evidence justifying the need for intermarket protection against trade-throughs. They noted, for example, that trading in Nasdaq stocks has never been subject to an intermarket trade-through rule, while trading in exchange-listed stocks, particularly NYSE stocks, has been subject to the ITS trade-through provisions. Given the difference in regulatory requirements between Nasdaq and NYSE stocks, many commenters relied on two factual contentions to show that a trade-through rule is not needed: (1) Trading in Nasdaq stocks currently is more efficient than trading in NYSE stocks;[41] and (2) fewer trade-throughs occur in Nasdaq stocks than NYSE stocks.[42] Based on these factual contentions, opposing commenters concluded that a trade-through rule is not necessary to promote efficiency or to protect the best displayed prices.

A few commenters submitted empirical data to support the claim that trading in Nasdaq stocks is more efficient than trading in NYSE stocks.[43]

[37] Nearly all commenters, both those supporting and opposing the need for an intermarket trade-through rule, agreed that the current ITS trade-through provisions are seriously outdated and in need of reform. They particularly focused on the problems created by affording equal protection against trade-throughs to both automated and manual quotations. Reproposed Rule 611 responds to these problems by protecting only automated quotations.

[38] Approximately 138 commenters favored a trade-through rule that did not include an exception allowing market participants to opt-out of the rule. Commenters in this group included (1) many mutual fund companies and the Investment Company Institute; (2) approximately 24 individual investors and the Consumer Federation of America and the National Association of Individual Investors Corporation, (3) floor-based exchanges and their members, (4) approximately 29 listed companies, (5) a variety of securities industry participants, and (6) 12 members of Congress. In addition, many commenters supported an opt-out exception to a trade-through rule, but varied in the extent to which they made clear whether they supported a trade-through rule in general. These commenters are included in footnote 99 below addressing supporters of an opt-out exception.

[39] *See, e.g.*, Letter from Barbara Roper, Director of Investor Protection, Consumer Federation of America, to Jonathan G. Katz, Secretary, Commission, dated June 17, 2004 (''Consumer Federation Letter'') at 2; Letter from Ari Burstein, Associate Counsel, Investment Company Institute, to Jonathan G. Katz, Secretary, Commission, dated June 30, 2004 (''ICI Letter'') at 7.

[40] Approximately 242 commenters opposed any trade-through rule. Approximately 179 of these commenters utilized ''Letter Type C,'' which primarily supported an opt-out exception to the proposed rule, but also suggested that no trade-through rule would be simpler. Letter Type C is posted on the Commission's Internet Web site (*http://www.sec.gov/rules/proposed.shtml*). The remaining commenters included securities industry participants, particularly electronic markets and their participants, a variety of local political and community groups and individuals, and 17 members of Congress.

[41] *See, e.g.*, Letter from Ellen L.S. Koplow, Executive Vice President and General Counsel, Ameritrade Holding Corporation, to Jonathan G. Katz, Secretary, Commission, dated June 30, 2004 (''Ameritrade Letter I''), Appendix at 10; Letter from William O'Brien, Chief Operating Officer, Brut LLC, to Jonathan G. Katz, Secretary, Commission, dated July 29, 2004 (''Brut Letter'') at 10; Letter from Eric D. Roiter, Senior Vice President & General Counsel, Fidelity Management and Research Company, to Jonathan G. Katz, Secretary, Commission, dated June 22, 2004 (''Fidelity Letter I'') at 11; Letter from Edward J. Nicoll, Chief Executive Officer, Instinet Group Incorporated, to Jonathan G. Katz, Secretary, Commission, dated June 30, 2004 (''Instinet Letter'') at 3, 9 & Exhibit A; Letter from Edward S. Knight, The Nasdaq Stock Market, Inc., to Jonathan G. Katz, Secretary, Commission, dated July 2, 2004 (''Nasdaq Letter II'') at 6 and Attachment II; Letter from Bruce N. Lehmann & Joel Hasbrouck, Organizers, Reg NMS Study Group, to Jonathan G. Katz, Secretary, Commission (no date) (''NMS Study Group Letter'') at 4; Letter from David Colker, Chief Executive Officer & President, National Stock Exchange, to Jonathan G. Katz, Secretary, Commission, dated June 29, 2004 (''NSX Letter'') at 3; Letter from Huw Jenkins, Managing Director, Head of Equities for the Americas, UBS Securities LLC, to Jonathan G. Katz, Secretary, Commission, dated June 30, 2004 (''UBS Letter'') at 4.

[42] *See, e.g.*, Letter from Kim Bang, President & Chief Executive Officer, Bloomberg Tradebook LLC, to Jonathan G. Katz, Secretary, Commission, dated June 30, 2004 (''Bloomberg Tradebook Letter'') at 10; Fidelity Letter I at 11; Letter from Suhas Daftuar, Managing Director, Hudson River Trading, to Jonathan G. Katz, Secretary, Commission, dated August 13, 2004 (''Hudson River Trading Letter'') at 1; Instinet Letter at 14; Nasdaq Letter II at 6 and Attachment III.

[43] Instinet Letter, Exhibit A; Nasdaq Letter II, Attachment II. The Mercatus Center referenced several statistical studies in its comment letter and concluded that the findings of such studies are mixed. Letter from Susan E. Dudley, Director, Regulatory Studies Program, Mercatus Center, George Mason University, to Jonathan G. Katz, Secretary, Commission, dated May 24, 2004 (''Mercatus Center Letter'') at 3.

Specifically, they submitted tables asserting that effective spreads in Nasdaq stocks in the S&P 500 are significantly narrower than effective spreads in NYSE stocks in the S&P 500.[44] To help assess and respond to the views of commenters on market efficiency, the Commission staff analyzed Rule 11Ac1–5 reports and other trading data to evaluate the markets for Nasdaq and NYSE stocks.[45] The staff studies indicate that the execution quality statistics submitted by commenters are flawed. The claimed large and systematic disparities between Nasdaq and NYSE effective spreads disappear when an analysis of execution quality more appropriately controls for differences in stocks, order types, and order sizes.[46] The staff studies reveal that both the market for Nasdaq stocks and the market for NYSE stocks have significant strengths. But, as discussed below, both markets also have weaknesses that could be reduced by strengthened protection against trade-throughs.

First, the effective spread analyses submitted by commenters do not, in a number of respects, reflect appropriately the comparative trading costs in Nasdaq and NYSE stocks.[47] They were presented in terms of ''cents-per-share'' and therefore failed to control for the varying level of stock prices between Nasdaq stocks and NYSE stocks in the S&P 500. Lower priced stocks naturally will tend to have lower spreads in terms of cents-per-share than higher priced stocks, even when such cents-per-share spreads constitute a larger percentage of stock price and therefore represent trading costs for investors that consume a larger percentage of their investment. By using cents-per-share statistics, commenters did not adjust for the fact that the average prices of Nasdaq stocks are significantly lower than the average prices of NYSE stocks. For example, the average price of Nasdaq stocks in the S&P 500 in January 2004 was $34.14, while the average price of NYSE stocks was $41.32.[48]

The effective spread analyses submitted by commenters also were weakened by their failure to address the much lower fill rates of orders in Nasdaq stocks than orders in NYSE stocks. The commenters submitted ''blended'' statistics that encompassed both market orders and marketable limit orders. The effective spread statistics for these order types are not comparable, however, because market orders do not have a limit price that precludes their execution at prices inferior to the prevailing market price at time of order receipt. In contrast, the limit price of marketable limit orders often precludes an execution, particularly when there is a lack of liquidity and depth at the prevailing market price. For example, the fill rates for marketable limit orders in Nasdaq stocks generally are less than 75%, and often fall below 50% for larger order sizes.[49]

Accordingly, investors must accept trade-offs when deciding whether to submit market orders or marketable limit orders (particularly when the limit price equals or is very close to the current market price). Use of a limit price generally assures a narrower spread by precluding an execution an inferior price. By precluding an execution, however, the limit price may cause the investor to ''miss the market'' if prices move away (for example, if prices rise when an investor is attempting to buy). Effective spreads for marketable limit orders therefore represent trading costs that are conditional on execution, while effective spreads for market orders much more completely reflect the entire trading cost for a particular order. Market orders represent only approximately 14% of the blended flow of market and marketable limit orders in Nasdaq stocks (reflecting the fact that ECNs now dominate Nasdaq order flow and limit orders represent the vast majority of ECN order flow).[50] In contrast, market orders represent approximately 36% of the blended order flow in NYSE stocks.[51] Accordingly, the effective spread statistics for marketable limit orders, and particularly for orders in Nasdaq stocks, must be considered in conjunction with the fill rate for such orders—a narrow spread is good, but the benefits are greatly limited if investors are unable to obtain an execution at that spread. The analyses presented by the commenters, however, did not address the respective fill rates for Nasdaq stocks and NYSE stocks or reflect the inherent differences in measuring the trading costs of market orders and marketable limit orders.

The analyses prepared by Commission staff are designed to provide appropriate evaluations of comments on the efficiency of trading in Nasdaq and NYSE stocks. In particular, they are more finely tuned to evaluate trading for different types of stocks with varying trading volume, different types of orders, and different sizes of orders. These analyses indicate that the markets for Nasdaq and NYSE stocks each have weaknesses that an intermarket price protection rule could help address. For example, the effective spread statistics for large, electronically-received market orders in NYSE stocks show significant ''slippage''—the amount by which orders are executed at prices inferior to the national best bid or offer (''NBBO'') at the time of order receipt.[52] Slippage often results in effective spreads for large orders that are many times wider than the effective spreads for small orders in the same NYSE stocks. By protecting automated quotations, the reproposed Trade-Through Rule should enhance the depth and liquidity available for large, electronic orders in NYSE stocks.

For Nasdaq stocks, the Rule 11Ac1–5 statistics reveal very low fill rates for larger sizes of marketable limit orders (*e.g.*, 2000 shares or more), which generally fall below 50% for most Nasdaq stocks. Contrary to the assertion of some commenters,[53] certainty of

[44] Nasdaq and Instinet based their tables on statistics derived from the reports (''Dash 5 Reports'') on order execution quality made public by markets pursuant to Exchange Act Rule 11Ac1–5 (proposed to be redesignated as Rule 605 under Regulation NMS). Their source for these reports is Market Systems, Inc. (''MSI''), a private vendor that collects the reports of all markets each month and includes them in a searchable database. MSI also is the source of the Dash 5 Reports used in the staff analyses.

[45] Memorandum to File, from Office of Economic Analysis, dated December 15, 2004 (comparative analysis of execution quality for NYSE and NASDAQ stocks based on a matched sample of stocks) (''Matched Pairs Study''); Memorandum to File, from Division of Market Regulation, dated December 15, 2004 (comparative analysis of Rule 11Ac1–5 statistics by S&P Index) (''S&P Index Study''). The Matched Pair Study and S&P Index Study have been placed in Public File No. S7–10–04 and are available for inspection on the Commission's Internet Web site (*http://www.sec.gov*).

[46] Matched Pairs Study, Tables 4–10; S&P Index Study, Tables 2–9.

[47] The effective spread is a useful measure of trading costs, particularly for small order sizes, because it reflects the prices actually received by investors when compared to the best quotes at the time a market received an order. Consequently, unlike the quoted spread, the effective spread reflects any cost to investors caused by movement in prices during a delay between receipt of an order and execution of an order. In other words, the effective spread penalizes slow markets for failing to execute trades at their quoted prices at the time they received an order. It therefore provides an appropriate criterion with which to compare execution quality between automated and manual markets for comparable stocks, order types, and order sizes. As discussed below, however, effective spread statistics do not capture trading costs that are attributable to low fill rates—the failure to obtain an execution—for marketable limit orders.

[48] S&P Index Study, Table 1.

[49] Matched Pairs Study, Table 10; S&P Index Study, Tables 7, 9.

[50] An overwhelming majority of market orders in Nasdaq stocks are executed by market-making dealers pursuant to agreement with their correspondent or affiliated brokers.

[51] Matched Pairs Study at 1.

[52] Matched Pairs Study, Tables 4, 7; S&P Index Study, Tables 2, 4, 6, 8.

[53] *See, e.g.*, Instinet Letter at 9; Nasdaq Letter II at 6. In addition to effective spread statistics, Instinet submitted statistics indicating that

execution clearly is not a strength of the current market for Nasdaq stocks. Certainty of a fast response is a strength, but much of the time the response to large orders will be a ''no fill'' at any given trading center. The reproposed Trade-Through Rule is designed to enhance depth and liquidity and thereby improve the execution quality of large orders in Nasdaq stocks.[54]

Effective spread statistics do not, of course, reflect all types of trading costs. They focus on the execution price of individual orders in comparison with the best quoted prices at the time orders are received. As a result, they do not capture trading costs that are associated with the short-term movement of quoted prices, or volatility. To further assist the Commission in evaluating the views of commenters, Commission staff also has analyzed short-term volatility for trading in Nasdaq and NYSE stocks.[55] This analysis particularly focuses on transitory volatility—short-term fluctuations away from the fundamental or ''true'' value of a stock. Transitory volatility should be distinguished from fundamental volatility—price fluctuations associated with factors independent of market structure, such as earnings changes and other economic determinants of stock prices. The staff analysis found that transitory volatility is significantly higher for Nasdaq stocks than for NYSE stocks.[56] Excessive transitory volatility indicates a shortage of liquidity. Such volatility may provide benefits in the form of profitable trading opportunities for short-term traders or market makers, but these benefits come at the expense of other investors, who would be buying at artificially high or selling at artificially low prices. Retail investors, in particular, tend to be relatively uninformed concerning short-term price movements and are apt to bear the brunt of the trading costs associated with excessive transitory volatility. The reproposed Trade-Through Rule, by promoting greater depth and liquidity, is designed to help reduce excessive transitory volatility in Nasdaq stocks.

The second principal factual contention of commenters opposed to a trade-through rule is premised on the claim that there are fewer trade-throughs in Nasdaq stocks, which are not covered by any trade-through rule, than in NYSE stocks, which are covered by the ITS trade-through provisions.[57] One commenter asserted that, outside the exchange-listed markets, competition alone had been sufficient to create a ''no-trade through zone.''[58] To respond to these claims, the Commissions staff examined public quotation and trade data to analyze the incidence of trade-throughs for Nasdaq and NYSE stocks.[59] It found that the overall trade-through rates for Nasdaq stocks and NYSE stocks were, respectively, 7.9% and 7.2% of the total volume of traded shares.[60] When considered as a percentage of number of trades, the overall trade-throughs rate for both Nasdaq and NYSE stocks was 2.5%. In addition, the staff analysis found that the amount of the trade-throughs was significant—2.3 cents per share on average for Nasdaq stocks and 2.2 cents per share for NYSE stocks.[61]

The staff analysis also revealed that a large volume of block transactions (10,000 shares or greater) trade through displayed quotations. Block transactions represent approximately 50% of total trade-through volume for both Nasdaq and NYSE stocks.[62] Importantly, many block transactions currently are not subject to the ITS trade-through provisions that apply to exchange-listed stocks. Broker-dealers that act solely as block positioners are not covered by the ITS trade-through provisions if they print their trades in the over-the-counter (''OTC'') market. In addition to not covering the trades of block positioners, the ITS trade-through provisions include an exception for 100-share quotations. They therefore often may fail to protect the small orders of retail investors. When block trade-throughs and trade-throughs of 100-share quotations are eliminated, the overall trade-through rate for NYSE stocks is reduced from 7.2% to approximately 2.3% of total share volume.[63] The two gaps in ITS coverage therefore account for most of the trade-through volume in NYSE stocks. The reproposed Trade-Through Rule, by closing these gaps in protection against trade-throughs, would establish much stronger price protection than the ITS provisions.

In sum, relevant data supports the need for an intermarket rule to strengthen price protection and improve the quality of trading in both Nasdaq and exchange-listed stocks. The arguments of some commenters that competitive forces alone are sufficient to achieve these objectives fail to take into account two structural problems—principal/agent conflicts of interest and ''free-riding'' on displayed prices.

Agency conflicts occur when brokers may have incentives to act otherwise than in the best interest of their customers. Customers, particularly retail investors, may have difficulty monitoring whether their individual orders miss the best displayed prices at the time they are executed.[64] Given the large number of trades that fail to obtain the best displayed prices (*e.g.*, approximately 1 in 40 trades for both Nasdaq and NYSE stocks, or approximately 98,000 trades per day in Nasdaq stocks),[65] the Commission is

combined market and marketable limit orders in Nasdaq stocks were more likely to be executed at or inside the NBBO than such orders in NYSE stocks. Instinet Letter, Table I–C. These statistics, however, only reflect orders that in fact receive an execution—not the large volume of orders in Nasdaq stocks that fail to receive any execution at all.

[54] Some commenters asserted that the large number of limit orders in Nasdaq stocks indicates that sufficient incentives exist for the placement of limit orders in such stocks. *See, e.g.*, Instinet Letter at 11; Letter from Thomas N. McManus, Managing Director & Counsel, Morgan Stanley & Co. Incorporated, to Jonathan G. Katz, Secretary, Commission, dated August 19, 2004 (''Morgan Stanley Letter'') at 14. Strengthened intermarket trade-through protection, however, is designed to improve the *quality* of limit orders in a stock, particularly their displayed size, and thereby promote greater depth and liquidity. This goal is not achieved, for example, by a large number of limit orders with small sizes and high cancellation rates.

[55] Memorandum to File, from Office of Economic Analysis, dated December 15, 2004 (analysis of volatility for stocks switching from NASDAQ to NYSE) (''Volatility Study''). The Volatility Study has been placed in Public File No. S7–10–04 and is available for inspection on the Commission's Internet Web site (*http://www.sec.gov*).

[56] Volatility Study at 1.

[57] *See, e.g.*, Bloomberg Tradebook Letter at 10; Fidelity Letter I at 11; Hudson River Trading Letter at 1; Instinet Letter at 14; Nasdaq Letter II at 6 and Attachment III.

[58] Letter from Kevin J. P. O'Hara, Chief Administrative Officer & General Counsel, Archipelago Holdings, Inc., to Jonathan G. Katz, Secretary, Commission, dated September 24, 2004 (''ArcaEx Letter'') at 3.

[59] Memorandum to File, from Office of Economic Analysis, dated December 15, 2004 (analysis of trade-throughs in Nasdaq and NYSE issues) (''Trade-Through Study''). The Trade-Through Study has been placed in Public File No. S7–10–04 and is available for inspection on the Commission's Internet Web site (*http://www.sec.gov*). To eliminate false trade-throughs, the staff calculated trade-through rates using a 3-second window—a reference price must have been displayed one second before a trade and still have been displayed one second after a trade. In addition, the staff eliminated quotations displayed by the American Stock Exchange LLC (''Amex'') from the analysis of Nasdaq stocks because they were manual quotations. Finally, the staff used the time of execution of a trade, if one was given, rather than time of the trade report itself. This methodology was designed to eliminate manual trades, such as block trades, that might not be reported for several seconds after the trade was effected manually.

[60] Trade-Through Study, Tables 4, 11.

[61] *Id.,* Tables 3, 10.

[62] *Id.,* Tables 4, 11.

[63] *Id.,* Table 11.

[64] *See supra*, note 35 (discussion of difficulty for investors to monitor whether their order execution prices equal the best quoted prices at the time of order execution).

[65] In October 2004, there were 3.9 million average daily trades reported in Nasdaq stocks. Source: *http://www.nasdaqtrader.com.* The average trade-through rate of 2.5% for Nasdaq stocks yields

Continued

concerned that many of the investors that ultimately received the inferior price on these trades may not be aware that their orders did not, in fact, obtain the best price. The reproposed Trade-Through Rule would backstop a broker's duty of best execution by prohibiting the practice of executing orders at inferior prices, absent an applicable exception.

Just as importantly, even when market participants act in their own economic self-interest, or brokers act in the best interests of their customers, they may deliberately choose, for various reasons, to bypass (*i.e.*, not protect) limit orders with the best displayed prices. For example, an institution may be willing to accept a dealer's execution of a particular block order at a price outside the NBBO, thereby transferring the risk of any further price impact to the dealer. Market participants that execute orders at inferior prices without protecting displayed limit orders are effectively ''free-riding'' on the price discovery provided by those limit orders. Displayed limit orders benefit all market participants by establishing the best prices, but, when bypassed, do not themselves receive a benefit, in the form of an execution, for providing this public good. This economic externality, in turn, creates a disincentive for investors to display limit orders, particularly limit orders of any substantial size.

As demonstrated by the current rate of trade-throughs of the best quotations in Nasdaq and NYSE stocks, these structural problems often can lead to executions at prices that are inferior to displayed quotations, meaning that limit orders are being bypassed. The frequent bypassing of limit orders can cause fewer limit orders to be placed. The Commission therefore preliminarily believes that the reproposed Trade-Through Rule is needed to encourage greater use of limit orders. The more limit orders available at better prices and greater size, the more liquidity available to fill incoming marketable orders. Increased liquidity, in turn, could lead market participants to interact more often with displayed orders, which would lead to greater use of limit orders, and thus begin the cycle again. The end result should be an NMS that more fully meets the needs of a broad spectrum of investors, particularly the long-term investors, as opposed to short-term traders, that benefit most from improved market depth and liquidity.

average daily trade-throughs of approximately 98,000.

2. Limiting Protection to Automated and Accessible Quotations

The trade-through proposal sought to strengthen protection against trade-throughs, while also addressing problems posed by the inherent differences in quotations displayed by automated markets, which are immediately accessible, and quotations displayed by manual markets, which are not. The proposal included an exception that would have allowed automated markets to trade through manual markets, but only up to certain amounts that varied depending upon the price of the security. Under the proposal, a market would be classified as ''manual'' if it did not provide for an immediate automated response to *all* incoming orders attempting to access its displayed quotations.[66]

At the NMS Hearing, a significant portion of the discussion of the trade-through proposal addressed issues relating to quotations of automated and manual markets. Representatives of two floor-based exchanges announced their intent to establish ''hybrid'' trading facilities that would offer automatic execution of orders seeking to interact with their displayed quotations, while at the same time maintaining a traditional floor.[67] These representatives acknowledged the difficulties posed in developing an efficient hybrid market, but emphasized that they were committed to developing such facilities and that such facilities were likely to become operational prior to any implementation of Regulation NMS.

Other panelists at the NMS Hearing strongly believed that manual quotations should not receive any protection against trade-throughs and that the proposed trade-through amounts should be eliminated.[68] They noted, however, that existing order routing technologies are capable of identifying, on a quote-by-quote basis, indications from a market that a particular quotation is not immediately and automatically accessible (*i.e.*, is a manual quotation). Using this functionality, a trade-through rule could classify individual quotations as automated or manual, rather than classifying an entire market as manual solely because it displayed manual quotations on occasion.

To give the public a full opportunity to comment on these issues, the Supplemental Release described the developments at the NMS Hearing and requested comment on whether a trade-through rule should protect only automated quotations and whether the rule should adopt a ''quote-by-quote'' approach to identifying protected quotations.[69] The Supplemental Release also requested comment on the requirements for an automated quotation, including whether the rule should impose a maximum response time, such as one second, on the total time for a market to respond to an order in an automated manner. Comment also was requested on mechanisms for enforcing compliance with the automated quotation requirements.

Nearly all commenters believed that only automated quotations should receive protection against trade-throughs and that therefore the proposed limitation on trade-through amounts for manual markets should be eliminated.[70] The Commission agrees. The reproposed Trade-Through Rule would protect only those quotations that are immediately and automatically accessible. Providing protection to manual quotations, even limited to trade-throughs beyond a certain amount, potentially would lead to undue delays in the routing of investor orders, thereby outweighing the benefits of price protection. If the Trade-Through Rule were adopted, investors would have the choice of whether to access a manual quotation and wait for a response or to access an automated quotation with an inferior price and obtain an immediate response. Moreover, those who route limit orders would be able to control whether their orders are protected by evaluating the extent to which various trading centers display automated versus manual quotations.

Commenters expressed differing views, however, on the appropriate standards for automated quotations and on the standards that should govern ''hybrid'' markets—those that display both automated and manual quotations. These issues are discussed below.

a. Standards for Automated Quotations. Nearly all commenters addressing the issue believed that only quotations that are truly firm and fully accessible should qualify as ''automated.''[71] To achieve this goal,

[66] Proposing Release, 69 FR at 11140.

[67] Hearing Tr. at 90–92, 94–97, 120.

[68] Hearing Tr. at 57–58, 67, 142–144, 157–158.

[69] Supplemental Release, 69 FR at 30142–30144.

[70] *See, e.g.*, Ameritrade Letter I at 8; Letter from Lou Klobuchar Jr., President and Chief Brokerage Officer, E*TRADE Financial Corporation, to Jonathan G. Katz, Secretary, Commission, dated June 30, 2004 (''E*Trade Letter'') at 6; ICI Letter at 12; Nasdaq Letter II at 9, 14; Letter from Marc Lackritz, President, Securities Industry Association, to Jonathan G. Katz, Secretary, Commission, dated June 30, 2004 (''SIA Letter'') at 15.

[71] *See, e.g.*, Letter from John J. Wheeler, Vice President, Director of U.S. Equity Trading, American Century Investment Management Inc., to Jonathan G. Katz, Secretary, Commission, dated June 30, 2004 (''American Century Letter'') at 3;

they suggested that, at a minimum, the market displaying an automated quotation should be required to provide a functionality for an incoming order to receive an immediate and automated (*i.e.*, without human intervention) execution up to the full displayed size of the quotation. In addition, they believed the market should provide an immediate and automated response to the sender of the order indicating whether the order had been executed (in full or in part) and an immediate and automated updating of the quotation. A number of commenters advocated a specific time standard for distinguishing between manual and automated quotations, ranging from one second down to 250 milliseconds.[72] Other commenters did not believe the definition of automated quotation should include a specific time standard, generally because setting a specific standard might discourage innovation and become a ''ceiling'' on market performance.[73]

The Commission has included in the reproposal a definition of automated quotation that incorporates the three elements suggested by commenters: (1) Acting on an incoming order, (2) responding to the sender of the order, and (3) updating the quotation. In particular, reproposed Rule 600(b)(3) would require that the trading center displaying an automated quotation must provide an ''immediate-or-cancel'' (''IOC'') functionality for an incoming order to execute immediately and automatically against the quotation up to its full size, and for any unexecuted portion of such incoming order to be cancelled immediately and automatically without being routed elsewhere. The trading center also must immediately and automatically respond to the sender of an IOC order. To qualify as ''automatic,'' no human discretion exercised after the time an order is received would be permissible in determining any action taken with respect to an order. Trading centers would be required to offer this IOC functionality only to customers that request immediate action and response by submitting an IOC order. Customers therefore would have the choice of whether to require an immediate response from the trading center, or to allow the market to take further action on the order (such as by routing the order elsewhere, seeking additional liquidity for the order, or displaying the order). Finally, trading centers would be required to immediately and automatically update their automated quotations to reflect any change to their material terms (such as a change in price, size, or ''automated'' status).

The definition of automated quotation does not set forth a specific time standard for responding to an incoming order. The Commission agrees with commenters that the standard should simply be ''immediate''—*i.e.*, a trading center's systems should provide the fastest response possible without any programmed delay. Nevertheless, the Commission also is concerned that trading centers with well-functioning systems should not be unnecessarily slowed down waiting for responses from a trading center that is experiencing a systems problem. Consequently, rather than fixing a specific time standard that may become obsolete as systems improve over time, Rule 611(b)(1) would address the problem of slow trading centers by providing an exception for quotations displayed by trading centers that are experiencing, among other things, a material delay in responding to incoming orders. Given current industry conditions, the Commission believes that repeatedly failing to respond within one second after receipt of an order would constitute a material delay.[74] Accordingly, a trading center would act reasonably in the current trading environment if it bypassed the quotations of another trading center that had repeatedly failed to respond to orders within a one-second time frame (after adjusting for any potential delays in transmission not attributable to the other trading center).[75] This ''self-help'' remedy, discussed further in sections II.A.3 and II.B.3 below, would give trading centers needed flexibility to deal with a trading center that is experiencing systems problems, rather than forcing smoothly-functioning trading centers to slow down for a problem market.

b. Standards for Automated Trading Centers. The trade-through proposal would have classified a market as manual if it did not provide automated access to *all* orders seeking access to its displayed quotations. Many commenters responded positively to the concept of allowing hybrid markets to display both automated and manual quotations that was raised at the NMS Hearing and discussed in the Supplemental Release. Most national securities exchanges believed that focusing on whether individual quotations are automated or manual would permit hybrid markets to function, thereby expanding the range of trading choices for investors.[76] For example, Amex stated that hybrid markets would offer investors the choice to utilize auction markets when advantageous for them to do so, while at the same time offering automatic execution to those investors desiring speed and certainty of a fast response.[77] A majority of other commenters also believed that the application of any trade-through rule should depend on whether a particular quotation is

Letter from C. Thomas Richardson, Citigroup Global Markets, Inc., to Jonathan G. Katz, Secretary, Commission, dated July 20, 2004 (''Citigroup Letter'') at 6–7; Letter from Gary Cohn, Managing Director, Goldman, Sachs & Co., to Jonathan G. Katz, Secretary, Commission, dated July 19, 2004 (''Goldman Sachs Letter'') at 4–5; ICI Letter at 13; Morgan Stanley Letter at 7; SIA Letter at 6.

[72] *See, e.g.*, Ameritrade Letter I at 6; Bloomberg Tradebook Letter at 13; Letter from Kenneth R. Leibler, Chairman, Boston Stock Exchange, Inc., to Jonathan G. Katz, Secretary, Commission, dated June 30, 2004 (''BSE Letter'') at 7; Consumer Federation Letter at 3; Letter from David A. Herron, Chief Executive Officer, Chicago Stock Exchange, to Jonathan G. Katz, Secretary, Commission, dated June 30, 2004 (''CHX Letter'') at 7–8; Citigroup Letter at 7; Goldman Sachs Letter at 2; ICI Letter at 3, 10; Nasdaq Letter II at 3, 13; Letter from John Martello, Managing Director, Tower Research Capital LLC, to Jonathan G. Katz, Secretary, Commission, dated June 30, 2004 (''Tower Research Letter'') at 5.

[73] *See, e.g.*, American Century Letter at 3, Letter from Salvatore F. Sodano, Chairman & Chief Executive Officer, American Stock Exchange LLC, to Jonathan G. Katz, Secretary, Commission, dated June 30, 2004 (''Amex Letter''), Exhibit A at 6; Brut Letter at 7; Letter from Matt D. Lyons, Capital Research and Management Company, to Jonathan G. Katz, Secretary, Commission, dated June 28, 2004 (''Capital Research Letter'') at 2; Fidelity Letter I at 8; Instinet Letter at 4; Letter from John H. Bluher, Executive Vice President & General Counsel, Knight Trading Group, to William H. Donaldson, Chairman, Commission, dated April 15, 2004 (''Knight Letter'') at 5; Letter from James T. Brett, J.P. Morgan Securities Inc., to Jonathan G. Katz, Secretary, Commission, dated July 8, 2004 (''JP Morgan Letter'') at 3; Morgan Stanley Letter at 7; Letter from Darla C. Stuckey, Corporate Secretary, New York Stock Exchange, Inc., to Jonathan G. Katz, Secretary, Commission, dated July 2, 2004 (''NYSE Letter''), Attachment at 3; Letter from David Humphreville, President, The Specialist Association, to Jonathan G. Katz, Secretary, Commission, dated June 30, 2004 (''Specialist Assoc. Letter'') at 8; Letter from Lisa M. Utasi, President, *et al.*, The Security Traders Association of New York, Inc., to Jonathan G. Katz, Secretary, Commission, dated June 30, 2004 (''STANY Letter'') at 4; Letter from George U. Sauter, Managing Director, The Vanguard Group, Inc., to Jonathan G. Katz, Secretary, Commission, dated July 14, 2004 (''Vanguard Letter'') at 4.

[74] *Cf.* Ameritrade Letter I at 6 (one second response time is appropriate); CHX Letter at 8 (receive, execute, and report back within one second); Citigroup Letter at 7 (turnaround time of no more than one second); Goldman Sachs Letter at 4 (orders executed or cancelled within not more than one second).

[75] As discussed further in section II.B.3 below, a trading center utilizing the material delay exception would be required to establish specific and objective parameters for its use of the exception in its policies and procedures.

[76] *See, e.g.*, Amex Letter at 5; Letter from William J. Brodsky, Chairman & Chief Executive Officer, Chicago Board Options Exchange, Inc., to Jonathan G. Katz, Secretary, Commission, dated July 1, 2004 (''CBOE Letter'') at 3; CHX Letter at 7; NYSE Letter at 4.

[77] Amex Letter, Appendix A at 4.

automated.[78] They believed that such a rule would achieve the benefits of encouraging limit orders and improving market depth and liquidity, while avoiding indirectly mandating a particular market structure.

Although generally supportive of the concept of hybrid markets, several commenters expressed concern about how the ''quote-by-quote'' approach to protected quotations would operate in practice.[79] The ICI noted that ''[w]e are concerned that if it is left completely up to an individual market's discretion when a quote is 'automated' or manual, that market could base its decision on what is in the best interests of that market and its members, as opposed to the best interests of investors and other market participants.'' [80] These commenters suggested that the Commission should provide clear guidelines as to when and how a market could switch its quotations from automated to manual, and vice versa, so as to prevent abuse by the market.

After considering the views of commenters, the Commission has decided to include in the reproposal an approach that would offer flexibility for a hybrid market to display both automated and manual quotations, but only when such a market meets basic standards that promote fair and efficient access by the public to the market's automated quotations. This approach is designed to allow markets to offer a variety of trading choices to investors, but without requiring other markets and market participants to route orders to a hybrid market with quotations that are not truly accessible. Reproposed Rule 600(b)(4) therefore sets forth requirements for a trading center to qualify as an ''automated trading center.'' Unless a trading center met these requirements, none of its quotations could qualify as automated, and therefore protected, quotations.

To qualify as an automated trading center, the trading center must have implemented such systems and rules as are necessary to render it capable of displaying quotations that meet the action, response, and updating requirements set forth in the definition of an automated quotation. Further, the trading center must identify all quotations other than automated quotations as manual quotations, and must immediately identify its quotations as manual quotations whenever it has reason to believe that it is not capable of displaying automated quotations. These requirements are designed to enable other trading centers readily to determine whether a particular quotation displayed by a hybrid trading center is protected by the reproposed Trade-Through Rule. Finally, an automated trading center must adopt reasonable standards limiting when its quotations change from automated quotations to manual quotations, and vice versa, to specifically defined circumstances that promote fair and efficient access to its automated quotations and are consistent with the maintenance of fair and orderly markets.

These requirements are designed to promote efficient interaction between a hybrid market and other trading centers. The requirement that automated quotations cannot be switched on and off except in specifically defined circumstances is particularly intended to assure that hybrid markets do not give their members, or anyone else, overbroad discretion to control the automated or manual status of the trading center's quotations, which potentially could disadvantage less favorably situated market participants. Changes from automated to manual quotations, and vice versa, must to subject to specific, enforceable limitations as to the timing of switches. For a trading center to qualify as entitled to display any protected quotations, the public in general must have fair and efficient access to a trading center's quotations.

3. Workable Implementation of Intermarket Trade-Through Protection

Several commenters expressed concern that the proposed trade-through rule could not be implemented in a workable manner, particularly for high-volume stocks.[81] Morgan Stanley, for example, asserted that an inefficient trading center might have inferior systems that would delay routed orders and potentially diminish their quality of execution.[82] Instinet emphasized that protecting a market's quotations ''confers enormous power on a market * * * Such power can and will be abused either directly (*e.g.*, by quoting slower than executing orders) or indirectly (*e.g.*, not investing in more than minimum system capacity or redundancy).'' [83] Hudson River Trading noted that markets sometimes experience temporary systems problems and questioned how a trade-through rule would handle these scenarios.[84] Nasdaq observed that quotations in many Nasdaq stocks are updated more than two times per second. It said that these frequent changes could lead to many false indications of trade-throughs and that eliminating these ''false positives'' would greatly reduce the percentage of transactions subject to a trade-through rule.[85] Finally, many commenters noted that market participants need the ability to sweep multiple price levels simultaneously at different trading centers. They emphasized that a trade-through rule should accommodate this trading strategy by freeing each trading center to execute orders immediately without waiting for other trading centers to update their better priced quotations.[86]

The Commission fully agrees with these commenters that intermarket protection against trade-throughs must be workable and implemented in a way that promotes fair and orderly markets. It therefore has formulated the reproposed Trade-Through Rule to achieve this objective in a variety of ways. First and most importantly, only automated trading centers, as defined in Rule 600(b)(4), that are capable of providing immediate responses to incoming orders would be eligible to have their quotations protected. Moreover, an automated trading center is required to identify its quotations as manual (and therefore not protected) whenever it has reason to believe that it is not capable of providing immediate responses to orders. Thus, a trading center that experiences a systems

[78] *See, e.g.*, Letter from Joseph M. Velli, Senior Executive Vice President, The Bank of New York, to Jonathan G. Katz, Secretary, Commission, dated June 30, 2004 (''BNY Letter'') at 2; E*Trade Letter at 6; ICI Letter at 7, 13; Morgan Stanley Letter at 6.

[79] *See, e.g.*, Citigroup Letter at 6; ICI Letter at 13; Morgan Stanley Letter at 7; Nasdaq Letter II at 13–14;Vanguard Letter at 5.

[80] ICI Letter at 13.

[81] *See, e.g.*, Hudson River Trading Letter at 3; Instinet Letter at 18–19; Morgan Stanley Letter at 11–12; Letter from Edward S. Knight, The Nasdaq Stock Market, Inc., to Jonathan G. Katz, Secretary, Commission, dated September 29, 2004 (''Nasdaq Letter III'') at 3.

[82] Morgan Stanley Letter at 12.

[83] Instinet Letter at 17.

[84] Hudson River Trading Letter at 3. This commenter also raised a number of quite specific questions concerning the operation of an intermarket trade-through rule. To address these detailed order sequencing and response scenarios, trading centers would be entitled to adopt policies and procedures that reasonably resolve the practical difficulties of handling fast-arriving orders in a fair and orderly fashion. For example, if a trading center routed orders to other markets to access the full size of protected quotations under the reproposed Trade-Through Rule, it would be allowed to continue trading without regard to a particular market's quotations until it has received a response from such market. With respect to concern that traders would not be able to control the routing of their own orders if markets are required to route out to other markets, a trader's use of the IOC functionality specified in Rule 600(b)(3) would preclude the first market from routing to other markets.

[85] Nasdaq Letter III at 3–4.

[86] *See, e.g.*, Brut Letter at 10; Citigroup Letter at 10; E*Trade Letter at 8; Goldman Sachs Letter at 7.

problem, whether because of a flood of orders or otherwise, must immediately identify its quotations as manual.

If the reproposed Trade-Through Rule were adopted, the Commission would monitor and enforce the foregoing requirements for automated trading centers and automated quotations. Nevertheless, it concurs with commenters' concerns that well-functioning trading centers should not be dependent on the willingness and capacity of other markets to meet, and the Commission's ability to enforce, these automation requirements. The Trade-Through Rule therefore provides a ''self-help'' remedy that would allow trading centers to bypass the quotations of a trading center that fails to meet the immediate response requirement. Rule 611(b)(1) sets forth an exception that applies to quotations displayed by trading centers that are experiencing a failure, material delay, or malfunction of its systems or equipment. To implement this exception consistent with the requirements of Rule 611(a), trading centers would have to adopt policies and procedures reasonably designed to avoid dealing with problem trading centers. Such policies and procedures would need to set forth specific and objective parameters for initiating and monitoring compliance with the self-help remedy. Given current industry capabilities, the Commission believes that trading centers should be entitled to bypass another trading center's quotations if it repeatedly fails to respond within one second to incoming orders attempting to access its protected quotations. Accordingly, trading centers would have the necessary flexibility to respond to problems at another trading center as they occur during the trading day. The Commission, of course, also would monitor a trading center's compliance with the policies and procedures required by Rule 611(a) to affirm that the trading center bypasses quotations only when, in fact, another trading center is experiencing a material delay.

In many active NMS stocks, the price of a trading center's best displayed quotations often can change multiple times in a single second (''flickering quotations''). These rapid changes can create the impression that a quotation was traded-through, when in fact the trade was effected nearly simultaneously with display of the quotation.[87] To address the problem of flickering quotations, reproposed Rule 611(b)(8) sets forth an exception that allows trading centers a one-second ''window'' prior to a transaction for trading centers to evaluate the quotations at another trading center. Trading centers would be entitled to trade at any price equal to or better than the least aggressive best bid or best offer, as applicable, displayed by the other trading center during that one-second window.[88] For example, if the best bid price displayed by another trading center has flickered between $10.00 and $10.01 during the one-second window, the trading center that received the order could execute a trade at $10.00 without violating Rule 611. By addressing the flickering quotation problem in this way, reproposed Rule 611(b)(8) would give trading centers added flexibility to deal with the practical difficulties of protecting quotations displayed by other trading centers.

The Commission believes that excepting flickering prices from trade-through protection would ease the implementation of the reproposed Trade-Through Rule without significantly reducing its benefits.[89] In this regard, it appears that many of the potential implementation difficulties with respect to high-volume stocks are related to the general problem of dealing with sub-second time increments. The Commission generally does not believe that the benefits would justify the costs imposed on trading centers of attempting to implement an intermarket price priority rule at the level of sub-second time increments. Accordingly, Rule 611 has been formulated to relieve trading centers of this burden.[90]

Paragraphs (b)(5) and (b)(6) of reproposed Rule 611 set forth exceptions for intermarket sweep orders. The exceptions respond to the need of market participants to access multiple price levels simultaneously at different trading centers. An intermarket sweep order is defined in Rule 600(b)(30) as a limit order that meets the following requirements: (1) The limit order is identified as an intermarket sweep order when routed to a trading center, and (2) simultaneously with the routing of the limit order, one or more additional limit orders are routed to execute against all better-priced protected quotations displayed by other trading centers up to their displayed size. These additional orders also must be marked as intermarket sweep orders to inform the receiving trading center that they can be immediately executed without regard to protected quotations in other markets. Paragraph (b)(5) would allow a trading center to execute immediately any order identified as an intermarket sweep order, without regard for better-priced protected quotations displayed at one or more other trading centers. The exception is fully consistent with the principle of protecting the best displayed prices because it is premised on the condition that the trading center or broker-dealer responsible for routing the order will have attempted to access all better-priced protected quotations up to their displayed size.[91] Consequently, there is no reason why the trading center that receives an intermarket sweep order while displaying an inferior-priced quotation should be required to delay an execution of the order.

Paragraph (b)(6) would authorize a trading center itself to route intermarket sweep orders and thereby enable

[87] A number of commenters were concerned about flickering quotations and recommended an exemption to address the problem. CHX Letter at 5; E*Trade Letter at 9; JP Morgan Letter at 3; Letter from Richard A. Korhammer, Chairman & Chief Executive Officer, Lava Trading Inc., to Jonathan G. Katz, Secretary, Commission (no date) (''Lava Trading Letter'') at 5; SIA Letter at 10; Letter from Mary McDermott-Holland, Chairman & John C. Giesea, President, Security Traders Association, to Jonathan G. Katz, Secretary, Commission, dated June 30, 2004 (''STA Letter'') at 5.

[88] The Commission emphasizes that reproposed Rule 611 is designed to facilitate intermarket trade-through protection only. Compliance with the Rule would not be a substitute for meeting the best execution responsibilities of brokers-dealers. As a result, the best execution responsibilities of broker-dealers that engage in ''price-matching'' business practices that depend on the NBBO would not be affected by Rule 611's exception for flickering quotations. In making a best execution determination, for example, a broker-dealer could not rely on the Rule's exception to justify ignoring a recently displayed, better-priced quotation when experience shows that the quotation is likely to be accessible.

[89] Even with the one-second exception for flickering quotations, reproposed Rule 611 would address a large number of trade-throughs that currently occur in the equity markets. The substantial trade-through rates discussed in section II.A.1 above were calculated using a 3-second window. Rule 611 would address all of these trade-throughs, assuming no other exception was applicable.

[90] Several commenters raised questions concerning ''clock drift'' and time lags between different data sources. *See, e.g.,* Hudson River Trading Letter at 2; Nasdaq Letter III at 4. These implementation issues would most appropriately be addressed in the context of a trading center's reasonable policies and procedures. Clearly, one essential procedure would be for trading centers to implement clock synchronization practices that meet or exceed industry standards. In addition, a trading center's compliance with the Trade-Through Rule would be assessed based on the times that orders and quotations are received, and trades are executed, at that trading center. In contrast, to comply with the locking/crossing provisions of the reproposed Access Rule (Rule 610(d)), a trading center would be required reasonably to avoid displaying a quotation that would lock or cross a quotation at the time it is displayed by a Plan processor in the consolidated quotation stream.

[91] Reserve size, in contrast, is not displayed. Trading centers and broker-dealers therefore would not be required to route orders to access reserve size.

immediate execution of a transaction at a price inferior to a protected quotation at another trading center. For example, paragraph (b)(6) could be used by a dealer that wished immediately to execute a block transaction at a price three cents down from the NBBO, as long as the dealer simultaneously routed orders to access all better-priced protected quotations. By facilitating intermarket sweep orders of all kinds, Rule 611 as reproposed would allow a much wider range of beneficial trading strategies than the rule as proposed. In addition, the intermarket sweep exception would help prevent an ''indefinite loop'' scenario in which waves of orders otherwise might be required to chase the same quotations from trading center to trading center, one price level at a time.[92]

4. Elimination of Proposed Opt-Out Exception

The rule text of the trade-through proposal included a broad exception for persons to opt-out of the best displayed prices if they provided informed consent. The Proposing Release indicated that the exception was particularly intended to allow investors to bypass manual markets, to execute block transactions without moving the market price, and to help discipline markets that provided slow executions or inadequate access to their quotations.[93] The Commission also noted, however, that an opt-out exception would be inconsistent with the principle of price protection and, if used frequently, could undermine investor confidence that their orders will receive the best available price. It therefore requested comment on an automated execution alternative to the opt-out exception, under which all markets would be required to provide an automated response to electronic orders. At the subsequent NMS Hearing, some panelists questioned whether, assuming only truly accessible and automated quotations were protected, there was a valid reason for opting-out of such a quotation.[94] To address this issue, the Commission requested comment in the Supplemental Release on whether the proposed opt-out exception would be necessary if manual quotations were excluded from trade-through protection.

Many commenters opposed a general opt-out exception.[95] They believed that it would be inconsistent with the principle of price protection and undermine the very benefits the trade-through rule is designed to provide. American Century, for example, asserted that the Commission should focus on the limit order investors who have ''opted-in'' to the NMS, rather than on those that wish to opt-out.[96] Vanguard noted that an opt-out exception might serve a short-term desire to obtain an immediate execution, but ''without recognizing the second order effect of potentially significantly reducing liquidity in the long term.''[97] Similarly, the ICI stated that ''while our members may be best served on a particular trade by 'opting-out' from executing against the best price placed in another market, we believe that in the long term, *all* investors will benefit by having a market structure where all limit orders are protected and investors are provided with an incentive to place those orders in the markets.''[98] All of the foregoing views were conditioned on an assumption that only accessible, automated quotations would be protected by a trade-through rule.

Many other commenters, in contrast, supported the proposed opt-out exception.[99] Aside from concerns that a trade-through rule would be unworkable without an opt-out exception, which were discussed in the preceding section, the primary concerns of these commenters were that, without an opt-out exception, a trade-through rule would (1) dampen competition among markets, particularly with respect to factors other than price; and (2) restrict the freedom of choice for market participants to route marketable orders to trading centers that are most appropriate for their particular trading objectives and to achieve best execution. As discussed next, the Commission has formulated the reproposed Trade-Through Rule to respond to these concerns, while still preserving the benefits of intermarket price protection.

a. Preserving Competition Among Markets. Many commenters believed that an opt-out exception was necessary to promote competition among trading centers, particularly competition based on factors other than price, such as speed of response. For example, 179 commenters submitted letters stating that, in the absence of an opt-out exception, ''Reg. NMS will freeze market development and, over the long term, could hurt investors.''[100] Morgan Stanley asserted that allowing market participants to opt-out ''would reward markets that provide faster and surer executions, and conversely, would penalize those markets that are materially slower or are displaying smaller quote sizes by ignoring those quotes.''[101] Instinet believed that, without an opt-out exception, a trade-through rule ''would virtually eliminate intermarket competition by forcing operational and technological uniformity on each marketplace, negating price competition, system performance, or any other differentiating feature that a market may develop.''[102]

The Commission recognizes the vital importance of preserving vigorous competition among markets, but believes that commenters have overstated the risk that such competition would be dampened by adoption of a trade-through rule without a general opt-out exception. Even if reproposed Rule 611 were adopted, markets likely would have strong incentives to continue to compete and innovate to attract both marketable orders and limit orders. Market participants and intermediaries responsible for routing marketable orders, consistent with their desire to achieve the best price and their duty of best execution, would continue to rank trading centers according to the total range of services provided by those markets. Such services include cost, speed of response, sweep functionality, and a wide variety of complex order types. The most competitive trading center would be the first choice for routing marketable orders, thereby enhancing the likelihood of execution for limit orders routed to that trading center. Because likelihood of execution is of such great importance to limit orders, routers of limit orders would be attracted to this preferred trading center. More limit orders would enhance the depth and liquidity offered by the

[92] The indefinite loop scenario also is addressed by (1) the self-help remedy in reproposed Rule 611(b)(1) for trading centers to deal with slow response times and (2) the requirement that trading centers immediately stop displaying automated (and therefore protected) quotations when they can no longer meet the immediate response requirement for automated quotations.

[93] Proposing Release, 69 FR at 11138.

[94] Hearing Tr. at 32, 58, 65, 74, 80, 84–85, 154.

[95] *See supra*, note 38 (overview of commenters supporting a strong trade-through rule without an opt-out exception).

[96] American Century Letter at 4.

[97] Vanguard Letter at 5.

[98] ICI Letter at 14 (emphasis in original).

[99] Approximately 367 commenters supported an opt-out exception. Approximately 211 of these commenters opposed a trade-through rule and endorsed an opt-out to remediate what they viewed as its adverse effects. Of these 211 commenters, 179 commenters utilized Form Letter C. The remaining commenters supporting an opt-out exception included a variety of securities industry participants and 15 members of Congress.

[100] Letter Type C.

[101] Morgan Stanley Letter at 11–12.

[102] Instinet Letter at 19.

preferred trading center, thereby increasing its attractiveness for marketable orders, and beginning the cycle all over again.[103]

Conversely, trading centers that offer poor services, such as a slower speed of response, likely would rank near the bottom in order-routing preference of most market participants and intermediaries. Whenever the least-preferred trading center was merely posting the same price as other trading centers, orders would be routed to other trading centers. As a result, limit orders displayed on the least preferred trading center would be least likely to be executed in general. Moreover, such limit orders would be the least likely to be executed when prices move in favor of the limit orders, and the most likely to be executed only when prices are moving against the limit order, adding the cost of ''adverse selection'' to the cost of a low likelihood of execution. In sum, the lowest ranked trading center in order-routing preference, with or without intermarket price protection, would suffer the consequences of offering a poor range of services to the routers of marketable orders.[104] The Commission therefore preliminarily does not believe that the absence of an opt-out exception would freeze market development or eliminate competition among markets.

b. Promoting the Interests of Both Marketable Orders and Limit Orders. Many commenters that supported an opt-out exception believed that an ability to opt-out of the best displayed prices was necessary to promote full freedom of choice in the routing of marketable orders, and particularly to allow factors other than quoted prices to be considered. For example, 179 commenters submitted a letter stating that ''[i]nvestors are driven by price, but prices that are inaccessible either because of lagging execution time within a market or insufficient liquidity at the best price point impact the overall costs associated with trading securities in today's markets. The Trade Through rule may harm investors by restricting their ability to achieve best execution, and investors deserve the opportunity to make choices.'' [105] Similarly, Fidelity asserted that ''as a fiduciary to the mutual funds under our management, we should be free to reach our own informed judgment regarding the market center where our funds' trades are to be executed, particularly when a delay may open the way for exchange floor members and others to exploit an informational advantage that arises not from their greater investment or trading acumen but merely from their privileged presence on the physical trading floor.'' [106]

The Commission agrees that the interests of investors in choosing the trading center to which to route marketable orders are vitally important, but believes that advocates of the opt-out exception have failed to consider the interests of *all* investors—both those who submit marketable orders and those who submit limit orders. A fair and efficient NMS must serve the interests of both types of investors. Moreover, their interests are inextricably linked together. Displayed limit orders are the primary source of public price discovery. They typically set quoted spreads, supply liquidity, and in general establish the public ''market'' for a stock. The quality of execution for marketable orders, which, in turn, trade with displayed liquidity, depends to a great extent on the quality of market established by limit orders (*i.e.*, the narrowness of quoted spreads and the available liquidity at various price levels).

Limit orders, however, make the first move—when submitted, they must be displayed rather than executed, and therefore offer a ''free option'' for other market participants to trade a stock by submitting marketable orders and taking the liquidity supplied by limit orders. Consequently, the fate of limit orders is dependent on the choices made by those who route marketable orders. Much of the time, the interests of marketable orders in obtaining the best available price are aligned with those of limit orders that are displaying the best available price. But, as shown by the significant trade-through rates discussed in section II.A.1 above (even for automated quotations in Nasdaq stocks), the interests of marketable orders and limit orders are not always aligned.

One important example where the interests of limit orders and marketable orders often diverge are large, block trades. Several commenters noted that they often are willing to bypass the best quoted prices if they can obtain an immediate execution of large orders at a fixed price that is several cents away from the best prices.[107] Yet these block trades often will be priced based on the displayed quotations in a stock. They thereby demonstrate the ''free-riding'' economic externality that, as discussed in section II.A.1 above, is at the heart of the need for intermarket price protection. To achieve the full benefits of intermarket price protection, all investors must be governed by a uniform rule that encompasses their individual trades. For any particular trade, an investor may believe that the best course of action is to bypass displayed quotations in favor of executing larger size immediately. The Commission believes, however, that the long-term strength of the NMS as a whole is best promoted by fostering greater depth and liquidity, and it follows from this that the Commission should examine the extent to which it can encourage the limit orders that provide this depth and liquidity to the market at the best prices. Allowing individual market participants to pick and choose when to respect displayed quotations could undercut the fundamental reason for displaying the liquidity in the first place.

Consequently, the Commission has decided to eliminate the proposed opt-out exception from the reproposal because it could severely detract from the benefits of intermarket order protection. Instead, reproposed Rule 611 has been modified to address the concerns of those who otherwise may have felt they needed to opt-out of protected quotations. In particular, it would incorporate an approach that seeks to serve the interests of both marketable orders and limit orders by appropriately balancing these interests in the contexts where they may diverge. In this way, the reproposed Trade-Through Rule is intended to promote the overall efficiency of the NMS for all investors.

First and most importantly, reproposed Rule 611 would protect only immediately accessible quotations that are available through automatic execution. It would never require investors submitting marketable orders to access ''maybe'' quotations that, after arrival of the order, are subject to human intervention and thereby create the potential for other market participants to determine whether to honor the quotation. Moreover, as discussed in section II.A.2 above,

[103] Importantly, reproposed Rule 611 would not require that limit orders be routed to any particular market, as it does, at least indirectly, marketable orders. Consequently, competitive forces would be fully operative to discipline markets that offer poor services to limit orders, such as limiting the extent to which limit orders can be cancelled in changing market conditions or providing slow speed of cancellation.

[104] As discussed below in section III.A.2, a competitive problem could arise if a least preferred market was allowed to charge exorbitant fees to access its protected quotations, and then pass most of the fee on as rebates to liquidity providers to offset adverse selection costs. To address the problem of such an ''outlier'' market, reproposed Rule 610(c) would set forth a uniform fee limitation for accessing protected quotations.

[105] Letter Type C.

[106] Fidelity Letter I at 6–7.

[107] *See, e.g.*, Fidelity Letter I at 9; Morgan Stanley Letter at 12.

reproposed Rule 611 includes a variety of provisions designed to assure that marketable orders must be routed only to well-functioning trading centers displaying executable quotations.

Second, reproposed Rule 611 has been formulated to promote the interests of investors seeking immediate execution of specific order types that reduce their total trading costs, particularly for larger orders, by, among other things, minimizing price impact costs. Paragraph (b)(7), for example, sets forth an exception that would allow the execution of volume-weighted average price (''VWAP'') orders, as well as other types of orders that are not priced with reference to the quoted price of a stock at the time of execution and for which the material terms were not reasonably available at the time the commitment to execute the order was made. This exception would serve the interests of marketable orders and is consistent with the principle of protecting the best displayed quotations.

Although reproposed Rule 611 does not provide a general exception for block orders, it seeks to address the legitimate interest of investors in obtaining an immediate execution in large size (and thereby minimizing price impact). The intermarket sweep order exception would allow broker-dealers to continue to facilitate the execution of block orders. The entire size of a large order can be executed immediately at any price, so long as the broker-dealer routes orders seeking to execute against the full displayed size of better-priced protected quotations. The size of the order therefore need not be parceled out over time in smaller orders that might tip the market about pending orders. By both allowing immediate execution of the large order and protecting better-priced quotations, reproposed Rule 611 is designed to appropriately balance the interests for investors on both sides of the market.

The Commission recognizes, however, that the existence of a intermarket price protection, without an opt-out exception, may interfere to some extent with the extremely short-term trading strategies of some market participants. Some of these strategies can be affected by a delay in order-routing or execution of as little as 3/10ths of one second. Given the current NMS structure with multiple competing markets, *any* protection of displayed quotations in one market could affect the implementation of short-term trading strategies in another market. This conflict between protecting the best displayed prices and facilitating short-term trading strategies raises a fundamental policy question—should the overall efficiency of the NMS defer to the needs of professional traders, many of whom rarely intend to hold a position overnight? Or should the NMS serve the needs of longer-term investors, both large and small, that will benefit substantially from intermarket price protection?

The Commission believes that two of the most important public policy functions of the secondary equity markets are to minimize trading costs for long-term investors and to reduce the cost of capital for listed companies. These functions are inherently connected, because the cost of capital of listed companies depends on the trading costs of those who are willing to accept the investment risk of holding corporate stock for an extended period. To the extent that the interests of professional traders and market intermediaries in a broad opt-out exception conflict with those of investors, the interests of investors are entitled to take precedence. In this way, the NMS will fulfill its Exchange Act objectives to promote fair and efficient equity markets for investors and to serve the public interest.

5. Scope of Protected Quotations: Market BBO Alternative and Voluntary Depth Alternative

The trade-through proposal would have protected all quotations disseminated by a Plan processor in the consolidated quote stream. Currently, the scope of these quotations depends on the regulatory status of an SRO. Under Exchange Act Rule 11Ac1–1 (''Quote Rule'') (proposed to be redesignated as Rule 602), exchange SROs are required to provide only their best bids and offers (''BBOs'') in a stock. In contrast, a national securities association, which currently encompasses Nasdaq's trading facilities and the NASD's ADF, must provide BBOs of its individual members. Consequently, the proposal would have protected only a single BBO of an exchange and not any additional quotations in its depth of book (''DOB''). For Nasdaq facilities and the ADF, however, the proposal would have protected member BBOs at multiple price levels. The Proposing Release requested comment on whether only a single BBO for Nasdaq and the ADF should be protected.[108]

Commenters expressed concern that the proposed rule text would protect the BBOs of individual market makers and ATSs in Nasdaq's facilities and the ADF, but only a single BBO of exchange SROs.[109] The Specialist Association, for example, believed that it would be unfair to offer greater protection to the quotations of members of an association SRO than to those of an exchange SRO.[110] Morgan Stanley stated that to ''equalize the protections available to all market participants, we believe the Commission should treat SuperMontage as a single market for purposes of the trade-through rule, instead of treating each individual Nasdaq market maker as a separate quoting market participant.'' [111]

The Commission agrees that reproposed Rule 611 should not mandate a regulatory disparity between the quotations displayed through exchange SROs and those displayed through Nasdaq facilities and the ADF. Potentially, Nasdaq and the ADF could attract a significant number of limit orders if they were able to offer order protection that was not available at exchange SROs. This result would not be consistent with the Exchange Act goals of fair competition among markets and the equal regulation of markets.[112] Each of the proposed alternatives for the definition of ''protected bid'' and ''protected offer'' in reproposed Rule 600(b)(57) (the Market BBO Alternative and the Voluntary Depth Alternative) therefore encompasses the BBOs of an exchange, Nasdaq, and the ADF. In this way, exchange markets would be treated comparably with Nasdaq and the ADF under either alternative.

The Proposing Release also addressed the issue of extending trade-through protection to DOB quotations, but questioned whether protecting all DOB quotations would be feasible at this time.[113] Comment specifically was requested, however, on whether protection should be extended beyond the BBOs of SROs if individual markets *voluntarily* provided DOB quotations through the facilities of an effective national market system plan.[114] At the subsequent NMS Hearing, a panelist specifically endorsed the policy and feasibility of extending trade-through protection to DOB quotations, as long as

[108] Proposing Release, 69 FR at 11136.

[109] See, *e.g.*, Goldman Sachs Letter at 6; Morgan Stanley Letter at 8; NYSE Letter, Attachment at 4; Specialist Assoc. Letter at 3.

[110] Specialist Assoc. Letter at 3.

[111] Morgan Stanley Letter at 8.

[112] Exchange Act Section 11A(a)(1)(C)(ii) and 11A(c)(1)(F).

[113] Proposing Release, 69 FR at 11136.

[114] *Id.* The Commission does not believe that markets should be *required* to disseminate their DOB quotations in the consolidated data stream and thereby obtain trade-through protection for such quotations. Rather, the Voluntary Depth Alternative would allow each market the freedom to choose the course of action most appropriate for its particular competitive strategy.

such quotations were automated and accessible: ''Automatically executable quotes, whether they are on the top of the book or up and down the book, should be protected by the trade-through rule, and manual quotes should not be. This is a simple and technically easy idea to implement.'' [115]

Most of the subset of comment letters that specifically addressed the DOB issue supported the approach of extending trade-through protection to all limit orders displayed in the NMS, not merely the BBOs of the various markets.[116] The Consumer Federation of America, for example, stated that ''such an approach would result in better price transparency and help to address complaints that decimal pricing has reduced price transparency because of the relatively thin volume of trading interest displayed in the best bid and offer.'' [117] The ICI recognized that protecting all displayed limit orders might not be feasible at this time, but urged the Commission to examine the issue further.[118]

The Commission recognizes, however, that other commenters may have chosen not to address the alternative of protecting voluntary DOB quotations because it was not included in the proposed rule text. In this reproposal, therefore, the Commission has decided to propose rule text for two alternatives: (1) The Market BBO Alternative that would protect only the BBOs of the exchange SROs, Nasdaq, and the ADF, or (2) the Voluntary Depth Alternative that, in addition to protecting BBOs, would protect the DOB quotations that markets voluntarily disseminate in the consolidated quotations stream. The alternatives are incorporated in two alternative definitions of ''protected bid'' and ''protected offer'' in Rule 600(b)(57). Comment is requested on which of the two alternatives would most further the Exchange Act objectives for the NMS in a practical and workable manner. The following discussion is intended to highlight issues that commenters may wish to address when evaluating the two alternatives.

Comment is requested on whether extending trade-through protection to DOB quotations would significantly increase the benefits of the reproposed Trade-Through Rule. Would protecting quotations at multiple price levels further encourage the display of limit orders and thereby significantly enhance depth and liquidity in the NMS? Since decimalization, quoted spreads have narrowed substantially. Market participants often may not be willing to quote in significant size at the inside prices, but might be willing to do so at a price that is a penny or more away from the inside prices. Granting trade-through protection to such quotations potentially would reward this beneficial quoting activity.

In assessing the potential benefits of DOB protection, commenters should consider the effect of the reserve (or undisplayed) size function that many trading centers offer investors. For example, Market A may be displaying a best offer of 1000 shares at $10.00, and DOB offers of 2000 shares at $10.01 and 2000 shares at $10.02. With a reserve size function, however, Market A may have an additional 1000 shares offered at $10.00 and an additional 2000 shares offered at $10.01, neither of which is displayed. Assuming the displayed offers of $10.00, $10.01, and $10.02 were protected quotations under the Voluntary Depth Alternative, Market B could execute a trade at $10.03 only by simultaneously routing an order to execute against the accumulated displayed size of the protected quotations at Market A. Market B therefore would be required to route a buy order, identified as an intermarket sweep order, to Market A with a limit price of $10.02 for a total of 5000 shares (the accumulated amount of the displayed size of protected quotations with a price of $10.02 or better at Market A). Under the priority rules currently in effect at electronic markets, undisplayed size has priority over displayed size at a inferior price. Accordingly, Market A would execute the 5000 share buy order as follows: 2000 shares at $10.00 (1000 displayed plus 1000 reserve) and 3000 shares at $10.01 (2000 displayed plus 1000 reserve). While Market B would have complied with the Rule, the displayed $10.02 offer at Market A would still go unfilled when Market B traded at $10.03. Comment is requested on the extent to which this outcome would detract from the benefits of the Voluntary Depth Alternative.

The Commission also requests comment on whether the Voluntary Depth Alternative could be implemented in a practical and cost-effective manner. To comply, trading centers would need to monitor a significantly larger number of protected quotations displayed by other markets and route orders to execute against such quotations.[119] The Voluntary Depth Alternative, however, would not increase the *number* of orders that a trading center would be required to route to other trading centers if only BBOs were protected. Instead, the *size* of the routed orders would need to be increased to reflect the accumulated depth displayed by other trading centers in their protected DOB quotations.

In addition, protection of DOB quotations would not be feasible unless (1) market participants have a source of information that clearly identifies the quotations to be protected, (2) such quotation information is made available on fair and reasonable terms, and (3) market participants have fair and efficient access to the protected quotations at reasonable cost (*i.e.*, without paying exorbitant access fees). Moreover, the applicable regulatory authorities must be able to monitor and enforce compliance with a rule that protected DOB quotations. At a minimum, this would require an objective and uniform source to identify the quotations that are protected at any particular time. Comment is requested on whether the Voluntary Depth Alternative would meet these vitally important requirements.

The Voluntary Depth Alternative would set up a process through which individual markets could choose to secure protection for their DOB quotations by disseminating them in the consolidated quotation stream. To implement this approach, the SRO participants in the market data Plans would need to establish a mechanism for individual markets to disseminate their quotations through the Plan processor and have them designated as protected quotations. The participants in the Nasdaq UTP Plan already have agreed on such a mechanism.[120] It provides that the future processor for the Plan should have the ability to collect, consolidate, and disseminate quotations at multiple price levels beyond the BBO from any participant that voluntarily chooses to submit such quotations. The participant would be expected to bear the costs of processing

[115] Hearing Tr. at 57 (testimony of Thomas Peterffy, Chairman, Interactive Brokers Group).

[116] American Century Letter at 2; Ameritrade Letter I at 4; BNY Letter at 2; Capital Research Letter at 2; Consumer Federation Letter at 2; Goldman Sachs Letter at 6; ICI Letter at 8. *See also* ArcaEx Letter at 7 (supports trade-through protection for exchange-listed stocks only, but for entire depth-of-book). *But see* Letter from Samuel F. Lek, Chief Executive Officer, Lek Securities Corporation, to Jonathan G. Katz, Secretary, Commission, dated May 24, 2004 (''Lek Securities Letter'') at 7; Specialist Assoc. Letter at 3.

[117] Consumer Federation Letter at 2.

[118] ICI Letter at 8.

[119] As a means to address capacity issues, the SRO participants in the applicable market data Plans potentially could determine to disseminate only those DOB quotations that were within a certain number of price levels away from the NBBO.

[120] Nasdaq UTP Plan, section XXI, Depth of Book Display (published in Securities Exchange Act Release No. 49137 (Jan. 28, 2004), 69 FR 5217, 5225 (Feb. 3, 2004).

its additional information. If the Voluntary Depth Alternative were adopted and any individual market were willing to disseminate its DOB quotations through the Plan processors, the participants in each of the Plans would be expected to agree on a fair and equitable means to disseminate such quotations.

As noted in section II.A.3 above, any intermarket protection against trade-throughs must be workable and implemented in a way that promotes fair and orderly markets. To the extent commenters are concerned about practical problems with implementing the Trade-Through Rule, would the basis for these concerns be magnified by the Voluntary Depth Proposal? Specifically, comment is requested on all issues relating to the feasibility and desirability of disseminating DOB quotations through Plan processors.[121] For example, would the voluntary dissemination of protected DOB quotations through the Plan processors create a single point of failure that could threaten the stability of trading in NMS stocks?

In addition, it would be inappropriate to extend trade-through protection to any quotation unless it was publicly available and accessible on fair and reasonable terms. For example, the limitation on access fees set forth in reproposed Rule 610(c) would apply to any protected quotation, whether a BBO or DOB quotation. Moreover, any fee charged for DOB information disseminated pursuant to a market data Plan would have to be filed with the Commission for approval. The fee could be approved only if it was fair and reasonable and appropriately justified by Plan participants. The Commission requests comment on how best to evaluate the fairness and reasonableness of fees for DOB quotations if the Voluntary Depth Alternative were adopted.

Finally, the Commission requests comment on the effect that adoption of the Voluntary Depth Alternative would have on competition among markets. One commenter, for example, suggested that protection of DOB quotations might cause increased fragmentation of liquidity across different markets because limit orders, no matter where displayed, would have price protection.[122] Another commenter, in contrast, asserted that protecting only BBOs would lead to greater fragmentation because limit orders would be routed to any market where they would set or equal the BBO and thereby obtain trade-through protection.[123] Comment is requested on the fragmentation issue, as well as in general on whether protecting DOB quotations would inappropriately limit the terms of market competition so as to harm investors and the efficiency of the NMS. For example, would adoption of the Voluntary Depth Alternative inappropriately reduce the scope of competition among markets to the payment of liquidity rebates for executed limit orders? Comment also is requested on whether adoption of the Voluntary Depth Alternative would generate forces that would lead to a monopolization of trading in a single trading facility.

6. Benefits and Implementation Costs of Trade-Through Rule

Commenters were concerned about the cost of implementing the original trade-through proposal. Some argued that, in general, implementing the proposed rule would be too expensive and would outweigh any perceived benefits of the rule.[124] Commenters also were concerned about the cost of specific requirements in the proposed rule, particularly the procedural requirements associated with the proposed opt-out exception (*e.g.*, obtaining informed consent from customers and disclosing the NBBO to customers).[125]

In assessing the implementation costs of the reproposed Trade-Through Rule, it is important to recognize that much, if not all, of the connectivity among trading centers necessary to implement intermarket price protection has already been put in place. Trading centers for exchange-listed securities already are connected through the ITS. The Commission understands that, at least as an interim solution, ITS facilities and rules could be modified relatively easily and at low cost to enable an automatic execution functionality. With respect to Nasdaq stocks, connectivity among trading centers already is established through private linkages. Routing out to other trading centers when necessary to obtain the best prices for Nasdaq stocks is an integral part of the business plan of many trading centers, even when not affirmatively required by best execution responsibilities. Moreover, a variety of private vendors currently offer connectivity to NMS trading centers for both exchange-listed and Nasdaq stocks.

Some of the commenters based their concerns about implementation costs on the estimated costs included in the Proposing Release for purposes of the Paperwork Reduction Act of 1995 (''PRA'').[126] The Commission has revised its estimate of the PRA costs associated with the proposed rule to reflect the streamlined requirements of Rule 611 as reproposed, and to reflect a further refinement of the estimated number of trading centers subject to the rule.[127] In particular, Rule 611 as reproposed does not contain the proposed opt-out exception. Costs associated with this proposed exception represented a large portion of the overall estimated costs described in the Proposing Release, and are no longer applicable.[128] In total, eliminating the opt-out procedural requirements alone reduces the estimate of the Proposing Release by $294 million in start-up costs and $207 million in annual costs.

The Commission also has refined its estimate of the number of broker-dealers that would be required to establish, maintain, and enforce policies and

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[121] In its discussion of the market data proposal, the Proposing Release requested comment on whether and, if so, on what terms Plan processors should be required to disseminate data on behalf of individual markets. Proposing Release, 69 FR at 11184 n. 300. In response, one commenter was concerned that, at a minimum, the Plans should offer all participants the same opportunity on the same terms to disseminate additional data. Instinet Letter at 48. The Commission agrees that the Plans must act fairly and reasonably toward all participants. To assure that the Plans were responsive to individual markets that were willing to display DOB quotations and that they treated such participants fairly and reasonably, the Commission would monitor the deliberations of the Plan operating committees and, if necessary, take action to strengthen the NMS and promote the interests of investors.

[122] Letter from Bruce Lisman, Bear, Stearns & Co., Inc., to Jonathan G. Katz, Secretary, Commission, dated November 26, 2004 (''Bear Stearns Letter''), at 2.

[123] Goldman Sachs Letter at 6.

[124] *See, e.g.*, Bloomberg Tradebook Letter at 14; Fidelity Letter I at 12; Instinet Letter at 14, 15; Nasdaq Letter II at 2; Letter from Junius W. Peake, Monfort Distinguished Professor of Finance, Kenneth W. Monfort College of Business, University of Northern Colorado, dated April 23, 2004 (''Peake Letter I'') at 2; Reg NMS Study Group Letter at 4; Letter from Richard A. Rosenblatt, Chief Executive Officer, & Joseph C. Gawronski, Chief Operating Officer, Rosenblatt Securities Inc., to William H. Donaldson, Chairman, Commission, dated June 23, 2004 (''Rosenblatt Securities Letter II'') at 4; STANY Letter at 3; UBS Letter at 8.

[125] *See, e.g.*, Ameritrade Letter I at 8, 9; Brut Letter at 12; Citigroup Letter at 8–9; E*TRADE Letter at 7; Letter from W. Leo McBlain, Chairman, & Thomas J. Jordan, Executive Director, Financial Information Forum, to Jonathan G. Katz, Secretary, Commission, dated July 9, 2004 (''Financial Information Forum Letter'') at 2; JP Morgan Letter at 4; SIA Letter at 12–14.

[126] 44 U.S.C. 3501 *et seq.*

[127] The revised PRA analysis is forth in section VIII.A below.

[128] Specifically, the estimated costs of providing investors with disclosure necessary to obtain informed consent to opt-outs and retaining records relating to such disclosures were $100 million in start-up costs and $59 million annually. Further, the estimated costs of the proposed requirement for broker-dealers to provide every customer that opted out with the NBBO at the time of execution were $194 million in start-up costs and almost $148 million annually.

procedures designed to prevent trade-throughs pursuant to the rule as reproposed. In the Proposing Release, the Commission estimated that potentially all of the 6,768 registered broker-dealers would be subject to this requirement, but acknowledged that it believed the figure was likely overly-inclusive because it might include registered broker-dealers that do not effect transactions in NMS stocks.[129] After further consideration, the Commission believes that this number indeed greatly overestimated the number of registered broker-dealers that would be subject to the rule, given that most of those broker-dealers do not engage in the business of executing orders internally. The estimated number therefore has been reduced to approximately 600 broker-dealers.[130]

Taken together, these changes substantially reduce the estimated costs associated with implementation of and ongoing compliance with Rule 611 as reproposed. As discussed further in section VIII.A below, the estimated PRA costs associated with reproposed Rule 611 are $17.8 million in start-up costs and $3.5 million in annual costs. In addition, as discussed further in section IX.A.2 below, the estimated implementation costs for necessary systems modifications are $126 million in start-up costs and $18.4 million in annual costs. Accordingly, the total estimated costs are $143.8 million in start-up costs and $21.9 million in annual costs.

The Commission preliminarily believes that the benefits of strengthening price protection for exchange-listed stocks (*e.g.,* by eliminating the gaps in ITS coverage of block positioners and 100-share quotes) and introducing price protection for Nasdaq stocks would be substantial, although the total amount is difficult to quantify. One objective, though quite conservative, estimate of benefits is the dollar amount of quotations that currently are traded through. The Commission staff's analysis of current trade-through rates indicates that over 12 billion shares of displayed quotations in Nasdaq and NYSE stocks were traded through in 2003, by an average amount of 2.3 cents for Nasdaq stocks and 2.2 cents for NYSE stocks.[131] These traded-through quotations represent approximately $209 million in Nasdaq stocks and $112 million in NYSE stocks, for a total of $321 million in bypassed limit orders and inferior prices for investors in 2003 that could have been addressed by strong trade-through protection.[132] The Commission preliminarily believes that this $321 million estimated annual benefit, particularly when combined with the benefits of enhanced investor confidence in the fairness and orderliness of the equity markets, would justify the one-time costs of implementation and ongoing annual costs of the reproposed Trade-Through Rule.

The foregoing estimate of benefits is very conservative because it is based solely on the size of displayed quotations in the *absence* of strong price protection. In essence, it measures the problem—a shortage of quoted depth—that the reproposed Trade-Through Rule is designed to address, rather than the benefits that it could achieve. Every trade-through transaction potentially sends a message to market participants that their displayed quotations can be and are ignored by other market participants. When the total share volume of trade-through transactions that do not interact with displayed quotations reaches 8% and above for hundreds of the most actively traded NMS stocks,[133] this message is unlikely to be missed by those who watched their quotations being traded through. Certainly, the common practice of trading through displayed size is most unlikely to prompt market participants to display even greater size.

A primary objective of the reproposed Trade-Through Rule is to increase displayed depth and liquidity in the NMS and thereby reduce trading costs for a wide spectrum of investors, particularly institutional investors that must trade in large sizes. Precisely estimating the extent to which strengthened price protection would improve market depth and liquidity, and thereby lower the trading costs of investors, is very difficult. The difficulty of estimation should not hide from view, however, the enormous potential benefits for investors of improving the depth and efficiency of the NMS. Because of the huge dollar amount of trading volume in NMS stocks—more than $17 trillion in 2003 [134]—even the most incremental improvement in market depth and liquidity could generate a dollar amount of benefits that annually would dwarf the one-time start-up costs of implementing trade-through protection.

One approach to evaluating the potential benefits of the reproposed Trade-Through Rule is to examine a category of investors that stand to benefit a great deal from improved depth and liquidity for NMS stocks—the shareholders in U.S. equity mutual funds. In 2003, the total assets of such funds were $3.68 trillion.[135] The average portfolio turnover rate for equity funds was 55%, meaning that their total purchases and sales of securities amounted to approximately $4.048 trillion.[136] A leading authority on the trading costs of institutional investors has estimated that in the second quarter of 2003 the average price impact experienced by investment managers ranged from 17.4 basis points for giant-capitalization stocks, 21.4 basis points for large-capitalization stocks, and up to 35.4 basis points for micro-capitalization stocks.[137] In addition, it estimated the cost attributable to adverse price movements while searching for liquidity for institutional orders, which often are too large simply to be presented to the market. Its estimate of liquidity search costs ranged from 13 basis points for giant capitalization stocks, 23 basis points for large capitalization stocks, and up to 119 basis points for micro-capitalization stocks. Assuming that the average price impact costs and liquidity search costs incurred across all stocks were a conservative 37.4 basis points,[138] the shareholders in U.S. equity mutual funds incurred implicit trading costs of $15.1 billion in 2003. Based on a hypothetical assumption that, in light of the current share volume of trade-through transactions that does not interact with displayed liquidity, intermarket trade-through protection could improve depth and liquidity for NMS stocks by at least 5% (or an average reduction of 1.87 basis points in price impact and liquidity search costs for large investors), the savings in trading costs for U.S equity funds alone,

[129] Proposing Release 69 FR at 11145 n.95.

[130] The estimate is described further in section VIII.A below.

[131] Trade-Through Study at 3, 5.

[132] *Id.* at 3.

[133] *See* Trade-Through Study, Tables 4 and 11.

[134] World Federation of Exchanges, *Annual Report* (2003), at 86.

[135] Investment Company Institute, *Mutual Fund Fact Book* (2004), at 55.

[136] *Id.* at 64. Portfolio turnover is reported as the lesser of portfolio sales or purchases divided by average net assets. Because price impact occurs for both purchases and sales, the turnover rate must be doubled, then multiplied by total fund assets, to estimate the total value of trading that would be affected by an improvement in depth and liquidity.

[137] Plexus Group, Inc., Commentary 80, ''Trading Truths: How Mis-Measurement of Trading Costs Is Leading Investors Astray,'' (April 2004), at 2–3.

[138] The estimate of 37.4 basis points is the average of the total market impact and liquidity search costs for giant capitalization stocks (30.4 basis points) and the total market impact and liquidity search costs for large capitalization stocks (44.4 basis points). The much higher market impact and liquidity search costs of midcap, smallcap, and microcap stocks are not included.

and the improved returns for their millions of individual shareholders, would have amounted to approximately $755 million in 2003.

Of course, the benefits of improved depth and liquidity for the equity holdings of other types of investors, including pension funds, insurance companies, and individuals, are not incorporated in the foregoing calculations. In 2003, these other types of investors held 78% of the value of publicly traded U.S. equity outstanding, with equity mutual funds holding the remaining 22%.[139] Assuming that these other types of investors experienced a reduction in trading costs that merely equaled the reduction of trading costs for equity mutual funds, the assumed 5% improvement in market depth and liquidity could yield total trading cost savings for all investors of over $1.5 billion annually. Such savings would improve the investment returns of equity ownership, thereby promoting the retirement and other long-term financial interests of individual investors and reducing the cost of capital for listed companies.

B. Description of Reproposed Rule

Reproposed Rule 611 can be divided into three elements: (1) The provisions that establish the scope of the Rule's coverage, most of which are set forth in the definitions of Rule 600(b); (2) the operative requirements of paragraphs (a) of Rule 611, which, among other things, mandate the adoption and enforcement of written policies and procedures that are reasonably designed to prevent trade throughs of protected quotations and, if relying on an exception, that are reasonably designed to assure compliance with the terms of the exception, and (3) the exceptions set forth in paragraph (b) of Rule 611. These elements are discussed below, followed by a section emphasizing that a broker's duty of best execution would in not be lessened if reproposed Rule 611 were adopted.

1. Scope of Rule

The scope of reproposed Rule 611 would largely be determined by a series of definitions set forth in Rule 600(b). In general, the Rule would address trade-throughs of protected quotations in NMS stocks by trading centers. A ''trading center'' is defined in Rule 600(b)(78) as a national securities exchange or national securities association that operates an SRO trading facility,[140] an ATS,[141] an exchange market maker,[142] an OTC market maker,[143] or any other broker or dealer that executes orders internally by trading as principal or crossing orders as agent. This last phrase is intended particularly to cover block positioners. An ''NMS stock'' is defined in paragraphs (b)(47) and (b)(46) of Rule 600 as a security, other than an option, for which transaction reports are collected, processed and made available pursuant to an effective national market system plan. This definition effectively covers stocks listed on a national securities exchange and stocks included in either the National Market or SmallCap tiers of Nasdaq. It does not include stocks quoted on the OTC Bulletin Board or elsewhere in the OTC market.

The term ''trade-through'' is defined in Rule 600(b)(77) as the purchase or sale of an NMS stock during regular trading hours,[144] either as principal or agent, at a price that is lower than a protected bid or higher than a protected offer. Rule 600(b)(57), which defines a ''protected bid'' or ''protected offer,''[145] includes three main elements: (1) An automated quotation, (2) displayed by an automated trading center, and (3) alternative proposals for the scope of quotations that are to be protected—the Market BBO Alternative and the Voluntary Depth Alternative. These three elements are described in more detail below.

As discussed above, an ''automated quotation'' is defined in reproposed Rule 600(b)(3) as a quotation displayed by a trading center that: (1) Permits an incoming order to be marked as immediate-or-cancel; (2) immediately and automatically executes an order marked as immediate-or-cancel against the displayed quotation up to its full size; (3) immediately and automatically cancels any unexecuted portion of an order marked as immediate-or-cancel without routing the order elsewhere; (4) immediately and automatically transmits a response to the sender of an order marked as immediate-or-cancel indicating the action taken with respect to such order; and (5) immediately and automatically displays information that updates the displayed quotation to reflect any change to its material terms.

Consequently, a quotation would not qualify as ''automated'' if any human intervention after the time an order is received is allowed to determine the action taken with respect to the quotation. The term ''immediate'' precludes any coding of automated systems or other type of intentional device that would delay the action taken with respect to a quotation. Although a trading center must provide an IOC/no-routing functionality for incoming orders, it also can offer additional functionalities. Among the changes to material terms that require an immediate update to a quotation are price, size, and automated/manual indicator. Any quotation that does not meet the requirements for an automated quotation is defined in Rule 600(b)(37) as a ''manual quotation.''

As discussed above, an ''automated trading center'' is defined in reproposed Rule 600(b)(4) as a trading center that: (1) Has implemented such systems and rules as are necessary to render it capable of displaying quotations that meet the requirements for an automated quotation set forth in paragraph (b)(3) of this section; (2) identifies all quotations other than automated quotations as manual quotations; (3) immediately identifies its quotations as manual quotations whenever it has reason to believe that it is not capable of displaying automated quotations; and (4) has adopted reasonable standards limiting when its quotations change from automated quotations to manual quotations, and vice versa, to specifically defined circumstances that promote fair and efficient access to its automated quotations and are consistent with the maintenance of fair and orderly markets. The requirement of reasonable standards for switching the automated/manual status of quotations is designed to preclude any practices that would cause confusion among market participants concerning the status of a trading center's quotations or that would inappropriately advantage the members or customers of a trading center at the expense of the public.

The third element of the definition of protected quotations in Rule 600(b)(57) addresses the scope of quotations displayed by a trading center that are entitled to protected status. As discussed above, the Commission is requesting comment on two alternatives. Under the Market BBO Alternative, only an automated quotation that is the BBO

[139] Mutual Fund Factbook, *supra* note 135, at 59.

[140] An ''SRO trading facility'' is defined in reproposed Rule 600(b)(72) as a facility operated by an SRO that executes orders in a security or presents orders to members for execution.

[141] An ''alternative trading system'' is defined in reproposed Rule 600(b)(2) with a cross reference to Regulation ATS.

[142] An ''exchange market maker'' is defined in reproposed Rule 600(b)(24).

[143] An ''OTC market maker'' is defined in reproposed Rule 600(b)(52).

[144] The term ''regular trading hours'' is defined in reproposed Rule 600(b)(64) as the time between 9:30 a.m. and 4 p.m., unless otherwise specified.

[145] Protected bid and protected offer are collectively defined as a ''protected quotation'' in reproposed Rule 600(b)(58).

of an exchange SRO, the BBO of Nasdaq, and the BBO of the NASD (*i.e.*, the ADF) would qualify as a protected quotation. The Voluntary Depth Alternative would protect, in addition to all of the quotations protected under the Market BBO Alternative, such additional bids or offers that are designated as protected bids or protected offers pursuant to an effective national market system plan. Thus, the minimum quotations that would be protected at present under either alternative are the BBOs of each exchange SRO, The NASDAQ Market Center, and the NASD's ADF. In addition, the Voluntary Depth Alternative would establish a mechanism pursuant to which a market, on a *voluntary* basis, would be allowed to obtain trade-through protection for its DOB quotations. In particular, the market would need to arrange to have its DOB quotations designated as protected pursuant to one of the market data Plans. Section II.A.5 above discusses the two alternatives and requests comment on specific issues.

2. Requirement of Reasonable Policies and Procedures

Paragraph (a)(1) of reproposed Rule 611 would require a trading center to establish, maintain, and enforce written policies and procedures that are reasonably designed to prevent trade-throughs of protected quotations in NMS stocks that do not fall within an exception set forth in paragraph (b) of Rule 611 and, if relying on such an exception, that are reasonably designed to assure compliance with the terms of the exception. In addition, paragraph (a)(2) of Rule 611 would require a trading center to regularly surveil to ascertain the effectiveness of the policies and procedures required by paragraph (a)(1) and to take prompt action to remedy deficiencies in such policies and procedures. As discussed in the Proposing Release, the Commission continues to believe that it would be inappropriate to implement a complete prohibition against any trade-throughs, particularly given the realities of intermarket trading and order-routing in many high-volume NMS stocks.[146] The requirement of written policies and procedures, as well as the responsibility assigned to trading centers to regularly surveil to ascertain the effectiveness of their procedures and take prompt remedial steps, is intended to achieve the objective of eliminating all trade-throughs that reasonably can be prevented, while also recognizing the inherent difficulties of eliminating trade-through transactions that, despite a trading center's reasonable efforts, may occur due to random and accidental causes. The Commission requests comment, however, on whether this approach is sufficient to address enforceability concerns. In this regard, should the Commission, instead or in addition, explicitly prohibit trade-throughs absent an applicable exception? Could a prohibition against trade-throughs be fashioned that would establish a fair, effective, and workable standard to govern trading center conduct?

At a minimum, a trading center's policies and procedures must enable the trading center (and persons responsible for transacting on its market, such as specialists) to monitor, on a real-time basis, the protected quotations displayed by other trading centers so as to determine the prices at which the trading center can and cannot execute trades. In addition, a trading center's policies and procedures must establish objective standards and parameters governing its use of the exceptions set forth in Rule 611(b). A trading center's automated order-handling and trading systems must be programmed in accordance with these policies and procedures. Finally, the trading center must take such steps as are necessary to enable it to enforce its policies and procedures effectively. For example, trading centers will need to establish procedures such as regular exception reports to evaluate their trading and order-routing practices. Such reports would need to be examined to affirm that a trading center's policies and procedures have been followed by its personnel and properly coded into its automated systems and, if not, to promptly identify the reasons and take remedial action.

Of course, surveillance is an important component of a trading center's satisfaction of its legal obligations. In the context of this rulemaking, paragraph (a)(2) of Rule 611 would reinforce the ongoing enforcement requirement by explicitly assigning an affirmative responsibility to trading centers to surveil to ascertain the effectiveness of their policies and procedures. Trading centers cannot merely establish policies and procedures that may be reasonable when created and assume that such policies and procedures continue to satisfy the requirements of Rule 611. Rather, trading centers must regularly assess the continuing effectiveness of their procedures and take prompt action when needed to remedy deficiencies.

3. Exceptions

Rule 611(b) sets forth a variety of exceptions addressing transactions that may fall within the definition of a trade-through, but which would not be subject to the operative requirements of the Rule. The exceptions primarily are designed to achieve workable intermarket price protection and to facilitate certain trading strategies and order types that are useful to investors, but also are consistent with the principle of price protection.

Paragraph (b)(1) excepts a transaction if the trading center displaying the protected quotation that was traded through was experiencing a failure, material delay, or malfunction of its systems or equipment when the trade-through occurred. As discussed in section II.A.3 above, the exception for a ''material delay'' would give trading centers a self-help remedy if another trading center repeatedly fails to provide an immediate (within one second under current trading conditions) response to incoming orders attempting to access its quotes. The trading center receiving an order could only be held responsible for its own turnaround time (*i.e.*, from the time it first received an order to the time it transmits a response to the order). Accordingly, the routing trading center would be required to develop policies and procedures that allow for any potential delays in transmission not attributable to the receiving trading center. Trading centers would need to establish reasonable and objective parameters governing their use of the material delay exemption. For example, a single failure to respond within one second generally would not justify future bypassing of another trading center's quotations. Many failures to respond within one second in a short time period, in contrast, clearly would warrant use of the exception. Moreover, prior to disregarding quotations, a trading center should attempt to resolve the problem by contacting the other trading center that has failed to respond immediately.

Paragraph (b)(8) of Rule 611 sets forth an exception for flickering quotations. It excepts a transaction if the trading center displaying the protected quotation that was traded through had displayed, within one second prior to execution of the trade-through, a best bid or best offer, as applicable, for the NMS stock with a price that was equal or inferior to the price of the trade-through transaction. This exception thereby provides a ''window'' to address false indications of trade-throughs that in actuality are attributable to rapidly

[146] Proposing Release, 69 FR at 11137 (noting the problem of ''false positive'' trade-throughs caused by rapidly changing quotations, even when a trading center took reasonable precautions to prevent trade-throughs).

moving quotations. It also potentially would reduce the number of instances in which a trading center must alter its normal trading procedures and route orders to other trading centers to comply with reproposed Rule 611. The exception is thereby intended to promote more workable intermarket price protection.

Paragraphs (b)(5) and (b)(6) of Rule 611 set forth exceptions for intermarket sweep orders. An intermarket sweep order is defined in Rule 600(b)(30) as a limit order [147] that meets the following requirements: (1) when routed to a trading center, the limit order is identified as an intermarket sweep order, and (2) simultaneously with the routing of the limit order identified as an intermarket sweep order, one or more additional limit orders, as necessary, are routed to execute against the full displayed size of all protected quotations with a superior price. These additional limit orders must be marked as intermarket sweep orders to allow the receiving market center to execute the order immediately without regard to better-priced quotations displayed at other trading centers (by definition, each of the additional limit orders would meet the requirements for an intermarket sweep order). Paragraph (c) of Rule 611 would require that the trading center or broker-dealer responsible for the routing of an intermarket sweep order take reasonable steps to establish that orders are properly routed in an attempt to execute against all applicable protected quotations. A trading center or broker-dealer would be required to satisfy this requirement regardless whether it routes the order through its own systems or sponsors a customer's access through a third-party vendor's systems. Paragraph (b)(5) would allow a trading center immediately to execute any order identified as an intermarket sweep order. It therefore need not delay its execution for the updating of the better-priced quotations at other trading centers to which orders were routed simultaneously with the intermarket sweep order. Paragraph (b)(6) would allow a trading center itself to route intermarket sweep orders and thereby clear the way for immediate internal executions at the trading center. This exception particularly would facilitate the immediate execution of block orders by dealers on behalf of their institutional clients.

To illustrate the operation of the intermarket sweep order exception, assume that the Market BBO Alternative were adopted and a broker-dealer's customer wished to sell a large amount of an NMS stock. Trading Center A is displaying the national best bid of 500 shares at $10.00, along with quotations in its proprietary depth-of-book data feed of 1500 shares at $9.99, and 5000 shares at $9.97. The customer decides to sweep all liquidity on Trading Center A down to $9.97. Assume also that Trading Center B is displaying a protected bid of 2000 shares at $9.99, Trading Center C is displaying a protected bid of 400 shares at $9.98, and Trading Center D is displaying a protected bid of 200 shares at $9.97. The broker-dealer could execute this trade for its customer, subject to its best execution responsibilities, by simultaneously routing the following orders: (1) An intermarket sweep order to Trading Center A with a limit price of $9.97 and a size of 7000 shares; (2) an intermarket sweep order to Trading Center B with a limit price of $9.99 and a size of 2000 shares; and (3) an intermarket sweep order to Trading Center C with a limit price of $9.98 and a size of 400 shares. All of these orders would meet the requirements of Rule 600(b)(30) because the necessary orders simultaneously were routed to execute against the displayed size of all better-priced protected quotations. Trading Centers A, B, and C all could execute their orders immediately without regard to the protected quotations displayed at other trading centers. No order would need to be routed to Trading Center D because the price of its bid was not superior to the most inferior limit price of the order routed to Trading Center A. Assuming the customer obtained a fill for each of its orders at the displayed prices and sizes,[148] it would have been able to obtain an immediate execution of a 9400-share trade by sweeping through four price levels at Trading Center A, while also honoring the protected quotations at two other trading centers. The trade therefore would have both upheld the principle of price protection and served the customer's legitimate interest in obtaining an immediate execution of large size.

The exception in paragraph (b)(7) of Rule 611 would facilitate other types of orders that often are useful to investors—benchmark orders. It would except the execution of an order at a price that was not based, directly or indirectly, on the quoted price of an NMS stock at the time of execution and for which the material terms were not reasonably determinable at the time the commitment to execute the order was made. A common example of a benchmark order is a VWAP order. Assume a broker-dealer's customer decides to buy a stock at 9 a.m. before the markets open for normal trading. The customer submits, and the broker-dealer accepts, an order to buy 100,000 shares at the volume-weighted average price of the stock from opening until 1 p.m. At 1 p.m., the national best offer in the stock is $20.00, but the relevant volume-weighted average price (in a rising market) is $19.90. The broker-dealer would be able to rely on the benchmark order exception to execute the order at $19.90 at 1 p.m., without regard to better-priced protected quotations at other trading centers. Of course, any transactions effected by the broker-dealer during the course of the day to obtain sufficient stock to fill the benchmark order would remain subject to Rule 611. The benchmark exception also would encompass the execution of an order that is benchmarked to a market's single-priced opening, as the Commission would not interpret such an opening price to be the ''quoted price'' of the NMS stock at the time of execution.[149]

Finally, paragraph (b) of Rule 611 includes a variety of other exceptions: (1) transactions other than ''regular way'' contracts; [150] (2) single-price

[147] Such a limit order would be ''marketable'' because it would be immediately subject to execution at current displayed prices. Consequently, ''limit order'' is used differently in this context than elsewhere in this release, where it is used to refer to non-marketable orders that generally will be displayed, in contrast to marketable orders that generally will not be displayed. *See supra*, note 34 (description of marketable limit orders and non-marketable limit orders).

[148] An intermarket sweep order could go unfilled because the protected quotation at a trading center was accessed or withdrawn prior to the trading center's receipt of the intermarket sweep order. In addition, the existence of undisplayed orders or reserve size at some trading centers could result in an execution at better prices than may have been indicated by the displayed prices and sizes. The router of an intermarket sweep order would only be responsible, however, for routing orders in accordance with the displayed price and size of protected quotations. Whether the orders actually execute against the protected quotations, or go unfilled because the quotations have been previously executed or withdrawn, is not within the responsibility or control of the router of the intermarket sweep order.

[149] The Commission preliminarily does not believe that ''stopped'' orders should be excepted from reproposed Rule 611 because their execution is based, at least indirectly, on the quoted price of a stock at the time of execution and their material terms are known when the commitment to execute the order was made. Comment is requested on the extent to which the proposed rule language appropriately designates those transactions that should be excepted because they are consistent with the price protection objectives of reproposed Rule 611.

[150] ''Regular way'' refers to bids, offers, and transactions that embody the standard terms and conditions of a market. Thus, this exception would apply to a transaction that was executed other than pursuant to standardized terms and conditions, for

opening, reopening, or closing transactions; and (3) transactions executed at a time when protected quotations were crossed. The crossed quotation exception would not apply when a protected quotation crosses a non-protected (*e.g.*, manual) quotation.[151]

4. Duty of Best Execution

The Commission emphasizes that adoption of reproposed Rule 611 would in no way lessen a broker-dealer's duty of best execution. Broker-dealers still must seek the most advantageous terms reasonably available under the circumstances for their customer orders. They must carry out a regular and rigorous review of the quality of markets to evaluate their order execution policies, including their decisions concerning the markets to which to route customer order flow.[152] The protection against trade-throughs that would be provided by Rule 611 would not diminish the broker-dealer's responsibility for evaluating the execution quality of markets, regardless of the exceptions set forth in the Rule. Moreover, Rule 611 could not be used to justify the internal execution of retail orders by a market maker at prices inferior to the best available quotations.

Several commenters who supported excluding manual quotations from trade-through protection also suggested that manual quotations should be excluded from the NBBO that is calculated and disseminated by Plan processors.[153] Under this approach, market participants could disregard manual quotations for purposes of assessing the best execution of customer orders and calculating execution quality statistics under Rule 11Ac1–5 (proposed to be redesignated as Rule 605). The Commission has decided not to propose the elimination of manual quotations from the NBBO at this time. Under the Quote Rule, broker-dealers must honor their firm quotations, although the speed of their response may vary according to whether such a quotation is automated or manual. A common business practice of many market makers is to use the NBBO to price investor orders, particularly those of retail investors. Currently, manual quotations establish the NBBO in many NMS stocks. The Commission is concerned that eliminating manual quotations from the NBBO potentially would widen the spreads in many stocks, even though the quotations often may in fact represent the best indication of the current market price of the stock. Of course, broker-dealers would continue to be able to assess the availability of manual quotations in making their best execution analyses.

III. Access Rule

For the NMS to fulfill its statutory objectives, fair and efficient access to each of the individual markets that participate in the NMS is essential. One of the NMS objectives, for example, is to assure the practicability of brokers executing investors' orders in the best market.[154] Another is to assure the efficient execution of securities transactions.[155] Clearly, neither of these objectives can be achieved if brokers cannot fairly and efficiently route orders to execute against the best quotations for a stock, wherever such quotations are displayed in the NMS. In 1975, Congress determined that the ''linking of all markets'' for NMS stocks through communications and data processing facilities would ''foster efficiency; enhance competition; increase the information available to brokers, dealers, and investors; facilitate the offsetting of investors' orders; and contribute to the best execution of investors' orders.'' [156] Since 1975, there have been dramatic improvements in communications and processing technologies. Reproposed Rule 610 is intended to capitalize on these improvements and thereby enhance the ''linking of all markets'' for the future NMS.

All SROs that trade exchange-listed stocks currently are linked through ITS, a collective intermarket linkage facility. ITS provides a means of access to exchanges and Nasdaq by permitting each market to send a ''commitment to trade'' through the system, with receiving markets generally having up to 30 seconds to respond.[157] ITS also provides access to quotations of participants without fees and establishes uniform rules to govern quoting practices.[158] Thus, while ITS promotes access that is uniform and free, it also is often slow and limited. Moreover, it is governed by a unanimous vote requirement that impedes innovation.

In contrast, there is no collective intermarket linkage system for SROs that trade Nasdaq stocks. Instead, access is achieved primarily by private linkages among individual trading centers. This approach has demonstrated its advantages among electronic markets. It is flexible and can readily incorporate technological advances as they occur. There is no intermarket system, however, that offers free access to quotations in Nasdaq stocks. Nor are the trading centers for Nasdaq stocks subject to uniform intermarket standards governing their quoting and trading practices. The fees for access to quotations in Nasdaq stocks, as well as the absence of standards for quotations that lock and cross markets, have been the source of severe disputes among participants in the market for Nasdaq stocks for many years. Moreover, private linkages have not worked effectively with respect to the Amex manual trading of Nasdaq stocks, nor have they been successful in preventing intentional barriers to access, especially involving fees.

Reproposed Rule 610 is based on the Commission's determination that fair and efficient access to markets could be achieved without a collective intermarket linkage facility such as ITS.[159] It reproposes a private linkage approach for all NMS stocks, but with modifications to address the most serious problems that have arisen with this approach in the trading of Nasdaq stocks. Rule 610 would address three subject areas: (1) access to quotations, (2) fees for access to protected quotations, and (3) locking and crossing quotations. In addition, the Commission is reproposing a modification to the fair access requirements of Regulation ATS that would extend their application to ATSs with 5% of trading volume in a security.[160]

instance a transaction that has extended settlement terms.

[151] Rule 611 as reproposed does not include two exceptions that were included in the proposed rule. One was for trade-throughs of ''non-firm'' quotations. This exception is unnecessary because a quotation that is not firm would not qualify as an automated, and therefore protected, quotation. The other proposed exception was for a transaction by a trading center experiencing systems problems. To the extent such a transaction is isolated and could not have been reasonably avoided, it would not be addressed by reasonable policies and procedures. If such transactions occurred repeatedly, however, they would call into question whether the trading center in fact had implemented reasonable policies and procedures to prevent trade-throughs.

[152] *See generally* Securities Exchange Act Release No. 37619A (Sept. 6, 1996), 61 FR 48290, 48322–48333 (Sept. 12, 1996) (discussion of best execution responsibilities).

[153] *See, e.g.*, Citigroup Letter at 3, 6; Goldman Sachs Letter at 5–6; Morgan Stanley Letter at 7; SIA Letter at 7.

[154] Section 11A(a)(1)(C)(iv) of the Exchange Act.

[155] Section 11A(a)(1)(C)(i) of the Exchange Act.

[156] Section 11A(a)(1)(D) of the Exchange Act.

[157] ITS Plan, Section 6(b)(i).

[158] ITS Plan, Sections 6(b), 8(d), and 11(b).

[159] Were reproposed Rule 610 to be adopted, the Commission anticipates that SRO participants would be permitted to withdraw from the ITS Plan, assuming they had otherwise arranged to meet their access responsibilities.

[160] The modification of Regulation ATS is discussed in section III.B.4 below.

A. Response to Comments and Basis for Reproposed Rule

1. Access to Quotations

Paragraphs (a) and (b) of reproposed Rule 610 would address access to quotations. Among the variety of services offered by equity markets, access to displayed quotations, particularly the best quotations of a trading center, is most vital for the smooth functioning of intermarket trading. Brokers responsible for routing their customers' orders, as well as investors that make their own order-routing decisions, clearly must have fair and efficient access to the best quotations of all trading centers to achieve best execution of those orders. In addition, trading centers themselves must have the ability to execute orders against the displayed quotations of other market centers. Indeed, the very existence of intermarket protection against trade-throughs is premised on the ability of trading centers to trade with, rather than trade through, the protected quotations displayed by other trading centers.

Access to quotations, sometimes referred to as ''order execution access,'' [161] should be distinguished from a broader type of access that encompasses all of the different types of services offered by markets, such as the right to display limit orders or to submit complex order types. To obtain the full range of their services, markets generally require that an individual or firm become members or subscribers of the market. This type of access, or ''membership access,'' subsumes access to quotations and is governed by particular regulatory requirements. Sections 6(b)(2) and 15A(b)(3) of the Exchange Act, for example, provide for fair access to membership in SROs. Similarly, Rule 301(b)(5) of Regulation ATS prohibits certain high volume ATSs from denying fair access to their services.[162] Reproposed Rule 610(a) and (b), in contrast, would only address the responsibilities of trading centers to provide order execution access to their quotations.

The access proposal sought to achieve the goal of fair and efficient access to quotations primarily by prohibiting trading centers from unfairly discriminating against non-members or non-subscribers that attempt to access quotations through a member or subscriber of the trading center. Market participants could either become members or subscribers of a trading center to obtain direct access to its quotations, or they could obtain indirect access by ''piggybacking'' on the direct access of members or subscribers. These forms of access are widely used today in the market for Nasdaq stocks (as well as to a lesser extent in the market for exchange-listed stocks). Instead of every market participant establishing separate linkages with every trading facility, many different private firms have entered the business of linking with a wide range of trading centers and then offering their customers access to those trading centers through the private firms' linkages. Competitive forces determine the types and costs of these private linkages.

Most commenters supported this private linkage approach for access to quotations.[163] They frequently noted the success of private linkages among electronic markets for Nasdaq stocks and contrasted the speed and usefulness of those linkages with the ITS linkage for exchange-listed stocks. Morgan Stanley noted that ''[p]rivate linkages are much easier to establish and operate and can be constructed directly between [order execution facilities] or through market intermediaries. The smooth operation of the market for Nasdaq stocks today clearly demonstrates the power of private linkages.'' [164] The SIA stated that ''for competitive reasons, market participants will be interested in the most up-to-date technology and routing methods available at any given time, and the proposed standards would permit such technology to evolve on an ongoing basis.[165] The NYSE concluded that ''[i]n the market for listed stocks, we believe that proposed Regulation NMS will provide the framework for alternatives to ITS for intermarket access.'' [166]

A few commenters opposed the proposed private linkages approach.[167] Some questioned whether multiple private linkages could match the efficiency of a single, uniform intermarket linkage, although they generally emphasized that the current ITS linkage needed to be enhanced. The BSE, for example, stated that ''[m]ultiple individual links to every market is not an economical or practical solution and it would enable gaming opportunities within the markets via technology.'' [168] The Alliance of Floor Brokers suggested that problems with the ITS linkage, such as its slow speed and lack of structural flexibility, ''should be addressed before it is determined to replace it with some, as yet unspecified, routing methodology or mechanism.'' [169] The Commission has considered these views, but preliminarily believes that the benefits of private linkages, including their flexibility to meet the needs of different market participants and the scope they allow for competitive forces to determine linkages, justifies reliance on this model rather than a single intermarket linkage.

Several commenters, including some that otherwise supported the proposal, expressed concern about particular problems that might arise under a private linkage approach.[170] Some were concerned that requiring non-discriminatory access to markets might undermine the value of SRO membership. CHX stated that ''[b]y requiring the Exchange to grant non-members access to the full capabilities of its order execution systems, the Commission's fair access proposal would inappropriately require the Exchange's members to help fund the costs of operating a market that could be routinely used by non-members. It would severely undercut the value of membership and enable non-members to free-ride on the fees paid by members.'' [171] Amex stated that ''to the extent that the proposed rule undermines our right to differentiate between members (who pay fees and have duties and responsibilities to the Exchange) and non-members in our charges, it could effectively remove any incentive for Amex membership.''[172]

The Commission does not believe that adoption of a private linkage approach would seriously undermine the value of membership in SROs that offer valuable

[161] *See* Rule 301(b)(3) of Regulation ATS (order display and execution access requirements).

[162] As discussed in section III.B.4 below, the Commission is reproposing an amendment to the fair access requirements of Regulation ATS that would extend their application to ATSs with 5% of trading volume in a security.

[163] See, *e.g.*, Citigroup Letter at 12; Consumer Federation Letter at 4; Goldman Sachs Letter at 4; ICI Letter at 16–17; Morgan Stanley Letter at 17; Nasdaq Letter II at 20; NYSE Letter, Attachment at 6; Letter from Carrie E. Dwyer, General Counsel & Executive Vice President, Charles Schwab & Co., Inc., to Jonathan G. Katz, Secretary, Commission, dated June 30, 2004 (''Schwab Letter'') at 17; SIA Letter at 16; UBS Letter at 8.

[164] Morgan Stanley Letter at 17.

[165] SIA Letter at 16.

[166] NYSE Letter, Attachment at 7.

[167] *See, e.g.*, Letter from Brendan R. Dowd, Daniel W. Tandy & Ronald Zdrojeski, Alliance of Floor Brokers, to Jonathan G. Katz, Secretary, Commission, dated June 24, 2004 (''Alliance of Floor Brokers Letter'') at 2; Ameritrade Letter I, Appendix at 11; BSE Letter at 7; CHX Letter at 13; E*Trade Letter at 9.

[168] BSE Letter at 7.

[169] Alliance of Floor Brokers Letter at 2.

[170] Alliance of Floor Brokers Letter at 10; Amex Letter, Exhibit A at 25–26; BSE Letter at 12; CHX Letter at 14; Citigroup Letter at 12; Letter from Edith H. Hallahan, First Vice President, Deputy General Counsel, Philadelphia Stock Exchange, to Jonathan G. Katz, Secretary, Commission, dated August 10, 2004 (''Phlx Letter'') at 2; STANY Letter at 9.

[171] CHX Letter at 14.

[172] Amex Letter, Exhibit A at 26.

services to their members. First, the fact that markets would not be allowed to impose unfairly discriminatory terms on non-members who obtain indirect access to quotations through members does not mean that non-members would obtain *free* access to quotations. Members who provide piggyback access would be providing a useful service and presumably would charge a fee for such service. The fee would be subject to competitive forces and likely would reflect the costs of SRO membership, plus some element of profit to the SRO's members. As a result, non-members that frequently make use of indirect access are likely to contribute indirectly to the costs of the SRO market. Moreover, the unfair discrimination standard of Rule 610(a) would apply only to access to quotations, not to the full panoply of services that markets generally provide only to their members.

On the other hand, any attempt by an SRO to charge differential fees based on the non-member status of the person obtaining indirect access to quotations, such as whether it is a competing market maker, would violate the anti-discrimination standard of reproposed Rule 610. As noted above, fair and efficient access to quotes is essential to the functioning of the NMS. To comply with the Trade-Through Rule and their duty of best execution, trading centers often may be required to access the quotations of other trading centers. If a trading center charged discriminatory fees to competitors accessing its quotations, it would interfere in the functioning of the private linkage approach and detract from its usefulness to trading centers in meeting their regulatory responsibilities.

Other types of differential fees, however, would not violate the anti-discrimination standard of reproposed Rule 610. Fees with volume-based discounts or fees that are reasonably based on the cost of providing a particular service would be permitted, so long as they do not vary based on the non-member status of a person obtaining indirect access to quotations. For example, a member providing indirect access would be entitled to obtain a volume discount on the full amount of its volume, including the volume accounted for by persons obtaining indirect access to quotations.

Another specific concern expressed by commenters about the private linkage approach was assuring efficient linkage to trading centers with a small amount of trading volume that do not make their quotations accessible through an SRO trading facility.[173] Such quotations currently are displayed only through the ADF, a display-only quotation facility operated by the NASD, and must be accessed directly at the trading center. The proposal would have only required such trading centers to provide access to SROs and other ADF participants. At the NMS Hearing, several panelists expressed concern that this requirement would be inadequate to assure sufficient access, which prompted the Commission to request comment on the matter in its Supplemental Release.[174] It noted that panelists at the NMS Hearing had suggested that relatively inactive ATSs and market makers should be required to publish their quotations in an SRO trading facility, at least until their share of trading reached a point where the cost of direct connections to those markets would not be out of proportion to their volume of trading. Alternatively, the Supplemental Release requested comment on whether an SRO without a trading facility, of which the NASD is currently the only one, should be required to ensure that any ATS or market maker is directly connected to most market participants before publishing its quotations in a display-only facility.

Several commenters supported the approach of requiring low-volume trading centers to make their quotations available through an SRO trading center.[175] Brut, for example, stated that the presence of such low-volume trading centers ''requires vast industry investments to establish private connectivity (or utilize vendors) to access these markets—no matter how small or potentially how fleeting—to satisfy best execution obligations and avoid market disruption. The effort and investment to establish such connectivity is disproportionate to the liquidity on such market.'' [176] Brut further noted that it had sought to avoid such ADF trading centers in the past, but that the extension of trade-through protection to Nasdaq stocks would eliminate this option.

The SIA also believed that ''reliance solely on the SEC's proposed market access rules would fail to address access issues related to smaller markets * * *. If the SEC obligates market participants to trade with [a smaller ADF market maker or ATS] by promulgating a trade-through rule, we are concerned about the firms' burden of creating many private linkages to many small ATSs that may charge exorbitant fees for the necessary access.'' [177] SIA members were divided, however, on the best means to resolve the issue. Some favored requiring smaller trading centers to make their quotes accessible through an SRO trading center. Other SIA members, as well as other commenters, recommended requiring all trading centers to make their best quotations available through a public intermarket linkage facility.[178]

One commenter, in contrast, believed that access to trading centers quoting on the ADF should be addressed by requiring the NASD to add an order execution functionality to ADF. NexTrade stated that the ADF was created to make participation in Nasdaq's SuperMontage facility voluntary. It believed that ''the Commission should re-evaluate whether or not 'private sector' solutions for SROs without an execution mechanism are sufficient for the investment community to satisfy its various obligations under the Act.'' [179]

After considering the various views of commenters, the Commission preliminarily has determined not to require small market centers to make their quotations accessible through an SRO trading facility. As discussed below, it believes that broker-dealers should continue to have the option of trading in the OTC market. Nor is the NASD statutorily required to provide an order execution functionality in the ADF. Instead, the Commission has reproposed Rule 610(b)(1), which requires all trading centers that choose to display quotations in an SRO display-only quotation facility to provide a level and cost of access to such quotations that is substantially equivalent to the level and cost of access to quotations displayed by SRO trading facilities.

The NASD, as a national securities association, is subject to different regulatory requirements than a national securities exchange. It is responsible for regulating the OTC market (*i.e.*, trading by broker-dealers otherwise than on a national securities exchange). Section 15A(b)(11) of the Exchange Act requires an association to have rules governing the form and content of quotations relating to securities sold otherwise than

[173] Amex Letter at 8; Brut Letter at 19; Citigroup Letter at 13; E*Trade Letter at 9; Nasdaq Letter II at 22; SIA Letter at 16; Specialist Assoc. Letter at 12; STA Letter at 4; STANY Letter at 10; UBS Letter at 9.

[174] Hearing Tr. at 135, 138–140; Supplemental Release, 69 FR at 30146.

[175] *See, e.g.*, Brut Letter at 13; Citigroup Letter at 13; SIA Letter at 17 (some firms).

[176] Brut Letter at 13.

[177] SIA Letter at 16.

[178] *See, e.g.*, Ameritrade Letter I, Appendix at 11; E*Trade Letter at 9; SIA Letter at 17.

[179] Letter from John M. Schaible, President, NexTrade Holdings, Inc., to Jonathan G. Katz, Secretary, Commission, dated July 29, 2004 (''NexTrade Letter'') at 14.

on a national securities exchange that are published by a member of the association. Such rules must be designed to produce fair and informative quotations and to promote orderly procedures for collecting, distributing, and publishing quotations. The Exchange Act does not, however, require an association to establish a facility for executing orders against the quotations of its members.

ATSs and market makers that wish to trade NMS stocks can choose from a number of options for quoting and trading. They can become a member of a national securities exchange and quote and trade through the exchange's trading facilities. They can participate in the NASDAQ Market Center and quote and trade through that facility. Finally, they can quote and trade in the OTC market. The existence of the NASD's ADF makes this third choice possible by providing a facility for displaying quotations and reporting transactions in the consolidated data stream.[180]

The Commission preliminarily believes that those ATSs and market makers that choose to display quotations in the ADF should bear the responsibility of providing a level and cost of access to their quotations that is substantially equivalent to the level and cost of access to quotations displayed by SRO trading facilities. Although the Exhange Act allows an individual broker-dealer to have the option of trading in the OTC market, it does not mandate that the securities industry in general subsidize the costs of accessing a broker-dealer's quotations in the OTC market. Under reproposed Rule 610(b)(1), therefore, ADF participants would be required to establish the necessary connectivity that would facilitate efficient access to their quotations. As noted in the Commission's order approving the pilot program for the ADF, the reduction in communications line costs in recent years and the advent of competing access providers offer the potential for multiple competitive means of access to the various trading centers that trade NMS stocks.[181] To meet their regulatory requirements, ADF participants would have the option of establishing connections to these industry access providers, which in turn have extensive connections to a wide array of market participants. As the self-regulatory authority responsible for the OTC market, the NASD would need to assess the extent to which ADF participants have met the access standards of reproposed Rule 610.

2. Limitation on Access Fees

Many trading centers charge fees that are triggered when incoming orders execute against their displayed quotations.[182] Such access fees particularly have characterized the business models of ECNs, which typically pass a substantial portion of the access fee on to customers as rebates for supplying the accessed liquidity (*i.e.*, by submitting non-marketable limit orders). For Nasdaq stocks, ECNs have charged access fees directly to their subscribers, but also have charged access fees to non-subscribers when their quotations have been displayed and executed through Nasdaq facilities. Other types of trading centers, including exchange SROs, also charge fees that are triggered when incoming orders access their displayed quotations. These fees have only been charged to their members, because only members have the right to route orders to an exchange other than through ITS. For exchange-listed stocks, moreover, the ITS has provided free intermarket access to quotations for its participants. Finally, market makers have not been permitted to charge any fee for counterparties accessing their quotations under the Quote Rule.

The reproposed trade-through protection and linkage requirements would significantly alter the regulatory landscape that has shaped access fee practices in the past. For exchange-listed stocks, Rule 610 reproposes a private linkage approach that relies on access through members and subscribers rather than through a public intermarket linkage system. For access outside of ITS, markets would pay, directly or indirectly, the fees charged by other markets to their members and subscribers. For Nasdaq stocks, the reproposed Trade-Through Rule would, for the first time, establish price protection, so market participants would no longer have the option of bypassing the quotations of trading centers with access fees that they view as too high.

The benefits of strengthened price protection and more efficient linkages could be compromised if trading centers were able to charge substantial fees for accessing their quotations. Moreover, the wider the disparity in the level of access fees, the less useful and accurate are the prices of quotations displayed for NMS stocks. For example, if two trading centers displayed offers to buy an NMS stock for $10.00 per share, one offer might be accessible for a total price of $10.00 plus a $0.003 fee and the other offer might be accessible for a total price of $10.00 plus a $0.009 fee. If each trading center rebated all except $0.001 of their fees to liquidity providers (as is often the case), one customer submitting a limit order to sell at $10.00 would receive $10.002, while another customer submitting a limit order to sell at $10.00 would receive $10.008. What appeared in the consolidated data stream to be identical quotations would in fact be far from identical, and market participants potentially would have powerful incentives to display their limit orders in high fee markets to obtain an economic reward beyond the quoted price of their limit order.

To address the potential distortions caused by substantial, disparate fees, the access proposal included a limitation on fees. Trading centers would have been limited to a fee of no more than $0.001 per share. Liquidity providers also would have been limited to a fee of no more than $0.001 per share for attributable quotations, but could not have charged any fee for non-attributable quotations. In addition, the proposal established an accumulated fee limitation of no more than $0.002 per share for any transaction. At the NMS Hearing, panelists displayed a sharp divergence of opinion on access fees, with some panelists arguing that agency markets must be allowed to charge for services, and other panelists arguing that access fees distort quotation prices.[183] In the Supplemental Release, therefore, the Commission requested comment on all aspects of the proposed fee limitations, including whether it should adopt a single accumulated fee limitation that would apply to all types of market centers, and, if so, whether the proposed $0.002 per share was an appropriate amount, or whether the amount should be higher or lower.[184]

Commenters were splintered on the issue of access fees. A number were supportive of the Commission's proposal as a worthwhile compromise on an extremely difficult issue.[185] They believed that the proposal would level

[180] Under Rule 301(b)(3) of Regulation ATS, an ATS is required to display its quotations in the consolidated data stream only in those securities for which its trading volume reaches 5% of total trading volume.

[181] Securities Exchange Act Release No. 46249 (July 24, 2002), 67 FR 49821 (July 31, 2002).

[182] A full description of the current framework for access fees is provided in the Proposing Release. 69 FR at 11156.

[183] *See, e.g.*, Hearing Tr. at 166, 168.

[184] Supplemental Release, 69 FR at 30147.

[185] *See, e.g.*, BNY Letter at 4; Letter from Kenneth Griffin, President & Chief Executive Officer, Citadel Investment Group, L.L.C., to Jonathan G. Katz, Secretary, Commission, dated July 9, 2004 (''Citadel Letter'') at 9; Citigroup Letter at 14; E*Trade Letter at 10; Nasdaq Letter II at 3; SIA Letter (some members) at 18.

the playing field in terms of who could charge fees, and provide some measure of certainty to market participants that the quoted price will be, essentially, the price they will pay. Other commenters were strongly opposed to any limitation on fees, believing that competition alone would sufficiently address the high fees that distort quoted prices.[186] One asserted that ''[c]ompetitive forces have satisfactorily dealt with the issue of outlier ECNs. . . [M]arket participants have put them at the bottom of their order routing tables, which means that orders placed on these ECNs would be the last to be executed at any price level, a position that no market participant wants to be in.'' [187] In contrast, some commenters argued that all access fees charged to non-members and non-subscribers should be prohibited, but believed that the proposed fee limitations should not apply to SRO transaction fees, particularly those that are filed with the Commission for approval.[188] Finally, a few commenters questioned the Commission's authority to set limitations on access fees.[189]

The Commission acknowledges the many difficult issues associated with access fees, but is concerned that these issues must be resolved to promote a fair and efficient NMS, particularly under the reproposed regulatory structure. As the SIA noted while discussing the divergent views of its members both opposing and supporting access fees, ''[p]erhaps the only point of agreement in this debate is a desire for the resolution of the issue.'' [190]

After considering the many divergent views of commenters, the Commission preliminarily believes that a flat limitation on access fees to $0.003 per share would be the fairest and most appropriate solution to what has been a longstanding and contentious issue.[191] The limitation is intended to achieve several objectives. First, it would greatly simplify the proposal by eliminating the separate limitations for trading centers and liquidity providers, as well as the associated attribution requirement. A single accumulated fee cap would apply equally to all types of trading centers and all types of market participants, thereby promoting the NMS objective of equal regulation of markets and broker-dealers.[192]

Second, the $0.003 fee limitation would be consistent with current business practices, as very few trading centers charge fees that exceed this amount.[193] Based on recent inquiries, it appears that only two ECNs currently charge fees that exceed $0.003. One charges $0.004 for access through ADF, and the other charges $0.009 for access through the ADF. Neither of these ECNs currently accounts for a large percentage of trading volume. In addition, a few SROs have large fees on their books for transactions in ETFs that exceed a certain size (*e.g.*, 2100 shares). It is unlikely that these fees generate a large amount of revenues.

Accordingly, the reproposed fee limitation would *not* reduce, much less eliminate, the fees that currently are charged by agency markets. The Commission recognizes that agency trading centers perform valuable agency services in bringing buyers and sellers together, and that their business model historically has relied, at least in part, on charging fees for execution of orders against their displayed quotations. Prohibiting access fees entirely would unduly harm this business model.

Although not intended to reduce access fees, the reproposed fee limitation would be designed to preclude individual trading centers from raising their fees substantially in an attempt to take improper advantage of strengthened protection against trade-throughs and the adoption of a private linkage regime. In particular, the reproposed fee limitation would be necessary to address ''outlier'' trading centers that otherwise might charge high fees and pass most of the fees through as rebates to attract liquidity providers. It also would preclude a trading center from charging high fees selectively to competitors, practices that have arisen in the market for Nasdaq stocks, with limited success. In the absence of a fee limitation, however, the adoption of the Trade-Through Rule and private linkages could significantly boost the viability of the outlier business model. Outlier markets might well try to take advantage of intermarket price protection by acting essentially as a toll booth between price levels. The high fee market likely would be the last market to which orders would be routed, but prices could not move to the next level until someone routed an order to take out the displayed price at the outlier market. Because an outlier market could be no worse than last in order-routing preference, no matter how high its fees, it might see little downside to charging exceptionally high fees, such as $0.009, and passing most of the fee on to liquidity providers as rebates. In sum, while markets would have significant incentives to compete to be near the top in order-routing priority,[194] there might be little incentive to avoid being the least-preferred market if fees were not limited.

The $0.003 cap would preclude the outlier business model. It would place all markets on a level playing field in terms of the fees they can charge and the rebates they can pass on to liquidity providers. Some markets might choose to charge lower fees, thereby increasing their ranking in the preferences of order routers. Others might charge the full $0.003 and rebate a substantial proportion to liquidity providers. Competition would determine which strategy was most successful.

Moreover, the fee limitation would be necessary to achieve the purposes of the Exchange Act. Access fees tend to be highest when markets use them to fund substantial rebates to liquidity providers, rather than merely to compensate for agency services. If outlier markets were allowed to charge exorbitant fees and pass most of them through as rebates, the published quotations of such markets would not reliably indicate the true price that is actually available to investors or that would be realized by liquidity providers. Section 11A(c)(1)(B) of the Exchange Act authorizes the Commission to adopt rules assuring the fairness and usefulness of quotation in information. For quotations to be fair and useful, there must be some limit on the extent to which the true price for those who access quotations, and the true price realized by those who supply liquidity for quotations, can vary from the displayed price. Consequently, the $0.003 fee limitation would further the statutory purposes of the NMS by harmonizing quotation practices and precluding the distortive effects of exorbitant fees and liquidity rebates. Moreover, the fee limitation would be needed to further the statutory purpose of enabling broker-dealers to route orders in a manner consistent with the

[186] *See, e.g.*, Brut Letter at 12; Instinet Letter at 24; SIA Letter (some firms) at 18.

[187] Instinet Letter at 27.

[188] *See, e.g.*, Amex Letter at 7–8; Goldman Sachs Letter at 5; Knight Letter at 2; NYSE Letter at 5; STA Letter at 6.

[189] *See, e.g.*, Instinet Letter at 24; Letter from Roderick Covlin, Executive Vice President, TrackECN, to William H. Donaldson, Chairman, Commission, dated May 10, 2004 (''TrackECN Letter'') at 1.

[190] SIA Letter at 17.

[191] For the relatively small number of NMS stocks priced under $1.00, fees would be limited to 0.3% of the quotation price per share to prevent fees from constituting an excessive percentage of share price.

[192] Section 11A(c)(1)(F) of the Exchange Act.

[193] *Cf.* Instinet Letter at 38 (''there is no basis for adopting any limitation other than at the prevailing $0.003 per share level, which was arrived at through open competition among ATSs, ECNs, and SRO markets in the Nasdaq market'').

[194] *See supra,* section II.A.4.a (discussion of competitive implications of trade-through protection).

operation of the NMS.[195] To protect limit orders, orders must be routed to those markets displaying the best-priced quotations. This purpose would be thwarted if market participants were allowed to charge exorbitant fees that distort quoted prices.

Finally, the access fee limitation is narrowly drafted to cover only quotations that market participants would be required to access because of the Trade-Through Rule. The limitation would not apply to depth-of-book quotations (unless such quotations were designated as protected quotations under the Voluntary Depth Alternative) or to any other services offered by markets. It thereby would provide the necessary support for proper functioning of the Trade-Through Rule and private linkages, while leaving trading centers otherwise free to set fees subject only to other applicable standards (*e.g.*, prohibiting unfair discrimination).

3. Locking or Crossing Quotations

The access proposal provided that the SROs must establish and enforce rules (1) requiring their members reasonably to avoid posting quotations that lock or cross the quotations of other markets, (2) enabling the reconciliation of locked or crossed markets, and (3) prohibiting their members from engaging in a pattern or practice of locking or crossing quotations. In light of the discussion at the NMS Hearing concerning automated quotations and automated markets,[196] the Supplemental Release requested comment on whether market participants should be allowed to submit automated quotations that lock or cross manual quotations.[197]

Most of the commenters who addressed the issue supported the proposed restrictions on locking and crossing quotations.[198] They generally agreed that the practice of displaying quotations that lock or cross previously displayed quotations is inconsistent with fair and orderly markets and detracts from market efficiency. One noted, for example, that locked and crossed markets ''can be a sign of an inefficient market structure'' and ''may create confusion for investors, as it is unclear under such circumstances what is the true trading interest in a stock.''[199] Some commenters asserted that locked markets often occur when a market participant deliberately posts a locking quotation to avoid paying a fee to access the quotation of another market and to receive a liquidity rebate for an execution against its own displayed quotation.[200] Nasdaq submitted data regarding the frequency of locked and crossed markets. During a one-week period in March 2004, it found that markets for Nasdaq stocks were locked or crossed an average of 509,018 times each day, with an average of 194,638 of the locks and crosses lasting more than 1 second and an average duration of all locks and crosses of 3.1 seconds.[201] Nasdaq stocks currently are not subject to provisions discouraging intermarket locking or crossing quotations such as those contained in the ITS Plan.

A few commenters opposed restricting the practice of locking or crossing quotations.[202] They generally believed that the proposal would impair market transparency and efficiency, such as by prohibiting the display of information as to the true level of trading interest or information that a particular market's quotations may be inaccessible. One commenter identified a number of causes, apart from access fees and liquidity rebates, that could lead to locked and crossed markets.[203] These included determinations by market participants that quotations displayed by a locked or crossed market are not truly accessible, decisions by market participants that the potential disadvantages of routing away outweigh the potential advantages (*e.g.*, loss of execution priority on the market place currently displaying the order), and decisions by market participants to exclusively use a particular market to run a trading strategy, even at the risk of missing some trading opportunities.

The Commission has decided to repropose restrictions on the practice of displaying locking or crossing quotations, but, consistent with its approach in the reproposed Trade-Through Rule, has modified the proposal to allow automated quotations to lock or cross manual quotations. Rule 610(d) as reproposed thereby would address the concern that manual quotations may not be fully accessible and would recognize that allowing automated quotations to lock or cross manual quotations may provide useful market information. The Commission preliminarily believes, however, that an automated quotation is entitled to protection from locking or crossing quotations. When two market participants are willing to trade at the same quoted price, giving priority to the first-displayed automated quotation would contribute to fair and orderly markets. Moreover, the basic principle underlying the NMS is to promote fair competition among markets, but within a unified system that also promotes interaction between all of the buyers and sellers in a particular NMS stock. Allowing market participants simply to ignore accessible quotations in other markets and routinely display locking and crossing quotations would be inconsistent with this principle.

B. Description of Reproposed Rule

Paragraphs (a) and (b) of reproposed Rule 610 address access to all quotations displayed by an SRO trading facility or by an SRO display-only facility. Paragraph (c) addresses the fees charged for access to protected quotations, and paragraph (d) addresses locking and crossing quotations. The Commission also is reproposing an extension of the scope of the fair access requirements of Regulation ATS.

1. Access to Quotations

a. Quotations of SRO Trading Facilities. Paragraph (a) of reproposed Rule 610 applies to quotations of an SRO trading facility. In reproposed Rule 600(b)(72), an SRO trading facility is defined as a facility operated by a national securities exchange or a national securities association that executes orders in securities or presents orders to members for execution.[204] This definition therefore would encompass the trading facilities of each of the exchanges, as well as the NASDAQ Market Center. The term ''quotations'' is defined in reproposed Rule 600(b)(63) as bids and offers, and ''bid'' or ''offer'' is defined in reproposed Rule 600(b)(8) as the bid

[195] Section 11A(c)(1)(E) of the Exchange Act authorizes the Commission to adopt rules assuring that broker-dealers transmit orders for NMS stocks in a manner consistent with the establishment and operation of a national market system.

[196] *See supra,* section II.A.2.

[197] Supplemental Release, 69 FR at 30147.

[198] Amex Letter, Exhibit A at 27–28; Letter from Steve Swanson, Chief Executive Officer & President, Automated Trading Desk, LLC, to Jonathan G. Katz, Secretary, Commission, dated June 30, 2004 (''ATD Letter'') at 3; Brut Letter at 17; BSE Letter at 13; Citigroup Letter at 14; E*Trade Letter at 10; ICI Letter at 18; JP Morgan Letter at 6; Nasdaq Letter II at 23–24; NYSE Letter, Attachment at 9; SIA Letter at 19–20; STA Letter at 6; STANY Letter at 8; UBS Letter at 9–10.

[199] ICI Letter at 18.

[200] Amex Letter, Exhibit A at 27–28; ATD Letter at 3; ICI Letter at 18; Nasdaq Letter II at 23.

[201] Nasdaq Letter II at 23.

[202] Letter from Linda Lerner, General Counsel, Domestic Securities, Inc., to Jonathan G. Katz, Secretary, Commission, dated September 9, 2004 (''Domestic Securities Letter'') at 2–3; Hudson River Trading Letter at 5–6; Instinet Letter at 39–41; Letter from Michael J. Simon, Senior Vice President & Secretary, International Securities Exchange, Inc., to Jonathan G. Katz, Secretary, Commission, dated June 30, 2004 (''ISE Letter'') at 7–8; Tower Research Letter at 6–8.

[203] Instinet Letter at 39.

[204] For clarity, the definition of ''SRO trading facility'' replaces the definition of ''quoting market center'' in the proposal. It is consistent with the old definition.

price or the offer price communicated by a member of a national securities exchange or national securities association to any broker or dealer or to any customer. Reproposed Rule 610(a) therefore would apply to the entire depth of book of displayed orders of an SRO trading facility.

Reproposed Rule 610(a) would prohibit an SRO from imposing unfairly discriminatory terms that prevent or inhibit any person from obtaining efficient access through a member of the SRO to the quotations in an NMS stock displayed by the SRO trading facility. This anti-discrimination standard is designed to give non-members indirect access to quotations through members, but is premised on the fact that the SRO's members themselves have fair and efficient access to the quotations of the SRO's trading facility. Such access currently is addressed by a series of provisions of the Exchange Act. Sections 6(b)(1) and 15A(b)(2) require that an exchange or association must have the capacity to be able to carry out the purposes of the Exchange Act. Sections 6(b)(5) and 15A(b)(6) require an exchange or association to have rules designed to remove impediments to and perfect the mechanism of a free and open market and a national market system. Section 11A(a)(1)(C) provides that two of the objectives of a national market system are to assure the economically efficient execution of securities transactions and the practicability of brokers executing investors' orders in the best market. Neither of these objectives is possible if an SRO's members—those entities that have the right to trade directly on an SRO facility—do not themselves have fair and efficient access to the quotations displayed on such facility.

Reproposed Rule 610(a) would build on this existing regulatory structure by prohibiting unfair discrimination that prevents or inhibits non-members from piggybacking on the access of members. In the absence of mandatory public linkages directly between markets, the ability to obtain indirect access is necessary to assure that competing markets can meet the requirements of the Trade-Through Rule and that all brokers can fulfill their duty of best execution. In general, any SRO rule or practice that treats orders less favorably based on the identity of the ultimate party submitting the order through an SRO member would violate reproposed Rule 610(a). Thus, for example, charging differential fees or reducing an order's priority based on the identity of a member's customer would violate reproposed Rule 610(a).

Given the critical importance of indirect access to the private linkage approach incorporated in reproposed Rule 610(a), the Commission intends to review the current extent to which SRO members have fair and efficient access to quotations in NMS stocks that are displayed on an SRO trading facility, which term does not include the NASD's ADF, as discussed below. In this regard, it emphasizes that the SROs cannot meet the access requirements of the Exchange Act by relying on access provided by trading centers that are not a facility operated by the SRO. Thus, if a trading center displays quotes on an SRO trading facility, but also provides direct access to such quotes, that SRO could not rely on the level of direct access to the non-SRO trading center to meet its Exchange Act responsibilities. An SRO trading facility must itself provide fair and efficient access to the quotations that are displayed as quotations of such SRO. Stated another way, an SRO trading facility cannot be used simply as a conduit for the display of quotations that cannot be accessed fairly and efficiently through the SRO trading facility itself. Accordingly, each SRO's facilities would be reviewed to determine whether they were able to meet the enhanced need for access under the reproposed regulatory structure.

b. Quotations of SRO Display-Only Facility. Paragraph (b) of reproposed Rule 610 would apply to all quotations displayed by an SRO display-only facility. The term ''SRO display-only facility'' is defined in reproposed Rule 600(b)(71) as a facility operated by a national securities exchange or national securities association that displays quotations in securities, but does not execute orders against such quotations. For quotations in NMS stocks, this definition currently would encompass only the NASD's ADF.[205]

Paragraph (b)(1) of reproposed Rule 610 would require any trading center that displays quotations in NMS stocks through an SRO display-only facility to provide a level and cost of access to such quotations that is substantially equivalent to the level and cost of access to quotations displayed by SRO trading facilities. The phrase ''level and cost of access'' would encompass both (1) the policies, procedures, and standards that govern access to quotations of the trading center, and (2) the connectivity through which market participants can obtain access and the cost of such connectivity. As discussed in section III.A.1 above, trading centers that choose to display quotations in an SRO display-only facility would be required to bear the responsibility of establishing the necessary connections to afford fair and efficient access to their quotations. The nature and cost of these connections for market participants seeking to access the trading center's quotations would need to be substantially equivalent to the nature and cost of connections to SRO trading facilities. In recent years, a variety of different types of entities have entered the business of providing connections for brokers and market participants to different trading centers. The Commission anticipates that ADF participants would take advantage of these service providers to establish the necessary connectivity. The NASD, as the self-regulatory authority responsible for enforcing compliance by ADF participants with the requirements of the Exchange Act, would need to evaluate the connectivity of ADF participants to determine whether it meets the requirements of Rule 610(b)(1).

Paragraph (b)(2) of reproposed Rule 610 would prohibit any trading center that displays quotations through an SRO display-only facility from imposing unfairly discriminatory terms that prevent or inhibit any person from obtaining efficient access to such quotations through a member, subscriber, or customer of the trading center. This prohibition parallels the prohibition in reproposed Rule 610(a) that applies to the quotations of SRO trading facilities. Thus, a trading center's differential treatment of orders based on the identity of the party ultimately submitting an order through a member, subscriber, or customer of such trading center generally would be prohibited.

2. Limitation on Access Fees

Reproposed Rule 610(c) would limit the fees that could be charged for access to protected quotations. It provides that a trading center shall not impose, nor permit to be imposed, any fee or fees for the execution of orders against its protected quotations in an NMS stock that exceed or accumulate to more than $0.003 per share or, for its protected quotations with a price of less than $1.00, that exceed or accumulate to

[205] As proposed, the indirect access requirement for ADF participants would have applied only to trading centers whose quotations were *solely* accessible in the ADF and not through an SRO trading facility. As reproposed, Rule 610(b)(1) applies to all quotations displayed on an SRO display-only facility, even if the trading center also displays quotations in an SRO trading facility. This modification is needed to preclude the consolidated data stream from giving a misleading indication of available liquidity. Separate quotations displayed on an SRO trading facility and an SRO display-only facility must each be fully accessible.

more than 0.3% of the quotation price per share.

Thus, the scope of reproposed Rule 610(c) would be limited to quotations protected by the Trade-Through Rule. Under the alternative definitions of ''protected bid'' and ''protected offer'' reproposed for Rule 600(b)(57), the fee limitation would apply, at a minimum, to an automated quotation that is the BBO of an exchange, the NASDAQ Market Center, or the ADF. If the Voluntary Depth Alternative were adopted and markets voluntarily obtained protection for their depth-of-book quotations, the fee limitation also would apply to orders accessing these quotations.[206] When triggered, the fee limitation of Rule 610(c) would apply to any order execution at the displayed price of the protected quotation. It therefore would encompass executions against both the displayed size and any reserve size at the price of a protected quotation.

Reproposed Rule 610(c) would encompass a wide variety of fees currently charged by trading centers, including both the fees commonly known as access fees charged by ECNs and the transaction fees charged by SROs. So long as the fees are based on the execution of an order against a protected quotation, the restriction of reproposed Rule 610(c) would apply. Conversely, fees not triggered by the execution of orders against protected quotations (*e.g.*, certain periodic fees such as monthly or annual fees) generally would not be included.

In addition, reproposed Rule 610(c) would encompass any fee charged directly by a trading center, as well as any fee charged by market participants that display quotations through the trading center's facilities. Trading centers would have flexibility in establishing their fee schedules to comply with reproposed Rule 610(c). In particular, trading centers could impose a limit on the fees that market participants are permitted to charge for quotations that are accessed through a trading center's facilities. For example, Nasdaq has adopted such a limit for quotations displayed by the NASDAQ Market Center.[207]

If reproposed Rule 610(c) were adopted, market makers would be permitted to charge fees for accessing their quotations, so long as such fees met the Rule's requirements. Market makers currently are not permitted to charge access fees under the Quote Rule. To promote the equal regulation of markets, the Commission preliminarily believes that, if reproposed Rule 610(c) were adopted, it would be consistent with the Quote Rule for market makers to charge access fees. In particular, market makers would be permitted to charge fees for executions of orders against their protected quotations irrespective of whether the order executions are effected on an SRO trading facility or directly by the market maker.

3. Locking or Crossing Quotations

Reproposed Rule 610(d) would restrict locking or crossing quotations, but would recognize that locked and crossed markets can occur accidentally, especially given the differing speeds with which trading centers update their quotations. It would require that each national securities exchange and national securities association establish and enforce rules that: (1) Require its members to reasonably avoid displaying quotations that lock or cross any protected quotation in an NMS stock, or of displaying manual quotations that lock or cross any quotation in an NMS stock disseminated pursuant to an effective national market system plan; (2) are reasonably designed to assure the reconciliation of locked or crossed quotations in an NMS stock; and (3) prohibit its members from engaging in a pattern or practice of displaying quotations that lock or cross any protected quotation in an NMS stock, or of displaying manual quotations that lock or cross any quotation in an NMS stock disseminated pursuant to an effective national market system plan.

Thus, reproposed Rule 610(d) would distinguish between protected (and therefore automated)[208] quotations and manual quotations. Protected quotations could not be crossed or locked by any other quotations. Manual quotations, in contrast, could be locked or crossed by automated quotations, but could not themselves lock or cross any other quotations included in the consolidated data stream, whether automated or manual. Recognizing that quotations may on occasion accidentally lock or cross other quotations, reproposed Rule 610(d) would require members to ''reasonably avoid'' locking and crossing and prohibits a ''pattern or practice'' of locking or crossing. SRO rules could include so-called ''ship and post'' procedures that require a market participant to attempt to execute against a relevant displayed quotation while posting a quotation that could lock or cross such a quotation. Finally, reproposed Rule 610(d)(2) would require that each SRO's rules be reasonably designed to enable the reconciliation of locked or crossed quotations in an NMS stock. Such rules would require the market participant responsible for displaying the locking or crossing quotation to take reasonable action to resolve the locked or crossed market.

4. Regulation ATS Fair Access

The ''fair access'' standards of Rule 301(b)(5) of Regulation ATS[209] require a covered ATS, among other things, to (1) establish written standards for granting access on its system, and (2) not unreasonably prohibit or limit any person in respect to services offered by the ATS by applying its access standards in an unfair or discriminatory manner. The Commission is reproposing an amendment to this section of Regulation ATS to lower the threshold that triggers the Regulation ATS fair access requirements from 20% of the average daily volume in a security to 5%.[210] Under the access approach reproposed today, the fairness and efficiency of private linkages would assume heightened importance. A critical component of private linkages is the ability of interested market participants to become members or subscribers of a trading center, particularly those trading centers with significant trading volume. As discussed in section III.A1 above, market participants then may use their membership or subscribership access as a means for others to obtain indirect access by piggybacking on the direct access of members or subscribers. The Commission therefore believes that it would be appropriate to lower the fair access threshold of Regulation ATS.[211] Lowering the threshold for paragraph (b)(5) of Rule 301 also would make its coverage consistent with the 5% threshold triggering the order display and execution access requirements of Rule 301(b)(3). As a result, each ATS required to disseminate its quotations in the consolidated data stream also would be prohibited from unreasonably

[206] *See supra*, section II.A.5 (scope of quotations protected by reproposed Trade-Through Rule).

[207] NASD Rule 4623(b)(6).

[208] Under Rule 600(b)(57), only automated quotations can qualify as protected quotations.

[209] 17 CFR 242.301(b)(5).

[210] The Regulation ATS fair access requirements are triggered on a security-by-security basis for equity securities. *See* Securities Exchange Act Release No. 40760 (Dec. 8, 1998), 63 FR 70844, 70873 (Dec. 22, 1998).

[211] One commenter opposed the proposal to lower the threshold for Regulation ATS fair access, primarily because it largely acts as an agency broker that routes orders to other venues. Bloomberg Tradebook Letter at 7. The Commission preliminarily believes that ATSs, which by definition has chosen to offer market functions beyond mere agency routing, would appropriately be subject to regulatory requirements that reflect such functions.

limiting market participants from becoming a subscriber or customer. Aside from lowering the threshold, the substantive requirements of Rule 301(b)(5) would be left unchanged.

IV. Sub-Penny Rule

The Commission today is reproposing Rule 612 under the Exchange Act which would govern sub-penny quoting of NMS stocks. Rule 612 would impose new requirements on any bid, offer, order, or indication of interest that is displayed, ranked, or accepted by a national securities exchange, national securities association, ATS, vendor, or broker-dealer. The reproposed rule incorporates the substance of the initially proposed rule with a few minor revisions, as discussed below.

A. Background

In June 2000, the Commission issued an order directing NASD and the national securities exchanges to act jointly in developing a plan to convert their quotations in equity securities and options from fractions to decimals.[212] The June 2000 Order stated that the plan could fix the minimum price variation (''MPV'') during the phase-in period, provided that the MPV was no greater than $0.05 and no less than $0.01 for any equity security.[213] The June 2000 Order also required NASD and the exchanges to provide the Commission with studies analyzing how decimal conversion had affected systems capacity, liquidity, and trading behavior, including an analysis of whether there should be a uniform MPV.[214] The Commission stated that, if NASD or an exchange wished to move to quoting stocks in an increment less than $0.01, its study should include a full analysis of the potential impact on the market requesting the change and on the markets as a whole.[215] Furthermore, the Commission required each SRO to propose a rule change under Section 19(b) of the Exchange Act[216] to establish its individual choice of MPV for securities traded on its market.[217] NASD and the exchanges complied with these requirements, and in August 2002 the Commission approved rule changes from all of these SROs to establish MPVs in NMS stocks of $0.01.[218]

Between the June 2000 Order and the August 2002 Order, the Commission issued a Concept Release seeking public comment on the potential impact of sub-penny pricing,[219] including its effect on: (1) Price clarity (*e.g.*, the potential to cause ephemeral or ''flickering'' quotations); (2) market depth (*i.e.*, the number of shares available at a given price); (3) compliance with the Order Handling Rules and other price-dependent rules; and (4) the operations and capacity of automated systems.[220] The Commission received 33 comments on the Concept Release.[221] The majority of commenters opposed sub-penny pricing. Some stated that the negative effects of decimal trading would be exacerbated by reducing the MPV even further, without meaningfully reducing spreads or securing other benefits for the markets or investors.[222] These commenters recommended that all securities have an MPV of at least a penny.[223] A smaller number of commenters believed that the forces of competition, rather than regulation by the Commission or Congress, should determine the MPV.[224] These commenters suggested that a smaller MPV could improve market efficiency and provide investors with greater opportunity for price improvement. They argued in general that the problems accompanying decimals could be resolved through technology enhancements, rather than through regulation.

In August 2003, Nasdaq submitted a proposed rule change to the Commission to adopt an MPV of $0.001 for Nasdaq-listed securities.[225] Nasdaq stated that, unless and until a uniform MPV is established, it believed it must implement an MPV of $0.001 to remain competitive with ECNs that permit their subscribers to quote in sub-pennies. Simultaneous with the proposed rule change, Nasdaq filed a petition for Commission action urging the Commission ''to adopt a uniform rule requiring market participants to quote and trade Nasdaq securities in a consistent monetary increment * * * with the exception of average price trades.''[226]

B. Commission Proposal on Sub-Penny Quoting

In February 2004, the Commission proposed new Rule 612 that would govern quoting in sub-pennies as part of the overall Regulation NMS proposal. In the Proposing Release, the Commission summarized the conversion of the U.S. securities markets from fractional to decimalized trading and stated its view that, on balance, the benefits of decimalization have justified the costs. The Commission cautioned, however, that if the MPV decreases beyond a certain level the potential costs to investors and the markets might increase and could at some point surpass any potential benefits.[227] To address this concern, proposed Rule 612 would prohibit any national securities exchange, national securities association, ATS, vendor, or broker-dealer from displaying, ranking, or accepting from any person bid, offer, order, or indication of interest in any NMS stock priced in an increment less than $0.01. Proposed Rule 612 would not impose this restriction on any NMS stock the share price of which is below $1.00.

The proposed rule was designed to limit the ability of a market participant to gain execution priority by bettering the price of another limit order by an economically insignificant amount. In issuing the sub-penny proposal, the Commission cited research performed by OEA strongly suggesting that much sub-penny quoting currently taking place results from market participants attempting to step ahead of limit orders for the smallest economic increment possible.[228] This conclusion was based on the high incidence of sub-penny

[212] *See* Securities Exchange Act Release No. 42194 (June 8, 2000), 65 FR 38010 (June 19, 2000) (''June 2000 Order''). On January 28, 2000, the Commission ordered NASD and the exchanges to facilitate an orderly transition to decimal pricing in the securities markets. *See* Securities Exchange Act Release No. 42360 (Jan. 28, 2000), 65 FR 5003 (Feb. 2, 2000). In that order, the Commission set a timetable for NASD and the exchanges to begin trading some equity securities, and options on those securities, in decimals by July 3, 2000, and to begin trading all equities and options by January 3, 2001. *See* January 2000 Order, 65 FR at 5005. In April 2000, the Commission issued another order staying the original deadlines for decimalization. *See* Securities Exchange Act Release No. 42685 (Apr. 13, 2000), 65 FR 21046 (Apr. 19, 2000).

[213] *See* June 2000 Order, 65 FR at 38013. The June 2000 Order also required that at least some equity securities be quoted in minimum increments of $0.01. *See id.*

[214] *See id.*

[215] *See id.*

[216] 15 U.S.C. 78s(b).

[217] *See* June 2000 Order, 65 FR at 38013.

[218] *See* Securities Exchange Act Release No. 46280 (July 29, 2002), 67 FR 50739 (Aug. 5, 2002) (''August 2002 Order'') (approving SR–Amex–2002–02, SR–BSE–2002–02, SR–CBOE–2002–02, SR–CHX–2002–06, SR–CSE–2002–02, SR–ISE–2002–06, SR–NASD–2002–08, SR–NYSE–2002–12, SR–PCX–2002–04, and SR–Phlx–2002–05).

[219] Securities Exchange Act Release No. 44568 (July 18, 2001), 66 FR 38390 (July 24, 2001) (''Concept Release'').

[220] *See* 66 FR at 38391–95.

[221] For a list of the commenters, *see* Proposing Release, 69 FR at 11165.

[222] *See id.*

[223] However, some commenters that opposed sub-penny quoting thought that trading in sub-pennies should be permitted. *See id.*

[224] *See* id. at 11165–66.

[225] *See* SR–NASD–2003–121. Nasdaq has since withdrawn this proposal.

[226] Letter to Jonathan G. Katz, Secretary, Commission, from Edward S. Knight, Executive Vice President, Nasdaq, dated August 4, 2003 (''Nasdaq Petition'').

[227] *See* Proposing Release, 69 FR at 11165.

[228] *See* 69 FR at 11169–70.

trades that cluster around the $0.001 and $0.009 price points.

In the Proposing Release, the Commission pointed to a variety of potential problems caused by sub-penny quoting, including the following:

• If investors' limit orders lose execution priority for a nominal amount, investors may over time decline to use them, thus depriving the markets of liquidity.

• When market participants can gain execution priority for an infinitesimally small amount, important customer protection rules such as exchange priority rules and NASD's Manning rule [229] could be rendered meaningless. Without these protections, professional traders would have more opportunity to take advantage of non-professionals, which could result in the latter either losing executions or receiving executions at inferior prices.

• Flickering quotations that can result from widespread sub-penny pricing could make it more difficult for broker-dealers to satisfy their best execution obligations and other regulatory responsibilities. The best execution obligation requires a broker-dealer to seek for its customer's transaction the most favorable terms reasonably available under the circumstances.[230] This standard is premised on the practical ability of the broker-dealer to determine whether a displayed price is reasonably obtainable under the circumstances.

• Widespread sub-penny quoting could decrease market depth (*i.e.*, the number of shares available at the NBBO). This could lead to higher transaction costs, particularly for institutional investors (such as pension funds and mutual funds), which are more likely to place large orders. These higher transaction costs would likely be passed on to retail investors whose assets are managed by the institutions.

• Decreasing depth at the inside also could cause such institutions to rely more on execution alternatives away from the exchanges and Nasdaq that are designed to help larger investors find matches for large blocks of securities. Such a trend could increase fragmentation of the securities markets.

C. Comments Received

The Commission sought comment on all aspects of proposed Rule 612, including the potential problems with sub-penny quoting noted above. Of the comments that the Commission received in response to the Regulation NMS Proposing Release, approximately 60 separate commenters addressed the sub-penny proposal.

1. Comments Addressing Overall Proposal

A majority of commenters supported the proposed sub-penny rule.[231] Several commenters concurred with the Commission's view that sub-penny quoting is widely used to step-ahead of competing limit orders.[232] One commenter, an ECN, stated that it carried out an informal survey of its buy-side clients, and of the 158 responses received 145 said that they opposed sub-penny quoting.[233] The ECN concluded that ''[its] clients believe that quoting in sub pennies is used, not for bona fide price improvement, but to jump ahead of their limit orders.'' [234] Another commenter, a large discount brokerage firm, stated that it ceased allowing its clients to submit sub-penny orders in April 2003 ''because it had determined that clients were using sub-pennies to step ahead of resting limit orders and undermining the Manning provision.'' [235] A third commenter stated that the reduction of the MPV has allowed ''speculators'' to post quotations at small increments ahead of institutional trading interest, resulting in decreased liquidity as such institutional interest began seeking methods of execution other than the posting of limit orders. [236]

Furthermore, the commenters supporting the Commission's sub-penny proposal were generally of the view that the marginal benefits of a further reduction in the MPV were not justified by the associated costs.[237] Several commenters argued, in essence, that ''[a]n industry-wide shift to quoting in sub-pennies would * * * require costly additional investments in systems capacity while producing little in the way of more efficient markets.'' [238] Several commenters also believed that sub-penny quotations increase the incidence of quote flickering, which in turn may have adverse effects such as creating investor confusion or impeding a broker-dealer's duty of best execution.[239]

However, a minority of commenters opposed the Commission's proposal to prohibit sub-penny quoting.[240] These commenters generally argued that the MPV should be determined by market forces. Two commenters believed that regulating quoting conventions would ''prevent marketplaces from making subsequent innovative changes to their quotation increments to respond to the needs of investors'' [241] and ''legislate[] a maximum efficiency for the market instead of allowing further improvement.'' [242] Other commenters stated that quoting in sub-pennies can increase liquidity, lower trading costs,

[229] *See* NASD IM–2110–2 (generally requiring that a member firm that accepts and holds an unexecuted limit order from its customer in a Nasdaq security and that continues to trade the subject security for its own market-making account at prices that would satisfy the customer's limit order, without executing that limit order, shall be deemed to have acted in a manner inconsistent with just and equitable principles of trade). The impetus for this rule was a case brought by a customer of an NASD member firm, William Manning, who alleged that the firm had accepted his limit order, failed to execute it, and violated its fiduciary duty to him by trading ahead of the order. In the *Manning* decision, *In re E.F. Hutton & Co.,* Exchange Act Release No. 25887 (July 6, 1988), the Commission affirmed NASD's finding that a member firm, upon acceptance of a customer's limit order, undertakes a fiduciary duty to its customer and cannot trade for its own account at prices more favorable than the customer's order.

[230] *See* Securities Exchange Act Release No. 37619A (Sept. 6, 1996), 61 FR 48290, 48322 (Sept. 12, 1996) (adopting the Commission's Order Handling Rules). A broker-dealer's duty of best execution derives from common law agency principles and fiduciary obligations and is incorporated in both SRO rules and, through judicial and Commission decisions, in the antifraud provisions of the federal securities laws. *See id.*

[231] *See, e.g.*, AFB Letter at 12; American Century Letter at 2; Ameritrade Letter at 10; Archipelago Letter at 14; ATD Letter at 3–4; Bloomberg Tradebook Letter at 2; BoNY Letter at 4; BSE Letter at 13–14; CBOE Letter at 7; Citadel Letter at 9; Citigroup Letter at 14–15; CSE Letter at 23; Denizkurt E-mail; E*Trade Letter at 11; Financial Information Forum Letter at 2–3; Financial Services Roundtable Letter at 5–6; Florida State Board Letter at 2; Goldman Sachs Letter at 10; ICI Letter at 19–20; ISE Letter at 8; JP Morgan Letter at 6–7; Knight Letter at 7–8; Lava Trading Letter at 5; Lehman Brothers Letter at 5; Liquidnet Letter at 8; LSC Letter at 11; Morgan Stanley Letter at 3; Nasdaq Letter at 1–2; NYSE Letter at 9–10; NSX Letter at 9; Peake I Letter at 13; Reuters Letter at 4; Schwab Letter at 17; SIA Letter at 20–21; Specialist Assoc. Letter at 13–15; STA Letter at 7; STANY Letter at 13–14; UBS Letter at 10; Vanguard Letter at 6.

[232] *See, e.g.*, Ameritrade Letter at 10; Archipelago Letter at 14; ATD Letter at 3; Bloomberg Tradebook Letter at 2; Citadel Letter at 9; Citigroup Letter at 14; ICI Letter at 7–8; Tullo Letter at 8.

[233] *See* Bloomberg Tradebook Letter at 2.

[234] *Id.*

[235] Ameritrade Letter at 10.

[236] *See* Tullo Letter at 8.

[237] *See, e.g.*, Citigroup Letter at 14; LSC Letter at 11; STA Letter at 7; STANY Letter at 10–11.

[238] Reuters Letter at 4. *See also* Financial Information Forum Letter at 2–3; Financial Services Roundtable Letter at 6; Knight Letter at 7; Lehman Brothers Letter at 5.

[239] *See, e.g.*, Citadel Letter at 9; ICI Letter at 7; Knight Letter at 7; Reuters Letter at 4; SIA Letter at 20–21.

[240] *See* Brut Letter at 24; Domestic Securities Summary of Intended Testimony (no page numbers); GETCO Letter (no page numbers); Hudson River Trading Meeting Memo (no page numbers); Instinet Letter at 50; King Letter at 1; Mercatus Center Letter at 7; NexTrade Letter at 9–10; Reg NMS Study Group Letter at 9; Tower Research Letter at 8; Vie Securities Letter at 3.

[241] Instinet Letter at 50.

[242] E-mail from John Martello, Managing Director, Tower Research Capital LLC, to *rule-comments@sec.gov,* dated March 26, 2004.

and promote efficient pricing in the equity markets.[243]

These commenters generally argued that regulation was not necessary to remedy any perceived abuses caused by sub-penny quoting. Two commenters noted that some trading markets already have abandoned sub-penny quoting.[244] Another commenter added that ''[t]he problems attributed to subpenny quoting have been largely cleared up by the market, and are likely to further improve if the Commission removes some uncertainty from the marketplace by withdrawing its proposal.'' [245] This commenter also criticized the Nasdaq and OEA studies on which the Commission relied in issuing the sub-penny proposal.[246]

Under reproposed Rule 612, the minimum spread for most NMS stocks would be $0.01. Two commenters stated that, as a result, investors would suffer harm from artificially widened spreads.[247] Another commenter stated that ''the primary result of eliminating subpenny trading would be to preserve a minimum profit for market makers, and would result in significantly worse realized prices for the vast majority of market participants not in the business of making markets.'' [248] This commenter analyzed trading in six high-volume securities and concluded that proposed Rule 612 would have costs of over $400 million in these securities alone due to wider spreads.[249] Another commenter stated that, if all markets traded QQQQ solely in sub-pennies, the savings would be approximately $150 million per year.[250]

In summary, the comments received have reinforced the Commission's preliminary view that there are substantial drawbacks to allowing sub-penny quoting, and the Commission believes that a uniform rule prohibiting sub-penny quoting (except for quotations less than $1.00) is appropriate in this case. Sub-penny quoting generally impedes transparency by reducing market depth at the NBBO and increasing quote flickering. In an environment where the NBBO can change very quickly, broker-dealers will have more difficulty in carrying out their duties of best execution and complying with other regulatory requirements that require them to identify the best bid or offer available at a particular moment (such as the Manning rule and the short sale rule).

The Commission preliminarily believes that the $400 million and $150 million estimates of the cost to the markets caused by wider spreads provided by commenters are inaccurate and excessive. These estimates appear to assume that all trading activity would occur at narrower quoted spreads. The Commission does not believe that the commenters provided any evidence to justify that assumption. Currently, no national securities exchange or national securities association permits quoting in sub-pennies; sub-penny quoting occurs on only a small number of ATSs. Because spreads on most markets already cannot be smaller than $0.01, the Commission preliminarily does not believe that reproposed Rule 612 would require these markets to take any action that would cause their spreads to widen. Therefore, the Commission believes that the cost to these markets of not having sub-penny spreads should not be considered costs of the reproposed rule.[251]

Finally, the Commission agrees with the many commenters that believed that prohibiting sub-penny quoting will deter the practice of stepping ahead of exposed trading interest by an economically insignificant amount. Limit orders provide liquidity to the market and perform an important price-setting function. The Commission is concerned that, if a quotation or order can lose execution priority because of economically insignificant price improvement from a later-arriving quotation or order, liquidity could diminish and some market participants could incur greater execution costs. As one commenter, the Investment Company Institute, stated, ''[t]his potential for the increased stepping-ahead of limit orders would create a significant disincentive for market participants to enter any sizeable volume into the markets and would reduce further the value of displaying limit orders.'' [252] Improved liquidity should decrease the costs of trading, especially for large orders, since larger size should be available at fewer price points than would exist in a sub-penny quoting environment.

The reproposed rule would make only minor changes to the initially proposed rule. Reproposed Rule 612(a) would prohibit sub-penny quotations in NMS stocks over $1.00. Rule 612(b) would allow sub-penny quotations below $1.00, but only to four decimal places. Rule 612(c) would establish procedures for the Commission to grant exemptions from paragraphs (a) and (b).

2. Response to Other Comments

Beyond addressing the general thrust of the proposed sub-penny rule, some commenters discussed more specific matters. The Commission has revised the proposed sub-penny rule in response to certain of these comments, as discussed below.

a. Restriction Based on Price of the Quotation not Price of the Stock. As initially proposed, the restriction on sub-penny quoting would be triggered if the price of the NMS stock itself were above $1.00. One commenter sought clarification of when an NMS stock became sub-penny eligible, suggesting a threshold of trading below $1.00 for 30 consecutive business days.[253] A second commenter suggested instead that the prohibition should derive from the price of the *order,* rather than the price of the *stock;* in other words, the rule should permit any sub-penny quotation below $1.00 and prohibit any sub-penny quotation above $1.00, regardless of the price level where the stock was in fact trading.[254] The second commenter argued that this approach ''does not require countless re-classifications of stocks as 'sub-penny eligible' based on fluctuations in their valuation, stock splits, or other price movements.'' [255]

The Commission agrees with the second commenter. Basing the restrictions on the price of the quotation or order rather than the price of the NMS stock itself would spare market participants the need to track the

[243] *See* Hudson River Trading Testimony (no page numbers); GETCO Letter (no page numbers).

[244] *See* Brut Letter at 24; Regulatory Studies Letter at 9.

[245] Tower Research Letter at 8.

[246] *See id.* Tower Research argued, for example, that the studies do not differentiate between sub-penny trades and sub-penny quotations and that clustering of sub-penny trades around the $0.001 and $0.009 price points could be the result of other activity, such as market makers offering sub-penny price improvement. In response to this comment, OEA reviewed the sources of data used in the original study and found that sub-penny trades cluster at these two price points in both markets where trades necessarily result from quotations, such as ECNs, and where that is not necessarily the case. Accordingly, OEA continues to believe that market participants frequently used their ability to quote in sub-pennies to step ahead of competing limit orders by the smallest possible amount.

[247] *See* Instinet Letter at 51; Mercatus Center Letter at 9.

[248] Tower Group Letter at 8.

[249] *See* id. at 9.

[250] *See* Instinet Letter at 50.

[251] With respect to the ATSs that currently do permit some NMS stocks to be quoted in sub-pennies, the Commission staff has estimated that the costs of widened spreads in these securities would be approximately $48 million annually (or approximately $33 million if the Commission were to exempt QQQQ from reproposed Rule 612). *See* Memorandum to File from Office of Economic Analysis, dated December 15, 2004. A copy of this study has been placed in Public File No. S7–10–04 and is available for inspection on the Commission's Internet Web site (*http://www.sec.gov/rules/proposed/s71004.shtml*).

[252] ICI Letter at 20.

[253] *See* Citigroup Letter at 15.

[254] *See* Brut Letter at 25.

[255] *Id.*

eligibility of stocks priced near the $1.00 threshold. Accordingly, paragraph (a) of reproposed Rule 612 would prohibit bids, offers, orders, and indications of interest equal to or greater than $1.00 in an increment smaller than $0.01. Therefore, a market participant could not, for example, accept a sell order in an NMS stock priced at $1.0025, even if the stock were trading below $1.00. The Commission requests comment on the new approach taken in reproposed Rule 612(a).

b. Quotations Below $1.00. The Commission initially proposed a threshold of $1.00 below which the prohibition on sub-penny quoting would not apply and requested comment on whether that threshold was appropriate. The majority of commenters addressing this issue believed that it would be useful for low-priced securities to trade in increments finer than a penny, because a penny would constitute a significant percentage of the overall price. These commenters viewed $1.00 as an appropriate threshold.[256] One commenter stated that there is ''real demand for sub-penny trading (and therefore subpenny quoting) in securities trading below $1.00, due to the low trading value of the security.'' [257] The Commission agrees that sub-penny quotations for very low-priced securities largely represent genuine trading interest rather than an effort to step ahead of competing limit orders by an economically insignificant amount. In such cases, a sub-penny increment is more likely to represent a significant amount of the price of the quotation or order. Accordingly, the prohibition on sub-penny quoting in paragraph (a) of reproposed Rule 612 would apply only to bids, offers, orders, and indications of interest priced $1.00 or greater.

Two commenters suggested that the Commission establish an MPV for quotations below $1.00; both recommended allowing such quotations to extend to four decimal places.[258] The Commission agrees with these commenters and believes that it is reasonable to restrict quotations below $1.00 to four decimal places. Accordingly, paragraph (b) of reproposed Rule 612 would prohibit bids, offers, orders, and indications of interest priced less than $1.00 in an increment smaller than $0.0001. Without the ability to quote very low-priced securities in sub-pennies, market participants would be forced to express their trading interest in increments that represented a substantial portion of the overall quotation. However, if the number of decimal places for quotations in low-priced securities were not limited, the problems caused by sub-penny quoting of higher-priced securities, discussed above, could arise. Restricting quotations below $1.00 to four decimal places would avoid these problems. Under reproposed Rule 612, a quotation of $0.9987 × $1.00 would be permissible but a quotation of $0.9987 × $1.0001 would not. The Commission requests comment on whether limiting quotations priced below $1.00 to four decimal places is appropriate.

c. Revisiting the Penny Increment. Some commenters, while generally acknowledging problems caused by sub-penny quoting, recommended that the Commission consider increasing the MPV above $0.01.[259] One commenter believed that ''[t]he Commission should seriously consider experimenting with different tick sizes to help determine the optimal tick policy.'' [260] A second commenter recommended that the Commission establish an MPV of a $0.01 for high-volume stocks, $0.05 middle-volume stocks, and $0.10 for the low-volume stocks.[261] A third commenter stated that ''sub-penny quoting does little, if anything, to degrade the market from its current state'' because, in the commenter's view, ''the true damage was done to the market in the shift from a fractionalized environment to a penny spread environment.'' [262]

Under reproposed Rule 612, the Commission would set a floor for the MPV, not determine the optimal MPV. Penny pricing was established by rules that were proposed by NASD and each of the national securities exchanges that trade NMS stocks and approved by the Commission pursuant to Section 19(b) of the Exchange Act.[263] While some commenters have raised liquidity concerns regarding the $0.01 MPV, the move to decimals (and specifically the move to a penny MPV for equity securities) also has reduced spreads, thus resulting in reduced trading costs for investors entering orders—particularly smaller orders—that are executed at or within the quotations. Therefore, the Commission did not propose a higher MPV as part of the initial Regulation NMS proposal. However, if the SROs in the future believe that an increase in the MPV is necessary or desirable, they may propose rule changes to institute the higher MPV. The Commission would evaluate those proposals under the requirements of the Exchange Act at that time.

d. Exemptions for Specific NMS Stocks. As initially proposed, Rule 612 included a provision that would establish procedures for the Commission to grant exemptions to the rule, and the Commission requested comment on whether certain securities should be exempted from Rule 612.[264] In particular, the Commission asked whether exchange-traded fund shares (''ETFs''), which are derivatively priced, raise the same concerns that have been expressed with respect to sub-penny pricing generally.[265]

Of the commenters who addressed this issue, the majority argued that the sub-penny prohibition should apply to all NMS stocks, including ETFs.[266] These commenters generally believed that sub-penny quoting raises the same type of concerns for ETFs as for other types of securities.[267] On the other hand, other commenters provided arguments that exemptions for at least certain securities would be appropriate. One commenter that opposed Rule 612 argued that, if the Commission nevertheless did approve the rule, it should provide an exemption for QQQQ and other ETFs.[268] This commenter argued that these securities ''uniquely lend[] themselves to subpenny quoting and trading'' because ''the[ir] derivative nature * * * enables investors to determine their true value at any point in time by calculating the aggregate price of the securities constituting a particular ETF.'' [269] Other commenters, while not explicitly recommending that the Commission grant particular exemptions, argued that sub-penny quoting was reasonable for certain securities.[270] One of these commenters noted, for example, that quotations in QQQQ are not clustered around the $0.001 and $0.009 price points, which suggests that sub-penny quotations are

[256] *See* Archipelago Letter at 14; BSE Letter at 14; Citigroup Letter at 15; LSC Letter at 11; SIA Letter at 21; STANY Letter at 14.

[257] Archipelago Letter at 14.

[258] *See* Citigroup Letter at 15; SIA Letter at 21.

[259] *See* Amex Letter at 30; Angel Letter at 10; Anil Abraham Memo at 2; BoNY Letter at 4; Citadel Letter at 10; McGuire Summary of Intended Testimony (no page numbers); Tullo Letter at 9.

[260] Angel Letter at 10.

[261] *See* Tullo Letter at 9.

[262] NexTrade Letter at 9.

[263] 15 U.S.C. 78s(b). *See supra* note .

[264] *See* Proposing Release, 69 FR at 11172.

[265] *See id.*

[266] *See* Amex Letter, Exhibit A, at 29; ICI Letter at 20; Knight Letter at 8; Morgan Stanley Letter at 21; NYSE Letter at 10; SIA Letter at 21; Specialist Association Letter at 14.

[267] *See, e.g.*, Amex Letter, Exhibit A, at 29; ICI Letter at 20.

[268] *See* Instinet Letter at 51.

[269] *Id.*

[270] *See* Brut Letter at 25; Mercatus Center Letter at 9–10; Tower Research Letter at 9, 14–15.

not being entered for the purpose of stepping ahead.[271]

At this time, the Commission believes that a basis likely may exist to grant an exemption from the sub-penny quoting prohibition for QQQQ and perhaps other actively traded ETFs. This exemption would permit a national securities exchange, national securities association, ATS, vendor, or broker or dealer to display, rank, or accept from any person a bid or offer, an order, or an indication of interest—in QQQQ or perhaps other actively traded ETFs—in increments smaller than $0.01. The Commission intends to consider this matter further during the phase-in period for Regulation NMS, if Regulation NMS is adopted. The Commission also notes that, while the proposed effective date for Regulation NMS as a whole would be [November 5, 2005], the effective date for reproposed Rule 612(c), if adopted, would be 60 days from date of publication of final Regulation NMS in the **Federal Register**. Therefore, the Commission could exercise its exemptive authority such that any exemptions that it may grant pursuant to reproposed Rule 612(c) could take effect simultaneously with the main prohibitions of Rule 612.

e. Sub-Penny Trading. The Commission stated in the Proposing Release that it did not at that time believe that *trading* in sub-penny increments raised the same concerns as sub-penny *quoting*. Therefore, the proposed rule would not prohibit an exchange or association from printing a trade in sub-penny increments that was, for example, the result of a mid-point or volume-weighted pricing algorithm, as long as the exchange or association or its members did not otherwise violate the proposed rule with respect to the trading interest that resulted in the execution. For example, a system that accepted unpriced orders that were then matched at the midpoint of the NBBO would not violate the proposed rule even though resulting executions could occur in share prices of less than one cent. In addition, a broker-dealer could, consistent with the proposed rule, provide price improvement to a customer order in an amount that resulted in an execution in an increment less than a penny so long as the broker-dealer did not accept orders that were priced in increments less than a penny. The Commission sought specific comment on this aspect of the proposal.

Every commenter that addressed this issue agreed that any sub-penny rule should permit sub-penny trades that result from midpoint and average-price algorithms.[272] While most of these commenters believed that the rule should permit broker-dealers to offer sub-penny price improvement to their customers' orders,[273] a few commenters urged the Commission to bar this practice.[274] After considering these views, the Commission has determined not to revise the sub-penny rule in a manner that would prohibit sub-penny trading, whether that trading results from midpoint or VWAP algorithms or from broker-dealers offering sub-penny price improvement. The Commission continues to believe that trading in sub-penny increments does not at this time raise the same concerns as sub-penny quoting.

f. Acceptance of Sub-Penny Quotations. The Commission initially proposed to prohibit national securities exchanges, national securities associations, ATSs, vendors, and broker-dealers from displaying, ranking, or *accepting* quotations in NMS stocks that are priced in sub-pennies. One commenter argued that the rule should allow a market participant to accept sub-penny quotations if it consistently re-prices such quotations to an acceptable increment and does not give the sub-penny quotations any special priority for ranking or execution purposes.[275] A second commenter disagreed, arguing that rounding a sub-penny quotation to the nearest penny may be confusing for investors.[276] The Commission agrees with the second commenter and has determined to revise the proposed rule. The Commission believes that little purpose would be served by permitting market participants to accept sub-penny quotations when such quotations could not be displayed or considered for purposes of ranking. Furthermore, the Commission agrees that permitting market participants to accept sub-penny quotations that must be rounded to comply with the requirements of reproposed Rule 612 could cause confusion among investors.

g. Application to Options Markets. The initially proposed rule, by its terms, would apply only to NMS stocks, but the Commission requested comment on whether the rule should apply to options.[277] Currently, SRO rules require options to be quoted on the U.S. markets in increments of $0.05 and $0.10. Therefore, the problems that could be created by sub-penny quoting currently do not exist in the options markets.

Two commenters believed that the rule should not apply to quoting in options.[278] One of these commenters, assuming that the rule as proposed would allow options with a premium of less than $1.00 to be quoted in sub-pennies and options with a premium over $1.00 to be quoted in pennies, argued that this approach ''would overwhelm the already taxed capacity of existing options quote processing systems.''[279] The Commission believes that it is not necessary or appropriate at this time to apply reproposed Rule 612 to options. If a national securities exchange seeks to quote options in pennies or sub-pennies in the future, it would first need to propose a rule change to that effect under Section 19(b) of the Exchange Act.[280] The Commission would have an opportunity to consider such a proposal at that time, after providing notice and obtaining public comment.[281]

A third commenter, while agreeing strongly with the proposed sub-penny rule, argued that the Commission also should prohibit the Boston Options Exchange (''BOX''), a facility of the Boston Stock Exchange, from using ''sub-increment'' pricing (*i.e.*, penny prices below the standard $0.05 and $0.10 increments used for options) in its ''PIP'' auction.[282] By initiating a PIP auction, a BOX market participant may execute a portion of its agency order as principal in pennies, and BOX market makers can match that price or offer price improvement to those orders in penny increments during the three-second auction. The Commission previously has approved the BOX trading rules, including the rules governing the PIP, pursuant to Section 19(b) of the Exchange Act.[283] The PIP uses pennies in an auction, not in public quotations. Therefore, the Commission does not believe that the PIP raises the same problems caused sub-penny quotations of non-option securities and, therefore, that it is not

[271] *See* Mercatus Center Letter at 9.

[272] *See* STANY Letter at 14; STA Letter at 7; SIA Letter at 21; UBS Letter at 10; ACIM Letter at 2; E*Trade Letter at 11; Amex Letter at 12; Liquidnet Letter at.8.

[273] *See* ACIM Letter at 2; Amex Letter, Exhibit A, at 31–32; E*Trade Letter at 11; Liquidnet Letter at 8; BSE Letter at 14; Morgan Stanley Letter at 21; SIA Letter at 21; STA Letter at 7; STANY Letter at 14; UBS Letter at 10.

[274] *See* CHX Letter at 23; Goldman Sachs Letter at 10; SIA Letter at 21.

[275] *See* Brut Letter at 26.

[276] *See* CHX Letter at 23.

[277] *See* Proposing Release, 69 FR at 11172.

[278] *See* Amex Letter, Exhibit A, at 32; SIA Letter at 21.

[279] *Id.*

[280] 15 U.S.C. 78s(b).

[281] The Commission has previously stated that, ''[g]iven the implications of penny quoting for OPRA, penny quoting would require very careful review by the Commission.'' Securities Exchange Act Release No. 49068 (Jan. 13, 2004), 69 FR 2775, 2789 (Jan. 20, 2004) (''BOX Approval Order'').

[282] *See* CBOE Letter at 8.

[283] BOX Approval Order, 69 FR at 2789.

necessary to prohibit the use of pennies in BOX's PIP.

D. Exemptive Authority

Reproposed Rule 612(c) would establish procedures for the Commission to exempt from the provisions of Rule 612 any person, security, or quotation, or any class or classes or persons, securities, or quotations, if it determines that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors. The Commission could grant such exemption either unconditionally or on specified terms and conditions. Reproposed Rule 612(c) also would provide that the Commission may grant an exemption from the sub-penny prohibition by order.

V. Market Data Rules and Plan Amendments

The Exchange Act rules and joint-SRO Plans for disseminating market information to the public are the heart of the NMS. Pursuant to these rules and Plans, investors are able to obtain real-time access to the best current quotes and most recent trades for all NMS stocks. As a result, investors of all types—large and small—have access to a comprehensive, accurate, and reliable source of information for the prices of any NMS stock at any time during the trading day.

The SROs generate consolidated market data by participating in the Plans.[284] Pursuant to the Plans, three separate networks disseminate consolidated market information for NMS stocks: (1) Network A for securities listed on the NYSE, (2) Network B for securities listed on the Amex and other national securities exchanges, and (3) Network C for securities traded on Nasdaq. For each security, the data includes (1) an NBBO with prices, sizes, and market center identifications, (2) a montage of the best bids and offers from each SRO that includes prices, sizes, and market center identifications, and (3) a consolidated set of trade reports in the security. The Networks establish fees for this data, which must be filed for Commission approval.[285] In 2003, the Networks collected $424 million in revenues derived from market data fees and, after deduction of Network expenses, distributed $386 million to their individual SRO participants.[286]

The overriding objective of the rules and Plan amendments reproposed today would be to preserve the vital benefits that investors currently enjoy, while addressing those particular problems with the current rules and Plans that are most in need of reform. The changes fall into three categories: (1) Modifying the current formulas for allocating market data revenues to the SROs to more appropriately reflect their contributions to public price discovery, (2) establishing non-voting advisory committees to broaden participation in Plan governance, and (3) updating and streamlining the various Exchange Act rules that govern the distribution and display of market information.

A. Response to Comments and Basis for Reproposed Rules

1. Alternative Data Dissemination Models

In addition to proposing specific rules and amendments, the Proposing Release discussed and requested comment on the Commission's decision not to propose an alternative model of data dissemination to the replace the current consolidation model.[287] The great strength of the current model is that it benefits investors, particularly retail investors, by enabling them to assess prices and evaluate the best execution of their orders by obtaining data from a single source that is highly reliable and comprehensive. But, by requiring vendors and broker-dealers to display data to investors that is consolidated from all markets, the current model effectively also requires the purchase of data from all markets. As a result, the most significant drawback of the current model is that it offers little opportunity for market forces to determine a Network's fees, or the allocation of those fees to a Network's SRO participants. Network fees must be closely scrutinized for fairness and reasonableness, and the revenues resulting from those fees must be allocated to the SROs pursuant to a Plan formula. In addition, individual markets have less freedom to innovate in individually providing their quotation and trade data.

In the Proposing Release, the Commission specifically considered three alternative models that potentially could introduce greater competition and flexibility into the dissemination of market data: (1) A deconsolidation model, (2) a competing consolidators model, and (3) a hybrid model. It decided not to propose any of these alternative models after consideration of the benefits and drawbacks of each model. The Commission did, however, request comment on whether it should develop an alternative model for disseminating market data to the public, and, in particular, on its evaluation of the strengths and weaknesses of the current model and of the various alternative models for the dissemination of market data.

In response to the Commission's request for comment, a minority of commenters expressed their views regarding the appropriate structure for the dissemination of market information to the public. One group believed that the current model requiring the display of consolidated data in a stock through a Plan processor has produced significant benefits for investors and the markets, although they also strongly recommended that its operation needed to be improved in significant respects.[288] Another group of commenters, in contrast, asserted that the current system has inhibited competition among markets and that the Plans should be eliminated.[289] These commenters further suggested deregulation of market data by allowing markets to sell their own data, and by allowing market forces and competition to control the pricing of such data. They advocated a competing consolidators model or a hybrid model.

a. Competing Consolidators Model. Under a competing consolidators model, the consolidated display requirement would be retained, but the Plans and Networks would no longer be necessary. Each of the nine SROs that participate in the NMS, as well as Nasdaq, would be allowed to establish its own fees, to enter into and administer its own market data contracts, and to provide its own data distribution facility. Any number of data vendors or broker-dealers (*i.e.*, ''competing consolidators'') could purchase data from the individual SROs, consolidate the data, and distribute it to investors and other data users. Of the commenters that urged the Commission to adopt a competing

[284] *See infra,* note 21.

[285] *See* Exchange Act Rule 11Aa3–2(c)(1).

[286] *See* Proposing Release, 69 FR at 11179 (table setting forth revenues, expenses, and allocations of net income for Networks A, B, and C).

[287] Proposing Release, 69 FR at 11176–11179.

[288] *See, e.g.*, Amex Letter, Exhibit A at 11; Angel Letter I at 1; CBOE Letter at 2, 9; CHX Letter at 18–20; Financial Information Forum Letter at 4; Schwab Letter at 11–13; SIA Letter at 26–28; STANY Letter at 14.

[289] *See, e.g.*, Alliance of Floor Brokers Letter at 11; Letter from Daniel M. Clifton, Executive Director, American Shareholders Association, to Jonathan G. Katz, Secretary, Commission, dated June 10, 2004 (''ASA Letter'') at 2; ArcaEx Letter at 4, 12, 14; Brut Letter at 22; Financial Services Roundtable Letter at 7; ISE Letter at 8–10; Nasdaq Letter II at 24–26; NYSE Letter, Attachment at 10–11; Letter from Phil Lynch, Chief Executive Officer, Reuters America LLC, to Jonathan G. Katz, Secretary, Commission, dated June 30, 2004 (''Reuters Letter'') at 2; Specialist Assoc. Letter at 17.

consolidators model,[290] the NYSE, for example, believed that allowing the markets to withdraw from the Plans would ''reestablish the link between the value of a market's data * * * and the fair allocation of costs among * * * users,'' thereby ending inter-market subsidies and market-distortive initiatives created by the current system.'' [291] Similarly, ArcaEx stated that ''the best way to reform the [P]lans is to abolish them altogether and to adopt a competing consolidators model.'' [292]

The Commission has considered the comments advocating a competing consolidators model, but continues to question the extent to which the model would in fact subject the level of market data fees to competitive forces. If the benefits of a fully consolidated data stream are to be preserved for investors, every consolidator would need to purchase the data of each SRO to assure that the consolidator's data stream in fact included the best quotations and most recent trade report in all NMS stocks. Moreover, to comply with the reproposed Trade-Through Rule, each market center would need the quotation data from every other market center in a security. As a practical matter, payment of every SRO's fees would be mandatory, thereby affording little room for competitive forces to influence the level of fees. Consequently, far from freeing the Commission from involvement in market data fee disputes, the multiple consolidator model would require review of at least ten separate fees for individual SROs and Nasdaq. The overall level of fees would not be reduced unless one or more of the SROs or Nasdaq was willing to accept a significantly lower amount of revenues than they currently are allocated by the Plans. It seems unlikely that any SRO or Nasdaq would voluntarily propose lower fees to reduce their current revenues, and some might well propose higher fees to increase their revenues, particularly those with dominant market shares whose information is most vital to investors. No commenter offered useful, objective standards for the Commission to use in evaluating the separate fees of SROs and Nasdaq. For this and for data quality concerns,[293] the Commission remains unconvinced that discarding the current model in favor of a multiple consolidator model would benefit investors and the NMS in general.

b. Hybrid Model. Nasdaq advocated a hybrid model of data dissemination as a compromise if the Commission believes that it is necessary to retain the Plans.[294] Under a hybrid approach, basic elements of the current model (including the consolidated display requirement and the Plans) would be retained for quotations representing the NBBO, but all trade reports and all quotations other than the NBBO would be deconsolidated. Because much less consolidated data would be disseminated under this model, the fees for consolidated data would be reduced commensurately. The individual SROs would distribute their own trade and quotation information separately and establish fees for such information. To obtain the data eliminated from the consolidated system, investors would need to pay the separate SRO fees.

In sum, Nasdaq suggested that consolidated data fees should be reduced,[295] but only in the context of advocating a hybrid model that would drastically reduce the quantity of data that would be disseminated to investors (*i.e.*, by eliminating all trade reports and all quotations other than the NBBO). Nasdaq stated that the Commission should allow competitive forces to determine the individual SRO fees for deconsolidated data because trade reports and non-NBBO quotations are not ''essential to investors.'' [296]

The Commission believes, however, that comprehensive trade and quotation information, even beyond the NBBO, is vital to investors. It remains concerned that an SRO with a significant share of trading in NMS stocks could exercise market power in setting fees for its data. Few investors could afford to do without the best quotations and trades of such an SRO that is dominant in a significant number of stocks. In the absence of a solid basis to believe that full trade and quotation information would continue to be widely available and affordable to all types of investors under a hybrid model, the Commission has determined that the most responsible course of action is to take such immediate steps are necessary to improve the operation of the current consolidation model.[297]

2. Level of Fees and Plan Governance

a. Level of Fees. In the Proposing Release, the Commission emphasized that one of its primary goals with respect to market data is to assure reasonable fees that promote its wide public availability. Comment was requested on the extent to which investors and other data users were relatively satisfied with the products and fees offered by the Networks.[298] At the NMS Hearing, several panelists addressed the current level of fees and questioned whether such fees remained reasonably related to the cost of market data.[299] The Supplemental Release therefore noted the panelists' views and welcomed comments on the reasonableness of market data fees and whether the Commission should modify its approach to reviewing such fees.[300]

Many commenters recommended that the level of market data fees should be reviewed and that, in particular, greater transparency concerning the costs of market data and the fee-setting process is needed.[301] The Commission agrees. To respond to commenters' concerns, it has initiated a review of market data fees in its concept release relating to SRO structure.[302] The release discusses and requests comment on a number of issues raised by commenters in the context of SRO revenues and the funding of self-regulation—in particular, whether market data fees are reasonable, whether the Commission should

[290] *See, e.g.*, ArcaEx Letter at 12, 14; ISE Letter at 8–9; NYSE Letter, Attachment at 10–11.

[291] NYSE Letter at 7 and Attachment at 10. The NYSE provided several reasons for the elimination of the Plans.

[292] AcraEx Letter at 14.

[293] *See* Proposing Release, 69 FR at 11178.

[294] Nasdaq Letter II at 26–28.

[295] At the NMS Hearing, a representative of Nasdaq stated that the current $20 fee for professionals to obtain market data in Nasdaq stocks is too high; that the fee, based on a recent analysis of Nasdaq's cost structure, should be around $5 to $7; and that the $20 fee is a monopoly price ''set almost twenty years ago without any active review of how that relates.'' Hearing Tr. at 223–224, 253. These remarks subsequently engendered some confusion among the public, which was reflected in many comments on the market data proposals addressing the level of fees. To put these comments in perspective and dispel any potential misconceptions, the following points should be kept in mind: (1) In 1999, the Commission undertook a comprehensive review of market data fees and revenues, which led to a 75% reduction in the fees paid by retail investors for market data; (2) Nasdaq's suggested $5 to $7 monthly fee for professional investors would entitle them to only the NBBO in Nasdaq stocks, which is a fraction of the data that currently is disseminated for the $20 monthly fee for professional investors for consolidated trades and quotations in Nasdaq stocks; and (3) Nasdaq's $5 to $7 cost estimate encompassed only its own costs and therefore excluded the costs of other SROs that now represent a large percentage of trading in Nasdaq-listed stocks.

[296] Nasdaq Letter II at 27.

[297] The Commission also is concerned about the risk of compromising the quality of market information if the hybrid model were adopted. Proposing Release, 69 FR at 11178.

[298] Proposing Release, 69 FR at 11179.

[299] Hearing Tr. at 223–224, 228–229, 230–231, 233.

[300] Supplemental Release, 69 FR at 30148.

[301] *See, e.g.*, Ameritrade Letter I at 3, 10; ASA Letter at 2; Bloomberg Tradebook Letter at 8–9; Brut Letter at 21–23; Citigroup Letter at 15; Financial Information Forum Letter at 3; Financial Services Roundtable Letter at 6–7; Goldman Sachs Letter at 2, 10; ICI Letter at 21–22; Morgan Stanley Letter at 21–22; Schwab Letter at 2; SIA Letter at 22; STANY Letter at 14; UBS Letter at 10.

[302] SRO Structure Release, *supra* note 30.

reconsider a flexible cost-based approach as described in the 1999 Market Information Release, and whether market data fees should be used to fund SRO operational or regulatory costs. The Commission also has taken steps to promote more transparency with respect to market data fees and the use of market data revenues through its proposal on SRO transparency.[303] The proposal would greatly increase SRO transparency by requiring, among other things, that SROs file public reports with the Commission detailing their sources of revenues and their uses of these revenues. Such reports would enhance the public's ability to evaluate the role of market data revenues in funding SROs. For example, proposed amendments to Form 1, Exhibit I would require exchange SROs to disclose their revenues earned from market information fees, itemized by product, and proposed new Rule 17a–26 would require SROs to file electronic quarterly and annual reports on particular aspects of their regulatory activities.

Some commenters suggested that, instead of modifying the Plan formulas for allocating market data revenues, the Commission should impose a cost-based limitation on fees.[304] Most, however, adopted a very restricted view of market data costs—solely the costs of the Networks to collect data from the individual SROs and disseminate it to the public.[305] Yet nearly the entire financial burden of collecting and producing market data is borne by the individual markets, not by the Networks. If, for example, an SRO's systems break down on a high-volume trading day and it can no longer provide its data to the Networks, investors would suffer the consequences of a defective data stream, regardless of whether the Networks are able to continue operating.

The commenters' suggested approach to market data fees would eliminate any funding for the SROs that supply data to the Networks, which would have reduced SRO funding by $386 million in 2003.[306] The Commission is reluctant to impose such a significant and sudden reduction in SRO funding without taking due care for the consequences it might have on the integrity of the U.S. equity markets. When the Commission last reviewed market data fees and revenues in 1999, it noted the direct connection between an SRO's operational and regulatory functions and the value of its market information:

> [T]he value of a market's information is dependent on the quality of the market's operation and regulation. Information is worthless if it is cut off during a systems outage (particularly during a volatile, high-volume trading day when reliable access to market information is most critical), tainted by fraud or manipulation, or simply fails to reflect accurately the buying and selling interest in a security.[307]

Moreover, the U.S. equity markets are not alone in their reliance on market data revenues as a substantial source of funding. All of the other major world equity markets currently derive large amounts of revenues from selling market information, despite having significantly less trading volume and less market capitalization than the NYSE and Nasdaq. To illustrate, the following table sets forth the respective market information revenues, dollar value of trading, and market capitalization for the largest world equity markets in 2003:[308]

	Data revenues (millions)	Trading volume (trillions)	Market capitalization (trillions)
London	$180	$3.6	$2.5
NYSE	172	9.7	11.3
Nasdaq	147	7.1	2.8
Deutsche Bourse	146	1.3	1.1
Euronext	109	1.9	2.1
Tokyo	60	2.1	3.0

In sum, the Commission is committed to assuring that investors are not required to pay unreasonable or unfair fees for the consolidated market information that they must have to participate in the U.S. equity markets. On the other hand, we must maintain high standards of SRO performance, without which the data they produce would be worth little. Some commenters suggested that SRO funding should be provided through more specifically targeted fees, such as an additional regulatory fee to fund market regulation costs. Given the potential harm if vital SRO functions are not adequately funded, we believe that the level of market data fees is most appropriately addressed in a context that looks at SRO funding as a whole. The Commission's review of SRO structure, governance, and transparency provides a useful context in which these competing policy concerns can be evaluated and balanced appropriately.

The Commission does not believe, however, that reform of the current revenue allocation formulas should be delayed until its review of fees is completed. The distortions caused by these formulas are substantial and ongoing. In particular, it appears that market participants increasingly are engaging in the practice of trade shredding (*i.e.*, splitting large trades into multiple 100-share trades) as a means to increase their share of market data revenues under the current Plan formulas. As discussed below, the reproposed formula would represent a substantial improvement because it is designed to eliminate trade shredding and other gaming of the current formulas and because it would more directly allocate revenues to those markets that contribute data to the consolidated data stream that is most useful to investors.

b. Plan Governance. The Commission is reproposing, substantially as proposed, an amendment to the Plans that would require the creation of non-voting advisory committees (''Governance Amendment''). It provides that the members of an advisory committee have the right to submit their views to the Plan operating committees on Plan matters, including any new or modified product, fee, contract, or pilot program. Most commenters supported the Governance

[303] SRO Transparency Release, *supra* note 31.

[304] *See, e.g.*, Ameritrade Letter I at 10; Goldman Sachs Letter at 10; SIA Letter at 22.

[305] *See, e.g.*, ASA Letter at 2; Citigroup Letter at 16; Schwab Letter at 6; SIA Letter at 25.

[306] *See supra*, note 29.

[307] Market Information Release, 64 FR at 70614–70615.

[308] Data for this table is derived from the 2003 annual reports of the various markets and from statistics compiled by the World Federation of Exchanges. The exchange rates are as of August 15, 2004.

[309] *See, e.g.*, Amex Letter at 10; Citigroup Letter at 17; Financial Information Forum Letter at 4;

Amendment.[309] They generally believed that expanding the participation of non-SROs parties in Plan governance would be a constructive step. Only a few commenters disagreed, stating that interested parties currently have the ability to communicate their views on Plan matters or questioning the efficacy of the committees.[310]

A number of commenters, however, believed that the proposal did not go far enough to reform the Plans and that even greater participation by interested non-SRO parties in the Plans is needed.[311] Brut suggested that the Commission ''consider applying SRO governance standards to [Network processors] going forward, subjecting their operations to the same standards of transparency and accountability'' in order to limit their monopoly power.[312] These commenters also raised concerns regarding several other aspects of Plan governance, including current administrative costs and burden, the unanimous vote requirement for Plan action, and the current process for reviewing SRO fee filings and Plan amendments. For instance, the SIA believed that inconsistencies among the Networks regarding administrative requirements and burdens (*i.e.*, agreements and contracts, billing policies, data use policies, and annual audit requirements) contribute to high market data fees and should be reduced, streamlined, and made uniform.[313]

In many respects, the Commission agrees with the concerns expressed by commenters on the administration of the Plans. It believes, however, the Governance Amendment would represent a useful first step toward improving the responsiveness of Plan participants and the efficiency of Plan operations. Expanding the participation of interested parties other than SROs in Plan governance should improve transparency, as well as provide an established mechanism for alternative views to be heard. Earlier and more broadly based participation could contribute to the ability of the Plans to achieve consensus on disputed issues. Going forward, the Commission is receptive to additional steps that would improve Plan operations in general, particularly those that would streamline fee administration procedures and burdens. Enhanced participation of advisory committee members in Plan affairs potentially should help further this process.

3. Revenue Allocation Formula

The proposal included an amendment to the Plans that would modify their formulas for allocating market data revenues to SRO Participants. The current Plan formulas are based solely on the trading activity of an SRO. The proposed formula was intended to address three serious weaknesses in the old formulas: (1) The absence of any allocation of revenues for the quotations contributed by an SRO to the consolidated data stream, (2) an excessive emphasis on the number of trades reported by an SRO that has led to distortive trading practices, such as wash sales, trade shredding, and print facilities, and (3) a disproportional allocation of revenues for a relatively small number of stocks with extremely high trading volume, to the detriment of the thousands of other stocks included in a Network, typically issued by smaller companies, with less trading volume.

To address these problems, the proposed formula included a number of elements, including a Quoting Share, an NBBO Improvement Share, a Trading Share, and a Security Income Allocation. The Quoting Share and NBBO Improvement Share would have provided an allocation of revenues for an SRO's quotations. In particular, the Quoting Share would have allocated revenues for all quotes, both automated and manual, according to the dollar size and length of time that such quotes equaled the price of the NBBO. It included an automatic cutoff of credit for manual quotations, however, when they were left alone at the NBBO. This cut-off was intended to preclude SROs from being allocated revenues merely for slowness in updating their manual quotations. The NBBO Improvement Share would have allocated revenues to SROs for the extent to which they displayed quotations that improved the price of the NBBO.

At the NMS Hearing, representatives of floor-based exchanges stated their intention to adopt hybrid trading models that would primarily display automated quotations.[314] In response, the Commission, in its Supplemental Release, stated that the prospect of hybrid trading models presented an opportunity for simplifying the proposed allocation formula.[315] It noted that the purpose of the automatic cutoff for manual quotations was to minimize the allocation of revenues for potentially stale quotations and requested comment on whether only automated quotes should be entitled to earn an allocation of revenues. The Supplemental Release also noted that the NBBO Improvement Share was significantly more complex than the other aspects of the proposed formula and that it had been proposed largely to counter the potential for an excessive allocation of revenues for manual quotations. Comment was requested on whether there was any need for the NBBO Improvement Share if manual quotations were excluded from the formula.

The comments generally addressed four broad categories of issues: (1) Whether the current Plan formulas need to be updated, (2) whether quotations should be considered in allocating revenues, (3) whether the size of trades should be considered in allocating revenues, and (4) whether the allocation of revenues should be allocated more evenly across all of a Network's stocks. These comments are discussed below.

a. Need for New Formula. Many commenters agreed with the Commission that, if the Networks were to continue allocating revenues to the SROs, the current allocation formulas needed to be updated.[316] Many of these commenters also believed that the proposed formula should be modified in several respects, and their specific suggestions to improve the proposed formula are discussed below. In general, however, they agreed with the objectives of the proposal to eliminate much of the incentive for distortive trade reporting practices and to begin providing some allocation of revenues for the quotations that SROs contribute to the consolidated data stream.

Other commenters, in contrast, opposed changing the current allocation formulas.[317] Their specific objections to the proposed formula are discussed below, but they also opposed changing the current formulas for more general reasons. First, some believed that, rather

Financial Services Roundtable Letter at 6–7; ICI Letter at 4 and 21 n. 35; Instinet Letter at 7, 46; Nasdaq Letter II at 33; Reuters Letter at 3; STANY Letter at 15.

[310] CBOE Letter at 2, 17; ISE Letter at 2; Specialist Assoc. Letter at 16.

[311] *See, e.g.*, Letter from W. Hardy Callcott, to Jonathan G. Katz, Secretary, Commission, dated May 6, 2004 (''Callcott Letter'') at 4–5 n.10; Citigroup Letter at 17; Financial Services Roundtable Letter at 6–7; Goldman Sachs Letter at 12–13; Instinet Letter at 46; Morgan Stanley Letter at 22; Schwab Letter at 8; SIA Letter at 26; STANY Letter at 15.

[312] Brut Letter at 24.

[313] SIA Letter at 27–28.

[314] Hearing Tr. at 85, 90–92, 94–97, 120–121.

[315] Supplemental Release, 69 FR at 30148.

[316] *See, e.g.*, Amex Letter at 11; ATD Letter at 4; Bloomberg Tradebook Letter at 7; BSE Letter at 15; ICI Letter at 21; Morgan Stanley Letter at 22; Nasdaq Letter II at 31; NYSE Letter, Attachment at 11–12; STA Letter at 7; UBS Letter 10; Vanguard Letter at 6.

than changing the formulas, the Commission simply should prohibit the particular distortive practices caused by the old formulas and enforce the existing prohibitions against such practices. Commenters also opposed the proposed formula because they believed it incorporated arbitrary judgments about the value of quotations and trades. Finally, those opposed to changing the Plan formulas also believed that the proposed formula was simply too complex to be implemented effectively and that its costs exceeded any benefits that were likely to be gained.

The Commission has considered the views of these commenters, but does not believe that they warrant leaving the current Plan formulas in place. First, the Commission intends to continue to enforce the existing prohibitions against distortive trade reporting practices. Rather than attempting to formulate new prohibitions that address every conceivable harmful practice, however, it has determined to address directly the ultimate source of the problem by reproposing revisions to the current formulas. As long as the allocation of market data revenues is based primarily on reporting a large number of very small trades, the incentive for distortive trading reporting will continue. Moreover, as discussed below, the current formulas are flawed in several important respects beyond the incentives they create for distortive trading reporting practices.

The Commission preliminarily does not believe that the reproposed formula would incorporate arbitrary judgments about the value of trades and quotes. In this regard, it is important to recognize that any formula for allocating market data revenues would reflect some judgment regarding the contribution of the various SROs to the consolidated data stream; otherwise, the revenues could simply be allocated equally among all Plan participants. The Commission's goal in reproposing a new formula is to improve the judgments incorporated in the old Plan formulas to more fully achieve NMS objectives.

For example, the current formula for Network A and Network B treats a 100-share trade the same as a 20,000 share trade in the same stock, even though their importance for price discovery purposes clearly is not equal. All of the current Plan formulas treat a quotation as having no value if it did not result in a trade, even if the quotation was fully accessible and established the NBBO for a substantial period of time, thereby providing price discovery for trades occurring at other markets that internalize orders with reference to the NBBO price. Such formulas based solely on an SRO's trading activity may have been adequate many years ago when a single market dominated each group of securities, but are seriously outdated now that trading is split among many different markets whose contributions to the public data stream can vary considerably.

The reproposed formula would reflect fairly straightforward determinations about the kinds of data that, in general, are likely to be useful to investors. For example, a $50,000 quote at the NBBO in a stock is likely more useful to investors than a $2000 quote in the same stock. Similarly, a $50,000 trade in a stock is likely more useful to investors in assessing the trading trend of that stock than a $2000 trade; again, not necessarily in every case, but in general and on average. The reproposed formula would represent a substantial improvement on the old formulas.[318]

The Commission agrees with commenters that the proposed formula was very complex and may have been difficult to implement efficiently. They particularly noted that the proposed NBBO Improvement Share was very difficult to understand and had the potential to be abused through gaming behavior. Given that only automated quotations would be entitled to earn an allocation under the reproposed formula, the proposed NBBO Improvement Share can be deleted, as well as the proposed cutoff of credits for manual quotations left alone at the NBBO. The elimination of these two elements greatly reduces the complexity of the reproposed formula and should promote more efficient implementation of the formula. In addition, the 15% of the Security Income Allocation that was allocated to the NBBO Improvement Share in the proposed formula would now be shifted to the Quoting Share to establish a generally even allocation of revenues between trading and quoting.

The Commission does not agree, however, with those commenters who argued that it would be overly costly and complex to calculate the other elements of the proposed formula. An SRO's Trading Share, for example, would not be materially more difficult to calculate than the current Network C formula, which is based on an average of the SRO's proportion of trades and share volume. The Security Income Allocation merely would use the square root function, which is a simple arithmetic calculation. Finally, some commenters believed that the Quoting Share, which would incorporate the total dollar size of the NBBO in a stock throughout the trading year, would result in astronomically high numbers that would be extremely difficult to calculate.[319] In fact, the largest number of Quote Credits in a year for even the highest price stock with the greatest displayed depth at the NBBO would be very unlikely to reach beyond the trillions, a number well within the capabilities of even the most basic spreadsheet program.[320] Moreover, it is the proportion of an SRO's Quote Credits in relation to other SROs that would determine an allocation, not the absolute amount of Quote Credits.

Finally, a few commenters were concerned about the effect of modifying the current allocation formulas on the existing business models and terms of competition for the various markets.[321] The Commission recognizes that reforming formulas that have remained unchanged for many years could affect the competitive position of various markets. Given the severe deficiencies of these formulas, however, it does not believe that the interests of any particular business model should preclude updating the formulas to reflect current market conditions. The reproposed formula is intended to reflect more appropriately the contributions of the various SROs to the consolidated data stream and thereby better align the interests of individual markets with the interests of investors.

b. Quotations that Equal the NBBO. Many commenters supported the proposal to allocate a portion of market

[318] Some commenters were concerned that the proposed formula's use of dollar volume calculations did not sufficiently allocate revenues to markets that trade low-priced stocks. *See, e.g.*, BSE Letter at 18; CHX Letter at 16. The Commission preliminarily believes that dollar volume would be the most appropriate measure, in general, of the importance to investors of trading and quoting information. Per share stock prices, in contrast, are a more arbitrary measure because they are dependent, to a large extent, on the number of shares a company chooses to issue, both originally and through stock splits and reverse stock splits. To the extent the commenters were concerned about the less active stocks of smaller companies, the Security Income Allocation of the reproposed formula would incorporate the square root function precisely to more appropriately allocate revenues to SROs that provide a venue for price discovery in these stocks. *See* section V.A.3.d below.

[319] *See, e.g.*, CBOE Letter at 14 (calculation of Quote Credits will ''yield astronomical numbers'' that ''can be expressed only in exponential terms''); NSX Letter at 7 (calculation of large number of Quote Credits is ''particularly ludicrous'').

[320] For example, assume a stock with an average price of $100 per share has an unusually large average quoted size of 200,000 shares at both the national best bid and the national best offer throughout every second of the trading year. Over an average 252 trading days during a year, the total Quote Credits in this stock would be 235.9 trillion ($100*400,000*252*23,400 seconds per trading day). Quote Credits would only be calculated for individual Network stocks and would not be totaled across all Network stocks.

[321] *See, e.g.*, Brut Letter at 22; CHX Letter at 21–22; NSX Letter at 6.

data revenues based on an SRO's quotations, particularly if only automated and accessible quotations would qualify for an allocation.[322] Some commenters, however, were concerned about the risk of harmful gaming behavior by market participants.[323] For example, Instinet stated that the ''fundamental problem with the Commission's proposed formula stems from the inherently low cost for market participants to generate quotation information and the consequent high potential for gaming behavior in any formula that attempts to reward such behavior.'' [324] A specific type of gaming that concerned commenters was ''flickering quotes''—quotes that are flashed for a short period of time solely to earn market data revenues, but are not truly accessible and therefore do not add any value to the consolidated quote stream.

The Commission recognizes that abusive quoting behavior is a legitimate concern. It preliminarily does not believe, however, that the reproposed formula would be unacceptably vulnerable to gaming, particularly because only automated and fully accessible quotations would be entitled to earn a share of market data revenues. The potential cost of displaying such quotations, in the form of unprofitable trades, should not be underestimated. Quotations would earn significant revenues only if they represent a significant proportion of the total size of quotations displayed at the NBBO for a stock throughout the trading year. The risk of losses that could result from the execution of orders against large quotations would be likely to dwarf any potential allocation of market data revenues. With the advent of highly sophisticated order-routing algorithms, automated quotations throughout the NMS can be accessed with lightning speed. Some of these algorithms are specifically designed to search the market for displayed liquidity and sweep such liquidity immediately when it is displayed. The market discipline imposed by these order-routing practices should greatly reduce the potential for ''low cost'' quotations at the NBBO if the reproposed formula were adopted. A market participant would need to think carefully about whether it is truly willing to trade at a price, particularly a price as attractive as the NBBO, before displaying accessible and automated quotations to earn market data revenues.

A few commenters also opposed the proposed Quoting Share because they believed it represented an attempt by the Commission to control the quoting behavior of market participants.[325] ArcaEx stated for example, that the ''most important question is how paying for top-of-book quotes—on a time- and size-weighted basis or on any other basis—encourages beneficial behavior,'' and questioned whether the Quoting Share would achieve this result. Brut asserted that ''[n]ot only would [the proposed formula] increase the potential unnatural trading and quoting behavior, it signifies a desire to use market structure regulation to micro-manage market participant behavior * * *'' [326]

These commenters appear to have misunderstood the Commission's objective in proposing to update the current Plan formulas. As noted above, it is unlikely that a marginal increase in market data revenues would significantly alter the quoting behavior of market participants, at least for those not already interested in trading a stock for separate reasons. The potential cost of unprofitable trades would be too high. Rather, the Commission's primary objective would be to correct an existing flaw in the current formulas by allocating revenues to those SROs that, even now, benefit investors by contributing useful quotations to the consolidated data stream. Currently, such SROs do not receive any allocation for providing a venue for this beneficial quoting activity. Basing an allocation on the extent to which an SRO's quotes equal the NBBO would be an appropriate means to correct this flaw, even if it does not always reflect the precise value of quotations.[327]

c. Number and Dollar Volume of Trades. The current Plan formulas allocate revenues based on the number of trades (Networks A and B) or on the average of number of trades and share volume of trades (Network C) reported by SROs. By focusing solely on trading activity (and particularly by rewarding the reporting of many trades no matter how small their size), these formulas have contributed to a variety of distortive trade reporting practices, including wash sales, shredded trades, and SRO print facilities. To address these practices and to establish a more broad-based measure of an SRO's contribution to the consolidated trade stream, the proposed formula provided that an SRO's Trading Share in a particular stock would be calculated by taking the average of the SRO's percentage of total dollar volume in the stock and the SRO's percentage of qualified trades in the stock. A ''qualified trade'' was defined as having a dollar volume of $5000 or more. The Proposing Release requested comment on whether this amount should be higher or lower, or whether trades with a size of less than $5000 should receive credit that was proportional to their size.[328]

Several commenters believed that small trades contribute to price discovery and should be entitled to earn at least some credit in the calculation of the number of qualified trades.[329] The Commission agrees and has included in the reproposed formula a provision that awards a fractional proportion of a qualified report for trades of less than $5000. Thus, a $2500 trade would constitute ½ of a qualified report. This approach would greatly reduce the potential for large allocations attributable to shredded trades, while recognizing the contribution of small trades to price discovery.

Two commenters asserted that the $5000 threshold was arbitrary.[330] As noted in the Proposing Release, an analysis of Network A data indicates that approximately 90% of dollar volume and 50% of trades exceed this threshold. The Commission preliminarily believes that the $5000 figure represents a reasonable attempt to address the problem of shredding large trades into 100-share trades. By providing only a proportional allocation for trades with dollar amounts below this threshold, the ability of market participants to generate large revenue allocations by shredding trades would be greatly reduced. For example, a 2000-share trade in a $25 stock could be shredded into twenty trades in the absence of a dollar threshold for qualified trades, but could be shredded into only ten qualified trades under the reproposed formula—a reduction of 50%. Moreover, when combined with the allocation of 50% of revenues to the

[322] *See, e.g.*, Amex Letter at 11; ATD Letter at 4; Bloomberg Tradebook Letter at 7–8; Morgan Stanley Letter at 22–23; STA Letter at 7; Vanguard Letter at 6.

[323] *See, e.g.*, ArcaEx Letter at 13; Brut Letter at 22; CHX Letter at 19; Instinet Letter at 41.

[324] Instinet Letter at 41.

[325] ArcaEx Letter at 13; Brut Letter at 22, Phlx Letter at 4.

[326] Brut Letter at 22.

[327] ArcaEx noted that top-of-book quotes make only a partial contribution to price discovery and that depth-of-book quotes are particularly important since decimalization. ArcaEx Letter at 13. The Commission agrees that depth-of-book quotes are important to investors, and for that reason has reproposed amendments to the market data rules to facilitate the independent dissemination of a market's depth of book. The rules would not prevent such a market from charging fees for depth-of-book quotations that are fair and reasonable and not unreasonably discriminatory.

[328] Proposing Release, 69 FR at 11181.

[329] *See, e.g.*, BSE Letter at 16; CHX Letter at 19–20; E*Trade Letter at 11.

[330] E*Trade Letter at 11; Instinet Letter at 42.

Quoting Share and the allocation of another 25% of revenues based on the dollar volume of trades, the $5000 threshold for qualified trades would eliminate much of the potential reward for trade shredding under reproposed formula.

d. Allocation of Revenues Among Network Stocks. The proposed formula included a Security Income Allocation, pursuant to which a Network's total distributable revenues would be allocated among each of the Network's stocks based on the square root of dollar volume. The square root function was intended to adjust for the highly disproportionate level of trading in the very top tier of Network stocks. A few hundred stocks (*e.g.*, the top 5%) are much more heavily traded than the other thousands of Network stocks. The Proposing Release noted that an allocation that simply was directly proportional to trading volume would fail to reflect adequately the importance of price discovery for the vast majority of stocks.[331]

Of the commenters that addressed this issue, four supported the use of a square root function to allocate revenues among stocks.[332] Nasdaq, for example, noted that the ''methodology will reduce the disparity between the value of data of the most active and least active securities.'' [333] Other commenters, in contrast, opposed the use of the square root function to allocate revenues among Network stocks.[334] ArcaEx believed that the proposed allocation method ''introduces a steeply progressive tax on liquid stocks to subsidize illiquid stocks'' and that the allocation of revenues should remain directly proportional to trading volume.[335]

The Commission has retained the square root function in the reproposed formula to allocate distributable Network revenues more appropriately among all of the stocks included in a Network. Although the extent to which Network stocks are tiered according to trading volume varies among the three Networks, it is quite pronounced in each of them. The use of the square root function reflects the Commission's judgment that, on average and not necessarily in every particular case, a $50,000 trade in a stock with an average daily trading volume of $500,000 is marginally more useful to investors than a $50,000 trade in a stock with an average daily trading volume of $500 million. Markets that provide price discovery in less active stocks serve an extremely important function for investors in those stocks. Price discovery not only benefits those investors who choose to trade on any particular day, but also benefits those who simply need to monitor the status of their investment. Efficient secondary markets support buy-and-hold investors by offering them a ready opportunity to trade at any time at a fair price if they need to buy or sell a stock. Indeed, this enhanced assurance is one of the most important contributions of secondary markets to efficient capital-formation and to reducing the cost of capital for listed companies. The square root function would allocate revenues to markets that perform this function for less-active stocks by marginally increasing their percentage of market data revenues, while still allocating a much greater dollar amount to more actively traded stocks.

4. Distribution and Display of Data

Most commenters supported the proposal authorizing the independent distribution of market data outside of what is required by the Plans.[336] They generally agreed that the proposal would allow investors and vendors greater freedom to make their own decisions regarding the data they need. They also believed that the Commission's ''fair and reasonable'' and ''not unreasonably discriminatory'' standards are appropriate to ensure that the independently distributed market data would be made available to all investors and data users. A few commenters, in contrast, objected to the proposed standards, asserting that the standards would not effectively protect investors and ''weaker and newer markets from predatory actions by stronger markets or the potential loss of data integrity.'' [337]

The Commission is reproposing Rule 603(a) as proposed. The ''fair and reasonable'' and ''not unreasonably discriminatory'' requirements in reproposed Rule 603(a) are derived from the language of Section 11A(c) of the Exchange Act. Under Section 11A(c)(1)(C), the more stringent ''fair and reasonable'' requirement is applicable to an ''exclusive processor,'' which is defined in Section 3(a)(22)(B) of the Exchange Act as an SRO or other entity that distributes the market information of an SRO on an exclusive basis. Reproposed Rule 603(a)(1) would extend this requirement to non-SRO markets when they act in functionally the same manner as exclusive processors and are the exclusive source of their own data. Applying this requirement to non-SROs would be consistent with Section 11A(c)(1)(F) of the Exchange Act, which grants the Commission rulemaking authority to ''assure equal regulation of all markets'' for NMS Securities.

Commenters were concerned about the statement in the Proposing Release that the distribution standards would prohibit a market from distributing its data independently on a more timely basis than it makes available the ''core data'' that is required to be disseminated through a Network processor.[338] Instinet, for example, requested that the Commission clarify that the proposal would not require a market center to artificially slow the independent delivery of its data in order to synchronize its delivery with the data disseminated by the Network.[339] Reproposed Rule 603(a) would not require a market center to synchronize the delivery of its data to end-users with delivery of data by a Network processor to end-users. Rather, independently distributed data could not be made available on a more timely basis than core data is made available to a Network processor. Stated another way, reproposed Rule 603(a) would require that an SRO or broker-dealer must not transmit data to a vendor or user any sooner than it transmits the data to a Network processor.

A majority of the commenters supported the Commission's proposed reduction of the consolidated display requirements, stating that it should lead to lower costs for investors.[340] A few commenters, however, opposed eliminating the requirement to display a full montage of market BBOs.[341] Amex, for example, believed that elimination of the montage would confuse investors

[331] Proposing Release, 69 FR at 11180.

[332] Amex Letter, Exhibit A at 15; Nasdaq Letter II at 32; NYSE Letter, Attachment at 12; Specialist Assoc. Letter at 16 n.21.

[333] Nasdaq Letter II at 32.

[334] ArcaEx Letter at 12; CBOE Letter at 11; Xanadu Letter at 2–3.

[335] ArcaEx Letter at 12.

[336] *See, e.g.*, Brut Letter at 21, 23; CBOE Letter at 2, 17; Citigroup Letter at 16; Financial Information Forum Letter at 4; Letter from Coleman Stipanovich, Executive Director, State Board of Administration of Florida, to Jonathan G. Katz, Secretary, Commission, dated June 29, 2004 (''Florida State Board Letter'') at 2; Financial Services Roundtable Letter at 6; Goldman Sachs Letter at 12; ICI Letter at 4, 21 n.35; Instinet Letter at 45; Nasdaq Letter II at 33; NYSE Letter, Attachment at 12; Reuters Letter at 3; Schwab Letter at 13.

[337] *See, e.g.*, Amex Letter at 10, Exhibit A at 13.

[338] Amex Letter, Exhibit A at 12.; Instinet Letter at 47; Reuters Letter at 2.

[339] Instinet Letter at 47.

[340] *See, e.g.*, Brut Letter at 21, 23; Financial Information Forum Letter at 3–4; Instinet Letter at 7, 45; Nasdaq Letter II at 27, 32; Reuters Letter at 2–3.

[341] *See, e.g.*, Amex Letter at 9 & Exhibit A at 12; Bloomberg Tradebook Letter at 9; Callcott Letter at 1, 2, 5.

and make it more complicated for vendors and broker-dealers to manage market data.

The Commission does not believe that streamlining the consolidated display requirement would detract from the quality of information made available to investors. Reproposed Rule 603(c) would continue to require the disclosure of basic information (*i.e.*, prices, sizes and market center identifications of the NBBO, along with the most recent last sale information). It would allow market forces, rather than regulatory requirements, to determine what, if any, additional quotations outside the NBBO are displayed to investors. Investors who need the BBOs of each SRO, as well as more comprehensive depth-of-book information, would be able to obtain such data from markets or third party vendors.

B. Description of Reproposed Rules and Amendments

1. Allocation Amendment

The Commission is reproposing with modifications an amendment to each of the Plans (''Allocation Amendment'') that incorporates a broad based measure of the contribution of an SRO's quotes and trades to the consolidated data stream.[342] The reproposed formula reflects a two-step process. First, a Network's distributable revenues (*e.g.*, $150 million) would be allocated among the many individual securities (*e.g.*, 3000) included in the Network's data stream. Second, the revenues that are allocated to an individual security (*e.g.*, $200,000) then would be allocated among the SROs based on measures of the usefulness to investors of their trades and quotes in the security. The Allocation Amendment provides that, notwithstanding any other provision of a Plan, its SRO participants would receive an annual payment for each calendar year that is equal to the sum of the SRO's Trading Shares and Quoting Shares in each Network security for the year.[343] These two types of Shares would be dollar amounts that would be calculated based on SRO trading and quoting activity in each Network security.

a. Security Income Allocation. The first step of the reproposed formula would be to allocate a Network's total distributable revenues among the many different securities that are included in a Network (the ''Security Income Allocation''). Paragraph (b) of the reproposed Allocation Amendment would base this allocation on the square root of dollar volume of trading in each security. Use of the square root function would more appropriately allocate revenues among stocks with widely differing trading volume. A small number of Network stocks are much more heavily traded than the great majority of Network stocks. By proportionally shifting revenues away from the very top tier of active stocks and increasing the allocation across other stocks, the Security Income Allocation is intended to reflect more adequately the importance of price discovery for all Network stocks.

b. Trading Share. Under paragraph (c) of the reproposed Allocation Amendment, an SRO's Trading Share in a particular Network security would be a dollar amount that is determined by multiplying (i) an amount equal to the lesser of (A) 50% of the Security Income Allocation for the Eligible Security or (B) an amount equal to $2.00 multiplied by the total number of qualified transaction reports disseminated by the Processor in the Eligible Security during the calendar year, by (2) the SRO's Trade Rating in the security. A Trade Rating would be a number that represents the SRO's proportion of dollar volume and qualified trades in the security, as compared to the dollar volume and qualified trades of all SROs. The Trade Ratings of all SROs would add up to a total of one. Thus, for example, multiplying 50% of the Security Income Allocation for a Network security (*e.g.*, $200,000) by an SRO's Trade Rating in that security (*e.g.*, 0.2555) would produce a dollar amount (*e.g.*, $50\% \times \$200{,}000 \times 0.2555 = \$25{,}550$) that is the SRO's Trading Share for the security for the year.

Applying 50% of the Security Income Allocation to the Trading Share reflects a judgment that generally trades and quotes are of approximately equal importance for price discovery purposes. For securities with lower trading volume, however, this percentage can disproportionately allocate revenues for a small number of trades during the year, at the expense of those markets that aggressively quote a security throughout the year. For example, 50% of the Security Income Allocation for a security with 10 qualified trades during the year might be $300. Rather than allocate the full $300 to those SROs that reported a small number of trades (for an average per trade allocation of $30), the reproposed formula would include a cap of $2 per qualified transaction report, so that a total of only $20 would be allocated pursuant to the Trading Share. The difference of $280 ($300 minus $20) would be shifted to the Quoting Share to allocate revenues to those markets that consistently displayed valuable quotes in the security throughout the more than 250 trading days during the year. The amount of the cap of $2 per qualified transaction report exceeds the highest amount per transaction report currently allocated for any of the three Networks.

An SRO's Trade Rating would be calculated by taking the average of (1) the SRO's percentage of total dollar volume reported in the Network security during the year, and (2) the SRO's percentage of total qualified trades reported in the Network security for the year. A transaction report with a dollar volume of $5000 or more would constitute one qualified report. A transaction report with a dollar volume of less than $5000 would constitute a proportional fraction of a qualified transaction report. As a result, all sizes of transaction reports would contribute toward an SRO's Trade Rating.

c. Quoting Share. Under paragraph (d) of the reproposed Allocation Amendment, an SRO's Quoting Share in a particular Network Security would be a dollar amount that is determined by multiplying (i) an amount equal to 50% of the Security Income Allocation for the security, plus the difference, if greater than zero, between 50% of the Security Income Allocation for the Eligible Security and an amount equal to $2.00 multiplied by the total number of qualified transaction reports disseminated by the Processor in the Eligible Security during the calendar year, by (ii) the SRO's Quote Rating in the security. A Quote Rating would be a number that represents the SRO's proportion of quotations that equaled the price of the NBBO during the year (''Quote Credits''), as compared to the Quote Credits of all SRO's during the year. The Quote Ratings of all SROs

[342] In 2002, the Commission abrogated several SRO proposals for rebating data revenues to market participants. Securities Exchange Act Release No. 46159 (July 2, 2002), 67 FR 45775 (July 10, 2002). The purpose of the abrogation was to allow more time for the Commission to consider market data issues. Given that the current Plan allocation formulas would be updated to allocate revenues for more beneficial quoting and trading behavior, the Commission anticipates that rebates would be permitted in the future if the reproposed formula were adopted, assuming their terms meet applicable Exchange Act standards and SROs are able to meet their regulatory responsibilities. Such SRO rebates would, of course, have to be filed with the Commission for approval.

[343] Two commenters were concerned that the new formula might prohibit the Network's current practice of making estimated quarterly payments of Network revenues, with a final reconciliation at the end of the year. BSE Letter at 18, 19; CHX Letter at 22. The reproposed formula, however, merely tracks existing Plan language for the calculation of ''Annual Shares'' or ''annual payments.'' Nothing in the reproposed formula would prohibit Networks from making estimated quarterly payments.

would add up to a total of one. Multiplying 50% of the Security Income Allocation for a Network security (plus any shifted allocation from the Trading Share) by an SRO's Quote Rating in that security would produce a dollar amount that is the SRO's Quoting Share for the security for the year.

An SRO would earn one Quote Credit for each second of time and dollar value of size that the SRO's automated quotation during regular trading hours equals the price of the NBBO.[344] Thus, for example, a bid with a dollar value of $4000 (*e.g.*, a bid of $20 with a size of 200 shares) that equals the national best bid for three seconds would be entitled to 12,000 Quote Credits. If an SRO quotes simultaneously at both the national best bid and the national best offer, it would earn Quote Credits for each quote. An automated quotation is defined by reference to reproposed Rule 600(b)(3) under Regulation NMS. Thus, an SRO's manual quotations would not be entitled to earn any Quote Credits.

2. Governance Amendment

The Governance Amendment is reproposed substantially as proposed. Paragraph (a) would mandate the formation of a Plan advisory committee. Paragraph (b) of the Governance Amendment would set forth the composition and selection process for such an advisory committee. Members of the advisory committee would be selected by the Plan operating committee, by majority vote, for two-year terms. At least one representative would be selected from each of the following five categories: (1) A broker-dealer with a substantial retail investor customer base, (2) a broker-dealer with a substantial institutional investor customer base, (3) an ATS, (4) a data vendor, and (5) an investor. Each Plan participant also would have the right to select one additional member to the advisory committee that is not employed by or affiliated with any Plan participant or its affiliates or facilities.

Paragraphs (c) and (d) of the Governance Amendment would set forth the function of the advisory committee and the requirements for its participation in Plan affairs. Pursuant to paragraph (c), members of an advisory committee would have the right to submit their views to the operating committee on Plan matters, including, but not limited to, any new or modified product, fee, contract, or pilot program that is offered or used pursuant to the Plan. Paragraph (d) provides that members would have the right to attend all operating committee meetings and to receive any information distributed to the operating committee relating to Plan matters, except when the operating committee, by majority vote, decides to meet in executive session after determining that an item of Plan business requires confidential treatment.

3. Consolidation, Distribution, and Display of Data

a. Independent Distribution of Information. The Commission is reproposing, substantially as proposed, the amendment to current Rule 11Aa3–1 (reproposed to be designated as Rule 601), which would rescind the prohibition on SROs and their members from disseminating their trade reports independently.[345] Under reproposed Rule 601, members of an SRO would continue to be required to transmit their trades to the SRO (and SROs would continue to transmit trades to the Networks pursuant to the Plans), but such members also would be free to distribute their own data independently, with or without fees.

Reproposed Rule 603(a) would establish uniform standards for distribution of both quotations and trades that would create an equivalent regulatory regime for all types of markets. First, Rule 603(a)(1) would require that any market information[346] distributed by an exclusive processor, or by a broker or dealer (including ATSs and market makers) that is the exclusive source of the information, be made available to securities information processors on terms that are fair and reasonable. Rule 603(a)(2) would require that any SRO, broker, or dealer that distributes market information must do so on terms that are not unreasonably discriminatory. These requirements would prohibit, for example, a market from making its ''core data'' (*i.e.*, data that it is required to provide to a Network processor) available to vendors on a more timely basis than it makes available the core data to a Network processor. With respect to non-core data, however, Network processors occupy a unique competitive position. As Network processor, it acts on behalf of all markets in disseminating consolidated information, yet it also may be closely associated with the competitor of a market. The Commission believes that markets should have considerable leeway in determining whether, or on what terms, they provide additional, non-core data to a Network processor.

b. Consolidation of Information. All of the SROs currently participate in Plans that provide for the dissemination of consolidated information for the NMS Stocks that they trade. The Plans were adopted in order to enable the SROs to comply with Exchange Act rules regarding the reporting of trades and distribution of quotations. With respect to trades, paragraph (b) of Exchange Act Rule 11Aa3–1 (proposed to be redesignated as Rule 601(a)) requires each SRO to file transaction reporting plans that specify, among other things, how its transactions are to be consolidated with the transactions of other SROs. With respect to quotations, paragraph (b)(1) of Exchange Act Rule 11Ac1–1 (proposed to be redesignated as Rule 602(a)(1)) requires an SRO to establish and maintain procedures for making its best quotes available to vendors.

To confirm by Exchange Act rule that both existing and any new SROs would be required to continue to participate in such joint-SRO plans, reproposed Rule 603(b) would require SROs to act jointly pursuant to one or more NMS plans to disseminate consolidated information for NMS Stocks. Such consolidated information would be required to include an NBBO that is calculated in accordance with the definition set forth in reproposed Rule 600(b)(42).[347] In addition, the NMS plans would be required to provide for the dissemination of all consolidated information for an individual NMS stock through a single processor. Thus, different processors would be permitted to disseminate information for different NMS stocks (*e.g.*, SIAC for Network A stocks, and Nasdaq for Network C stocks), but all quotations and trades in

[344] Regular trading hours are defined in reproposed Rule 600(b)(64) of Regulation NMS as between 9:30 a.m. and 4 p.m. eastern time, unless otherwise specified pursuant to the procedures established in reproposed Rule 605(a)(2).

[345] Reproposed Regulation NMS would remove the definitions in former paragraph (a) of current Rule 11Aa3–1 and place them in reproposed Rule 600(b). Current subparagraphs (c)(2) and (c)(3) of Rule 11Aa3–1 would be rescinded. As a result, current subparagraph (c)(4) of current Rule 11Aa3–1 would be redesignated as subparagraph (b)(2) of reproposed Rule 601.

[346] The information covered by the amendment tracks the language of Section 11A(c) of the Exchange Act, which applies to ''information with respect to quotations for or transactions in'' securities. This statutory language encompasses a broad range of information, including information relating to limit orders held by a market center. *See, e.g.*, S. Report No. 94–75, 94th Cong., 1st Sess. 9 (1975) (''In the securities markets, as in most other active markets, it is critical for those who trade to have access to accurate, up-to-the-second information as to the prices at which transactions in particular securities are taking place (*i.e.*, last sale reports) and the prices at which other traders have expressed their willingness to buy or sell (*i.e.*, quotations).'').

[347] Reproposed Rule 600(b)(42) of Regulation NMS defines ''national best bid and national best offer.''

a stock would be disseminated through a single processor. As a result, information users, particularly retail investors, could obtain data from a single source that reflects the best quotations and most recent trade price for a security, no matter where such quotations and trade are displayed in the NMS.

c. Display of Consolidated Information. Reproposed Rule 603(c) (currently Exchange Act Rule 11Ac1–2) substantially revises the consolidated display requirement. It would incorporate a new definition of ''consolidated display'' (set forth in reproposed Rule 600(b)(13)) that would be limited to the prices, sizes, and market center identifications of the NBBO, along with the ''consolidated last sale information'' (which is defined in Rule 600(b)(12)). Beyond disclosure of this basic information, market forces, rather than regulatory requirements, would be allowed to determine what, if any, additional data from other market centers is displayed. In particular, investors and other information users ultimately would be able to decide whether they need additional information in their displays.

In addition, reproposed Rule 603(c) would narrow the contexts in which a consolidated display is required to those when it is most needed—a context in which a trading or order-routing decision could be implemented. For example, the consolidated display requirement would continue to cover broker-dealers who provide on-line data to their customers in software programs from which trading decisions can be implemented. Similarly, the requirement would continue to apply to vendors who provide displays that facilitate order routing by broker-dealers. It would not apply, however, when market data is provided on a purely informational website that does not offer any trading or order-routing capability.[348]

VI. Regulation NMS

To simplify the structure of the rules adopted under Section 11A of the Exchange Act (''NMS rules''), the rules reproposed today would designate the NMS rules as Regulation NMS, renumber the NMS rules, and would establish a new definitional rule, reproposed Rule 600 (''NMS Security Designation and Definitions''). Rule 600(a) would replace Exchange Act Rule 11Aa2–1, which designates ''reported securities'' as NMS securities. In addition, Rule 600(b) would include, in alphabetical order, all of the defined terms used in Regulation NMS. Regulation NMS would include reproposed Rules 610, 611, and 612 in addition to the existing NMS rules. The new rule series would be Rule 600 through Rule 612 (17 CFR 242.600–612).

Reproposed Rule 600 would provide a single set of definitions that would be used throughout Regulation NMS. To create a single set of definitions, Rule 600 would update or delete from the existing NMS rules some terms that have become obsolete and eliminate the use of multiple inconsistent definitions for identical terms. In addition, Rule 600 reproposes new terms, ''NMS security'' and ''NMS stock,'' to replace some terms that have been eliminated. These terms would be necessary to maintain distinctions between NMS rules that apply only to equity securities and ETFs (*e.g.*, Exchange Act Rules 11Ac1–4 and 11Ac1–5, proposed to be redesignated as Rules 604 and 605) and those that apply to equity securities, ETFs, and options (*e.g.*, Exchange Act Rules 11Ac1–1 and 11Ac1–6, proposed to be redesignated as Rules 602 and 606). Rule 600 would retain, unchanged, most definitions used in the existing NMS rules and would include definitions used in the new NMS rules reproposed today. The definitional changes would not affect the substantive requirements of the existing NMS rules. In addition, the reproposal would amend a number of other Commission rules that cross-reference current NMS rules or that use terms that Regulation NMS would amend or eliminate.

The Commission received no comments regarding proposed Rule 600, the proposed redesignation of the NMS rules as Regulation NMS, or the proposed changes to other Commission rules. Accordingly, the Commission is reproposing Rule 600 and redesignating the NMS rules as Regulation NMS, and reproposing technical amendments to certain other Commission rules that cross-reference current NMS rules or that use terms that Regulation NMS would amend or eliminate, substantially as proposed.[349]

A. Description of Regulation NMS

Reproposed Regulation NMS would renumber and, in some cases, rename the existing NMS rules, and would incorporate Rule 600 and the other NMS rules reproposed today. Where applicable, existing NMS rules would be amended to remove the definitions that have been consolidated in Rule 600. The titles and numbering of the rules in Regulation NMS, including the NMS rules reproposed today, would be as follows:

- Rule 600: NMS Security Designation and Definitions (would replace Exchange Act Rule 11Aa2–1, which the Commission is proposing to rescind, and incorporate definitions from the existing NMS rules and the reproposed new rules);
- Rule 601: Dissemination of Transaction Reports and Last Sale Data with Respect to Transactions in NMS Stocks (would renumber and rename current Exchange Act Rule 11Aa3–1, the substance of which would be modified); [350]
- Rule 602: Dissemination of Quotations in NMS Securities (would renumber and rename current Exchange Act Rule 11Ac1–1 (''Quote Rule''), the substance of which would remain largely intact);
- Rule 603: Distribution, Consolidation, and Display of Information with Respect to Quotations for and Transactions in NMS Stocks (would renumber and rename current Exchange Act Rule 11Ac1–2 (''Vendor Display Rule''), the substance of which would be modified substantially); [351]
- Rule 604: Display of Customer Limit Orders (would renumber current Exchange Act Rule 11Ac1–4 (''Limit Order Display Rule''), the substance of which would remain largely intact);
- Rule 605: Disclosure of Order Execution Information (would renumber current Exchange Act Rule 11Ac1–5, the substance of which would remain largely intact);
- Rule 606: Disclosure of Order Routing Information (would renumber current Exchange Act Rule 11Ac1–6, the substance of which would remain largely intact);
- Rule 607: Customer Account Statements (would renumber current Exchange Act Rule 11Ac1–3, the substance of which would remain largely intact);
- Rule 608: Filing and Amendment of National Market System Plans (would renumber current Exchange Act Rule 11Aa3–2, the substance of which would remain largely intact);

[348] The amendment would retain the exemptions currently set forth in Rule 11Ac1–2(f) (proposed to be redesignated as Rule 603(c)(2)) for exchange and market linkage displays. The current exemption for displays used by SROs for monitoring or surveillance purposes would no longer be necessary because of the limitation of the amendment to trading and order-routing contexts.

[349] *See infra* note 394 for a list of rules to which technical amendments are proposed that are in addition to those originally proposed.

[350] In the market data rules, discussed in Section V., the Commission is reproposing substantive amendments to Exchange Act Rule 11Aa3–1 (proposed to be redesignated as Rule 601).

[351] In the market data rules, discussed in Section V., the Commission reproposes substantive amendments to the Vendor Display Rule.

• Rule 609: Registration of Securities Information Processors: Form of Application and Amendments (would renumber current Exchange Act Rule 11Ab2–1, the substance of which would remain largely intact);
• Rule 610: Access to Quotations (reproposed in this release);
• Rule 611: Order Protection Rule (reproposed in this release); and
• Rule 612: Minimum Pricing Increment (reproposed in this release).

B. Rule 600—NMS Security Designation and Definitions

1. NMS Security Designation—Transaction Reporting Requirements for Equities and Listed Options

Section 11A(a)(2) of the Exchange Act directs the Commission to ''designate the securities or classes of securities qualified for trading in the national market system.'' [352] The 1975 Amendments and the legislative history to the 1975 Amendments were silent as to the particular standards the Commission should employ in designating NMS securities.[353] Instead, Congress provided the Commission with the flexibility and discretion to base NMS designation standards on the Commission's experience in facilitating the development of an NMS.[354]

To satisfy the requirement that it designate the securities qualified for trading in the NMS, the Commission adopted Exchange Act Rule 11Aa2–1 in 1981.[355] Exchange Act Rule 11Aa2–1 defines the term ''national market system security'' to mean ''any reported security as defined in Rule 11Aa3–1.'' A ''reported security'' is ''any security or class of securities for which transaction reports are collected, processed and made available pursuant to an effective transaction reporting plan.'' [356] An ''effective transaction reporting plan'' is ''any transaction reporting plan approved by the Commission pursuant to this section.'' [357] A ''transaction reporting plan'' is ''any plan for collecting, processing, making available or disseminating transaction reports with respect to transactions in reported securities filed with the Commission pursuant to, and meeting the requirements of, this section.'' [358] The effective transaction reporting plans are the CTA Plan and the Nasdaq UTP Plan.

In addition to identifying those securities deemed to be NMS securities, when adopted, the Exchange Act Rule 11Aa2–1 designation also tacitly identified those securities that did not meet that designation (*i.e.*, securities other than those that were so designated as NMS securities). Historically, securities excluded from this designation included standardized options and small capitalization equity securities (a subset of which has been identified as Nasdaq SmallCap securities). Trading in options and Nasdaq SmallCap securities has increased over the past three decades and gradually many of the rules that govern NMS securities have been applied to these securities. As a result, much of the terminology that has been used to distinguish NMS securities from options and Nasdaq SmallCap securities has become obsolete.

For example, the Nasdaq UTP Plan provides for the collection from Plan participants, and the consolidation and dissemination to vendors, subscribers and others, of quotation and transaction information in ''eligible securities.'' Prior to 2001, the Nasdaq UTP Plan defined an ''eligible security'' as any Nasdaq National Market security as to which unlisted trading privileges have been granted to a national securities exchange pursuant to Section 12(f) of the Exchange Act or that is listed on a national securities exchange. In 2001, the Nasdaq UTP Plan was amended to include Nasdaq SmallCap securities.[359] As a result, Nasdaq SmallCap securities became ''eligible securities'' because they are now reported through an effective transaction reporting plan (*i.e.*, the Nasdaq UTP Plan), bringing them within the purview of the NMS security designation. Several definitions in the existing NMS rules, however, do not reflect the inclusion of Nasdaq SmallCap securities in the Nasdaq UTP Plan and therefore must be updated. Regulation NMS would do so.

In addition, transactions in exchange-listed options are reported through the Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information (''OPRA Plan'').[360] Unlike the CTA Plan and the Nasdaq UTP Plan—transaction reporting plans that the Commission approved pursuant to Exchange Act Rules 11Aa3–1 and 11Aa3–2 (proposed to be redesignated as Rules 601 and 608)—the Commission approved the OPRA Plan pursuant to Exchange Act Rule 11Aa3–2 (proposed to be redesignated as Rule 608).[361] As such, the OPRA Plan is an ''effective national market system plan'' but not an ''effective transaction reporting plan.'' While at their core the CTA Plan, the Nasdaq UTP Plan, and the OPRA Plan perform essentially the same function (*i.e.*, they govern the consolidated reporting of securities transactions by Plan participants), because the OPRA Plan is not an effective transaction reporting plan, listed options covered by the OPRA Plan are technically not ''securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan.'' Therefore, listed options were not considered NMS securities as defined by Exchange Act Rule 11Aa2–1. While the impact of this distinction may not be readily apparent, the differences in the way the Plans are designated dictates the securities laws and regulations that apply to securities reported pursuant to those Plans.

Further, as discussed below, some terms in the existing NMS rules have become superfluous or outdated, and some NMS rules define identical terms differently. To provide a consolidated set of definitions applicable to all of the NMS rules, Regulation NMS would eliminate these inconsistencies. The definitional changes reproposed today, however, are not intended to change materially the scope of the existing NMS rules.

2. NMS Security and NMS Stock

Some NMS rules, including the Quote Rule (proposed to be redesignated as Rule 602) and Exchange Act Rule 11Ac1–6 (proposed to be redesignated as Rule 606), currently apply to both (1)

[352] 15 U.S.C. 78k–1(a)(2).

[353] *See* Securities Exchange Act Release No. 23817 (Nov. 17, 1986), 51 FR 42856 (Nov. 26, 1986) (proposing amendments to Exchange Act Rules 11Aa2–1 and 11Aa3–1).

[354] *See id.*

[355] See Securities Exchange Act Release No. 17549 (Feb. 17, 1981), 46 FR 13992 (Feb. 25, 1981) (adopting Exchange Act Rule 11Aa2–1).

[356] *See* Exchange Act Rule 11Aa3–1(a)(4).

[357] *See* Exchange Act Rule 11Aa3–1(a)(3).

[358] *See* Exchange Act Rule 11Aa3–1(a)(2).

[359] *See* NASD Rule 4200 for the definition of a Nasdaq SmallCap security. The Nasdaq UTP Plan provides for the collection from Plan participants, and the consolidation and dissemination to vendors, subscribers and others, of quotation and transaction information in ''eligible securities.'' ''Eligible securities'' initially included Nasdaq NMS securities listed on an exchange or traded on an exchange pursuant to a grant of unlisted trading privileges. *See* Securities Exchange Act Release No. 28146 (June 26, 1990), 55 FR 27917 (July 6, 1990) (order approving the Nasdaq UTP Plan on a pilot basis). In 2001, the Nasdaq UTP Plan was amended to, among other things, revise the definition of ''eligible securities'' to include Nasdaq SmallCap securities. *See* Securities Exchange Act Release No. 45081 (Nov. 19, 2001), 66 FR 59273 (Nov. 27, 2001) (order approving Amendment No. 12 to the Nasdaq UTP Plan).

[360] The exchanges that are participants to the OPRA Plan are Amex, BSE, CBOE, ISE, PCX, and Phlx.

[361] *See* Securities Exchange Act Release No. 17638 (Mar. 18, 1981), 22 S.E.C. Docket 484 (Mar. 31, 1981). Exchange Act Rule 11Aa3–2 (proposed to be redesignated as Rule 608) codifies the procedures that SROs must follow to seek approval for or amendment of a national market system plan.

equities, ETFs and related securities for which transaction reports are made available pursuant to an effective transaction reporting plan, and (2) listed options for which market information is made available pursuant to an effective national market system plan. To provide a single term that will be used in any provision of Regulation NMS that applies to both categories of securities, Regulation NMS reproposes a new term, ''NMS security.'' [362]

Because many rules in Regulation NMS, including the Limit Order Display Rule (proposed to be redesignated as Rule 604) and Exchange Act Rule 11Ac1–5 (proposed to be redesignated as Rule 605), continue to be inapplicable to listed options, Regulation NMS reproposes a new term, ''NMS stock'' that would be used in those provisions. Regulation NMS would define the term ''NMS stock'' as ''any NMS security other than an option.'' [363]

3. Changes to Existing Definitions in the NMS Rules

Reproposed Rule 600(b) would provide a single set of definitions that would be used throughout Regulation NMS. To create a single set of definitions, Regulation NMS would eliminate multiple, inconsistent definitions of identical terms. In addition, Regulation NMS would amend some definitions in the NMS rules to reflect changed conditions in the marketplace or to modernize references. For example, as discussed above, several definitions in the existing NMS rules have been rendered obsolete by the extension of the Nasdaq UTP Plan to Nasdaq SmallCap securities.[364] Because the Nasdaq UTP Plan includes Nasdaq SmallCap securities, those securities now are ''securities for which transaction reports are collected, processed and made available pursuant to an effective transaction reporting plan'' (*i.e.*, they are ''reported'' securities).[365] For this reason, it is no longer necessary to distinguish, as several existing NMS rules do, between ''reported'' securities and equity securities for which market information is made available through Nasdaq.[366] Accordingly, Regulation NMS would eliminate or revise the defined terms in the existing NMS rules that make this distinction.

a. Covered Security. Different definitions of the term ''covered security'' appeared in the Quote Rule, the Limit Order Display Rule, and Exchange Act Rule 11Ac1–6.[367] In addition, as discussed below, the term has become obsolete. Therefore, Regulation NMS would eliminate the term ''covered security'' from the NMS rules and replaces it with the term ''NMS security'' or ''NMS stock,'' as applicable, depending upon the scope of the particular rule.

b. Reported Security. Several NMS rules used the term ''reported security.'' Although the Limit Order Display Rule, the Vendor Display Rule, and Exchange Act Rule 11Aa3–1 contain identical definitions of ''reported security,'' the Quote Rule provides a different definition.[368] Because the term ''reported security'' is defined inconsistently in the NMS rules and in light of the reproposed changes to related terms, Regulation NMS would eliminate the term ''reported security'' from the NMS rules and replace it with the term ''NMS security'' or ''NMS stock,'' depending on the scope of the particular rule.

The Limit Order Display Rule uses the term ''reported security'' solely for the purpose of defining the term ''covered security.'' [369] Because Regulation NMS would eliminate the term ''covered security,'' the term ''reported security'' also would not be needed in the Limit Order Display Rule (proposed to be redesignated as Rule 604). Therefore, the term ''NMS stock'' would replace the term ''covered security'' in the Limit Order Display Rule.

Similarly, the Quote Rule uses the term ''reported security'' primarily to define the term ''covered security.'' [370] Because Regulation NMS would eliminate the term ''covered security,'' the Quote Rule (proposed to be redesignated as Rule 602) [371] also would not use the term ''reported security.''

c. Subject Security. The Quote Rule and the Vendor Display Rule both use the term ''subject security,'' although they define the term differently. To

[362] Specifically, reproposed Regulation NMS would define an ''NMS security'' as ''any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan, or an effective national market system plan for reporting transactions in listed options.'' This definition is used to define a ''reported security'' in the Quote Rule. *See* Exchange Act Rule 11Ac1–1(a)(20). For the reasons described below, the Commission would eliminate the term ''reported security'' from the Quote Rule and would not include it in Regulation NMS.

[363] Reproposed Rule 600(b)(47).

[364] *See supra* Section VI.B.1.

[365] The Vendor Display Rule and Exchange Act Rule 11Aa3–1 define the term ''reported security'' to mean ''any security or class of securities for which transaction reports are collected, processed and made available pursuant to an effective transaction reporting plan.'' *See* Exchange Act Rules 11Ac1–2(a)(20) and 11Aa3–1(a)(4). As discussed more fully below, the Quote Rule provides a different definition of ''reported security.''

[366] *See e.g.*, paragraph (a)(4) of the Vendor Display Rule (defining ''subject security'' to mean ''(i) any reported security; and (ii) any other equity security as to which transaction reports, last sale data or quotation information is disseminated through NASDAQ''); and paragraph (a)(6) of the Quote Rule (defining ''covered security'' to mean ''any reported security and any other security for which a transaction report, last sale data or quotation information is disseminated through an automated quotation system as described in Section 3(a)(51)(A)(ii) of the Act (15 U.S.C. 78c(a)(51)(A)(ii))'').

[367] Although the Quote Rule and the Limit Order Display Rule each define the term ''covered security'' as ''any reported security and any other security for which a transaction report, last sale data or quotation information is disseminated through an automated quotation system as described in Section 3(a)(51)(A)(ii) of the Act (15 U.S.C. 78c(a)(51)(A)(ii)),'' the scope of the definitions is not identical because each rule defines the term ''reported security'' differently. The Quote Rule defines a ''reported security'' to mean ''any security or class of securities for which transaction reports are collected, processed and made available pursuant to an effective transaction reporting plan, or an effective national market system plan for reporting transactions in listed options.'' *See* Exchange Act Rule 11Ac1–1(a)(20). The Limit Order Display Rule defines a ''reported security'' to mean ''any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan.'' *See* Exchange Act Rule 11Ac1–4(a)(10).

Exchange Act Rule 11Ac1–6 defines the term ''covered security'' to mean: ''(i) any national market system security and any other security for which a transaction report, last sale data or quotation information is disseminated through an automated quotation system as defined in Section 3(a)(51)(A)(ii) of the Act (15 U.S.C. 78c(a)(51)(A)(ii)); and (ii) any option contract traded on a national securities exchange for which last sale reports and quotation information are made available pursuant to an effective national market system plan.'' *See* Exchange Act Rule 11Ac1–6(a)(1).

[368] The Limit Order Display Rule, the Vendor Display Rule, and Exchange Act Rule 11Aa3–1 define a ''reported security'' to mean ''any security or class of securities for which transaction reports are collected, processed and made available pursuant to an effective transaction reporting plan.'' *See* Exchange Act Rules 11Ac1–4(a)(10), 11Ac1–2(a)(20), and 11Aa3–1(a)(4). The Quote Rule defines the term ''reported security'' to mean ''any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan, or an effective national market system plan for reporting transactions in listed options.'' *See* Exchange Act Rule 11Ac1–1(a)(20). As discussed above, this release reproposes substantial modifications to the Vendor Display Rule.

[369] The Limit Order Display Rule defines a ''covered security'' to include both reported securities and other securities for which market information is disseminated through Nasdaq. *See* Exchange Act Rule 11Ac1–4(a)(5).

[370] The Quote Rule defines a ''covered security'' to include both reported securities and other securities for which market information is disseminated through Nasdaq. *See* Exchange Act Rule 11Aa1–1(a)(6).

[371] In paragraph (b)(1)(ii) of the Quote Rule (proposed to be redesignated as Rule 602), which requires a registered national securities association to disseminate quotations at all times when last sale information is available with respect to ''reported securities,'' the reference to ''reported security'' would be replaced by a reference to ''NMS security.''

eliminate this inconsistency, the reproposed Vendor Display Rule (proposed to be redesignated as Rule 603) would not use the term ''subject security'' and Regulation NMS would retain a slightly modified version of the definition of ''subject security'' currently found in the Quote Rule.

The Vendor Display Rule defines the term ''subject security'' to mean ''(i) any reported security; and (ii) any other equity security as to which transaction reports, last sale data or quotation information is disseminated through NASDAQ.'' [372] As discussed above, the extension of the Nasdaq UTP Plan to include Nasdaq SmallCap securities renders obsolete the distinction between a ''reported security'' and a security for which market information is disseminated through Nasdaq. Accordingly, the reproposed Vendor Display Rule (proposed to be redesignated as Rule 603) would use the term ''NMS stock'' rather than ''subject security.''

The Quote Rule defines the term ''subject security'' to mean:

(i) With respect to an exchange: (A) Any exchange-traded security other than a security for which the executed volume of such exchange, during the most recent calendar quarter, comprised one percent or less of the aggregate trading volume for such security as reported in the consolidated system; and (B) Any other covered security for which such exchange has in effect an election, pursuant to paragraph (b)(5)(i) of this section, to collect, process, and make available to quotation vendors bids, offers, quotation sizes, and aggregate quotation sizes communicated on such exchange; and

(ii) With respect to a member of an association: (A) Any exchange-traded security for which such member acts in the capacity of an OTC market maker unless the executed volume of such member, during the most recent calendar quarter, comprised one percent or less of the aggregate trading volume for such security as reported in the consolidated system; and (B) Any other covered security for which such member acts in the capacity of an OTC market maker and has in effect an election, pursuant to paragraph (b)(5)(ii) of this section, to communicate to its association bids, offers and quotation sizes for the purpose of making such bids, offers and quotation sizes available to quotation vendors.[373]

Because the Quote Rule (proposed to be redesignated as Rule 602) would continue to apply to both listed options and equities covered by an effective transaction reporting plan, Regulation NMS's definition of ''subject security'' would revise the Quote Rule's definition of ''subject security'' by replacing references to a ''covered security'' with references to an ''NMS security.'' In addition, for the reasons discussed below, Regulation NMS would replace the phrase ''reported in the consolidated system'' with the phrase ''reported pursuant to an effective transaction reporting plan or effective national market system plan.''

d. Consolidated System. As noted above, the definition of the term ''subject security'' in the Quote Rule uses the phrase ''reported in the consolidated system.'' [374] Paragraph (a)(5) of the Quote Rule defines the term ''consolidated system'' to mean ''the consolidated transaction reporting system, including a transaction reporting system operating pursuant to an effective national market system plan.'' [375]

Regulation NMS would clarify the definition of ''subject security'' by eliminating the phrase ''reported in the consolidated system'' and replacing it with the phrase ''reported pursuant to an effective transaction reporting plan or an effective national market system plan.'' Thus, Regulation NMS would define a ''subject security'' to include, among other things: (1) With respect to a national securities exchange, any exchange-traded security other than a security for which the executed volume of such exchange, during the most recent calendar quarter, comprised one percent or less of the aggregate trading volume for such security as reported pursuant to an effective transaction reporting plan or effective national market system plan; and (2) with respect to a member of a national securities association, any exchange-traded security for which such member acts in the capacity of an OTC market maker unless the executed volume of such member, during the most recent calendar quarter, comprised one percent or less of the aggregate trading volume for such security as reported pursuant to an effective transaction reporting plan or effective national market system plan.[376]

This change would provide a clearer definition of ''subject security'' by indicating that the trading volume referred to in the definition is the trading volume in a security that is reported pursuant to an effective transaction reporting plan or an effective national market system plan. Although replacing the phrase ''reported in the consolidated system'' with the phrase ''reported pursuant to an effective transaction reporting plan or an effective national market system plan'' produces a clearer definition of ''subject security,'' it would not alter the scope or the substance of the definition.[377]

e. National Securities Exchange. Section 3(a)(1) of the Exchange Act defines the term ''exchange'' to mean ''any organization, association, or group of persons * * * which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understood.* * *'' [378] Exchange Act Rule 3b–16,[379] adopted in 1998, interprets the statutory definition of ''exchange'' broadly to include any organization, association, or group of persons that: (1) brings together the orders for securities of multiple buyers and sellers; and (2) uses established, non-discretionary methods (whether by providing a trading facility or by setting rules) under which such orders interact with each other, and the buyers and sellers entering such orders agree to the terms of a trade. Exchange Act Rule 3b–16 was designed to provide ''a more comprehensive and meaningful interpretation of what an exchange is in light of today's markets.'' [380]

The Quote Rule's definition of an ''exchange market maker'' defines the term ''national securities exchange'' as an ''exchange.'' [381] To avoid confusion between a ''national securities exchange'' and the broader interpretation of ''exchange'' set forth in Exchange Act Rule 3b–16, Regulation NMS would use the term ''national

[372] *See* Exchange Act Rule 11Ac1–2(a)(4).

[373] *See* Exchange Act Rule 11Ac1–1(a)(25) (emphasis added).

[374] *Id.*

[375] *See* Exchange Act Rule 11Ac1–1(a)(5).

[376] Reproposed Rule 600(b)(73).

[377] This change also would impact certain non-NMS rules that define the term ''consolidated system.'' *See, e.g.*, Exchange Act Rule 10b–18(a)(7) (''consolidated system means the consolidated transaction reporting system contemplated by Rule 11Aa3–1''). As discussed below, the Commission is also reproposing to amend certain non-NMS rules that are affected by the definitional changes reproposed today.

[378] 15 U.S.C. 78c(a)(1).

[379] 17 CFR 240.3b–16.

[380] *See* Securities Exchange Act Release No. 40760 (Dec. 8, 1998), 63 FR 70844 (Dec. 22, 1998) (adopting Regulation ATS).

[381] Specifically, the Quote Rule states that the term ''exchange market maker'' shall mean ''any member of a national securities exchange ('exchange') who is registered as a specialist or market maker pursuant to the rules of such exchange.'' *See* Exchange Act Rule 11Ac1–1(a)(9). The statutory requirements applicable to a national securities exchange are set forth in Section 6 of the Exchange Act, 15 U.S.C. 78f.

securities exchange'' rather than ''exchange'' throughout the Regulation. The national securities exchange definition is intended to capture only those entities that operate as national securities exchanges and that are registered as such with the Commission. It is not intended to capture those entities that meet the ''exchange'' definition under Regulation ATS but that operate as something other than a national securities exchange. The use of this term would be consistent with the use of the term ''exchange'' in the existing NMS rules.

f. OTC Market Maker. The Quote Rule and Exchange Act Rule 11Ac1–5 define the term ''OTC market maker'' differently.[382] Unlike the Quote Rule, Exchange Act Rule 11Ac1–5 defines the term ''OTC market maker'' to include an explicit reference to a securities dealer that holds itself out as being willing to buy from and sell to customers or others in the United States. Regulation NMS would retain the reference to transactions with ''customers or others in the United States'' to indicate clearly that a foreign dealer could be an ''OTC market maker'' if it acts as a securities dealer with respect to customers or others in the United States.

Accordingly, Regulation NMS would define ''OTC market maker'' as ''any dealer that holds itself out as being willing to buy from and sell to its customers, or others, in the United States, an NMS stock for its own account on a regular or continuous basis otherwise than on a national securities exchange.'' [383]

g. Vendor. The term ''vendor'' or ''quotation vendor'' is defined differently in three NMS rules: the Quote Rule, the Vendor Display Rule, and Exchange Act Rules 11Aa3–1.[384] Although the definitions are similar, the definition of ''vendor'' in the Vendor Display Rule is the most comprehensive because it encompasses any SIP that disseminates transaction reports, last sale data, or quotation information, whereas the other definitions are less complete in identifying the types of information that vendors typically make available. To provide a uniform and comprehensive definition of the term ''vendor,'' Regulation NMS reproposes to include the definition of ''vendor'' as it was defined in the Vendor Display Rule.[385]

h. Best Bid, Best Offer, and National Best Bid and National Best Offer. The Quote Rule and the Vendor Display Rule define the terms ''best bid'' and ''best offer'' differently.[386] In addition, Exchange Act Rule 11Ac1–5(a)(7) defines the term ''consolidated best bid and offer'' to mean ''the highest firm bid and the lowest firm offer for a security that is calculated and disseminated on a current and continuous basis pursuant to an effective national market system plan.'' Regulation NMS would retain the definitions of ''best bid'' and ''best offer'' used in the Quote Rule. A new term called ''national best bid and national best offer'': (1) Would replace the term ''best bid and best offer'' as that term is used in the Vendor Display Rule; and (2) would replace the term ''consolidated best bid and offer'' as that term is used in Exchange Act Rule 11Ac1–5. This new term refers to the best quotations that are calculated and disseminated by a plan processor pursuant to an effective national market system plan.[387] The definition of ''national best bid and national best offer'' also would address instances where multiple market centers transmit identical bids and offers to the plan processor pursuant to an NMS plan by establishing the way in which these bids and offers are to be prioritized.[388]

i. Bid or Offer, Customer, Nasdaq Security, and Responsible Broker or Dealer. Regulation NMS also would update or clarify the following terms in the NMS rules: ''bid'' or ''offer;'' ''customer;'' ''Nasdaq security;'' and ''responsible broker or dealer.''

The Quote Rule defines the terms ''bid and offer'' to mean ''the bid price and the offer price communicated by an exchange member or OTC market maker to any broker or dealer, or to any customer, at which it is willing to buy or sell one or more round lots of a covered security, as either principal or agent, but shall not include indications of interest.'' [389] Regulation NMS would update this definition by replacing the term ''OTC market maker'' with the phrase ''member of a national securities association'' and call the term ''bid or offer'' rather than ''bid and offer'' to reflect the fact that the terms are not always used in the conjunctive. Modifying the definition to apply to any member of a national securities association would clarify that bids and offers include quotations communicated not only by OTC market makers but also by ATSs, ECNs, and order entry firms that are members of the NASD but that are not market makers.

Expanding the definition of ''bid or offer'' could have the unintended consequence of also expanding the scope of the Quote Rule (proposed to be redesignated as Rule 602) where those terms are used to apply to members of a national securities association that are not OTC market makers (*e.g.*, ECNs and

[382] *Compare* Exchange Act Rules 11Ac1–1(a)(13) and 11Ac1–5(a)(18).

[383] The reproposed definition of ''OTC market maker'' uses the term ''NMS stock'' because there is no OTC market in standardized options.

[384] The Quote Rule define the term ''quotation vendor'' to mean ''any securities information processor engaged in the business of disseminating to brokers, dealers or investors on a real-time basis, bids and offers made available pursuant to this section, whether distributed through an electronic communications network or displayed on a terminal or other display device.'' *See* Exchange Act Rule 11Ac1–1(a)(19). Exchange Act Rule 11Aa3–1(a)(11) defines the term ''vendor'' to mean ''any securities information processor engaged in the business of disseminating transaction reports or last sale data with respect to transactions in reported securities to brokers, dealers or investors on a real-time or other current and continuing basis, whether through an electronic communications network, moving ticker or interrogation device.'' The Vendor Display Rule defines the term ''vendor'' to mean ''any securities information processor engaged in the business of disseminating transaction reports, last sale data or quotation information with respect to subject securities to brokers, dealers or investors on a real-time or other current and continuing basis, whether through an electronic communications network, moving ticker or interrogation device.'' *See* Exchange Act Rule 11Ac1–2(a)(2).

[385] *See* Exchange Act Rule 11Ac1–2(a)(2).

[386] The Quote Rule states that ''[t]he terms *best bid* and *best offer* shall mean the highest priced bid and the lowest priced offer.'' *See* Exchange Act Rule 11Ac1–1(a)(3). The Vendor Display Rule (Exchange Act Rule 11Ac1–2(a)(15)) defines the terms ''best bid'' and ''best offer'' as follows:

(i) With respect to quotations for a reported security, the highest bid or lowest offer for that security made available by any reporting market center pursuant to § 240.11Ac1–1 (Rule 11Ac1–1 under the Act) (excluding any bid or offer made available by an exchange during any period such exchange is relieved of its obligations under paragraphs (b) (1) and (2) of § 240.11Ac1–1 by virtue of paragraph (b)(3)(i) thereof)); Provided, however, That in the event two or more reporting market centers make available identical bids or offers for a reported security, the best bid or best offer (as the case may be) shall be computed by ranking all such identical bids or offers (as the case may be) first by size (giving the highest ranking to the bid or offer associated with the largest size), then by time (giving the highest ranking to the bid or offer received first in time); and

(ii) With respect to quotations for a subject security other than a reported security, the highest bid or lowest offer (as the case may be) for such security disseminated by an over-the-counter market maker in Level 2 or 3 of NASDAQ.

[387] The definition of ''reporting market center'' currently in paragraph (a)(14) of the Vendor Display Rule and incorporated into that Rule's definitions of ''best bid'' and ''best offer'' would no longer be necessary and therefore would be deleted.

[388] *See* reproposed Rule 600(b)(42).

[389] *See* Exchange Act Rule 11Ac1–1(a)(4). Paragraph (a)(6) of the Vendor Display Rule uses the Quote Rule's definition of ''bid'' and ''offer'' for reported securities, but it defines ''bid'' and ''offer'' for Nasdaq SmallCap securities as ''the most recent bid or offer price of an over-the-counter market maker disseminated through Level 2 or 3 of NASDAQ.'' Because Nasdaq SmallCap securities now are reported securities, it is unnecessary to maintain the distinction between reported securities and Nasdaq SmallCap securities. Accordingly, to update and provide a single definition of the terms ''bid'' and ''offer,'' Regulation NMS would eliminate the definitions of ''bid'' and ''offer'' used in the Vendor Display Rule and retain modified versions of the terms as they are defined in the Quote Rule.

ATSs). To avoid this unintended expansion of the scope of the Quote Rule (proposed to be redesignated as Rule 602), Regulation NMS reproposes a revised version of the Quote Rule's definition of ''responsible broker or dealer.'' [390] In particular, Regulation NMS would amend the portion of the definition of ''responsible broker or dealer'' found in paragraph (a)(21)(ii) of the Quote Rule [391] to limit its scope to bids and offers communicated by an OTC market maker.

Regulation NMS also would amend the definition of the term ''customer.'' The Quote Rule defines that term to mean ''any person that is not a registered broker-dealer.'' [392] To indicate that the scope of the definition includes broker-dealers that are exempt from registration as well as registered broker-dealers, Regulation NMS would revise the definition by deleting the term ''registered.'' Thus, Regulation NMS would define the term ''customer'' to mean ''any person that is not a broker-dealer.''

Exchange Act Rule 11Aa3–1 defines the term ''NASDAQ security'' to mean ''any registered equity security for which quotation information is disseminated in the National Association of Securities Dealers Automated Quotation system (''NASDAQ'').'' [393] This acronym is now outdated. Therefore, to modernize this definition and to ensure that any type of registered security that Nasdaq lists is covered by the definition, Regulation NMS would define the term ''Nasdaq security'' to mean ''any registered security listed on The Nasdaq Stock Market, Inc.''

4. Definitions in the Regulation NMS Rules Reproposed Today

Reproposed Rule 600(b) includes a number of new definitions used in reproposed Rules 610 through 612 of Regulation NMS. These new terms are discussed in detail in Sections II through V above. Specifically, for the reasons discussed above, Regulation NMS reproposes the following terms: automated quotation, automated trading center, consolidated display, consolidated last sale information, intermarket sweep order, manual quotation, protected bid or protected offer, SRO display-only facility, SRO trading facility, trade-through, and trading center.

C. Changes to Other Rules

In addition to the changes described above, the rules reproposed today would amend a number of rules that cross-reference current NMS rules or that use terms that Regulation NMS would amend or eliminate. These amendments are intended to be non-substantive. Specifically, the rules reproposed today would make conforming changes to the following rules: [394] § 200.30–3; [395] § 200.800, Subpart N; [396] § 201.101; [397] Rule 144 [398] under the Securities Act of 1933; [399] Exchange Act Rule 0–10; [400] Exchange Act Rule 3a51–1 [401]; Exchange Act Rule 3a55–1; [402] Exchange Act Rule 3b–16; [403] Exchange Act Rules 10a–1; [404] Exchange Act Rule 10b–10; [405] Exchange Act Rule 10b–18; [406] Exchange Act Rule 15b9–1; [407] Exchange Act Rule 12a–7; [408] Exchange Act Rule 12f–1; [409] Exchange Act Rule 12f–2; [410] Exchange Act Rule 15c2–11; [411] Exchange Act Rule 19c–3; [412] Exchange Act Rule 19c–4; [413] Exchange Act Rule 31; [414] Rule 100 of Regulation M under the Exchange Act; [415] Rule 300 of Regulation ATS under the Exchange Act; [416] Rule 301 of Regulation ATS under the Exchange Act; [417] § 249.1001; [418] and Rule 17a–7 under the Investment Company Act of 1940.[419]

VII. General Request for Comment

In addition to any specific requests for comment included above, the Commission generally requests comment on all aspects of the reproposals described above. Interested persons are invited to submit written presentations of views, data, and arguments concerning the reproposals, including the feasibility and practicality of implementing the reproposals and the costs and benefits associated with the reproposals. In addition, the Commission will continue to accept comment on all issues that were previously raised in the Proposing Release and Supplemental Release. Finally, the Commission requests comment, assuming it were to adopt the reproposals, on the nature and length of implementation and phase-in periods that would be appropriate to allow market participants time to adapt to the new regulatory structure and implement the reproposals in an efficient and orderly manner. The Commission will consider all comments previously submitted in response to the Proposing Release, the Hearing, and the Supplemental Release, in addition to all comments received in response to this release, in evaluating any further action taken on Regulation NMS.

VIII.Paperwork Reduction Act

A. Trade-Through Rule

The reproposed Trade-Through Rule contains collection of information requirements within the meaning of the Paperwork Reduction Act of 1995.[420] The Commission published a notice requesting comment on the collection of information requirements in the Proposing Release, and submitted these requirements to the Office of Management and Budget (''OMB'') for

[390] *See* Exchange Act Rule 11Ac1–1(a)(21).

[391] *See* Exchange Act Rule 11Ac1–1(a)(21)(ii).

[392] *See* Exchange Act Rule 11Ac1–1(a)(26).

[393] *See* Exchange Act Rule 11Aa3–1(a)(6).

[394] § 200.800, Subpart N, § 201.101, Exchange Act Rules 0–10, 3a51–1(e), 3a55–1, 10a–1, and 31, and Rule 17a–7 under the Investment Company Act of 1940 are in addition to those included in the Proposing Release.

[395] 17 CFR 200.30–3. In addition to conforming changes, the Commission is reproposing to amend this rule to grant the Director of the Division of Market Regulation the authority to grant exemptions to Rules 610 through 612.

[396] 17 CFR 200.800, Subpart N.

[397] 17 CFR 201.101.

[398] 17 CFR 230.144.

[399] 15 U.S.C. 77a *et seq.*

[400] 17 CFR 240.0–10.

[401] 17 CFR 240.3a51–1.

[402] 17 CFR 240.3a55–1. Section 3(a)(55)(C)(vi) under the Exchange Act and Section 1a(25)(B)(vi) of the Commodity Exchange Act (''CEA'') provide that an index is not a narrow-based security index if a future on the index is traded on or subject to the rules of a board of trade and meets such requirements as are established by rule, regulation, or order jointly by the two Commissions. Pursuant to this authority, the Commission and the Commodity Futures Trading Commission (''CFTC'') jointly adopted Exchange Act Rule 3a55–1 and CEA Rule 41.11. The Commission today is proposing to substitute ''NMS securities, as defined in § 242.600,'' for ''reported securities, as defined in § 240.11Ac1–1'' in Exchange Act Rule 3a55–1. The new term ''NMS security'' is proposed to be defined in § 242.600 the same as the term ''reported security'' is defined in current Exchange Act Rule 11Ac1–1. Accordingly, the proposed changes to Rule 3a55–1 are technical. If the Commission adopts Regulation NMS, the changes to Rule 3a55–1, and identical changes to CEA Rule 41.11, would need to be adopted jointly by the Commission and the CFTC.

[403] 17 CFR 240.3b–16.

[404] 17 CFR 240.10a–1.

[405] 17 CFR 240.10b–10.

[406] 17 CFR 240.10b–18.

[407] 17 CFR 240.15b9–1.

[408] 17 CFR 240.12a–7.

[409] 17 CFR 240.12f–1.

[410] 17 CFR 240.12f–2.

[411] 17 CFR 240.15c2–11.

[412] 17 CFR 240.19c–3.

[413] 17 CFR 240.19c–4.

[414] 17 CFR 240.31.

[415] 17 CFR 242.100.

[416] 17 CFR 242.300.

[417] 17 CFR 242.301. The Commission also is proposing a technical change to Rule 301(b)(3)(iii) of Regulation ATS to correct a cross-reference to Rule 301(b)(3)(ii)(A) by deleting the reference to subparagraph (A). This change would not have any substantive effect.

[418] 17 CFR 249.1001.

[419] 17 CFR 270.17a–7.

[420] 44 U.S.C. 3501 *et seq.* (''Paperwork Reduction Act'').

review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The Commission is resubmitting these requirements to the OMB for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. An agency may not conduct or sponsor, and a person is not required to respond to, an information collection unless it displays a currently valid OMB control number. The title of the affected collection is ''Order Protection Rule'' under OMB control number 3235–0600.[421]

In the Proposing Release, the Commission proposed to create three new information collections. The first collection of information arose from the proposed requirement that trading centers[422] adopt policies and procedures reasonably designed to prevent the execution of a transaction at prices inferior to prices displayed by other trading centers. The other two collections of information related to requirements in a proposed exception to the Trade-Through Rule included in the Proposing Release—the opt-out exception.[423] The revised Trade-Through proposal does not contain an opt-out exception, and therefore, the collections of information associated with the proposed opt-out exception are no longer applicable.[424]

The Commission has revised the discussion below to reflect the requirements of the reproposed Trade-Through Rule.

1. Summary of Collection of Information

The reproposed Trade-Through Rule would require a trading center to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the execution of trades at prices inferior to protected quotations displayed by other trading centers, unless a valid exception applies, and, if relying on such an exception, that are reasonably designed to assure compliance with the terms of the exception. The nature and extent of the policies and procedures that a trading center would be required to establish to comply with this requirement would depend upon the type, size, and nature of the trading center.

2. Proposed Use of Information

The requirement that each trading center establish, maintain, and enforce written policies and procedures reasonably designed to prevent the execution of trades at prices inferior to protected quotations displayed by other trading centers or to assure compliance with the terms of an exception would help ensure that the trading center and its customers, subscribers, members, and employees, as applicable, generally avoid engaging in trade-throughs, unless a valid exception is applicable.

3. Respondents

The requirement for each trading center to establish written policies and procedures reasonably designed to prevent the execution of trade-throughs potentially would apply to eight registered national securities exchanges that trade NMS stocks and the NASD,[425] and approximately 600 broker-dealers registered with the Commission.[426] The Commission requests comment on the accuracy of these figures.

The Commission has considered each of these respondents for the purposes of calculating the reporting burden under the reproposed Trade-Through Rule.

4. Total Annual Reporting and Recordkeeping Burden

The Commission has modified the estimated total annual reporting and recordkeeping burden for this collection of information to take into account changes made to the reproposed Trade-Through Rule. The revisions relate to the burden necessary to establish written policies and procedures reasonably designed to assure compliance with the exceptions contained in the reproposed Rule. Thus, trading centers would need to develop written policies and procedures for preventing and monitoring for trade-throughs that do not fall within an enumerated exception, and, if relying on such an exception, that are reasonably designed to assure compliance with the terms of the exception, to assure that they are in compliance with the Rule.

Although the exact nature and extent of the required policies and procedures that a trading center would be required to establish likely would vary depending upon the nature of the trading center (*e.g.*, SRO vs. non-SRO, full service broker-dealer vs. market maker), the Commission broadly estimates that it would take an SRO trading center approximately 270 hours of legal,[427] compliance,[428] information technology[429] and business operations personnel[430] time,[431] and a non-SRO

[421] *See supra* note 9.

[422] In the Proposing Release, the Commission used the term ''order execution facility'' to describe the entities that would be subject to the proposed rule. In the revised proposal, these entities are referred to as ''trading centers.'' Specifically, a ''trading center'' would be defined to mean a national securities exchange or national securities association that operates an SRO trading facility, an alternative trading system, an exchange market maker, an OTC market maker, or any other broker or dealer that executes orders internally by trading as principal or crossing orders as agent. *See* reproposed Rule 600(b)(78).

[423] *See* Section III.G.1. of the Proposing Release.

[424] *See supra* Section II.A.4.

[425] There are eight national securities exchanges (Amex, BSE, CBOE, CHX, NSX, NYSE, Phlx and PCX) and one national securities association (NASD) that trade NMS stocks and thus would be subject to the reproposed Rule. The ISE does not trade NMS stocks and thus would not be subject to the reproposed Rule.

[426] After further analysis, the Commission has revised the estimated number of broker-dealers that would be subject to the reproposed Trade-Through Rule. The revised number includes the approximately 585 firms that were registered equity market makers or specialists at year-end 2003 (this number was derived from annual FOCUS reports and discussion with SRO staff), as well as ATSs that operate trading systems that trade NMS stocks. The Commission preliminarily believes it is reasonable to assume that in general, firms that are block positioners—*i.e.*, firms that are in the business of executing orders internally—are the same firms that are registered market makers (for instance, they may be registered as a market maker in one or more Nasdaq stocks and carry on a block positioner business in exchange-listed stocks), especially given the amount of capital necessary to carry on such a business.

[427] Based on industry sources, the Commission estimates that the average hourly rate for outsourced legal service in the securities industry is between $150 per hour and $300 per hour. For purposes of this Release, the Commission will use the highest rate of $300 per hour to determine potential outsourced legal costs associated with the proposed rule. For in-house legal services, the Commission estimates that the average hourly rate for an attorney in the securities industry is approximately $82 per hour. The $82 per hour figure for an attorney is from the Securities Industry Association, *Report on Management & Professional Earnings in the Securities Industry 2003* (Sept. 2003), adjusted by the SEC staff for an 1800-hour work-year with a 35% upward adjustment for overhead, reflecting the cost of supervision, space, and administrative support.

[428] The Commission estimates that the average hourly rate for an assistant compliance director in the securities industry is approximately $103 per hour. The $103 per hour figure for an assistant compliance director is from the Securities Industry Association, *Report on Management & Professional Earnings in the Securities Industry 2003* (Sept. 2003), adjusted by the SEC staff for an 1800-hour work-year with a 35% upward adjustment for overhead, reflecting the cost of supervision, space, and administrative support.

[429] The Commission estimates that the average hourly rate for a senior computer programmer in the securities industry is approximately $67 per hour. The $67 per hour figure for a senior computer programmer is from the Securities Industry Association, *Report on Management & Professional Earnings in the Securities Industry 2003* (Sept. 2003), adjusted by the SEC staff for an 1800-hour work-year with a 35% upward adjustment for overhead, reflecting the cost of supervision, space, and administrative support.

[430] The Commission estimates that the average hourly rate for an operations manager in the securities industry is approximately $70 per hour. The $70 per hour figure for an operations manager is from the Securities Industry Association, *Report on Management & Professional Earnings in the Securities Industry 2002* (Sept. 2002), adjusted by the SEC staff for an 1800-hour work-year with a 35% upward adjustment for overhead, reflecting the cost of supervision, space, and administrative support.

[431] The Commission anticipates that of the 270 hours it estimates would be spent to establish the required policies and procedures, 120 hours would

Continued

trading center approximately 210 hours of legal, compliance, information technology and business operations personnel time,[432] to develop the required policies and procedures.

Included within this estimate, the Commission expects that SRO and non-SRO respondents may incur one-time external costs for out-sourced legal services. While the Commission recognizes that the amount of legal outsourcing utilized to help establish written policies and procedures may vary widely from entity to entity, it estimates that on average, each trading center would outsource 50 hours of legal time in order to establish policies and procedures in accordance with the reproposed Rule.

The Commission estimates that there would be an initial one-time burden of 220 burden hours per SRO trading center or 1,980 hours,[433] and 160 burden hours per non-SRO trading center[434] or 96,000 hours, for a total of 97,980 burden hours to establish policies and procedures reasonably designed to prevent the execution of a trade-through, for an estimated one-time initial cost of $8,646,405.[435] The Commission estimates a capital cost of approximately $9,135,000 for both SRO and non-SRO trading centers resulting from outsourced legal work[436] for a total one-time initial cost of $17,781,405.[437]

Once a trading center has established written policies and procedures reasonably designed to prevent trade-throughs in its market, the Commission estimates that it would take the average SRO and non-SRO trading center approximately two hours per month of internal legal time and three hours of internal compliance time to ensure that its written policies and procedures are up-to-date and remain in compliance with reproposed Rule 611. The Commission staff estimates that these ongoing costs would be 60 hours annually per respondent, for a total estimated annual cost of $3,456,684.[438]

5. General Information About Collection of Information

This collection of information would be mandatory. The Commission expects that the written policies and procedures that would be generated pursuant to reproposed Rule 611 would be communicated to the members, subscribers, and employees (as applicable) of all entities covered by the reproposed Rule. To the extent that this information is made available to the Commission, it would not be kept confidential. Any records generated in connection with the reproposed Rule's requirement to establish written policies and procedures would be required to be preserved in accordance with, and for the periods specified in, Exchange Act Rules 17a–1[439] and 17a–4(e)(7).[440]

6. General Request for Comment

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

Persons submitting comments on the collection of information requirements should direct them to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should also send a copy of their comments to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609, with reference to File No. S7–10–04. Requests for materials submitted to OMB by the Commission with regard to this collection of information should be in writing, refer to File No. S7–10–04, and be submitted to the Securities and Exchange Commission, Records Management, Office of Filings and Information Services, 450 Fifth Street, NW., Washington, DC 20549–0609. As OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

B. Access Rule

In the Proposing Release, the Commission requested comment on its preliminary view that proposed Rule 610 and the proposed amendment to Rule 301(b)(5) under Regulation ATS do not contain a collection of information requirement as defined by the Paperwork Reduction Act.[441] No comments were submitted that addressed the issue. The Commission continues to believe that reproposed Rule 610 and the reproposed amendment to Rule 301(b)(5) do not contain a collection of information requirement.

C. Sub-Penny Rule

In the Proposing Release, the Commission stated its preliminary view that proposed Rule 612 does not contain a collection of information requirement as defined by the Paperwork Reduction Act.[442] Although the Commission solicited comment on the PRA implications of the proposed Sub-Penny Rule, no commenters addressed this issue. The Commission continues to believe that reproposed Rule 612 does not contain a collection of information requirement.

D. Market Data Rules and Plan Amendments

In the Proposing Release, the Commission stated its preliminary view that the proposed amendments to the joint-industry plans and to Exchange Act Rules 11Aa3–1 and 11Ac1–2 (proposed to be redesignated as Rules 601 and 603) do not impose a collection of information requirement as defined

be spent by legal personnel, 105 hours would be spent by compliance personnel, 20 hours would be spent by information technology personnel and 25 hours would be spent by business operations personnel of the SRO trading center.

[432] The Commission anticipates that of 210 hours it estimates would be spent to establish policies and procedures, 87 hours would be spent by legal personnel, 77 hours would be spent by compliance personnel, 23 hours would be spent by information technology personnel and 23 hours would be spent by business operations personnel of the non-SRO trading center.

[433] The estimated 1,980 burden hours necessary for SRO trading centers to establish policies and procedures are calculated by multiplying nine times 220 hours (9 × 220 hours = 1,980 hours).

[434] The estiamted 96,000 burden hours necessary for non-SRO trading centers to establish policies and procedures are calculated by multiplying 600 times 160 hours (600 × 160 hours = 96,000 hours).

[435] This figure was calculated as follows: (70 legal hours × $82) + (105 compliance hours × $103) + (20 information technology hours × $67) + (25 business operation hours × $70) = $19,645 pier SRO × 9 SROs = $176,805 total cost for SROs; (37 legal hours × $82) + (77 compliance hours × $103) + (23 information technology hours × $67) + (23 business operation hours × $70) = $14,116 per broker-dealer × 600 broker-dealers = $8,469,600 total cost for broker-dealers, $176,805 + $8,469,000 = $8,646,405.

[436] This figure was calculated as follows: (50 legal hours × $300 × 9 SROs) + (50 legal hours × $300 × 600 broker-dealers) = $9,135,000.

[437] This figure was calculated by adding $8,646,405 and $9,135,000.

[438] This figure was calculated as follows: (2 legal hours × 12 months × $82) × (9 + 600) + (3 compliance hours × 12 months × $103) × (9 + 600)) = $3,456,684.

[439] 17 CFR 240.17a–1.

[440] 17 CFR 240.17a–4(e)(7).

[441] Proposing Release, 69 FR at 11160.

[442] Proposing Release, 69 FR at 11172.

by the Paperwork Reduction Act.[443] No comments were received that addressed this issue. The Commission continues to believe that these reproposed amendments do not contain a collection of information requirement.

E. Regulation NMS

In the Proposing Release, the Commission stated its preliminary view that proposed Rule 600, the redesignation of the NMS rules, and the conforming amendments to various rules do not impose a collection of information requirement as defined by the Paperwork Reduction Act.[444] No comments were received that addressed this issue. The Commission continues to believe that these proposed amendments do not contain a collection of information requirement.

IX. Consideration of Costs and Benefits

In the Proposing Release, the Commission identified certain costs and benefits of the Regulation NMS proposals, and, to help evaluate the costs and benefits, requested comment on all aspects of the costs and benefits and encouraged commenters to identify or supply any relevant data concerning the costs or benefits of the proposal.[445] To the extent commenters discussed costs and benefits, the Commission has considered those comments. The Commission renews its request for comments on the costs and benefits of the Regulation NMS proposals. The Commission encourages commenters to identify, discuss, analyze, and supply relevant data concerning the costs or benefits of the reproposed rules.

A. Trade-Through Rule

Reproposed Rule 611 would require a trading center (which includes national securities exchanges and national securities associations that operate SRO trading facilities, ATSs, market makers, and block positioners) to establish, maintain, and enforce written policies and procedures that are reasonably designed to prevent trade-throughs of protected quotations, and, if relying on an exception, that are reasonably designed to assure compliance with the terms of the exception. To qualify for protection, a quotation would be required to be displayed and immediately accessible through automatic execution. The reproposed Rule also would require a trading center to regularly surveil to ascertain the effectiveness of the policies and procedures and to take prompt remedial action to remedy deficiencies in such policies and procedures.

Reproposed Rule 611 would include a variety of exceptions to make intermarket price protection as efficient and workable as possible. These would include an intermarket sweep exception, which would allow market participants simultaneously to access multiple price levels at different trading centers—a particularly important function now that trading in penny increments has dispersed liquidity across multiple price levels. The intermarket sweep exception would enable trading centers that receive sweep orders to execute those orders immediately, without waiting for better-priced quotations in other markets to be updated. In addition, reproposed Rule 611 would, among other things, provide exceptions for the quotations of trading centers experiencing a material delay (generally of more than one second) in providing a response to incoming orders, as well as for flickering quotations with prices that have been displayed for less than one second.

1. Benefits

Many commenters supported the adoption of a uniform rule against trade-throughs for all NMS stocks and discussed the benefits that such a rule would bring to the markets.[446] These commenters noted that such a uniform rule would encourage the use of displayed limit orders, thus increasing depth and liquidity in the market.[447] Some of these commenters also stated that the trade-through proposal would increase investor confidence by helping to eliminate the impression of unfairness when an investor's order executes at a price that is worse than another displayed order, or when a trade occurs at a price that is inferior to the investor's displayed order.[448] As discussed above in Section II.A.1, the Commission preliminarily agrees with these commenters.

The Commission preliminarily believes that the reproposed Trade-Through Rule would enhance the overall fairness and efficiency of the NMS and produce significant benefits for investors. By providing greater protection for displayed prices, the reproposed Rule would serve to enhance the depth and liquidity of the NMS, and thus contribute to the maintenance of fair and orderly markets. By better protecting the interests of investors, both those that post limit orders and those that execute against posted limit orders, the reproposed Rule would promote investor confidence in the NMS. The reproposed Rule would be a significant improvement over the existing ITS trade-through rule, and would level the competitive playing field among markets by eliminating the potential advantage that the ITS rule afforded to manual markets.

The Commission preliminarily believes that the proposed Trade-Through Rule is necessary to, and would serve to, enhance protection of displayed prices. Investors who post limit orders, and trading centers that quote aggressively, should not see trades occurring on another market at a price inferior to their orders, except in circumstances where an exception applies. By requiring trading centers to establish written policies and procedures reasonably designed to prevent trade-throughs and to comply with exceptions, and by requiring them to regularly surveil to ascertain the effectiveness of the policies and procedures and to take prompt remedial action to remedy deficiencies in such policies and procedures, the reproposed Rule should help ensure that displayed limit orders are not routinely bypassed by transactions occurring in other markets at inferior prices. By providing this protection for displayed prices, the Rule would serve to promote greater display of limit orders and more aggressive quoting. An increase in the use of limit orders and aggressive quoting should enhance price discovery and depth and liquidity in the markets; greater depth and liquidity would lead to improved execution quality for marketable orders, particularly for the execution of large institutional orders where statistics show there is room for improvement in both the markets for the trading of Nasdaq and exchange-listed stocks.[449]

Comment is requested on whether extending trade-through protection to DOB quotations [450] would significantly increase the benefits of the reproposed Trade-Through Rule. Would protecting quotations at multiple price levels further encourage the display of limit orders and thereby significantly enhance depth and liquidity in the NMS? Since decimalization, quoted spreads have narrowed substantially. Market participants often may not be willing to quote in significant size at the inside prices, but might be willing to do so at a price that is a penny or more

[443] Proposing Release, 69 FR at 11186.

[444] Proposing Release, 69 FR at 11197.

[445] Proposing Release, 69 FR at 11148–11150, 11161, 11172–73, 11186–89, 11197–98.

[446] *See supra* Section II.A.1.

[447] *See, e.g.*, BNY Letter at 2; Consumer Federation Letter at 2; ICI Letter at 7.

[448] *See, e.g.*, Consumer Federation Letter at 2; ICI Letter at 7.

[449] *See supra* Section II.A.1.

[450] *See supra* Section II.A.5.

away from the inside prices. Granting trade-through protection to such quotations potentially would reward this beneficial quoting activity. In assessing the potential benefits of DOB protection, commenters should consider the effect of the reserve (or undisplayed) size function that many trading centers offer investors.[451]

By requiring trading centers to establish written policies and procedures reasonably designed to prevent trade-throughs and to comply with exceptions, and by requiring them to regularly surveil to ascertain the effectiveness of the policies and procedures and to take prompt remedial action to remedy deficiencies in such policies and procedures, the reproposed Rule also should help ensure that investors that submit marketable orders consistently receive executions at the best displayed bid or offer (or better). The Rule should facilitate the ability of a broker-dealer to achieve best execution for its customer orders because the market to which a broker-dealer routes an order would not execute the order at a price that is inferior to a protected bid or offer displayed on the other market (unless an exception applies).[452] By better protecting the interests of all investors—both those that post limit orders and those that execute against posted limit orders—the reproposed Rule should bolster investor confidence in the integrity of the NMS, which should encourage investors to be more willing to invest in the market, thus adding depth and liquidity to the markets and promoting the ability of listed companies to raise capital.

Almost all commenters agreed that the current ITS trade-through rule must be fixed to accommodate the realities of today's NMS, in particular the differences in operation among automated and non-automated markets. Reproposed Rule 611, by providing protection only for automated quotations displayed by automated trading centers, would significantly update the ITS trade-through rule. Intermarket efficiency and certainty of execution in the NMS would be improved as automated markets would no longer need to wait for responses from non-automated markets and thus would be able to execute trades more quickly without regard for potentially unavailable quotations displayed on non-automated markets. The reproposed Rule also would level the playing field by eliminating the potential competitive advantage the existing ITS rule provides to manual markets. In addition, by providing an incentive for non-automated markets to automate—because market participants may be less likely to send their order flow to a market center whose orders can be ignored by other markets—the proposed Rule generally should improve the accessibility of bids and offers for all investors and increase the efficiency of the NMS.

When an investor receives an execution in one market at a price that is inferior to a price displayed in another market, that ''trade-through'' has a cost to the investor receiving the inferior execution. The Commission preliminarily believes that the benefits of strengthening price protection for exchange-listed stocks (by eliminating the gaps in ITS coverage of block positioners and 100-share quotes) and introducing price protection for Nasdaq stocks would be substantial, although the total amount is difficult to quantify. One objective, though quite conservative, estimate of benefits is the dollar amount of quotations that currently are traded through. Commission staff's analysis of current trade-through rates indicates that over 12 billion shares of displayed quotations in Nasdaq and NYSE stocks were traded through in 2003, by an average amount of 2.3 cents for Nasdaq stocks and 2.2 cents for NYSE stocks.[453] These traded-through quotations represent approximately $209 million in Nasdaq stocks and $112 million in NYSE stocks, for a total of $321 million in bypassed limit orders and inferior prices for investors in 2003 that could have been addressed by strong trade-through protection. The Commission preliminarily believes that this $321 million estimated annual benefit, particularly when combined with the benefits of enhanced investor confidence in the fairness and orderliness of the equity markets, would justify the one-time costs of implementation and ongoing annual costs of the reproposed Trade-Through Rule.

The foregoing estimate of annual benefits is very conservative because it is based solely on depth of quotations that are displayed in the *absence* of strong price protection. In essence, it measures the problem—a shortage of quoted depth—that reproposed Rule 611 is designed to address, rather than the benefits that it would achieve. Every trade-through transaction potentially sends a message to market participants that their displayed quotations can be and are ignored by other market participants. When the total share volume of trade-through transactions that do not interact with displayed quotations reaches 8% and above for hundreds of the most actively traded NMS stocks, this message is unlikely to be missed by those who watched their quotations being traded through. Certainly, the practice of trading through displayed size is most unlikely to prompt market participants to display even greater size.

As discussed above,[454] a primary objective of reproposed Rule 611 is to increase displayed depth and liquidity in the NMS and thereby reduce trading costs for a wide spectrum of investors, particularly institutional investors that trade in large sizes. It is difficult, however, to precisely measure the extent to which strengthened price protection would improve market depth and liquidity, and thereby lower trading costs of investors. The difficulty of estimation, however, should not hide from view the enormous potential benefit for investors of improving depth and efficiency of the NMS. Because of the huge dollar amount of trading volume in NMS stocks—more than $17 trillion in 2003[455]—even the most incremental improvement in market depth and liquidity could generate a dollar amount of benefits that *annually* would dwarf the one-time start-up costs of implementing trade-through protection.

[451] For example, Market A may be displaying a best offer of 1000 shares at $10.00, and DOB offers of 2000 shares at $10.01 and 2000 shares at $10.02. With a reserve size function, however, Market A may have an additional 1000 shares offered at $10.00 and an additional 2000 shares offered at $10.01, neither of which is displayed. Assuming the displayed offers of $10.00, $10.01, and $10.02 were protected quotations under the Voluntary Depth Alternative, Market B could execute a trade at $10.03 only by simultaneously routing an order to execute against the accumulated displayed size of the protected quotations at Market A. Market B therefore would be required to route a buy order, identified as an intermarket sweep order, to Market A with a limit price of $10.02 for a total of 5000 shares (the accumulated amount of the displayed size of protected quotations with a price of $10.02 or better at Market A). Under the priority rules currently in effect at electronic markets, undisplayed size has priority over displayed size at an inferior price. Accordingly, Market A would execute the 5000 share buy order as follows: 2000 shares at $10.00 (1000 displayed plus 1000 reserve) and 3000 shares at $10.01 (2000 displayed plus 1000 reserve). While Market B would have complied with the Rule, the displayed $10.02 offer at Market A would still go unfilled when Market B traded at $10.03. Comment is requested on the extent to which this outcome would detract from the benefits of the Voluntary Depth Alternative.

[452] The Commission emphasizes that adoption of reproposed Rule 611 would in no way lessen a broker-dealer's duty of best execution. *See supra* section II.B.4.

[453] *See supra* Section II.A.1.

[454] *Id.*

[455] World Federation of Exchanges, Annual Report (2003), at 86.

One approach to evaluating the potential benefits of the reproposed Rule is to examine a category of investors that stand to benefit a great deal from improved depth and liquidity for NMS stocks—the shareholders of U.S. equity mutual funds. In 2003, the total assets of such funds were $3.68 trillion.[456] The average portfolio turnover rate for equity funds was 55%, meaning that the total purchases and sales of the securities they held total approximately $4.048 trillion.[457] A leading authority on the trading costs of institutional investors has estimated that in 2003 the average price impact experienced by investment managers in U.S. stocks ranged from 17.4 basis points for giant-capitalization stocks, 21.4 basis points for large-capitalization stocks, and up to 35.4 basis points for micro-capitalization stocks.[458] In addition, it estimated the cost attributable to adverse price movements while searching for liquidity for institutional orders, which often are too large simply to be presented to the market. Its estimate of search costs ranged from 13 basis points for giant capitalization stocks, 23 basis points for large capitalization stocks, and up to 119 basis points for micro-capitalization stocks. Assuming that the average price impact and search costs incurred across all stocks is a conservative 37.4 basis points,[459] the shareholders in U.S. equity mutual funds incurred implicit trading costs of $15.1 billion in 2003. Based on a hypothetical assumption that, in light of the current share volume of trade-through transactions that does not interact with displayed liquidity,[460] intermarket trade-through protection could improve depth and liquidity for NMS stocks by at least 5% (or an average reduction of 1.87 basis points in price impact and liquidity search costs for large investors), the savings in trading costs for U.S. equity mutual funds alone, and the improved returns for their millions of individual shareholders, would have amounted to approximately $755 million in 2003.

Of course, the benefits of improved depth and liquidity for the direct equity holdings of other types of investors, such as pension funds, insurance companies, and individuals, are not incorporated in the foregoing calculations. In 2003, these other types of investors held 78% of the value of publicly traded U.S. equity outstanding, with equity mutual funds holding the remaining 22%.[461] Assuming that these other types of investors experienced a reduction in trading costs that merely equaled the estimated reduction of trading costs for equity mutual funds, the assumed 5% improvement in market depth and liquidity could yield total trading cost savings of over $1.5 billion annually. Such savings would improve the investment returns of equity ownership, thereby promoting the retirement and other long-term financial interests of individual investors and reducing the cost of capital for listed companies.

2. Costs

Some commenters expressed concern over the anticipated cost of implementing the trade-through proposal.[462] These commenters argued that proposed Rule 611 would be too expensive and that the costs associated with implementing it would outweigh the perceived benefits of the rule. Some commenters were concerned about the cost of specific requirements in the proposed rule, particularly the procedural requirements associated with the proposed opt-out exception (*e.g.*, obtaining informed consent from customers and disclosing the NBBO to customers).[463] As discussed above, however, the reproposed Trade-Through Rule does not contain an opt-out exception, as was originally proposed.[464] Therefore, the concerns expressed by commenters relating to the costs of implementing an opt-out exception are not applicable. Commenters also expressed concern that applying the trade-through proposal to the Nasdaq market would harm market efficiency and execution quality.[465] As discussed above, the Commission preliminarily believes that a uniform rule that serves to limit the incidence of trade-throughs would improve market efficiency and benefit execution quality.[466]

The Commission recognizes that there would be significant one-time costs to implement the reproposed Trade-Through Rule. Trading centers would necessarily incur costs associated with establishing, maintaining, and enforcing written policies and procedures reasonably designed to prevent trade-throughs—in other words, with determining a course of action for how the trading center would comply with the requirements of the Rule, including compliance with the exceptions contained in the reproposed Rule. Although the extent of these costs would vary because the exact nature and extent of each trading center's written policies and procedures would depend on the type, size and nature of each entity's business, as discussed above in Section VIII.A., for purposes of the PRA the Commission broadly estimates that each SRO trading center would incur an average one-time initial cost for establishing such policies and procedures of approximately $34,645, and each non-SRO trading center would incur an average one-time initial cost for establishing policies and procedures of approximately $29,116, for a total of $17,781,405.[467]

Each trading center also would incur initial up-front costs associated with taking action necessary to implement the written policies and procedures it has developed, which would include necessary modifications to order routing and execution systems to ''hard-code'' compliance with the Rule and the exceptions. For instance, modifications to order routing and execution systems would need to be made to route and execute orders in compliance with the requirements of the proposed Rule to prevent trade-throughs of protected quotations (which would include, for instance, the ability to recognize quotations identified in the consolidated quotation system as manual quotations on a quotation-by-quotation basis). Trading centers would need to make sure they have connectivity to other trading centers in

[456] Mutual Fund Fact Book, *supra* note 135 at 55.

[457] *Id.* at 64. Portfolio turnover is measured by adding total fund purchases and sales, dividing by 2, and then dividing by total fund assets. Because price impact occurs for both purchases and sales, the turnover rate must be doubled, then multiplied by total fund assets, to measure the total value of trading that is affected by price impact costs.

[458] Plexus Group, Inc., Commentary 80, ''Trading Truths: How Mis-Measurement of Trading Costs Is Leading Investors Astray,'' (April 2004), at 2.

[459] The estimate of 37.4 basis points is the average of the total market impact and liquidity search costs for giant capitalization stocks (30.4 basis points) and the total market impact and liquidity search costs for large capitalization stocks (44.4 basis points). The much higher market impact and liquidity search costs of midcap, smallcap, and microcap stocks are not included.

[460] *See supra* Section II.A.1.

[461] Mutual Fund Fact Book, *supra* note 135 at 59.

[462] *See, e.g.*, Bloomberg Tradebook Letter at 14; Fidelity Letter I at 12; Instinet Letter at 14, 15; Nasdaq Letter II at 2; Peake Letter I at 2; Reg NMS Study Group Letter at 4; Rosenblatt Securities Letter II at 4; STANY Letter at 3; UBS Letter at 8.

[463] *See, e.g.*, Ameritrade Letter I at 8; Brut Letter at 10–12; Citigroup Letter at 8–9; E*TRADE Letter at 7; Financial Information Forum Letter at 2; JP Morgan Letter at 4; SIA Letter at 12–15.

[464] *See supra* Section II.A.4.

[465] *See, e.g.*, Citadel Letter at 6; Hudson River Trading Letter at 1–2; Instinet Letter at 12, 14; Nasdaq Letter II at 1–2, 5.

[466] *See supra* Section II.A.1.

[467] *See supra* notes 431 to 437 and accompanying text. As with any new Commission rule, trading centers also would have to take steps to educate and train their employees as to the scope and impact of, and how to comply with, the reproposed Rule and the policies and procedures implemented by the trading center.

the NMS that could post protected quotations, whether through proprietary linkages or through use of third-party services. As noted below, however, the Commission preliminarily believes that most of this private linkage functionality already exists, particularly in the market for Nasdaq securities. Surveillance systems would need to be modified to assure an effective mechanism for monitoring transactions after-the-fact for ongoing compliance purposes. Also, trading systems would need to be programmed to recognize when exceptions to the operative provisions of reproposed Rule 611 were applicable. For example, trading centers would need to be able to identify outgoing and recognize incoming orders as intermarket sweep orders. Data feeds and market vendor systems would need to be modified to accommodate order identifiers for manual quotations and intermarket sweep orders, which costs (to the extent incurred) would likely be passed along to the end users of these systems, the trading centers. These costs are included within the estimates below.

For non-SRO trading centers that rely upon their own internal order routing and execution management systems, of which the Commission preliminarily estimates that there are approximately 20, the Commission preliminarily estimates the average cost of necessary systems changes to implement the Rule would be approximately $3 million per trading center, for a total one-time start-up cost of approximately $60 million.[468] The Commission preliminarily estimates that the remaining non-SRO trading centers that would be subject to the reproposed Rule would utilize outside vendors to provide these services, consistent with their current use of such services for order routing and execution management. For these non-SRO trading centers, the Commission preliminarily estimates the cost of necessary systems modifications that would be passed along to the trading centers to be approximately $50,000 per trading center, for a total initial cost of $21 million.[469] The Commission also preliminarily estimates that the average cost to the nine SROs to make necessary system modifications to implement the reproposed Rule would be $5 million per SRO, for a total of $45 million. Therefore, preliminary estimated overall total one-time implementation costs, added to PRA costs, would be approximately $144 million.

In addition, broker-dealers that would not fall within the proposed definition of a trading center but that employ their own smart-order routing technology to route orders to multiple trading centers could choose to route orders in compliance with the proposed intermarket sweep exception. These broker-dealers would need to make necessary modifications to their order routing practices and proprietary order routing systems to monitor the protected quotations of trading centers and to properly identify such intermarket sweep orders. The Commission preliminarily does not believe that this category of broker-dealers is very large. The Commission also preliminarily believes it likely that most if not all of these non-trading center broker-dealers that employ their own order-routing technology already have systems in place that monitor best-priced quotations across markets, and thus does not believe that the changes necessary to implement the intermarket sweep order would be substantial.

With respect to maintaining and updating its required written policies and procedures to ensure they continue to be in compliance with the reproposed Rule, for purposes of the PRA the Commission preliminarily estimates that the average annual cost for each trading center would be approximately $5,676 per trading center per year, for a total annual cost for all trading centers of $3,456,684.[470] With regard to ongoing monitoring for and enforcement of trading in compliance with the Rule, the Commission preliminarily believes that, once the tools necessary to carry out on-going monitoring have been put in place (which are included in the above cost estimates), a trading center would be able to incorporate ongoing monitoring and enforcement within the scope of its existing surveillance and enforcement policies and procedures without a substantial additional burden.

The Commission recognizes, however, that this ongoing compliance would not be cost-free, and that trading centers would incur some additional annual costs associated with ongoing compliance, including compliance costs of reviewing transactions. For instance, the Commission recognizes that access to a database of BBO information for each trading center whose quotations would be protected by the reproposed Trade-Through Rule would be necessary to monitor transactions for compliance with the Rule on an after-the-fact basis. The Commission believes that this information currently is available, at least with respect to the BBO of each trading center, and understands that such information currently is maintained by at least one industry vendor. The Commission preliminarily believes that the cost to each trading center to access this database would be incremental in relation to the cost of other services provided by the vendor.[471] The Commission preliminarily estimates that each trading center would incur an average annual ongoing compliance cost of $30,144 for a total annual cost of $18,357,696 for all trading centers.[472]

The Commission also requests comment on whether the Voluntary Depth Alternative could be implemented in a practical and cost-effective manner.[473] To comply, trading centers would need to monitor a significantly larger number of protected quotations displayed by other markets and route orders to execute against such quotations.[474] The Voluntary Depth Alternative, however, would not increase the *number* of orders that a trading center would be required to route to other trading centers if only BBOs were protected. Instead, the *size* of the routed orders would need to be increased to reflect the accumulated depth displayed by other trading centers

[468] This number is an average estimated cost; thus, it would overestimate the costs for some trading centers and underestimate it for others. For instance, it likely overestimates the cost for ATS trading centers, particularly smaller ones, as opposed to full-service broker-dealer trading centers, in part because of the narrower business focus of some ATSs.

[469] Given that floor-based market-makers and specialists utilize exchange execution systems, the Commission preliminarily believes it is reasonable to assume that such market-makers and specialists would not incur substantial systems-related costs to implement the reproposed Rule independent of the costs that would be incurred by the exchange on whose floor they operate to make changes to the exchange's execution systems. Thus, these entities (approximately 160 of the 585) are not directly included within the cost estimates.

[470] *See supra* note 438 and accompanying text.

[471] The Commission acknowledges that, under the Voluntary Depth Alternative for protected quotations (*see supra* Section II.A.5) if a trading center were to choose to include its depth-of-book quotations in the consolidated quotation system and provide trade-through protection for those orders (to the extent they are automated quotations), it would be necessary for the industry to have access to that depth-of-book information on a real-time and historical basis, and that trading centers may incur additional costs associated with accessing and storing this data. The Commission requests comments on these costs.

[472] This figure was calculated as follows: (16 compliance hours × $103) + (8 information technology hours × $67) + (4 legal hours × $82) × 12 months = $30,144 per trading center × 609 trading centers = $18,357,696. *See supra* notes 427 to 429 for notation as to hourly rates.

[473] *See supra* Section II.A.5. for a discussion of the Voluntary Depth Alternative.

[474] *See supra* note 471. As a means to address capacity issues, the SRO participants in the applicable market data Plans potentially could determine to disseminate only those DOB quotations that were within a certain number of price levels away from the NBBO.

in their protected DOB quotations. In addition, the applicable regulatory authorities must be able to monitor and enforce compliance with a rule that protected DOB quotations. At a minimum, this would require an objective and uniform source to identify the quotations that are protected at any particular time.

As noted in section II.A.3 above, any intermarket protection against trade-throughs must be workable and implemented in a way that promotes fair and orderly markets. To the extent commenters are concerned about practical problems with implementing the Trade-Through Rule, would the basis for these concerns be magnified by the Voluntary Depth Proposal? Specifically, comment is requested on all issues relating to the feasibility and desirability of disseminating DOB quotations through Plan processors.[475] For example, would the voluntary dissemination of protected DOB quotations through the Plan processors create a single point of failure that could threaten the stability of trading in NMS stocks?

The Commission also requests comment on the effect that adoption of the Voluntary Depth Alternative would have on competition among markets. One commenter, for example, suggested that protection of DOB quotations might cause increased fragmentation of liquidity across different markets because limit orders, no matter where displayed, would have price protection.[476] Another commenter, in contrast, asserted that protecting only BBOs would lead to greater fragmentation because limit orders would be routed to any market where they would set or equal the BBO and thereby obtain trade-through protection.[477] Comment is requested on the fragmentation issue, as well as in general on whether protecting DOB quotations would inappropriately limit the terms of market competition so as to harm investors and the efficiency of the NMS. For example, would adoption of the Voluntary Depth Alternative inappropriately reduce the scope of competition among markets to the payment of liquidity rebates for executed limit orders? Comment also is requested on whether adoption of the Voluntary Depth Alternative would generate forces that would lead to a monopolization of trading in a single trading facility.

In assessing the costs of systems changes that may be required by the reproposed Rule, it is important to recognize that much, if not all, of the connectivity among trading centers necessary to implement intermarket price protection has already been put in place. For example, trading centers for exchange-listed securities already are connected through the ITS. The Commission understands that ITS facilities and rules can be modified relatively easily and at low cost to enable an automatic execution functionality. With respect to Nasdaq stocks, connectivity among trading centers already is established through private linkages. Routing out to other trading centers when necessary to obtain the best prices for Nasdaq stocks is an integral part of the business plan of many trading centers, even when not affirmatively required by best execution responsibilities. Moreover, a variety of private vendors currently offer connectivity to NMS trading centers for both exchange-listed and Nasdaq stocks. Many of the broker-dealers that are non-SRO trading centers that would be subject to the Rule already employ smart order routing technology, either their own systems or those of outside vendors, which should limit the cost of implementing systems changes. The Commission also understands that the cost to the Plan processors to incorporate the reproposed Trade-Through Rule and its exceptions would be minimal.

In determining these estimates the Commission also has considered that many market participants are already making changes to their systems to become more competitive. Many of the changes being made would assist the market participants in preparing for implementation of the reproposed Trade-Through Rule. For example, Nasdaq, which previously did not have an order routing system, recently purchased Brut, LLC in order to acquire access to such a system. The Commission preliminarily believes that this acquisition should reduce the costs that would be incurred by Nasdaq to implement the reproposed Trade-Through Rule. The Commission also notes that the NYSE is in the process of modifying its Direct+ System to make more quotations available on an automated basis.[478] These changes that the NYSE has undertaken should reduce the cost of additional systems changes needed to implement the Trade-Through Rule.

Overall, the Commission preliminarily believes that the reproposed Trade-Through Rule would produce significant benefits that justify the costs of implementation of the Rule.

B. Access Rule

Reproposed Rule 610 of Regulation NMS would set forth new standards governing access to quotations in NMS stocks. These standards would prohibit trading centers from imposing unfairly discriminatory terms that would prevent or inhibit the efficient access of any person through members, subscribers, or customers of such trading center, and enable access to NMS quotations through private linkages, rather than mandating a collective intermarket linkage facility. In addition, in order to ensure the fairness and accuracy of displayed quotations, the reproposed Rule would establish an outer limit on the cost of accessing protected quotations of no more than $0.003 per share (or 0.3% of the quotation price per share for quotations priced less than $1). Reproposed Rule 610 also would require SROs to establish and enforce rules that would, among other things, prohibit their members from engaging in a pattern or practice of displaying quotations that lock or cross the automated quotations of other trading centers. Finally, the reproposed amendment to Rule 301 of Regulation ATS would lower the threshold that triggers the Regulation ATS fair access requirements from 20% to 5% of average daily volume in a security.

1. Benefits

The Commission preliminarily believes that the reproposed Access Rule would help achieve the statutory objectives for the NMS by promoting fair and efficient access to each individual market. By relying on private linkages, rather than mandating a collective intermarket linkage facility, the access provisions of reproposed Rule 610(a) and (b) would allow market centers to connect through flexible and cost effective technologies widely used in the markets today, particularly in the market for Nasdaq stocks. This would allow firms to capitalize on the dramatic improvements in communications and processing technologies in recent years, and thereby enhance the linking of all

[475] The Voluntary Depth Alternative would set up a process through which individual markets could choose to secure protection for their DOB quotations by disseminating them in the consolidated quotation stream. To implement this approach, the SRO participants in the market data Plans would need to establish a mechanism for individual markets to disseminate their quotations through the Plan processor and have them designated as protected quotations. *See supra* Section II.A.5.

[476] Bear Stearns Letter at 2.

[477] Goldman Sachs Letter at 6.

[478] *See* Securities Exchange Act Release Nos. 50173 (Aug. 10, 2004), 69 FR 50407 (Aug. 16, 2004) and 50667 (Nov. 15, 2004), 69 FR 67980 (Nov. 22, 2004) (SR–NYSE–2004–05).

markets for the future NMS. Private linkages also would provide flexibility to meet the needs of different market participants and allow competitive forces to determine the specific nature and cost of connectivity. The reproposed access provisions of Rule 610(a) and (b) thus would allow market participants to fairly and efficiently route orders to execute against the best quotations for a stock, wherever such quotations are displayed in the NMS. The Commission believes that fair and efficient access to the best quotations of all trading centers is critical to achieving best execution of those orders.

The reproposed access provisions of Rule 610(a) and (b) also would promote fair and efficient access to quotations by prohibiting a trading center from unfairly discriminating against non-members or non-subscribers that attempt to access its quotations through a member or subscriber of such trading center. Such fair access to the quotations of other trading centers is critical for compliance with the reproposed Trade-Through Rule and broker-dealers' duty of best execution.

The reproposed fee limitation of Rule 610(c) would address the potential distortions caused by substantial, disparate fees. As a result of the reproposed fee limitation, displayed prices would more closely reflect actual costs to trade, thereby enhancing the usefulness of market information. The proposed fee limitation also would establish a level playing field across all market participants and trading centers. A single accumulated fee limitation would apply equally to all types of trading centers and all types of market participants, thereby promoting the NMS objective of equal regulation of markets and broker-dealers.

The reproposed fee limitation also should help address the ''outlier'' business model under which a trading center charges high fees for access to its quotations and passes most of the fees through as rebates to attract liquidity providers. These outliers might attempt to take advantage of intermarket price protection by acting essentially as a toll booth between price levels. Particularly with a trade-through rule, even though high fee markets likely would be the last market to which orders would be routed, prices could not move to the next level until someone routed an order to take out the displayed price at the outlier market. Such a business model would detract from the usefulness of quotation information and impede market efficiency and competition. The reproposed fee cap would preclude the outlier business model. It would place all markets on a level playing field in terms of the fees they can charge and ultimately the rebates they can pass on to liquidity providers. Some markets might choose to charge lower fees, thereby increasing their ranking in the preferences of order routers. Others might charge the full $0.003 and rebate a substantial proportion to liquidity providers. Competition would determine which strategy was most successful.[479]

The restrictions on locking or crossing quotations in reproposed Rule 610(d) should promote fair and orderly markets. Locked and crossed markets can cause confusion among investors concerning trading interest in a stock. Restricting the practice of submitting locking or crossing quotations therefore would enhance the usefulness of quotation information. Consistent with the approach to trade-through protection, however, reproposed Rule 610(d) would allow automated quotations to lock or cross manual quotations. Reproposed Rule 610(d) thereby would address the concern that manual quotations may not be fully accessible and recognize that allowing automated quotations to lock or cross manual quotations may provide useful market information regarding the accessibility of quotations. The Commission preliminarily believes, however, that an automated quotation is entitled to protection from locking or crossing quotations. When two market participants are willing to trade at the same quoted price, giving priority to the first-displayed automated quotation should contribute to fair and orderly markets. Moreover, the basic principle underlying the NMS is to promote fair competition among markets, but within a unified system that also promotes interaction between all of the buyers and sellers in a particular NMS stock. Allowing market participants simply to ignore accessible quotations in other markets and routinely display locking and crossing quotations would be inconsistent with this principle. The reproposed restrictions on locking or crossing quotations, in conjunction with the reproposed Trade-Through Rule, should encourage trading against displayed quotations and enhance the depth and liquidity of the markets.

Finally, lowering of the fair access threshold of Rule 301(b)(5) under Regulation ATS[480] from 20% to 5% of average daily trading volume in a security would further strengthen access to the full range of services of ATSs with significant trading volume in NMS stocks. Such access is particularly important for success of the private linkage approach proposed for access to quotations. The lowering of the fair access threshold also would make its coverage consistent with the existing 5% threshold triggering the order display and execution access requirements of Rule 301(b)(3) of Regulation ATS.[481] As a result, each ATS that is required to disseminate its quotations in the consolidated data stream also would be prohibited from unfairly prohibiting or limiting market participants from becoming a subscriber or customer.

In reproposing Rule 610 and the amendment to Rule 301 of Regulation ATS, the Commission seeks to help ensure that securities transactions can be executed efficiently, at prices established by vigorous and fair competition among market centers. By enabling fair access and transparent pricing among diverse marketplaces within a unified national market, the Commission preliminarily believes that the access proposal would foster efficiency, enhance competition, and contribute to the best execution of orders for NMS securities.

2. Costs

The Commission preliminarily believes that reproposed Rule 610 and the reproposed amendments to Rule 301 of Regulation ATS would not impose significant costs on most trading centers and market participants. The system changes necessary to meet the new access standards should be minor. Currently, private linkages are widely used in the equity markets, particularly for trading in Nasdaq stocks.[482] Moreover, the Commission understands that the ITS facilities that currently provide intermarket access for exchange-listed stocks could be modified at minimal cost to provide an auto-execution functionality, at least as an interim measure until private linkages were fully established for exchange-listed stocks.

While commenters were generally supportive of the Commission's proposal to employ private linkages to provide access between markets, some commenters expressed concern that the effort and investment to establish such

[479] The Commission preliminarily believes that the reproposed fee limitation on protected quotations priced less than $1.00 would provide the same benefits.

[480] 17 CFR 242.301(b)(5).

[481] 17 CFR 242.301(b)(3).

[482] One commenter, however, felt that the bilateral links required for private linkages would be particularly burdensome to smaller market centers compared to an ITS-type structure. Letter from Donald E. Weeden to Jonathan G. Katz, Secretary, Commission, dated June 30, 2004, at 9–10.

connectivity to smaller markets would likely be disproportionate to the liquidity on such a market.[483] Reproposed Rule 610(b)(1), however, would require trading centers that display quotations in the ADF to provide a level and cost of access to their quotations that is substantially equivalent to the level and cost of access to quotations displayed by SRO trading facilities.

Currently, three ATSs display quotations in the ADF, two of which also display quotations through the NASDAQ Market Center. Reproposed Rule 610(b) may require these trading centers to incur additional costs to enhance the level of access to their quotations and to lower the cost of connectivity for market participants seeking to access their quotations. The extent to which these trading centers in fact incur additional costs to comply with the proposed access standard would be largely within the control of the trading center itself. ATSs and market makers that wish to trade NMS stocks can choose from a number of options for quoting and trading. They can become a member of a national securities exchange and quote and trade through the exchange's trading facilities. They can participate in the NASDAQ Market Center and quote and trade through that facility. Finally, they can quote and trade in the OTC market. The existence of the NASD's ADF makes this third choice possible by providing a facility for displaying quotations and reporting transactions in the consolidated data stream.[484] As a result, the additional connectivity requirements of reproposed Rule 610(b) would be triggered only by a trading center that displays its quotations in the consolidated data stream and chooses not to provide access to those quotations through an SRO trading facility.

Currently, nine SROs operate trading facilities in NMS stocks. Market participants throughout the securities industry generally have established connectivity to these nine points of access to quotations in NMS stocks. By choosing to display quotations in the ADF, a trading center effectively could require the entire industry to establish connectivity to an additional point of access. Potentially, many trading centers could choose to display quotations in the ADF, thereby significantly increasing the overall costs of connectivity in the NMS. Such an inefficient outcome would become much more likely if an ADF trading center were not required to assume responsibility for the additional costs associated with its decision to display quotations outside of an established SRO trading facility. Consequently, the reproposed access standard in Rule 610(b)(2) would help reduce overall industry costs by more closely aligning the burden of additional connectivity with those entities whose choices have created the need for additional connectivity.

To meet the standard contained in reproposed Rule 610(b)(1), a trading center would be allowed to take advantage of the greatly expanded connectivity options that have been offered by competing access service providers in recent years.[485] These industry access providers have extensive connections to a wide array of market participants through a variety of direct access options and private networks. A trading center potentially could meet the requirement of reproposed Rule 610(b)(1) by establishing connections to and offering access through such vendors. The option of participation in existing market infrastructure and systems should greatly reduce a trading center's cost of compliance.[486]

Several commenters, including some that otherwise supported the proposal, expressed concern that requiring non-discriminatory access to markets might undermine the value of SRO membership.[487] The Commission preliminarily does not believe that adoption of a private linkage approach would seriously undermine the value of membership in SROs that offer valuable services to their members. First, the fact that markets would not be allowed to impose unfairly discriminatory terms on non-members who obtain indirect access to quotations through members does not mean that non-members would obtain *free* access to quotations. Members who provide piggyback access would be providing a useful service and presumably would charge a fee for such service. The fee would be subject to competitive forces and likely would reflect the costs of SRO membership, plus some element of profit to the SRO's members. As a result, non-members that frequently make use of indirect access are likely to contribute indirectly to the costs of the SRO market. Moreover, the unfair discrimination standard of Rule 610(a) would apply only to access to quotations, not to the full panoply of services that markets generally provide only to their members.

The Commission preliminarily does not believe that the proposed fee limitation of reproposed Rule 610(c) would impose significant new costs on most trading centers. A few commenters were concerned about the costs to market participants of administering a fee program under the original proposal, which would have limited trading centers to a fee of $0.001 and broker-dealers to a fee of $0.001.[488] The revised proposal, by imposing a single accumulated fee limitation of $0.003 (when the price of the protected quotation is $1 or more), would greatly simplify the proposed fee limitation and likely would leave existing fee practices largely intact. Entities that currently charge and collect fees would continue to do so. Market makers likely would collect fees through an SRO trading facility or ECN through which it displayed limit orders or quotations, and the administration of such fee program likely would be handled by the SRO or ECN. Therefore, the revised fee limitation should not impose significant new administrative costs.

The reproposed fee limitation of Rule 610(c) would, however, affect the few markets that currently impose access fees of greater than $0.003 per share that apply to a wide range of NMS stocks.[489] These markets could be required to re-evaluate their business models in light of the adopted fee limitation. In particular, they likely would need to reduce the rebates they currently pay to liquidity providers. The reproposed limitation also would affect a few trading centers that charge significant access fees for large transactions in specific types of NMS stocks, such as ETFs. It is unlikely, however, that such fees currently generate a large amount of revenues.[490]

The locked and crossed provisions of reproposed Rule 610(d) should not impose significant additional costs for

[483] *See, e.g.*, Brut Letter at 13; Citigroup Letter at 13; SIA Letter at 16–17; UBS Letter at 9.

[484] Under Rule 301(b)(3) of Regulation ATS, an ATS is required to display its quotations in the consolidated data stream only in those securities for which its trading volume reaches 5% of total trading volume.

[485] As noted in the Commission's order approving the pilot program for the ADF, the reduction in communications line costs in recent years and the advent of competing access providers offer the potential for multiple competitive means of access to the various trading centers that trade NMS stocks. Securities Exchange Act Release No. 46249, *supra* note 181.

[486] As the self-regulatory authority responsible for the OTC market, the NASD would need to assess the extent to which ADF participants have met the access standards of reproposed Rule 610.

[487] Alliance of Floor Brokers Letter at 10; Amex Letter, Exhibit A at 25–26; BSE Letter at 12; CHX Letter at 14; Citigroup Letter at 12; Phlx Letter at 2; STANY Letter at 9.

[488] Brokerage America Letter at 1; Oppenheimer Letter at 2; STANY Letter at 11.

[489] *See supra* note 193 and accompanying text.

[490] The Commission preliminarily believes that the same analysis would apply to the reproposed fee limitation on protected quotations priced less than $1.00.

the SROs. All SROs currently have rules restricting locking and crossing quotations in exchange-listed stocks to comply with the provisions of the ITS Plan. Such SROs also collect the data and related information required to monitor locked and crossed markets, and the Commission preliminarily believes that the additional surveillance and enforcement costs related to the provisions would be minor. The Commission recognizes, however, that reproposed Rule 610(d), by restricting locked markets with respect to automated quotations, could impose certain trading costs associated with widened spreads if an order that would otherwise have been displayed was not displayed. Although locked markets do occur a certain percentage of the time, they do not occur all the time, and thus, the average spread is between zero and a penny (a penny being the MPV for all but a very few stocks). Thus, the Commission preliminarily believes that any widening of average spreads caused solely by the reproposed rule would be limited to the difference between a sub-penny and penny spread. In addition, a locked market often does not actually represent two market participants willing to buy and sell at the same price because it is likely that the locking market participant is not truly willing to trade at the displayed locking price, but instead chooses to lock rather than execute against the already-displayed quotation to receive a liquidity rebate.

Finally, reducing the fair access thresholds of Regulation ATS would require ATSs that exceed the 5% threshold level to comply with Rule 301(b)(5) under Regulation ATS. Rule 301(b)(5) requires ATSs, among other things, to establish written standards for granting access to trading on its system, to not unreasonably prohibit or limit access to its services, to keep records of all grants or denials of access, and to report such information on Form ATS–R. The Commission preliminarily believes that the costs to meet these requirements are justified by the need to promote fair and efficient access to trading centers with significant volume.

C. Sub-Penny Rule

Reproposed Rule 612 would prohibit market participants from displaying, ranking, or accepting quotations in NMS stocks that are priced in an increment less than $0.01, unless the per share price of the quotation is less than $1.00. It would permit sub-penny quotations below $1.00, but only to four decimal places.

1. Benefits

The Commission believes that the markets' conversion to decimal pricing has benefited investors by, among other things, clarifying and simplifying pricing for investors, making the U.S. securities markets more competitive internationally, and reducing trading costs by narrowing spreads. The Commission is concerned, however, that if the MPV decreases beyond a certain point, some of the benefits of decimals could be lost while some of the negative effects are exacerbated. The Commission preliminarily believes that reproposed Rule 612, which would prohibit an MPV of less than $0.01 for most NMS stocks, would have several benefits. The majority of the commenters supported the proposal and noted various potential benefits of the proposed rule.[491]

The Commission preliminarily believes that sub-penny quoting impedes transparency by reducing market depth at the NBBO and increasing quote flickering. In an environment where the NBBO can change very quickly, broker-dealers have more difficulty in carrying out their duties of best execution and complying with other regulatory requirements that require them to identify the best bid or offer available at a particular moment (such as the Commission's short sale rule and the NASD's Manning rule).[492]

In addition, the Commission agrees with the many commenters that believed that prohibiting sub-penny quoting would deter the practice of stepping ahead of exposed trading interest by an economically insignificant amount. Limit orders provide liquidity to the market and perform an important price-setting function. The Commission is concerned that, if a quotation or order can lose execution priority because of economically insignificant price improvement from a later-arriving quotation or order, liquidity could diminish and some market participants could incur greater execution costs. As one commenter, the Investment Company Institute, stated, ''[t]his potential for the increased stepping-ahead of limit orders would create a significant disincentive for market participants to enter any sizeable volume into the markets and would reduce further the value of displaying limit orders.'' [493] Improved liquidity should decrease the costs of trading, especially for large orders.[494] Market participants may be more likely to place limit orders if they know that other market participants cannot quote ahead of them by a sub-penny amount.

2. Costs

The Commission recognizes that reproposed Rule 612 would impose certain costs on the U.S. securities markets. Currently, certain NMS stocks are quoted—and in the absence of the rule, others in the future could be quoted—in sub-pennies. For these NMS stocks, quoted spreads would be wider than they otherwise would be, because reproposed Rule 612 would not allow market participants to narrow the spread by a sub-penny amount.

Two commenters stated that investors would suffer harm from artificially widened spreads.[495] Another commenter stated that ''the primary result of eliminating subpenny trading would be to preserve a minimum profit for market makers, and would result in significantly worse realized prices for the vast majority of market participants not in the business of making markets.'' [496] This commenter analyzed trading in six high-volume securities and concluded that proposed Rule 612 would have costs of over $400 million in these securities alone due to wider spreads.[497] Another commenter stated that, if all markets traded QQQQ solely in sub-pennies, the savings would be approximately $150 million per year.[498] This commenter, however, did not provide data or analysis showing how it reached this conclusion. No other commenters provided any quantitative analysis of the costs that a sub-penny quoting rule would impose by widening spreads to at least a full penny.

The Commission preliminarily believes that the $400 million and $150 million estimates of the cost to the markets caused by wider spreads provided by these two commenters are

[491] *See supra* section IV.C.1.

[492] Rule 10a–1 under the Exchange Act, 17 CFR 240.10a–1, and NASD IM–2110–2.

[493] ICI Letter at 20.

[494] One commenter argued that a prohibition on sub-penny quoting should not affect institutional investors' trading costs because improvements in trading technology (such as auto-execution and VWAP trading algorithms) allow them to fill large orders at minimal cost. *See* Tower Research Letter at 9–10. While the Commission agrees that such improvements have been useful, it believes that this commenter does not consider the costs involved in having to develop these technologies in response, at least in part, to insufficient liquidity. Moreover, the Commission believes that this commenter also does not consider the positive externalities that limit orders have on price discovery and price competition; orders that execute without being quoted do not contribute to price discovery and price competition.

[495] *See* Instinet Letter at 51; Mercatus Letter at 9.

[496] Tower Research Letter at 8.

[497] *Id.* at 9.

[498] *See* Instinet Letter at 50.

inaccurate and excessive. This estimate appears to assume that all trading activity would occur at these narrower quoted spreads. The Commission does not believe that these commenters provided any evidence to substantiate that assumption. Currently, no national securities exchange or national securities association permits quoting in sub-pennies; sub-penny quoting occurs on only a small number of ATSs. Therefore, because spreads on most markets already cannot be smaller than $0.01, these markets would not be required to take any action in response to reproposed Rule 612 that would cause their spreads to widen. Therefore, the cost to these markets of not having sub-penny spreads should not be considered costs of the reproposed rule. With respect to the ATSs that currently do permit some NMS stocks to be quoted in sub-pennies, the Commission staff performed a study of trade data in Nasdaq, NYSE, and Amex stocks to better consider commenters' claims. Based on that study, the Commission staff estimates that the costs of widened spreads in these securities would be approximately $48 million annually (or approximately $33 million if the Commission were to exempt QQQQ from reproposed Rule 612).[499]

In this study, the Commission staff obtained public data from NYSE's ''Trade and Quote'' files for all NYSE-listed and Amex-listed stocks and public data from the Nastraq trade file for Nasdaq-listed stocks, for the period June 7–10, 2004. Based on trading activity from the Nasdaq-listed securities, Commission staff estimated that 1.5% of all trades over $1.00 were reported in a sub-penny increment.[500] These trades accounted for 4.7% of share volume. However, not all trades that were reported as having a sub-penny price resulted from sub-penny quotations. Commission staff excluded VWAP trades which are marked as such in the Nastraq file.[501] Based on this screened dataset, Commissions staff estimated that 1.4% of trades were reported in sub-penny increments accounting for 2.4% of share volume. Commission staff then calculated the dollar cost if all such trades executed at the near-side penny rather than at a sub-penny amount. This price difference, multiplied by the executed volume, produces a dollar cost per trade.[502] Summed across all sub-penny trades, the average daily cost for this sample was $80,973. At 252 trading days per year, this results in $20,400,235 on an annual basis.

Commission staff performed a similar analysis on the trade data for Amex-listed stocks, except that the data set did not permit VWAP trades to be excluded.[503] On an annualized basis, Commission staff estimated that the gross cost resulting from slightly wider spreads would be $16 million (or only $1.2 million if QQQQ is excluded). Similarly, the Commission staff estimated that the gross costs from wider spreads would be approximately $12 million annually for NYSE-listed stocks.

Another potential cost of reproposed Rule 612 is that market participants that have developed systems that allow their users to quote in sub-pennies would, for most NMS stocks, lose the ability to gain any market advantage from such enhancements. In addition, any market participant that currently allows its users to display, rank, or accept orders or quotations in sub-pennies would incur costs in reprogramming its systems to prevent the entry of sub-penny orders or quotations. The Commission preliminarily believes, however, that these costs would be negligible. Currently, the exchanges and Nasdaq do not permit sub-penny quoting; only two major ECNs permit sub-penny quoting, but only in a limited number of securities.[504] These ECNs would have to take only minor steps to readjust their systems to comply with reproposed Rule 612. Finally, the Commission preliminarily believes that paragraph (b) of reproposed Rule 612, which would prohibit quotations below $1.00 from extending beyond four decimal places, would have negligible systems costs. The Commission currently is not aware of any market that quotes and trades NMS stocks in increments beyond four decimal places and preliminarily believes, therefore, that no market would incur systems costs to limit quotations below $1.00 to a maximum of four decimal places.

After carefully considering all the comments received, the Commission preliminarily believes that, on balance, the benefits of reproposed Rule 612 would justify the costs.

D. Market Data Rules and Plan Amendments

The Commission is reproposing amendments to the rules relating to the dissemination of market information to the public. In particular, the Commission is reproposing amendments to the Plans[505] to modify the current formulas for allocating market data revenues to the SROs, and to require the establishment of non-voting advisory committees comprised of interested parties other than SROs. In addition, the Commission is reproposing to rescind the current prohibition in Exchange Act Rule 11Aa3–1 (proposed to be redesignated as Rule 601) on SROs and their members from independently distributing their own trade reports, and is reproposing an amendment to Exchange Act Rule 11Ac1–2 (proposed to be redesignated as Rule 603) to incorporate uniform standards pursuant to which they may independently distribute their own trade reports and quotations (outside of providing the requisite information to Plan processors). The Commission is further reproposing to amend Exchange Act Rule 11Ac1–2 (proposed to be redesignated as Rule 603) to make explicit that all SROs must act jointly through the Plans and through a single processor per security to disseminate consolidated market information in NMS stocks to the public. Finally, the Commission is reproposing amendments to Exchange Act Rule 11Ac1–2 (proposed to be redesignated as Rule 603) to streamline and simplify the consolidated display requirements by reducing the data required to be displayed under the rule, and by limiting the range of the rule to the display of such data in trading and order-routing contexts.

1. Revenue Allocation Formula

a. Benefits. The Commission preliminarily believes that the reproposed amendment to the Plans

[499] *See* Memorandum from the Office of Economic Analysis, Commission, to File, dated December 15, 2004. This study is available on the Commission's Internet Web site (*http://www.sec.gov/rules/proposed/s71005.shtml*) and from the Commission's Public Reference Room.

[500] Trades below $1.00 were excluded from the sample as Rule 612 would not prohibit sub-penny quotations priced less than $1.00.

[501] Executions occurring at a sub-penny price resulting from a mid-point, VWAP, or similar volume-weighted pricing algorithm would not be prohibited by reproposed Rule 612. For purposes of this study, Commission staff excluded all other trades that have a condition code other than ''regular way'' (*e.g.*, trades reported after normal trading hours, bunched trades, next-day trades, previous reference price trades, and late trade reports).

[502] For example, the cost to a sub-penny trade at price $25.248 for 300 shares is as follows. The assumption is that, without sub-penny quotations, this trade would have occurred at $25.25—a difference of $0.002 per share. At 300 shares, this trades incurs a cost of $0.60 ($0.002 x 300). A sub-penny trade at $25.242 would incur a cost of $0.002 per share under the assumption that, under Rule 612, it would execute at $25.24.

[503] *See supra* note 499.

[504] As of December 6, 2004, one of these ECNs (Brut) permitted sub-penny quoting only in securities priced below $5.00; the other ECN (Inet) permitted sub-penny quoting for securities priced below $1.00 and also for four other securities (QQQQ, SMH, JDSU, and SIRI).

[505] *See supra* note 21 and accompanying text.

modifying the current formulas for allocating market data revenues would be beneficial to the marketplace because the new allocation formula would allocate revenues to markets based on the value of their quotations in addition to their trades. The current formulas allocate Plan revenues based solely on the number or share volume of an SRO's reported trades, and do not allocate revenues to those market centers that generate quotations with the best prices and the largest sizes that are an important source of public price discovery. The new allocation formula also should help to reduce the economic and regulatory distortions caused by the current formulas, including wash sales, trade shredding, and SRO print facilities.[506] Because the reproposed formula would address these distortive practices and would allocate revenues to those market centers that provide the most useful market information, the Commission preliminarily believes that the NMS would be benefited as a whole.

The reproposed new revenue allocation formula would encompass a two-step process. Under the proposed initial step, the ''Security Income Allocation,'' a Network's distributable revenues would be allocated among the individual securities included in the Network's data stream based on the square root of the dollar volume of trading in each security. Use of the square root function is appropriate to take into account the level of trading activity in each security, while adjusting for the disproportionate level of trading in the most active NMS stocks when distributing revenues among the various securities.

Following this initial distribution of revenues, the next step in the process would be to allocate the revenues distributed to an individual security among the various SROs that trade the security based on each SRO's trading and quoting activity. Specifically, under the reproposed ''Trading Share'' criterion, fifty percent of the revenues allocated to a particular security (subject to a $2 cap per qualified transaction report) would be allocated to SROs based on their proportion of the total dollar volume and number of qualified trades (transactions that have a dollar volume of $5,000 or greater) in that security. A few commenters stated that small trades (transactions that have a dollar value of less than $5000) should be entitled to partial credit under this criterion because these trades also contribute to public price discovery.[507] The Commission acknowledges the benefits of small trades and has amended the original proposed new formula to provide for a proportional allocation of revenues for such trades. The reproposed Trading Share measure is intended to allocate revenue to those SROs that actively trade in the security, thereby providing liquidity and price discovery, while reducing the potential for the shredding of trade volume.

Under the reproposed ''Quoting Share'' criterion, fifty percent of the revenues allocated to a particular security under the Security Income Allocation measure would be allocated to SROs based on their proportion of credits earned for the time and size of their quotations at the NBBO in that security during regular trading hours. Many commenters agreed with the Commission that, if the Networks were to continue allocating revenues to the SROs, the current allocation formulas needed to be updated.[508] In particular, some of these commenters noted the benefits of adding a quoting component to the new formula,[509] especially if revenues are allocated only for automated and accessible quotations. Some commenters, however, were concerned that the inclusion of quotations in the proposed new allocation formula could lead new types of ''gaming'' of the formula, such as flashing quotations with no real intention to trade at those prices simply to earn more quote credits—and thereby more revenues—under the Quoting Share measure.[510] The Commission preliminarily believes that the proposed requirement that quotations last at least one second to earn credits coupled with overall market discipline imposed by current order-routing practices discouraging ''low-cost'' quotations at the NBBO should minimize the potential for such gaming behavior. The Quoting Share criterion of the reproposed formula is intended to do what the current formulas do not—allocate revenue to those markets whose quotations frequently equal the best prices and for the largest sizes.

The Commission received a number of comments regarding the potential cost and complexity of the proposed revenue allocation formula.[511] The Commission notes that, consistent with the approach of the reproposed Trade-Through Rule and the reproposed Access Rule, it has determined to eliminate from the reproposed formula the most complex elements of the proposed allocation formula that were intended primarily to address the problem of manual quotation—the ''NBBO Improvement Share'' criterion and the automatic cut-off for manual quotations left at the NBBO under the Quoting Share criterion. Because the revised formula would only allocate revenues for automated quotations, and manual quotations would be excluded from the any revenue allocation, the Commission believes that it is no longer necessary to include an NBBO Improvement Share criterion and automatic cut-off for manual quotations in the proposed new formula. As a result, the reproposed formula is substantially less complex than originally proposed.

In sum, the Commission preliminarily believes that the greatest benefit of allocating Plan revenues to the SROs based equally on the proposed Trading Share and Quoting Share measures is that such measures would allocate revenues to an SRO for its overall contribution of both quotations and trades, while reducing the incentive for distortive trade reporting practices caused by the current formulas. Investors would benefit from the proposed new formula because these broad-based measures would allocate revenues to those SROs that provide investors with the most useful market information, and thus that contribute to public price discovery, by allocating them a larger portion of Plan revenues.

b. Costs. The Commission recognizes that the current allocation formulas have been used since the creation of the Plans and Networks in the 1970s, and that the SROs and the Network processors have become familiar with those formulas for purposes of allocating revenues and structuring their businesses. Because the reproposed new allocation formula is more detailed than the current formulas, the Network processors would have to learn the particular features of the new formula and would have to consider SRO quotations in addition to reported trades as a measure for allocating Plan revenues. Accordingly, the Network processors, or some other entity retained by the Networks, would be required to

[506] *See* Proposing Release, 69 FR at 11179–11180.

[507] *See, e.g.*, BSE Letter at 16; CHX Letter at 19–20; E*TRADE Letter at 11.

[508] *See, e.g.*, Amex Letter at 11; ATD Letter at 4; Bloomberg Tradebook Letter at 7; BSE Letter at 15; ICI Letter at 21; Morgan Stanley Letter at 22; Nasdaq Letter II at 31; NYSE Letter, Attachment at 11–12; STA Letter at 7; UBS Letter 10; Vanguard Letter at 6.

[509] *See, e.g.*, Amex Letter at 11; ATD Letter at 4; Bloomberg Tradebook Letter at 7–8; Morgan Stanley Letter at 22–23; NYSE Letter, Attachment at 11; STA Letter at 7; Vanguard Letter at 6.

[510] *See, e.g.*, ArcaEx Letter at 13; Brut Letter at 22; CHX Letter at 19; Instinet Letter at 41.

[511] *See, e.g.*, Angel Letter I at 11; BSE Letter at 15, 18; Brut Letter at 22–23; Callcott Letter at 4; CBOE Letter at 2, 9; Instinet Letter at 42; ISE Letter at 9; Nasdaq Letter II at 31; NSX Letter at 7; NYSE Letter, Attachment at 11; Phlx Letter at 3–4.

develop a program to calculate the Trading Shares and Quoting Shares of the SRO participants. All of the data necessary for implementation of the formula would be disseminated through the consolidated data stream on a real-time basis. If a single entity were retained to handle the task for all three Networks, the Commission estimates that it would cost approximately $1 million annually to make the requisite calculations under the proposed new formula and to disseminate the results to the SRO participants on a daily basis. This estimated cost of implementation and compliance represents only ¼ of one percent of the total revenues collected and distributed through the Plans for 2003.

In addition, some SROs are likely to be allocated a smaller portion of Plan revenues under the reproposed new allocation formula than they would have received under the existing formulas, while other SROs would receive a larger portion of revenues. This would result if certain SROs are currently reporting a large number of trades or share volume of trades, but are not necessarily providing the best quotations or trades with larger sizes. A few commenters expressed concern that certain business models would be adversely impacted by the proposed new allocation formula,[512] particularly for those markets that primarily handle small retail order flow.[513] The Commission recognizes that reforming formulas that have remained unchanged for many years may affect the competitive position of various markets. Given the severe deficiencies of these formulas, however, it does not believe that the interests of any particular business model should preclude updating the formulas to reflect current market conditions. The reproposed formula is designed to reflect more appropriately the contributions of the various SROs to the consolidated data stream and thereby better align the interests of individual markets with the interests of investors. The Commission therefore preliminarily believes that the benefits of the proposed new allocation formula justify the costs of implementation.

[512] *See, e.g.*, Brut Letter at 22; BSE Letter at 16; CHX Letter at 19, 21–22; E*TRADE Letter at 11; NSX Letter at 6–7.

[513] *See, e.g.*, BSE Letter at 16; CHX Letter at 19, 21–22; E*TRADE Letter at 11. The Commission is proposing a provision in the new formula that would provide a partial allocation of revenues for smaller trades that have a dollar value of less than $5,000. This provision should lessen impact of the modified formula on exchanges that handle small retail orders.

2. Plan Governance

a. Benefits. The Commission preliminarily believes that the reproposed amendment to the Plans requiring the creation of advisory committees would improve Plan governance. Under the Plans, a representative of each SRO participating in the Plan is a member of the operating committee that governs that Plan. The reproposed amendment to the Plans would require the establishment of non-voting advisory committees comprised solely of persons not employed by or affiliated with an SRO participant. This reproposal is intended to broaden participation in the governance of the Plans.

The proposed amendment would require the SRO participants to select the members of the advisory committee comprised, at a minimum, of one or more representatives associated with (1) A broker-dealer with a substantial retail investor base, (2) a broker-dealer with a substantial institutional investor customer base, (3) an ATS, (4) a data vendor, and (5) an investor. In addition, each SRO participant would be entitled to select an additional committee member. The Commission believes that the composition of the advisory committee would give interested parties other than the SROs a voice in matters that affect them.

The members of the advisory committee would have the right to submit their views to the operating committee on Plan business (other than matters determined to be confidential by a majority of Plan participants), prior to any decision made by the operating committee, and would have the right to attend operating committee meetings. Broader participation in the Plans through the creation of Plan advisory committees would be beneficial to the administration of the Plans because it would provide transparency to the Plan governance process and could promote the formation of industry consensus on disputed issues.

b. Costs. The reproposed amendment to the Plans requiring the formation of advisory committees could potentially result in costs to the SRO participants who would be required to engage in a selection process for purposes of establishing such committees. A Plan's operating committee as a whole would be required to select a minimum of five committee members, while each SRO participant also would have the right to select an additional committee member. This selection process could potentially result in added costs and administrative burden and expense to the SRO participants.

The reproposed Plan amendment also could potentially disrupt the current governance of the Plans by their participants. Since the creation of the Plans, representatives from the SROs have been the sole participants in the Plans and have been responsible for their administration. A few commenters believed that the additional participation of non-SRO parties could potentially increase the difficulty of reaching a consensus on Plan business, stating that too many members on an advisory committee could complicate and disrupt, rather than assist, Plan operations due to differing agendas.[514] Although such a result may occur at times, the Commission preliminarily believes that this cost would be justified by the benefits that could be gained by increasing the transparency of Plan operations and giving parties other than SROs an opportunity to submit their views. In the past, the Plans may not have adequately considered the viewpoints of non-SRO parties on important issues such as fees and administrative burdens. Establishing advisory committees would address this problem and thereby potentially make the Plans more responsive to the needs of market participants and investors.

3. Proposed Amendments to Rules 11Aa3–1 and 11Ac1–2 (Proposed to Be Redesignated as Rules 601 and 603)

a. Independent Distribution of Information.

i. Benefits. The Commission is reproposing an amendment to Exchange Act Rule 11Aa3–1 (proposed to be redesignated as Rule 601) that would rescind the prohibition on SROs and their members from disseminating their trade reports independently.[515] Under the reproposed amendment to Exchange Act Rule 11Aa3–1 (proposed to be redesignated as Rule 601), members of an SRO would continue to be required to transmit their trades to the SRO (and SROs would continue to transmit trades to the Networks pursuant to the Plans), but such members also would be free to distribute their own data independently, with or without fees. The Commission preliminarily believes that independently distributed information could be beneficial to investors and other information users because depth-

[514] *See, e.g.*, Amex Letter, Exhibit A at 21–22; ISE Letter at 10; Reuters Letter at 3.

[515] Proposed Regulation NMS would remove the definitions in paragraph (a) of Exchange Act Rule 11Aa3–1 (proposed to be redesignated as Rule 601) and place them in proposed Rule 600. Subparagraphs (c)(2) and (c)(3) of Exchange Act Rule 11Aa3–1 (proposed to be redesignated as Rule 601) would be rescinded. As a result, subparagraph (c)(4) of Exchange Act Rule 11Aa3–1 would be redesignated as subparagraph (b)(2) of Rule 601.

of-book quotations have become increasingly important as decimal trading has spread displayed depth across a greater number of price points.

Reproposed Rule 603(a) would establish uniform standards for distribution of both quotations and trades. The reproposed standards would require an exclusive processor, or a broker or dealer with respect to information for which it is the exclusive source, that distributes quotation and transaction information in an NMS stock to a securities information processor (''SIP'') to do so on terms that are fair and reasonable. In addition, those SROs, brokers, or dealers that distribute such information to a SIP, broker, dealer, or other persons would be required to do so on terms that are not unreasonably discriminatory. Furthermore, these uniform standards would be based, in part, on similar requirements found in Sections 3 and 11A of the Exchange Act [516] for SROs and entities that distribute SRO information on an exclusive basis. The Commission preliminarily believes that extending these requirements to non-SRO market centers, including ATSs and market makers, would help assure equal regulation of all markets that trade NMS stocks.

ii. Costs. The Commission recognizes that the rescission of the prohibition on independent distribution of trade reports under Rule 11Aa3–1 (proposed to be redesignated as Rule 601) could potentially lead to market centers incurring costs associated with the independent distribution of their market data if they choose to distribute such data without charging a fee. In addition, investors may have to pay for additional data if market centers choose to charge a fee for the additional data. Furthermore, a corollary to one commenter's assertion that market centers could benefit from additional revenues if market centers choose to distribute their own quotation information [517] is that the data from one or more other market centers could potentially become more or less valuable than another market center's data, and thereby increase or reduce that market center's overall income. The Commission preliminarily does not believe that there will be any costs associated with the requirement to establish uniform standards for the distribution of trades and quotations pursuant to reproposed Rule 603(a), but requests comment on this issue.

b. Consolidation of Information.

i. Benefits. All SROs currently participate in Plans that provide for the dissemination of consolidated information for the NMS stocks that they trade. Reproposed Rule 603(b) would confirm by Exchange Act rule that both existing and any new SROs would be required to continue to participate in joint-industry plans to disseminate consolidated information in NMS stocks to the public. This reproposed amendment would provide the benefit of clarifying that all SROs—whether existing or new—would be required to participate jointly in one or more Plans to disseminate consolidated information in NMS stocks. The reproposed amendment also would require that all quotation and trade information for an individual NMS stock be disseminated through a single processor (currently, SIAC or Nasdaq). The Commission preliminarily believes that requiring a single processor for a particular security would help to ensure that investors continue to receive the benefits of obtaining consolidated information from a single source.

ii. Costs. Given that consolidated market information currently is disseminated through a single processor per stock, the Commission does not foresee any new costs associated with reproposed Rule 603(b).

c. Display of Consolidated Information.

i. Benefits. Reproposed Rule 603(c) (currently Exchange Act Rule 11Ac1–2) would substantially revise the consolidated display requirement by limiting its scope. It would incorporate a new definition of ''consolidated display'' (set forth in reproposed Rule 600(b)(13)) that is limited to the prices, sizes, and market center identifications of the NBBO, along with the ''consolidated last sale information'' (which is defined in proposed Rule 600(b)(14)). Beyond disclosure of this basic information, market forces, rather than regulatory requirements, would be allowed to determine what, if any, additional data from other market centers is displayed. In particular, investors and other information users ultimately would be able to decide whether they need additional information in their displays.

Reproposed Rule 603(c) also would eliminate the burden on vendors and broker-dealers to display a complete montage of quotations from all market centers trading a particular security, which would include the price of quotations that may be far away from the current NBBO. Furthermore, vendors and broker-dealers would have the ability to decide what, if any, additional data from other market centers beyond this basic disclosure to display. Vendors, broker-dealers, and investors would benefit from this reduced consolidated display requirement through a more efficient use of system capacity and because the costs of obtaining necessary data could be lowered. The Commission believes that giving investors the ability to choose (and pay for) only the data they need and use would be beneficial.

Reproposed Rule 603(c) would narrow the contexts in which a consolidated display is required to those when it is most needed—a context in which a trading or order-routing decision could be implemented. For example, the consolidated display requirement would continue to cover broker-dealers who provide on-line data to their customers in software programs from which trading decisions can be implemented. Similarly, the requirement would continue to apply to vendors who provide displays that facilitate order routing by broker-dealers. It would not apply, however, when market data is provided on a purely informational website that does not offer any trading or order-routing capability. Reproposed Rule 603(c) also would simplify the rule language to require that consolidated data be made available in an equivalent manner as other data and would rescind unnecessary provisions in order to update the Rule.[518] Reproposed Rule 603(c) should benefit broker-dealers and vendors by making compliance with the reproposed Rule's more tailored requirements easier and more efficient.

ii. Costs. A potential cost attributable to reproposed Rule 603(c) could be that there currently may be individuals who use the displayed montage of quotations from all market centers trading a particular security. If vendors and broker-dealers determined not to display this additional information, these investors would be required to obtain the additional data at additional cost. Reproposed Rule 603(c) also could potentially result in an administrative cost or burden for vendors and broker-dealers that would be required to assess in what circumstances they are displaying market data information for trading and order-routing purposes and in what circumstances they are displaying such information for other purposes. The Commission preliminarily believes that such a cost would be minimal.

[516] 15 U.S.C. 78c and 15 U.S.C. 78k–1.

[517] Specialist Assoc. Letter at 16–17.

[518] The provisions proposed to be rescinded include requirements relating to moving tickers, categories of market information, and representative bids and offers.

E. Regulation NMS

The Commission is reproposing to redesignate the current NMS rules adopted under Section 11A of the Exchange Act [519] as Regulation NMS, make non-substantive conforming changes to various rules, and create a separate definitional rule, Rule 600, which would contain all of the defined terms used in Regulation NMS. Currently, each NMS rule includes its own set of definitions, and some identical terms, such as ''covered security,'' ''reported security,'' and ''subject security,'' are defined inconsistently. Although reproposed Rule 600 would retain, unchanged, most of the definitions used in the existing NMS rules, it would delete or revise obsolete definitions and eliminate the use of inconsistent definitions for identical terms. Reproposed Rule 600 would not alter the requirements or operation of the existing NMS rules.

1. Benefits

The Commission believes that reproposed Rule 600 and the related proposed amendments to various rules would benefit all entities that are and would be subject to the requirements of the rules contained in Regulation NMS, including broker-dealers, national securities exchanges, the NASD, ECNs, SIPS, and vendors. By eliminating or revising obsolete and inconsistent definitions and adopting a single set of definitions that would be used throughout Regulation NMS, reproposed Rule 600 should make Regulation NMS clearer and easier to understand, thereby facilitating compliance with its requirements and potentially easing the compliance burden on entities subject to Regulation NMS. Increased compliance with Regulation NMS would, in turn, benefit investors and the public interest. Similarly, the related non-substantive amendments to various rules would ensure that those rules use the definitions provided in reproposed Rule 600 and refer accurately to the redesignated NMS rules.

2. Costs

Reproposed Rule 600 would update and clarify the definitions used in existing NMS rules. Neither reproposed Rule 600 nor the related conforming proposed amendments to various rules would alter the existing requirements of the NMS rules or other Commission rules. Accordingly, the Commission believes that reproposed Rule 600 and the related amendments would impose few additional costs on entities subject to Regulation NMS. Although some additional personnel costs may be incurred in reviewing the changes, the Commission believes that these costs would be minimal.

X. Consideration of Burden on Competition, and Promotion of Efficiency, Competition, and Capital Formation

Section 3(f) of the Exchange Act [520] requires the Commission, when engaging in rulemaking that requires the Commission to consider or determine whether an action is necessary or appropriate in the public interest, to consider whether the action will promote efficiency, competition and capital formation. Section 23(a) of the Exchange Act [521] requires the Commission to consider whether the action will promote efficiency, competition and capital formation. Section 23(a)(2) prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.[522] To assist the Commission in evaluating the costs and benefits of Regulation NMS, the Commission solicited comment in the Proposing Release on whether any of the proposals discussed therein would have an adverse effect on competition that is neither necessary nor appropriate in furtherance of the purposes of the Exchange Act, and whether they would, if adopted, promote efficiency, competition and capital formation. The Commission also requested commenters to provide empirical data and other factual support for their views on these subjects. The Commission has considered comments received and has reproposed these rules, taking into account these comments. The Commission requests comment on these issues in the context of the reproposed rules.

A. Trade-Through Rule

The Commission preliminarily believes that the price protection that would be provided by the reproposed Trade-Through Rule would encourage the use of limit orders and aggressive quoting, which should help improve the price discovery process, and contribute to increased liquidity and depth in the markets. The greater the number of limit orders available at better prices and greater size, the more liquidity available to fill incoming marketable orders. Thus, greater depth and liquidity should lead to improved execution quality, particularly for larger-sized institutional orders. The Commission also preliminarily believes that the reproposed Trade-Through Rule, by providing intermarket price protection for accessible, automated orders and not requiring automated markets to wait for responses from non-automated markets, would help promote efficiency in the markets by more effectively linking markets together and integrating trading centers with different market structures into the NMS, and by providing an incentive for non-automated markets to automate. Reproposed Rule 611 also should promote investor confidence in the markets by helping to ensure that customer orders are executed at the best price available and providing protection against limit orders being bypassed by inferior priced executions. Comment is requested on whether extending trade-through protection to DOB quotations would significantly increase the benefits of the reproposed Trade-Through Rule. Would protecting quotations at multiple price levels further encourage the display of limit orders and thereby significantly enhance depth and liquidity in the NMS?

The Commission recognizes the vital importance of preserving competition among market centers,[523] and preliminarily believes that reproposed Rule 611 would promote intermarket competition by leveling the playing field between automated and non-automated markets and, to the extent that the existing trade-through rule serves to constrain competition, by removing this barrier to competition. In addition, the Commission preliminarily believes that market participants and intermediaries, consistent with their desire to achieve the best price and their duty of best execution, would continue to rank trading centers according to the total range of services provided by such markets. The most competitive—*i.e.* attractive—trading center would be the first choice for routing marketable orders, thereby enhancing the likelihood of execution for limit orders routed to that trading center. Because likelihood of execution is very important to limit orders, routers of limit orders likely would be attracted to this preferred trading center. More limit orders would enhance the depth and liquidity at the preferred trading center, thereby increasing its attractiveness for marketable orders, and beginning the cycle over again.

[519] 15 U.S.C. 78k–1.

[520] 15 U.S.C. 78c(f).

[521] 15 U.S.C. 78w(a).

[522] 15 U.S.C. 78w(a)(2).

[523] Many commenters believed that an opt-out exception was necessary to promote competition among trading centers, particularly competition based on factors other than price, such as speed of response. *See supra* Section II.A.4.a.

Trading centers that offer poor services, such as slow response times, would likely rank near the bottom in order-routing preferences of market participants and intermediaries. Whenever a least-preferred trading center is merely posting the same price as other trading centers, orders would be routed to the other, more preferred, trading centers. Competitive forces would continue to dictate that the lowest ranked trading center in order-routing preference would suffer from offering a poor range of services to the routers of marketable orders. The Commission therefore preliminarily does not believe that reproposed Rule 611 would eliminate competition among markets.

The Commission requests comment on the effect that adoption of the Voluntary Depth Alternative would have on competition among markets. One commenter, for example, suggested that protection of DOB quotations might cause increased fragmentation of liquidity across different markets because limit orders, no matter where displayed, would have price protection.[524] Another commenter, in contrast, asserted that protecting only BBOs would lead to greater fragmentation because limit orders would be routed to any market where they would set or equal the BBO and thereby obtain trade-through protection.[525] Comment is requested on the fragmentation issue, as well as in general on whether protecting DOB quotations would inappropriately limit the terms of market competition so as to harm investors and the efficiency of the NMS. For example, would adoption of the Voluntary Depth Alternative inappropriately reduce the scope of competition among markets to the payment of liquidity rebates for executed limit orders? Comment also is requested on whether adoption of the Voluntary Depth Alternative would generate forces that would lead to a monopolization of trading in a single trading facility.

The end result should be an NMS that more fully meets the needs of a wide spectrum of investors, particularly long-term investors and publicly traded companies, by providing increased efficiency and improved depth and liquidity to our capital markets. By providing increased efficiency and promoting investor confidence in quality executions, investors may be more willing to invest in our capital markets, thus promoting the ability of listed companies to raise capital at lower cost.

B. Access Rule

Reproposed Rule 610 would establish standards governing access to quotations in NMS stocks that (1) prohibit trading centers from unfairly discriminating against non-members members or non-subscribers that attempt to access quotations through a member or subscriber of the trading center, and enable access to NMS quotations through private linkages, (2) establish an outer limit on the cost of accessing such quotations of no more than $0.003 per share, and (3) require SROs to establish and enforce rules that, among other things, prohibit their members from engaging in a pattern or practice of displaying quotations that lock or cross the automated quotations of other trading centers. The reproposed amendment to Rule 301(b)(5) under Regulation ATS would lower the threshold that triggers the Regulation ATS fair access requirements from 20% to 5% of average daily volume in a security.

The reproposed access provisions are intended to bolster investor confidence in the markets by helping to ensure investors that their orders will be executed at the best prices and will not subject to hidden fees, regardless of the market on which the execution takes place. By generally imposing a uniform fee limitation of $0.003 per share, the proposed rules would promote equal regulation of different types of trading centers, where currently some are permitted to charge fees and some are not, thereby leveling the playing field among diverse market centers. Moreover, the Commission preliminarily believes that, by prohibiting a trading center from imposing unfairly discriminatory terms that would prevent or inhibit the efficient access of any person through members, subscribers, or customers of such trading center, the reproposed rule would promote competition among trading centers.

The Commission preliminarily believes that reproposed Rule 610 also would increase transparency and efficiency in the market, thereby enhancing investor confidence, and thus capital formation. Specifically, the reproposed Rule would permit private linkages between markets, rather than mandating a collective intermarket linkage facility. Private linkages would permit market centers to connect through cost effective and technologically advanced communications networks. Such systems are widely utilized in the market for Nasdaq stocks today and should provide speed and flexibility to trading centers and their market participants. The use of private linkages should encourage interaction between the markets and reduce fragmentation by removing impediments to the execution of orders between and among marketplaces, thereby increasing efficiency and competition.

Several commenters expressed concerns regarding the impact that the access fee proposal could have on competition.[526] As discussed in detail in Section III, the Commission preliminarily believes that the flat limitation on access fees of $0.003 per share would be the fairest and most appropriate solution to what has been a longstanding and contentious issue. A single accumulated fee cap would apply equally to all types of trading centers and all types of market participants, thereby promoting the NMS objective of equal regulation of markets and broker-dealers.[527] The $0.003 fee limitation would be consistent with current business practices, as very few trading centers charge fees that exceed this amount.[528] In addition, a fee limitation is necessary to preclude individual trading centers from raising their fees substantially in an attempt to take improper advantage of strengthened protection against trade-throughs and the adoption of a private linkage regime.

In addition, the reproposed rule is designed to reduce the instances of locked and crossed quotations, which should promote capital formation by providing market participants a clear picture of the true trading interest in a stock. Moreover, the Commission preliminarily believes that the reproposed access provisions would encourage interaction between the markets and reduce fragmentation by removing impediments to the execution of orders between and among marketplaces, thereby increasing efficiency and competition. Finally, the Commission preliminarily believes that the reproposed access rule would assist broker-dealers in evaluating and complying with their best execution obligations.

[524] Bear Stearns Letter at 2.

[525] Goldman Sachs Letter at 6.

[526] *See, e.g.*, Amex Letter, Exhibit A at 23–24; Bloomberg Summary of Intended Testimony at 3; BrokerageAmerica Letter at 1; Brut Letter at 14; CHX Letter at 15; Domestic Securities Summary of Intended Testimony; Instinet Letter at 28, 33–34; TrackECN Letter at 3.

[527] Section 11A(c)(1)(F) of the Exchange Act.

[528] *Cf.* Instinet Letter at 35 (''there is no basis for adopting any limitation other than at the prevailing $0.003 per share level, which was arrived at through open competition among ATSs, ECNs, and SRO markets in the Nasdaq market'').

C. Sub-Penny Rule

The Commission has considered reproposed Rule 612 in light of Sections 3(f) and 23(a)(2) of the Exchange Act and preliminarily believes that the rule would not impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. To the contrary, by preserving the benefits of decimalization and guarding against the less desirable effects of further reducing the MPV, reproposed Rule 612 should promote fair and vigorous competition. The Commission acknowledges that the Rule would, in some circumstances, prevent market participants from offering marginally better prices. Some commenters argued that a prohibition on quoting in sub-pennies, at least in some NMS stocks, would inhibit price competition and artificially widen spreads.[529] Nevertheless, the Commission is concerned that sub-penny quoting may be used by market participants more as a means of stepping ahead of competing limit orders for an economically insignificant amount than of promoting genuine price competition.

The Commission preliminarily believes that the reproposed Rule would assist broker-dealers in evaluating and complying with their best execution obligations, as well as other rules premised on identifying the price of a security at a particular moment in time. The Commission also preliminarily believes that the reproposed Rule would enhance depth and transparency by preventing trading interest from being spread across an increasing number of price points. It also would prevent market participants from gaining priority over a standing limit order without making an economically significant contribution to the price of a security. In these respects, the reproposed Rule would encourage market participants to use limit orders, an important source of liquidity. Accordingly, the reproposed Rule may promote market efficiency, competition, and capital formation. In addition, the reproposed Rule also would bolster investor confidence by ensuring that their orders, especially large orders, can be executed without incurring large transaction costs. This increase in investor confidence should also promote market efficiency, competition, and capital formation.

The Commission believes that the reproposed Rule would establish common quoting conventions that would increase transparency in the markets. Moreover, the Commission preliminarily believes that the reproposed Rule would encourage interaction between the markets and reduce fragmentation by removing impediments to the execution of orders between and among markets. The increased transparency in the markets and reduction of fragmentation between the markets may bolster investor confidence, thereby promoting capital formation.

D. Market Data Rules and Plan Amendments

The Commission preliminarily believes that the reproposed Plan amendment modifying the current revenue allocation formulas would promote efficiency and competition in the marketplace by eliminating incentives for market participants to engage in distortive trading practices such as wash trades, trade shredding, and SRO print facilities to obtain market data revenues. Similarly, the Commission preliminarily believes that the reproposed Plan amendment requiring the creation of non-voting advisory committees would promote efficiency in the administration of the Plans by allowing interested parties other than SROs to have a voice in Plan matters, which could, in turn, contribute to the resolution of potential disputes that SRO participants would otherwise bring before the Commission or to the courts. Furthermore, reproposed amendments to Rule 11Ac1–2 (proposed to be redesignated as Rule 603) should promote efficiency and competition among market centers by helping to assure that independently reported trade and quotation information is distributed on terms that are fair and reasonable and not unreasonably discriminatory. Reproposed Rule 603(a) would allow investors and vendors greater freedom to make their own decisions regarding the data they need and thus the proposal should lead to lower costs to investors. Broker-dealers who do not need the data beyond the prices, sizes, market center identifications of the NBBO and consolidated last sale information would not required to receive (and pay for) such data, thereby promoting efficiency. Reproposed Rule 603(b) also should promote efficiency in the dissemination of consolidated market information by requiring that all SROs act jointly through the Plans to disseminate such information to the public.

The Commission preliminarily believes that the proposed Plan amendments would assist in capital formation through a more appropriate allocation of the Networks' revenues to those SROs that contribute most to public price discovery, and by potentially minimizing costs that may arise from having to resolve disputes relating to the administration of the Plans through broader representation. Reproposed Rule 603(c) also would eliminate the requirement to display a complete montage of quotations from all market centers and should therefore promote capital formation by reducing the costs to vendors and broker-dealers that are currently required to display quotations that may be far away from the NBBO.

The Commission further preliminarily believes that the reproposed amendments to the Plans and to Rules 11Aa3–1 and 11Ac1–2 (proposed to be redesignated as Rules 601 and 603) would not impose any competitive burden that is not necessary and appropriate in furtherance of the purposes of the Exchange Act. Although modifying the allocation formula could shift revenues among the SRO participants in the Plans, the formula would allocate revenue to those SROs that contribute useful information to the consolidated data stream and thereby would promote competition on terms that will benefit investors. The Commission also preliminarily believes that the reproposed Plan amendment requiring the Plans to form non-voting advisory committees should enhance and promote competition by broadening Plan governance to include non-SRO parties, and thereby provide greater transparency in the administration of such Plans. Furthermore, the reproposed amendments to Rules 11Aa3–1 and 11Ac1–2 (proposed to be redesignated as Rules 601 and 603) should lessen the burden on vendors and broker-dealers from having to comply with certain consolidated display requirements. Competition among markets also would be enhanced by enabling markets to independently distribute their own market data. In sum, the Commission preliminarily believes that the proposed amendments would enhance rather than burden competition.

E. Regulation NMS

Reproposed Rule 600, the redesignation of the existing NMS rules as Regulation NMS, and the related proposed conforming changes to other Commission rules should help to promote efficiency and capital formation by making the NMS rules easier to understand, thereby helping to reduce compliance costs for entities subject to the rules. Enhanced clarity in the definitions used in Regulation NMS

[529] *See, e.g.*, Instinet Letter at 47; Mercatus Center Letter at 9–10; Tower Research Letter at 8–11.

also should benefit investors and the public interest by facilitating compliance with the requirements of reproposed Regulation NMS. Because Rule 600 would clarify the existing definitions used in Regulation NMS without imposing new requirements, and because the redesignation of the NMS rules as Regulation NMS and the conforming changes to other Commission rules would create no new substantive requirements, Rule 600 and the related changes should not impose a burden on competition or alter the competitive standing of entities subject to Regulation NMS.

XI. Consideration of Impact on the Economy

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, or ''SBREFA,'' [530] the Commission must advise the Office of Management and Budget as to whether the proposed regulation constitutes a ''major'' rule. Under SBREFA, a rule is considered ''major'' where, if adopted, it results or is likely to result in:

- An annual effect on the economy of $100 million or more (either in the form of an increase or a decrease);
- A major increase in costs or prices for consumers or individual industries; or
- A significant adverse effect on competition, investment, or innovation.

If a rule is ''major,'' its effectiveness will generally be delayed for 60 days pending Congressional review. The Commission requested comment in the Proposing Release on the potential impact of the proposed regulation on the economy on an annual basis, including a request for commenters to provide empirical data and other factual support for their view to the extent possible.[531] The Commission did not receive any comments specific to the potential impact of the proposed rules on the economy on an annual basis. The Commission renews its request for comment contained in the Proposing Release.

XII. Regulatory Flexibility Act

Section 3(a) of the Regulatory Flexibility Act [532] requires the Commission to undertake an Initial Regulatory Flexibility Analysis (''IRFA'') of the proposed rules and amendments on small entities unless the Commission certifies that the proposed rules and amendments, if adopted, would not have a significant economic impact on a substantial number of small entities.

A. Trade-Through Rule

The Commission hereby certifies, pursuant to Section 603(b) of the Regulatory Flexibility Act,[533] that reproposed Rule 611 would not have a significant economic impact on a substantial number of small entities.[534] Reproposed Rule 611 would require any trading center [535] to establish, maintain, and enforce written policies and procedures reasonably designed to prevent trade-throughs of protected quotations in NMS stocks that do not fall within an exception to the reproposed Rule, and, if relying on such an exception, that are reasonably designed to assure compliance with the terms of the exception. Further, trading centers would be required to regularly surveil to ascertain the effectiveness of such policies and procedures and to take prompt remedial action to remedy deficiencies in such policies and procedures. Thus, only those entities that fall within the definition of trading center would be subject to the reproposed Rule. In addition, brokers-dealers that would not be included within the definition of trading center but that employ their own order smart-routing systems to route orders to multiple trading centers may choose to (but would not be required to) use the intermarket sweep order functionality of the proposed intermarket sweep exception.[536] In addition, vendors that would not be subject to reproposed Rule 611 may need to make system modifications to support the operation of the reproposed Rule.

The current national securities exchanges and one national securities association that would be subject to the proposed Rule are not considered ''small entities'' for purposes of the Regulatory Flexibility Act.[537] The remaining trading centers that would be subject to reproposed Rule 611 are registered broker-dealers. The Commission has preliminarily determined that approximately 600 broker-dealers registered with the Commission,[538] which includes broker-dealers operating as equity ATSs, broker-dealers registered as market makers or specialists in NMS stocks, and any broker-dealer that is in the business of executing orders internally in NMS stocks, would be subject to reproposed Rule 611. Of these 600 broker-dealers, only two are considered small for purposes of the Regulatory Flexibility Act pursuant to the standards of Rule 0–10(c) under the Exchange Act.[539]

With respect to non-trading center broker-dealers that employ their own smart-order routing technology and that would choose to route orders in compliance with the proposed intermarket sweep exception (and thus would need to make necessary modifications to their order routing practices and proprietary order routing systems), the Commission preliminarily does not believe that this category of broker-dealers would be very large, and also preliminarily does not believe that any such broker-dealer that would employ its own order routing systems would be considered small, given the cost of operating such proprietary systems.[540] The Commission also believes it likely that, given the nature of their business, most if not all of these non-trading center broker-dealers that employ their own order-routing technology already have systems in place that monitor best-priced quotations across markets, and thus

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[530] Pub. L. No. 104–121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C., 15 U.S.C. and as a note to 5 U.S.C. 601).

[531] Proposing Release, 69 FR at 11151, 11162, 11174, 11189–90, 11198.

[532] 5 U.S.C. 603(a).

[533] 5 U.S.C. 603(b).

[534] The Commission included an IRFA in the Proposing Release for proposed Rule 611. Proposing Release, 69 FR at 11151–53. The certificate contained herein is based on a further refinement of the number of entities that would be subject to reproposed Rule 611 and the impact of the reproposed Rule.

[535] A trading center would be defined as a national securities exchange or national securities association that operates an SRO trading facility, an alternative trading system, an exchange market maker, an OTC market maker, or any other broker or dealer that executes orders internally by trading as principal or crossing orders as agent.

[536] An intermarket sweep order would be defined in Rule 600(b)(30) as a limit order that meets the following requirements: (1) The limit order is identified as an intermarket sweep order when routed to a trading center, and (2) simultaneously with the routing of the limit order, one or more additional orders are routed to execute against all better-priced protected quotations displayed by other trading centers up to their displayed size. These additional orders must be marked to inform the receiving trading center that they are associated with an intermarket sweep order. Paragraph (c)(5) of reproposed Rule 611 would allow a trading center to execute immediately any order identified as an intermarket sweep order, without regard for better-priced protected quotations displayed at one or more other trading centers. Similarly, paragraph (c)(6) of reproposed Rule 611 would authorize a trading center itself to route intermarket sweep orders and thereby enable immediate execution of a transaction at a price inferior to a protected quotation at another trading center.

[537] *See* 17 CFR 240.0–10(e) and 13 CFR 121.201.

[538] *See supra* note 426.

[539] Pursuant to Rule 0–10(c) under the Exchange Act, 17 CFR 240.0–10(c), a broker-dealer is defined as a small entity for purposes of the Exchange Act and the Regulatory Flexibility Act if the broker-dealer had a total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared, and it is not affiliated with any person (other than a natural person) that is not a small entity.

[540] *Id.*

preliminarily does not believe that the changes necessary to implement the intermarket sweep order would be significant. With respect to any vendor that may determine to make systems modifications to support the operation of reproposed Rule 611, only 16 of the approximately 80 existing vendors are considered small.[541] Accordingly, the Commission does not believe that reproposed Rule 611 would have a significant economic impact on a substantial number of small entities.

The Commission encourages written comments regarding this certification. The Commission requests that commenters describe the nature of any impact on small entities and provide empirical data to support the extent of the impact. In particular, the Commission requests comment on (a) the number of small entities that would be affected by reproposed Rule 611; (b) the nature of any impact reproposed Rule 611 would have on small entities and empirical data supporting the extent of the impact; and (c) how to quantify the number of small entities that would be affected by or how to quantify the impact of reproposed Rule 611.

B. Access Rule

The Commission hereby certifies, pursuant to Section 603(b) of the Regulatory Flexibility Act,[542] that reproposed Rule 610 and the reproposed amendments to Rule 301 of Regulation ATS would not have a significant economic impact on a substantial number of small entities.[543] Reproposed Rule 610 would prohibit any trading center[544] from imposing unfairly discriminatory terms that would prevent or inhibit the access of any person through members, subscribers, or customers of such trading center. Further, the reproposed Rule would restrict access fees imposed by trading centers to a maximum of $0.003 per share. Finally, reproposed Rule 610 would require national securities exchanges and national securities associations to establish and enforce rules that, among other things, prohibit their members from engaging in a pattern or practice of displaying quotations that lock or cross the automated quotations of other trading centers. Thus, reproposed Rule 610 would impact only those entities that fall within the definition of trading center. The reproposed access provisions also would lower the threshold that triggers the fair access requirements in Rule 301 of Regulation ATS from 20% to 5% of average daily volume in a security. This amendment would potentially impact the existing operating ATSs.

The current national securities exchanges and national securities association that would be subject to the reproposed Rule are not considered ''small entities'' for purposes of the Regulatory Flexibility Act.[545] The remaining entities that would be subject to reproposed Rule 610 and the reproposed amendments to Rule 301 of Regulation ATS are registered broker-dealers. The Commission has preliminarily determined that approximately 600 broker-dealers registered with the Commission,[546] which includes broker-dealers operating as equity ATSs, broker-dealers registered as market makers or specialists in NMS stocks, and any other broker-dealer that is in the business of executing orders internally, would be subject to Rule 610. In addition, the existing operating ATSs (which are or are operated by registered broker-dealers) potentially could be subject to the reproposed amendment to Rule 301 of Regulation ATS. Of these broker-dealers, only two are considered small for purposes of the Regulatory Flexibility Act pursuant to the standards of Rule 0–10(c) under the Exchange Act.[547] Accordingly, the Commission preliminarily does not believe that reproposed Rule 610 and the reproposed amendments to Rule 301 of Regulation ATS would have a significant economic impact on a substantial number of small entities.

The Commission encourages written comments regarding this certification. The Commission requests that commenters describe the nature of any impact on small entities and provide empirical data to support the extent of the impact. In particular, the Commission requests comment on (a) the number of small entities that would be affected by reproposed Rule 610 and the reproposed amendment to Rule 301 of Regulation ATS; (b) the nature of any impact reproposed Rule 610 and the reproposed amendment to Rule 301 of Regulation ATS would have on small entities and empirical data supporting the extent of the impact; and (c) how to quantify the number of small entities that would be affected by or how to quantify the impact of reproposed Rule 610 and the reproposed amendment to Rule 301 of Regulation ATS.

C. Sub-Penny Rule

This IRFA relating to reproposed Rule 612 has been prepared in accordance with 5 U.S.C. 603. This IRFA is substantially the same as the one contained in the Proposing Release.[548] The Commission did not receive any comment on the IRFA contained in the Proposing Release.

1. Reasons for the Proposed Action

The Commission is concerned that, while the conversion from fractions to decimals benefited investors by clarifying and simplifying pricing for investors, making our markets more competitive internationally, and reducing trading costs by narrowing spreads, these benefits could be sacrificed by decreasing the MPV from a penny to pricing increments finer than a penny. The Commission is particularly concerned that sub-penny orders can be used to step ahead of competing limit orders for an economically insignificant amount.

The Commission believes that this would be an opportune time to address these issues by proposing a uniform standard of quoting in NMS stocks. The Commission is thus proposing to prohibit any vendor, exchange, association, broker-dealer, or ATS (including ECNs) from accepting, ranking, or displaying quotations, orders, or indications of interest in NMS stocks in sub-penny increments (except for quotations, orders, or indications of

[541] A vendor is defined as any securities information processor engaged in the business of disseminating transaction reports or last sale data with respect to transactions in reported securities to brokers, dealers or investors on a real-time or other current and continuing basis, whether through an ECN, moving ticker or interrogation device. *See* 17 CFR 11Aa3–1(a)(11). Rule 0–10(g) states that the term ''small business'' or ''small organization,'' when referring to a securities information processor, means any securities information processor that: (1) Had gross revenues of less than $10 million during the preceding fiscal year (or in the time it has been in business, if shorter); (2) provided service to fewer than 100 interrogation devices or moving tickers at all times during the preceding fiscal year (or in the time that it has been in business, if shorter); and (3) is not affiliated with any person (other than a natural person) that is not a small business or small organization under this section. 17 CFR 240.0–10(g). The Commission estimates that there are approximately 80 vendors, only 16 of which are considered small entities.

[542] 5 U.S.C. 603(b).

[543] The Commission included an IRFA for the access proposal in the Proposing Release. Proposing Release, 69 FR at 11162–63. The certification contained herein is based on a further refinement of the entities that would be subject to reproposed access requirements and the impact of the proposed rules.

[544] A trading center would be defined as a national securities exchange or national securities association that operates an SRO trading facility, an alternative trading system, an exchange market maker, an OTC market maker, or any other broker or dealer that executes orders internally by trading as principal or crossing orders as agent.

[545] *See* 17 CFR 240.0–10(e) and 13 CFR 121.201.

[546] *See supra* note 426.

[547] *See supra* note 539.

[548] Proposing Release, 69 FR at 11174–75.

interest priced less than $1.00 per share, in which case the price may not extend beyond four decimal places).

2. Objectives

The reproposed rule is designed to fulfill several objectives. Reproposed Rule 612 is designed to prevent widespread quoting in sub-pennies, which could harm the markets and investors, by undermining a number of the benefits of decimalization. In particular, sub-penny quotation could impair broker-dealers' efforts to meet their best execution obligations, and interfere with investors' understanding of securities prices. In addition, the reproposed rule is designed to enhance depth by preventing quotations from being spread across an increasing number of price points, while also encouraging the use of limit orders—an important source of liquidity—by preventing competing market participants from stepping ahead of limit orders for an economically insignificant amount.

3. Legal Basis

Pursuant to the Exchange Act and, particularly, Sections 3(b), 5, 6, 11A, 15, 15A, 17(a) and (b), 19, 23(a), and 36 thereof, 15 U.S.C. 78c(b), 78e, 78f, 78k–1, 78o, 78mm, 78q(a) and (b), and 78w(a), the Commission reproposes Rule 612.

4. Small Entities Subject to the Rule

The reproposed rule would apply to any national securities exchange, national securities association, ATS, vender, or broker or dealer. ATSs that are not registered as exchanges are required to register as broker-dealers. Accordingly, ATSs would be considered small entities if they fall within the standard for small entities that would apply to broker-dealers. Each type of market participant that would be affected by the reproposed rule is discussed below.

a. National Securities Exchanges and National Securities Association

Rule 0–10(e) under the Exchange Act[549] provides that the term ''small business'' or ''small organization,'' when referring to an exchange, means any exchange that: (1) Has been exempted from the reporting requirements of Rule 11Aa3–1 under the Exchange Act; and (2) is not affiliated with any person (other than a natural person) that is not a small business or small organization, as defined by Rule 0–10. No national securities exchanges are small entities because none meets these criteria. There is one national securities association (NASD) that would be subject to reproposed Rule 612. NASD is not a small entity as defined by 13 CFR 121.201.

b. Broker-Dealers

Commission rules generally define a broker-dealer as a small entity for purposes of the Exchange Act and the Regulatory Flexibility Act if the broker-dealer had a total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared, and the broker-dealer is not affiliated with any person (other than a natural person) that is not a small entity.[550] The Commission estimates that as of the end of 2003, there were approximately 6,565 Commission-registered broker-dealers,[551] of which approximately 905 would be considered small entities pursuant to the standard of Rule 0–10(c) under the Exchange Act.[552]

c. Vendors

A vendor is defined as any securities information processor engaged in the business of disseminating transaction reports or last sale data with respect to transactions in reported securities to brokers, dealers or investors on a real-time or other current and continuing basis, whether through an ECN, moving ticker or interrogation device.[553] Rule 0–10(g)[554] states that the term ''small business'' or ''small organization,'' when referring to a securities information processor, means any securities information processor that: (1) Had gross revenues of less than $10 million during the preceding fiscal year (or in the time it has been in business, if shorter); (2) provided service to fewer than 100 interrogation devices or moving tickers at all times during the preceding fiscal year (or in the time that it has been in business, if shorter); and (3) is not affiliated with any person (other than a natural person) that is not a small business or small organization under this section. The Commission estimates that there are approximately 80 vendors, 16 of which are considered small entities. The Commission seeks comment on whether these estimates are accurate.

5. Reporting, Recordkeeping, and Other Compliance Requirements

Reproposed Rule 612 would not impose any new reporting, recordkeeping or other compliance requirements on market participants that are small entities.

6. Duplicative, Overlapping or Conflicting Federal Rules

The Commission believes that there are no federal rules that duplicate, overlap or conflict with the proposed rule.

7. Significant Alternatives

Pursuant to Section 3(a) of the RFA,[555] the Commission must consider the following types of alternatives: (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the proposed rule for small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the proposed rule, or any part thereof, for small entities.

The primary goal of the reproposed rule is to provide a uniform pricing increment for NMS stocks. As such, imposing different compliance or reporting requirements, and possibly a different timetable for implementing compliance or reporting requirements, for small entities could undermine the goal of uniformity. In addition, the Commission preliminarily believes that it would not be consistent with the primary goal of the proposal to further clarify, consolidate, or simplify the reproposed rule for small entities. The Commission also does not believe that it is necessary to consider whether small entities should be permitted to use performance rather than design standards to comply with the proposed rule because the rule already reproposes performance standards and does not dictate for entities of any size any particular design standards (*e.g.*, technology) that must be employed to achieve the objectives of the proposed rule. The Commission also preliminarily believes that it would be inconsistent with the purposes of the Exchange Act to specify different requirements for small entities or to exempt broker-dealers from the proposed rule.

8. Request for Comments

The Commission encourages written comments on matters discussed in the IRFA. In particular, the Commission

[549] 17 CFR 240.0–10(e).

[550] 17 CFR 240.0–10(c).

[551] This number reflects the number of FOCUS filings.

[552] 17 CFR 240.0–10(c).

[553] *See* 17 CFR 11Aa3–1(a)(11).

[554] 17 CFR 240.0–10(g).

[555] 5 U.S.C. 603(c).

requests comments on (i) the number of small entities that would be affected by the reproposed rule; (ii) the nature of any impact the reproposed rule would have on small entities and empirical data supporting the extent of the impact; and (iii) how to quantify the number of small entities that would be affected by and how to quantify the impact of the reproposed rule. Such comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the reproposed rule is adopted, and will be placed in the same public file as comments on the reproposed rule itself.

D. Market Data Rules and Plan Amendments

1. Regulatory Flexibility Act Certification for the Plan Amendments

Pursuant to 5 U.S.C. 605(b) of the Regulatory Flexibility Act,[556] the Commission certified in the Proposing Release that amending the Plans to (1) modify the current formulas for allocating market data revenues, and (2) require the establishment of non-voting advisory committees would not have a significant economic impact on a substantial number of small entities.[557] The Commission did not receive any comments on the certification. The Commission renews its request for comment on the certification, which is set forth below.

The Commission hereby certifies, pursuant to 5 U.S.C. 603(b), that the reproposed amendments to the Plans, if adopted, would not have a significant economic impact on a substantial number of small entities. The reproposed amendments to the Plans imposing a new net income allocation formula would only impact the SROs,[558] SIAC (the processor for the CTA Plans and the CQ Plan), and Nasdaq (the processor for the Nasdaq UTP Plan). The reproposed amendments to the Plans requiring the establishment of an advisory committee would apply only to Plan participants. SIAC and Nasdaq would not be considered ''small entities'' for purposes of the Regulatory Flexibility Act.[559] The Plan participants are either national securities exchanges or a national securities association and, as such, are not small entities.[560] Accordingly, the Commission does not believe that the reproposed amendments to the Plans would have a significant economic impact on a substantial number of small entities.

2. Initial Regulatory Flexibility Analysis for Proposed Amendments to Rules 11Aa3–1 and 11Ac1–2 (Proposed To Be Redesignated as Rules 601 and 603)

This IRFA has been prepared in accordance with 5 U.S.C. 603. It relates to the proposed amendments to Rules 11Aa3–1 and 11Ac1–2 under the Exchange Act (proposed to be redesignated as Rules 601 and 603 of Regulation NMS).[561] This IRFA is substantially the same as the one contained in the Proposing Release.[562] The Commission did not receive any comment on the IRFA contained in the Proposing Release.

a. Reasons for the Proposed Action

The Commission believes that an overall modernization of the rules for disseminating market data to the public is necessary to address problems posed by the current market data rules. The Commission proposes to retain the core elements of the current rules—price discovery and mandatory consolidation—which provide important benefits to investors and to others who use market information, while amending other parts of the current rules that have resulted in serious economic and regulatory distortions. More specifically, the Commission reproposes to amend Rules 11Aa3–1 and 11Ac1–2 (proposed to be redesignated as Rules 601 and 603) to lift certain restrictions in order to reduce the burden on and to provide simplification and uniformity for those market centers, broker-dealers, and data vendors that have to comply with requirements under the Rules.

b. Objectives

The reproposed amendments to Rules 11Aa3–1 and 11Ac1–2 (proposed to be redesignated as Rules 601 and 603) are designed to fulfill several objectives. First, the reproposed amendment to Rule 11Aa3–1 (proposed to be redesignated as Rule 601) is intended to provide market centers, including ATSs and market makers, with flexibility to independently distribute their own trade reports, aside from their obligation to provide their trade reports to an SRO or to the Networks (depending on the type of market center). Second, a prime objective of the reproposed amendments to Rule 11Ac1–2 (proposed to be redesignated as Rule 603) is to provide uniform standards for all market centers, including non-SRO market centers and entities that are exclusive processors of SRO market data, for the independent distribution of market data. Third, the objective of the reproposed amendment to Rule 11Ac1–2 (proposed to be redesignated as Rule 603) providing that all SROs act jointly through the Plans and disseminate their consolidated information through a single processor is to clarify the current practice among the SROs and to require continued participation in the Plans and dissemination through one processor per security. Fourth, an additional objective of the reproposed amendments to Rule 11Ac1–2 (proposed to be redesignated as Rule 603) is to reduce consolidated display requirements on broker-dealers and vendors and to limit their consolidated display obligations to the disclosure of the NBBO and consolidated last sale information, and to the display of market information in a trading or order-routing context. Finally, the reproposed amendments to Rule 11Ac1–2 (proposed to be redesignated as Rule 603) are intended to ease the burden of compliance by simplifying the current consolidated display requirements under the Rule and by rescinding old provisions in the Rule that are outdated and no longer necessary.

c. Legal Basis

The Commission reproposes amendments to Rules 11Aa3–1 and 11Ac1–2 (proposed to be redesignated as Rules 601 and 603) pursuant to its authority set forth in Sections 2, 3(b), 5, 6, 11A, 15, 15A, 17(a), 19, 23(a), and 36 of the Exchange Act, and Rules 11Aa3–2(b)(2) and 11Aa3–2(c)(1) thereunder.[563]

d. Small Entities Subject to the Rule

The reproposed amendments to Rules 11Aa3–1 and 11Ac1–2 (proposed to be redesignated as Rules 601 and 603) would affect ATSs, market makers, broker-dealers, and SIPs that could potentially be small entities. Paragraph (c) of Rule 0–10 under the Exchange Act[564] defines the term ''small business'' or ''small organization,'' when referring to a broker-dealer, to mean a broker or dealer that had total capital of less than $500,000 on the date in the prior fiscal year as of which its

[556] 5 U.S.C. 605(b).

[557] Proposing Release, 69 FR at 11190–91.

[558] Paragraph (e) of Exchange Act Rule 0–10 provides that the term ''small entity,'' when referring to an exchange, means any exchange that has been exempted from the reporting requirements of 17 CFR 240.11Aa3–1 and is not affiliated with any person that is not a small entity. Under this standard, none of the exchanges affected by the proposed rule is a small entity. Similarly, the national securities association affected by the proposed rule is not small entity as defined by 13 CFR 121.201.

[559] *See* 17 CFR 240.0–10(g).

[560] *See* 17 CFR 240.0–10(e).

[561] 17 CFR 240.11Aa3–1 and 17 CFR 240.11Ac1–2.

[562] Proposing Release, 69 FR 11190–91.

[563] 15 U.S.C. 78b, 78c(b), 78e, 78f, 78k–1, 78*o*, 78*o*–3, 78q(a), 78s; 78w(a), and 78mm; 17 CFR 240.11Aa3–2(b)(2) and 17 CFR 240.11Aa3–2(c)(1).

[564] 17 CFR 240.0–10(c).

audited financial statements were prepared, or if not required to file such statements, it had total capital of less than $500,000 on the last business day of the preceding fiscal year; and is not affiliated with any person (other than a natural person) that is not a small business or small organization. ATSs and market makers would be considered broker-dealers for purposes of this definition. Paragraph (g) of Rule 0–10[565] defines the term ''small business'' or ''small organization,'' when referring to a SIP, to mean a SIP that had gross revenues of less than $10 million during the preceding fiscal year and provided service to fewer than 100 interrogation devices or moving tickers at all times during the preceding fiscal year; and is not affiliated with any person (other than a natural person) that is not a small business or small organization.

As of December 31, 2003, the Commission estimates that there are approximately 905 registered broker-dealers, including ATSs and market makers, that would be considered small entities. In addition, approximately 16 SIPs would be considered small entities. The Commission's reproposed amendment to Rule 11Aa3–1 (proposed to be redesignated as Rule 601) would enable small market centers, including ATSs and market makers, that contribute to consolidated information, if they so choose, to also independently distribute their own trade reports. The Commission's reproposed amendments to Rule 11Ac1–2 (proposed to be redesignated as Rule 603) would reduce the compliance burden on small broker-dealers and SIPs by limiting the data required to be consolidated and displayed under the rule.[566]

The Commission requests comment on the number of small entities that would be impacted by the reproposed amendments, including any available empirical data.

e. Reporting, Recordkeeping and Other Compliance Requirements

The reproposed amendments to Rules 11Aa3–1 and 11Ac1–2 (proposed to be redesignated as Rules 601 and 603) would not impose any new reporting, recordkeeping or other compliance requirements on ATSs, market makers, broker-dealers, and SIPs that are small entities. SROs that would be subject to these reproposed amendments would not be considered small entities.

f. Duplicative, Overlapping or Conflicting Federal Rules

The Commission believes that there are no rules that duplicate, overlap or conflict with the reproposed amendments to Rules 11Aa3–1 and 11Ac1–2 (proposed to be redesignated as Rules 601 and 603).

g. Significant Alternatives

The Regulatory Flexibility Act directs the Commission to consider significant alternatives that would accomplish the stated objective, while minimizing any significant adverse impact on small entities. In connection with the reproposed amendments, the Commission has considered the following alternative models for disseminating market data to the public: (1) A competing consolidators model under which each SRO would be allowed to sell its market data separately to any number of consolidators; (2) a rescission of the consolidated display requirement and allowing all SROs and other market centers to distribute their market data individually; and (3) a hybrid model that would retain the consolidated display requirement and existing Networks solely for the dissemination of the NBBO, but allow the SROs to distribute their own quotations and trades independently and without a consolidated display requirement. These alternative models were all intended to introduce more competition in the marketplace and greater flexibility in market data dissemination.

The primary goal of the reproposed amendments to Rules 11Aa3–1 and 11Ac1–2 (proposed to be redesignated as Rules 601 and 603) is to retain the benefits of the consolidated display requirement, which provides a uniform, consolidated stream of data and is the single most important tool for unifying all of the market centers trading NMS Stocks, while providing market centers that contribute to consolidated information with the ability to independently distribute their own market data and reducing the consolidated display requirements on broker-dealers and SIPs. The Commission preliminarily believes that these potential alternative models pose an unacceptable risk of losing important benefits that investors and other information users receive under the current system—an affordable and highly reliable stream of quotations and trades that is consolidated from all significant market centers trading an NMS Stock. The Commission also does not believe that it is necessary to consider whether small entities should be permitted to use performance rather than design standards to comply with the proposed amendments as the amendments already propose performance standards and do not dictate for entities of any size any particular design standards (*e.g.*, technology) that must be employed to achieve the objectives of the proposed amendments.

h. Solicitation of Comments

The Commission encourages comments with respect to any aspect of this IRFA. In particular, the Commission requests comments regarding: (1) The number of small entities that may be affected by the reproposed amendments; (2) the existence or nature of the potential impact of the reproposed amendments on small entities discussed in the analysis; and (3) how to quantify the impact of the reproposed amendments. Commenters are asked to describe the nature of any impact and provide empirical data supporting the extent of the impact. Such comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the proposals are adopted, and will be placed in the same public file as comments on the reproposed amendments themselves.

E. Regulation NMS

Pursuant to 5 U.S.C. 605(b), the Commission certified in the Proposing Release that proposed Rule 600 and the redesignation of the NMS rules as Regulation NMS would not have a significant economic impact on a substantial number of small entities.[567] The Commission received no comments regarding this certification. The Commission renews its request for comment on the certification, which is set forth below.

The Commission hereby certifies, pursuant to 5 U.S.C. 605(b), that reproposed Rule 600 and the related reproposed amendments, if adopted, would not have a significant economic impact on a substantial number of small entities. Reproposed Rule 600 would revise and clarify the definitions used in proposed Regulation NMS, thereby facilitating compliance with proposed Regulation NMS and potentially easing the compliance burden on entities seeking to comply with the regulation. Neither reproposed Rule 600 nor the related reproposed amendments of the NMS rules would alter the existing requirements of the NMS rules. Accordingly, the Commission does not

[565] 17 CFR 240.0–10(g).

[566] The reproposed amendment to Rule 11Ac1–2 (proposed to be redesignated as Rule 603), providing that all SROs act jointly through the Plans and disseminate their consolidated information through a single processor would only apply to the SROs, which are not ''small entities'' for purposes of the Regulatory Flexibility Act.

[567] Proposing Release, 69 FR at 11198.

believe that reproposed Rule 600 and the re-designation of the NMS rules as proposed Regulation NMS would have a significant impact on a substantial number of small entities.

XIII. Statutory Authority

Pursuant to the Exchange Act and particularly, Sections 2, 3(b), 5, 6, 11A, 15, 15A, 17(a) and (b), 19, 23(a), and 36 thereof, 15 U.S.C. 78b, 78c(b), 78e, 78f, 78k–1, 78o, 78o–3, 78q(a) and (b), 78s; 78w(a), and 78mm, and Rules 11Aa3–2(b)(2) and 11Aa3–2(c)(1) thereunder, 17 CFR 240.11Aa3–2(b)(2) and 17 CFR 240.11Aa3–2(c)(1), the Commission proposes to: (1) Redesignate the NMS rules under Section 11A of the Exchange Act as Regulation NMS rules; (2) adopt Rules 600, 610, 611, and 612 of Regulation NMS; (3) amend current Rules 11Aa3–1 and 11Ac1–2 under the Exchange Act and redesignate them as Rules 601 and 603 of Regulation NMS; (4) amend the CTA Plan, the CQ Plan, and the Nasdaq UTP Plan; and (5) amend various other rules to reflect the adoption of Regulation NMS, as set forth below.

XIV. Text of Proposed Amendments to the CTA Plan, the CQ Plan, and the Nasdaq UTP Plan

The Commission hereby proposes to amend the CTA Plan, the CQ Plan, and the Nasdaq UTP Plan to incorporate the new net income allocation formula into each Plan, which would supersede the existing allocation formulas in those Plans, and to incorporate the new Plan governance language into each Plan.

Set forth below is the text of (1) the proposed new allocation formula to be incorporated into each of the Plans, and (2) the proposed new Plan governance language to be incorporated into each of the Plans.

Formula Amendment

(#) *Allocation of Net Income.*

(a) *Annual Payment.* Notwithstanding any other provision of this Plan, each Participant eligible to receive distributable net income under the Plan shall receive an annual payment for each calendar year that is equal to the sum of the Participant's Trading Shares and Quoting Shares, as defined below, in each Eligible Security for the calendar year.

(b) *Security Income Allocation.* The Security Income Allocation for an Eligible Security shall be determined by multiplying (i) the distributable net income of the Plan for the calendar year by (ii) the Volume Percentage for such Eligible Security. The Volume Percentage for an Eligible Security shall be determined by dividing (i) the square root of the dollar volume of transaction reports disseminated by the Processor in such Eligible Security during the calendar year divided by (ii) the sum of the square roots of the dollar volume of transaction reports disseminated by the Processor in each Eligible Security during the calendar year.

(c) *Trading Share.* The Trading Share of a Participant in an Eligible Security shall be determined by multiplying (i) an amount equal to the lesser of (A) fifty percent of the Security Income Allocation for the Eligible Security or (B) an amount equal to $2.00 multiplied by the total number of qualified transaction reports disseminated by the Processor in the Eligible Security during the calendar year, by (ii) the Participant's Trade Rating in the Eligible Security. A Participant's Trade Rating in an Eligible Security shall be determined by taking the average of (i) the Participant's percentage of the total dollar volume of transaction reports disseminated by the Processor in the Eligible Security during the calendar year, and (ii) the Participant's percentage of the total number of qualified transaction reports disseminated by the Processor in the Eligible Security during the calendar year. A transaction report with a dollar volume of $5000 or more shall constitute one qualified transaction report. A transaction report with a dollar volume of less than $5000 shall constitute a fraction of a qualified transaction report that equals the dollar volume of the transaction report divided by $5000.

(d) *Quoting Share.* The Quoting Share of a Participant in an Eligible Security shall be determined by multiplying (i) an amount equal to fifty percent of the Security Income Allocation for the Eligible Security, plus the difference, if greater than zero, between fifty percent of the Security Income Allocation for the Eligible Security and an amount equal to $2.00 multiplied by the total number of qualified transaction reports disseminated by the Processor in the Eligible Security during the calendar year, by (ii) the Participant's Quote Rating in the Eligible Security. A Participant's Quote Rating in an Eligible Security shall be determined by dividing (i) the sum of the Quote Credits earned by the Participant in such Eligible Security during the calendar year by (ii) the sum of the Quote Credits earned by all Participants in such Eligible Security during the calendar year. A Participant shall earn one Quote Credit for each second of time multiplied by dollar value of size that a firm automated bid (offer) transmitted by the Participant to the Processor during regular trading hours is equal to the price of the national best bid (offer) in the Eligible Security. An automated bid (offer) shall have the meaning specified in Rule 600 of Regulation NMS of the Exchange Act for an ''automated quotation.'' The dollar value of size of a quote shall be determined by multiplying the price of a quote by its size.

Governance Amendment

(#) *Advisory Committee.*

(a) *Formation.* Notwithstanding any other provision of this Plan, an Advisory Committee to the Plan shall be formed and shall function in accordance with the provisions set forth in this section.

(a) *Composition.* Members of the Advisory Committee shall be selected for two-year terms as follows:

(1) *Operating Committee Selections.* By affirmative vote of a majority of the Participants entitled to vote, the Operating Committee shall select at least one representative from each of the following categories to be members of the Advisory Committee: (i) A broker-dealer with a substantial retail investor customer base, (ii) a broker-dealer with a substantial institutional investor customer base, (iii) an alternative trading system, (iv) a data vendor, and (v) an investor.

(2) *Participant Selections.* Each Participant shall have the right to select one member of the Advisory Committee. A Participant shall not select any person employed by or affiliated with any Participant or its affiliates or facilities.

(c) *Function.* Members of the Advisory Committee shall have the right to submit their views to the Operating Committee on Plan matters, prior to a decision by the Operating Committee on such matters. Such matters shall include, but not be limited to, any new or modified product, fee, contract, or pilot program that is offered or used pursuant to the Plan.

(d) *Meetings and Information.* Members of the Advisory Committee shall have the right to attend all meetings of the Operating Committee and to receive any information concerning Plan matters that is distributed to the Operating Committee; provided, however, that the Operating Committee may meet in executive session if, by affirmative vote of a majority of the Participants entitled to vote, the Operating Committee determines that an item of Plan business requires confidential treatment.

XV. Text of Reproposed Rules

List of Subjects

17 CFR Part 200

Administrative practice and procedure, Authority delegations (Government agencies), Organization and functions (Government agencies).

17 CFR Part 201

Administrative practice and procedure, Securities.

17 CFR Parts 230 and 270

Reporting and recordkeeping requirements, Securities.

17 CFR Parts 240, 242, and 249

Brokers, Reporting and recordkeeping requirements, Securities.

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

PART 200—ORGANIZATION; CONDUCT AND ETHICS; AND INFORMATION AND REQUESTS

1. The general authority citation for part 200 is revised to read as follows:

Authority: 15 U.S.C. 77s, 78d, 78d–1, 78d–2, 78w, 78*ll*(d), 78mm, 79t, 77sss, 80a–37, 80b–11 and 7202 unless otherwise noted.

* * * * *

2. Section 200.30–3 is amended by:

a. Removing paragraphs (a)(62) and (a)(71);

b. Redesignating paragraphs (a)(63) through (a)(82) as paragraphs (a)(62) through (a)(80);

c. Revising paragraphs (a)(27), (a)(28), (a)(36), (a)(37), (a)(42), (a)(49), (a)(61), and newly redesignated paragraphs (a)(68), and (a)(69); and

d. Adding new paragraphs (a)(81), (a)(82), and (a)(83).

The revisions and additions read as follows:

§ 200.30–3 Delegation of authority to Director of Division of Market Regulation.

* * * * *

(a) * * *

(27) To approve amendments to the joint industry plan governing consolidated transaction reporting declared effective by the Commission pursuant to Rule 601 (17 CFR 242.601) or its predecessors, Rule 11Aa3–1 and Rule 17a–15, and to grant exemptions from Rule 601 pursuant to Rule 601(f) (17 CFR 242.601(f)) to exchanges trading listed securities that are designated as national market system securities until such times as a Joint Reporting Plan for such securities is filed and approved by the Commission.

(28) To grant exemptions from Rule 602 (17 CFR 242.602), pursuant to Rule 602(d) (17 CFR 242.602(d)).

* * * * *

(36) To grant exemptions from Rule 603 (17 CFR 242.603), pursuant to Rule 603(d) (17 CFR 242.603(d)).

(37) Pursuant to Rule 600 (17 CFR 242.600), to publish notice of the filing of a designation plan with respect to national market system securities, or any proposed amendment thereto, and to approve such plan or amendment.

* * * * *

(42) Under 17 CFR 242.608(e), to grant or deny exemptions from 17 CFR 242.608.

* * * * *

(49) Pursuant to section 11A(b) of the Act (15 U.S.C. 78k–1(b)) and Rule 609 thereunder (17 CFR 242.609), to publish notice of and, by order, grant under section 11A(b) of the Act and Rule 609 thereunder: Applications for registration as a securities information processor; and exemptions from that section and any rules or regulations promulgated thereunder, either conditionally or unconditionally.

* * * * *

(61) To grant exemptions from Rule 604 (17 CFR 242.604), pursuant to Rule 604(c) (17 CFR 242.604(c)).

* * * * *

(68) Pursuant to Rule 605(b) (17 CFR 242.605(b)), to grant or deny exemptions, conditionally or unconditionally, from any provision or provisions of Rule 605 (17 CFR 242.605).

(69) Pursuant to Rule 606(c) (17 CFR 242.606(c)), to grant or deny exemptions, conditionally or unconditionally, from any provision or provisions of Rule 606 (17 CFR 242.606).

* * * * *

(81) To grant or deny exemptions from Rule 610 (17 CFR 242.610), pursuant to Rule 610(e) (17 CFR 242.610(e)).

(82) To grant or deny exemptions from Rule 611 (17 CFR 242.611), pursuant to Rule 611(d) (17 CFR 242.611(d)).

(83) To grant or deny exemptions from Rule 612 (17 CFR 242.612), pursuant to Rule 612(c) (17 CFR 242.612(c)).

Subpart N—Commission Information Collection Requirements Under the Paperwork Reduction Act: OMB Control Numbers

3. The authority citation for Subpart N continues to read as follows:

Authority: 44 U.S.C. 3506; 44 U.S.C. 3507.

4. Section 200.800 is amended by revising paragraph (b) to read as follows:

§ 200.800 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

(a) * * *

(b) *Display.*

Information collection requirement	17 CFR part or section where identified and described	Current OMB Control No.
Regulation S–X	Part 210	3235–0009
Regulation S–B	Part 228	3235–0417
Regulation S–K	Part 229	3235–0071
Rule 154	230.154	3235–0495
Rule 155	230.155	3235–0549
Rule 236	230.236	3235–0095
Rule 237	230.237	3235–0528
Regulation A	230.251 thru 230.263	3235–0286
Regulation C	230.400 thru 230.494	3235–0074
Rule 425	230.425	3235–0521
Rule 477	230.477	3235–0550
Rule 489	230.489	3235–0411
Rule 498	230.498	3235–0488
Regulation D	230.501 thru 230.506	3235–0076
Regulation E	230.601 thru 230.610a	3235–0232
Rule 604	230.604	3235–0232
Rule 605	230.605	3235–0232
Rule 609	230.609	3235–0233
Rule 701	230.701	3235–0522

Information collection requirement	17 CFR part or section where identified and described	Current OMB Control No.
Regulation S	230.901 thru 230.905	3235–0357
Regulation S–T	Part 232	3235–0424
Form SB–1	239.9	3235–0423
Form SB–2	239.10	3235–0418
Form S–1	239.11	3235–0065
Form S–2	239.12	3235–0072
Form S–3	239.13	3235–0073
Form N–2	239.14	3235–0026
Form N–1A	239.15A	3235–0307
Form S–6	239.16	3235–0184
Form S–8	239.16b	3235–0066
Form N–3	239.17a	3235–0316
Form N–4	239.17b	3235–0318
Form S–11	239.18	3235–0067
Form N–14	239.23	3235–0336
Form N–5	239.24	3235–0169
Form S–4	239.25	3235–0324
Form F–1	239.31	3235–0258
Form F–2	239.32	3235–0257
Form F–3	239.33	3235–0256
Form F–4	239.34	3235–0325
Form F–6	239.36	3235–0292
Form F–7	239.37	3235–0383
Form F–8	239.38	3235–0378
Form F–9	239.39	3235–0377
Form F–10	239.40	3235–0380
Form F–80	239.41	3235–0404
Form F–X	239.42	3235–0379
Form F–N	239.43	3235–0411
Form ET	239.62	3235–0329
Form ID	239.63	3235–0328
Form SE	239.64	3235–0327
Form TH	239.65	3235–0425
Form 1–A	239.90	3235–0286
Form 2–A	239.91	3235–0286
Form 144	239.144	3235–0101
Form 1–E	239.200	3235–0232
Form CB	239.800	3235–0518
Rule 6a–1	240.6a–1	3235–0017
Rule 6a–3	240.6a–3	3235–0021
Rule 6a–4	240.6a–4	3235–0554
Rule 6h–1	240.6h–1	3235–0555
Rule 8c–1	240.8c–1	3235–0514
Rule 9b–1	240.9b–1	3235–0480
Rule 10a–1	240.10a–1	3235–0475
Rule 10b–10	240.10b–10	3235–0444
Rule 10b–17	240.10b–17	3235–0476
Rule 10b–18	240.10b–18	3235–0474
Rule 10A–1	240.10A–1	3235–0468
Rule 11a1–1(T)	240.11a1–1(T)	3235–0478
Rule 12a–5	240.12a–5	3235–0079
Regulation 12B	240.12b–1 thru 240.12b–36	3235–0062
Rule 12d1–3	240.12d1–3	3235–0109
Rule 12d2–1	240.12d2–1	3235–0081
Rule 12d2–2	240.12d2–2	3235–0080
Rule 12f–1	240.12f–1	3235–0128
Rule 13a–16	240.13a–16	3235–0116
Regulation 13D/G	240.13d–1 thru 240.13d–7	3235–0145
Schedule 13D	240.13d–101	3235–0145
Schedule 13G	240.13d–102	3235–0145
Rule 13e–1	240.13e–1	3235–0305
Rule 13e–3	240.13e–3	3235–0007
Schedule 13E–3	240.13e–100	3235–0007
Schedule 13e–4F	240.13e–101	3235–0375
Regulation 14A	240.14a–1 thru 240.14a–12	3235–0059
Schedule 14A	240.14a–101	3235–0059
Regulation 14C	240.14c–1	3235–0057
Schedule 14C	240.14c–101	3235–0057
Regulation 14D	240.14d–1 thru 240.14d–9	3235–0102
Schedule TO	240.14d–100	3235–0515
Schedule 14D–1	240.14d–101	3235–0102
Schedule 14D–9	240.14d–101	3235–0102
Schedule 14D–1F	240.14d–102	3235–0376

Information collection requirement	17 CFR part or section where identified and described	Current OMB Control No.
Schedule 14D–9F	240.14d–103	3235–0382
Regulation 14E	240.14e–1 thru 240.14e–2	3235–0102
Rule 14f–1	240.14f–1	3235–0108
Rule 15a–4	240.15a–4	3235–0010
Rule 15a–6	240.15a–6	3235–0371
Rule 15b1–1	240.15b1–1	3235–0012
Rule 15b6–1(a)	240.15b6–1(a)	3235–0018
Rule 15c1–5	240.15c1–5	3235–0471
Rule 15c1–6	240.15c1–6	3235–0472
Rule 15c1–7	240.15c1–7	3235–0134
Rule 15c2–1	240.15c2–1	3235–0485
Rule 15c2–5	240.15c2–5	3235–0198
Rule 15c2–7	240.15c2–7	3235–0479
Rule 15c2–8	240.15c2–8	3235–0481
Rule 15c2–11	240.15c2–11	3235–0202
Rule 15c2–12	240.15c2–12	3235–0372
Rule 15c3–1	240.15c3–1	3235–0200
Rule 15c3–1(c)(13)	240.15c3–1(c)(13)	3235–0499
Appendix F to Rule 15c3–1	240.15c3–1f	3235–0496
Rule 15c3–3	240.15c3–3	3235–0078
Rule 15c3–4	240.15c3–4	3235–0497
Rule 15d–16	240.15d–16	3235–0116
Rule 15g–2	240.15g–2	3235–0434
Rule 15g–3	240.15g–3	3235–0392
Rule 15g–4	240.15g–4	3235–0393
Rule 15g–5	240.15g–5	3235–0394
Rule 15g–6	240.15g–6	3235–0395
Rule 15g–9	240.15g–9	3235–0385
Rule 15Aj–1	240.15Aj–1	3235–0044
Rule 15Ba2–1	240.15Ba2–1	3235–0083
Rule 15Ba2–5	240.15Ba2–5	3235–0088
Rule 15Bc3–1	240.15Bc3–1	3235–0087
Rule 17a–1	240.17a–1	3235–0208
Rule 17a–2	240.17a–2	3235–0201
Rule 17a–3	240.17a–3	3235–0033
Rule 17a–3(a)(16)	240.17a–3(a)(16)	3235–0508
Rule 17a–4	240.17a–4	3235–0279
Rule 17a–4(b)(10)	240.17a–4(b)(10)	3235–0506
Rule 17a–5	240.17a–5	3235–0123
Rule 17a–5(c)	240.17a–5(c)	3235–0199
Rule 17a–6	240.17a–6	3235–0489
Rule 17a–7	240.17a–7	3235–0131
Rule 17a–8	240.17a–8	3235–0092
Rule 17a–9T	240.17a–9T	3235–0524
Rule 17a–10	240.17a–10	3235–0122
Rule 17a–11	240.17a–11	3235–0085
Rule 17a–12	240.17a–12	3235–0498
Rule 17a–13	240.17a–13	3235–0035
Rule 17a–19	240.17a–19	3235–0133
Rule 17a–22	240.17a–22	3235–0196
Rule 17a–25	240.17a–25	3235–0540
Rule 17f–1(b)	240.17f–1(b)	3235–0032
Rule 17f–1(c)	240.17f–1(c)	3235–0037
Rule 17f–1(g)	240.17f–1(g)	3235–0290
Rule 17f–2(a)	240.17f–2(a)	3235–0034
Rule 17f–2(c)	240.17f–2(c)	3235–0029
Rule 17f–2(d)	240.17f–2(d)	3235–0028
Rule 17f–2(e)	240.17f–2(e)	3235–0031
Rule 17f–5	240.17f–5	3235–0269
Rule 17h–1T	240.17h–1T	3235–0410
Rule 17h–2T	240.17h–2T	3235–0410
Rule 17Ab2–1	240.17Ab2–1(a)	3235–0195
Rule 17Ac2–1	240.17Ac2–1	3235–0084
Rule 17Ad–2(c), (d), and (h)	240.17Ad–2(c), (d) and (h)	3235–0130
Rule 17Ad–3(b)	240.17Ad–3(b)	3235–0473
Rule 17Ad–4(b) and (c)	240.17Ad–4(b) and (c)	3235–0341
Rule 17Ad–6	240.17Ad–6	3235–0291
Rule 17Ad–7	240.17Ad–7	3235–0291
Rule 17Ad–10	240.17Ad–10	3235–0273
Rule 17Ad–11	240.17Ad–11	3235–0274
Rule 17Ad–13	240.17Ad–13	3235–0275
Rule 17Ad–15	240.17Ad–15	3235–0409
Rule 17Ad–16	240.17Ad–16	3235–0413

Information collection requirement	17 CFR part or section where identified and described	Current OMB Control No.
Rule 17Ad–17	240.17Ad–17	3235–0469
Rule 19b–1	240.19b–1	3235–0354
Rule 19b–4	240.19b–4	3235–0045
Rule 19b–4(e)	240.19b–4(e)	3235–0504
Rule 19b–5	240.19b–5	3235–0507
Rule 19b–7	240.19b–7	3235–0553
Rule 19d–1	240.19d–1(b) thru 240.19d–1(i)	3235–0206
Rule 19d–2	240.19d–2	3235–0205
Rule 19d–3	240.19d–3	3235–0204
Rule 19h–1	240.19h–1(a), (c) thru (e), and (g)	3235–0259
Rule 24b–1	240.24b–1	3235–0194
Rule 101	242.101	3235–0464
Rule 102	242.102	3235–0467
Rule 103	242.103	3235–0466
Rule 104	242.104	3235–0465
Rule 301	242.301	3235–0509
Rule 302	242.302	3235–0510
Rule 303	242.303	3235–0505
Rule 604	242.604	3235–0462
Rule 605	242.605	3235–0542
Rule 606	242.606	3235–0541
Rule 607	242.607	3235–0435
Rule 608	242.608	3235–0500
Rule 609	242.609	3235–0043
Rule 611	242.611	3235–0600
Regulation S–P	Part 248	3235–0537
Form 1	249.1	3235–0017
Form 1–N	249.10	3235–0554
Form 25	249.25	3235–0080
Form 26	249.26	3235–0079
Form 3	249.103	3235–0104
Form 4	249.104	3235–0287
Form 5	249.105	3235–0362
Form 8–A	249.208a	3235–0056
Form 10	249.210	3235–0064
Form 10–SB	249.210b	3235–0419
Form 18	249.218	3235–0121
Form 20–F	249.220f	3235–0288
Form 40–F	249.240f	3235–0381
Form 6–K	249.306	3235–0116
Form 8–K	249.308	3235–0060
Form 10–Q	249.308a	3235–0070
Form 10–QSB	249.308b	3235–0416
Form 10–K	249.310	3235–0063
Form 10–KSB	249.310b	3235–0420
Form 11–K	249.311	3235–0082
Form 18–K	249.318	3235–0120
Form 12B–25	249.322	3235–0058
Form 15	249.323	3235–0167
Form 13F	249.325	3235–0006
Form SE	249.444	3235–0327
Form ET	249.445	3235–0329
Form ID	249.446	3235–0328
Form DF	249.448	3235–0482
Form BD	249.501	3235–0012
Form BDW	249.501a	3235–0018
Form BD–N	249.501b	3235–0556
Form X–17A–5	249.617	3235–0123
Form X–17A–19	249.635	3235–0133
Form ATS	249.637	3235–0509
Form ATS–R	249.638	3235–0509
Form X–15AJ–1	249.802	3235–0044
Form X–15AJ–2	249.803	3235–0044
Form 19b–4	249.819	3235–0045
Form 19b–4(e)	249.820	3235–0504
Form Pilot	249.821	3235–0507
Form SIP	249.1001	3235–0043
Form MSD	249.1100	3235–0083
Form MSDW	249.1110	3235–0087
Form X–17F–1A	249.1200	3235–0037
Form TA–1	249b.100	3235–0084
Form TA–W	249b.101	3235–0151
Form TA–2	249b.102	3235–0337

Information collection requirement	17 CFR part or section where identified and described	Current OMB Control No.
Form CA–1	249b.200	3235–0195
Rule 1(a)	250.1(a)	3235–0170
Rule 1(b)	250.1(b)	3235–0170
Rule 1(c)	250.1(c)	3235–0164
Rule 2	250.2	3235–0161
Rule 3	250.3	3235–0160
Rule 7	250.7	3235–0165
Rule 7(d)	250.7(d)	3235–0165
Rule 20(b)	250.20(b)	3235–0125
Rule 20(c)	250.20(c)	3235–0125
Rule 20(d)	250.20(d)	3235–0163
Rule 23	250.23	3235–0125
Rule 24	250.24	3235–0126
Rule 26	250.26	3235–0183
Rule 29	250.29	3235–0149
Rule 44	250.44	3235–0147
Rule 45	250.45	3235–0154
Rule 47(b)	250.47(b)	3235–0163
Rule 52	250.52	3235–0369
Form 53	250.53	3235–0426
Rule 54	250.54	3235–0427
Rule 57(a)	250.57(a)	3235–0428
Rule 57(b)	250.57(b)	3235–0429
Rule 58	250.58	3235–0457
Rule 62	250.62	3235–0152
Rule 71(a)	250.71(a)	3235–0173
Rule 72	250.72	3235–0149
Rule 83	250.83	3235–0181
Rule 87	250.87	3235–0552
Rule 88	250.88	3235–0182
Rule 93	250.93	3235–0153
Rule 94	250.94	3235–0153
Rule 95	250.95	3235–0162
Rule 100(a)	250.100(a)	3235–0125
Uniform System of Accounts for Mutual Service Companies and Subsidiary Service Companies, Public Utility Holding Company Act of 1935.	Part 256	3235–0153
Preservation and Destruction of Records of Registered Public Utility Holding Companies and of Mutual and Subsidiary Service Companies.	Part 257	3235–0306
Form U5A	259.5a	3235–0170
Form U5B	259.5b	3235–0170
Form U5S	259.5s	3235–0164
Form U–1	259.101	3235–0125
Form U–13–1	259.113	3235–0182
Form U–6B–2	259.206	3235–0163
Form U–57	259.207	3235–0428
Form U–9C–3	259.208	3235–0457
Form U–12(I)–A	259.212a	3235–0173
Form U–12(I)–B	259.212b	3235–0173
Form U–13E–1	259.213	3235–0162
Form U–R–1	259.221	3235–0152
Form U–13–60	259.313	3235–0153
Form U–3A–2	259.402	3235–0161
Form U–3A3–1	259.403	3235–0160
Form U–7D	259.404	3235–0165
Form U–33–S	259.405	3235–0429
Form ET	259.601	3235–0329
Form ID	259.602	3235–0328
Form SE	259.603	3235–0327
Rule 7a–15 thru 7a–37	260.7a–15 thru 260.7a–37	3235–0132
Form T–1	269.1	3235–0110
Form T–2	269.2	3235–0111
Form T–3	269.3	3235–0105
Form T–4	269.4	3235–0107
Form ET	269.6	3235–0329
Form ID	269.7	3235–0328
Form SE	269.8	3235–0327
Form T–6	269.9	3235–0391
Rule 0–1	270.0–1	3235–0531
Rule 2a–7	270.2a–7	3235–0268
Rule 2a19–1	270.2a19–1	3235–0332
Rule 3a–4	270.3a–4	3235–0459
Rule 6c–7	270.6c–7	3235–0276
Rule 6e–2	270.6e–2	3235–0177

Information collection requirement	17 CFR part or section where identified and described	Current OMB Control No.
Rule 7d–1	270.7d–1	3235–0311
Rule 7d–2	270.7d–2	3235–0527
Section 8(b) of the Investment Company Act of 1940	270.8b–1 thru 270.8b–32	3235–0176
Rule 10f–3	270.10f–3	3235–0226
Rule 11a–2	270.11a–2	3235–0272
Rule 11a–3	270.11a–3	3235–0358
Rule 12b–1	270–12b–1	3235–0212
Rule 17a–7	270.17a–7	3235–0214
Rule 17a–8	270.17a–8	3235–0235
Rule 17e–1	270.17e–1	3235–0217
Rule 17f–1	270.17f–1	3235–0222
Rule 17f–2	270.17f–2	3235–0223
Rule 17f–4	270.17f–4	3235–0225
Rule 17f–6	270.17f–6	3235–0447
Rule 17f–7	270–17f–7	3235–0529
Rule 17g–1(g)	270.17g–1(g)	3235–0213
Rule 17j–1	270.17j–1	3235–0224
Rule 18f–1	270.18f–1	3235–0211
Rule 18f–3	270.18f–3	3235–0441
Rule 19a–1	270.19a–1	3235–0216
Rule 20a–1	270–20a–1	3235–0158
Rule 22d–1	270–22d–1	3235–0310
Rule 23c–1	270.23c–1	3235–0260
Rule 23c–3	270.23c–3	3235–0422
Rule 27e–1	270.27e–1	3235–0545
Rule 30b2–1	270.30b2–1	3235–0220
Rule 30d–2	270.30d–2	3235–0494
Rule 30e–1	270.30e–1	3235–0025
Rule 31a–1	270.31a–1	3235–0178
Rule 31a–2	270.31a–2	3235–0179
Rule 32a–4	270.32a–4	3235–0530
Rule 34b–1	270.34b–1	3235–0346
Rule 35d–1	270–35d–1	3235–0548
Form N–5	274.5	3235–0169
Form N–8A	274.10	3235–0175
Form N–2	274.11a–1	3235–0026
Form N–3	274.11b	3235–0316
Form N–4	274.11c	3235–0318
Form N–8B–2	274.12	3235–0186
Form N–6F	274.15	3235–0238
Form 24F–2	274.24	3235–0456
Form N–18F–1	274.51	3235–0211
Form N–54A	274.53	3235–0237
Form N–54C	274.54	3235–0236
Form N–SAR	274.101	3235–0330
Form N–27E–1	274.127e–1	3235–0545
Form N–27F–1	274.127f–1	3235–0546
Form N–17D–1	274.200	3235–0229
Form N–23C–1	274.201	3235–0230
Form N–8F	274.218	3235–0157
Form N–17F–1	274.219	3235–0359
Form N–17F–2	274.220	3235–0360
Form N–23c–3	274.221	3235–0422
Form ET	274.401	3235–0329
Form ID	274.402	3235–0328
Form SE	274.403	3235–0327
Rule 0–2	275.0–2	3235–0240
Rule 203–3	275.203–3	3235–0538
Rule 204–2	275.204–2	3235–0278
Rule 204–3	275.204–3	3235–0047
Rule 206(3)–2	275.206(3)–2	3235–0243
Rule 206(4)–2	275.206(4)–2	3235–0241
Rule 206(4)–3	275.206(4)–3	3235–0242
Rule 206(4)–4	275.206(4)–4	3235–0345
Form ADV	279.1	3235–0049
Schedule I to Form ADV	279.1	3235–0490
Form ADV–W	279.2	3235–0313
Form ADV–H	379.3	3235–0538
Form 4–R	279.4	3235–0240
Form 5–R	279.5	3235–0240
Form 6–R	279.6	3235–0240
Form 7–R	279.7	3235–0240
Form ADV–E	279.8	3235–0361

PART 201—RULES OF PRACTICE

5. The authority citation for part 201 continues to read as follows:

Authority: 15 U.S.C. 77s, 78w, 78x, 79t, 77sss, 80a–37 and 80b–11; 5 U.S.C. 504(c)(1).

6. Section 201.101 is amended by revising paragraphs (a)(9)(vi) and (a)(9)(vii) to read as follows:

§ 201.101 Definitions.

(a) * * *

(9) * * *

(vi) By the filing, pursuant to § 242.601 of this chapter, of an application for review of an action or failure to act in connection with the implementation or operation of any effective transaction reporting plan; or

(vii) By the filing, pursuant to § 242.608 of this chapter, of an application for review of an action taken or failure to act in connection with the implementation or operation of any effective national market system plan; or

* * * * *

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

7. The general authority citation for part 230 is revised to read as follows:

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

* * * * *

8. Section 230.144 is amended by:

a. Removing the authority citation following § 230.144; and

b. Revising paragraph (e)(1)(iii).

The revision reads as follows:

§ 230.144 Persons deemed not to be engaged in a distribution and therefore not underwriters.

* * * * *

(e) * * *

(1) * * *

(iii) The average weekly volume of trading in such securities reported pursuant to an *effective transaction reporting plan* or an *effective national market system plan* as those terms are defined in § 242.600 of this chapter during the four-week period specified in paragraph (e)(1)(ii) of this section.

* * * * *

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

9. The general authority citation for part 240 is revised to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l*, 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78*ll*, 78mm, 79q, 79t, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

10. Section 240.0–10 is amended by revising paragraph (e)(1) to read as follows:

§ 240.0–10 Small entities under the Securities Exchange Act for purposes of the Regulatory Flexibility Act.

* * * * *

(e) * * *

(1) Has been exempted from the reporting requirements of § 242.601 of this chapter; and

* * * * *

11. Section 240.3a51–1 is amended by revising the introductory text of paragraphs (a) and (e) to read as follows:

§ 240.3a51–1 Definition of ''penny stock''.

* * * * *

(a) That is an NMS stock, as defined in § 242.600 of this chapter:

* * * * *

(e) That is registered, or approved for registration upon notice of issuance, on a national securities exchange that makes transaction reports available pursuant to § 242.601 of this chapter, provided that:

* * * * *

12. Section 240.3a55–1 is amended by revising paragraphs (a)(2)(ii) and (b)(2)(ii)(B) to read as follows:

§ 240.3a55–1 Method for determining market capitalization and dollar value of average daily trading volume; application of the definition of narrow-based security index.

(a) * * *

(2) * * *

(ii) The 750 securities with the largest market capitalization shall be identified from the universe of all NMS securities, as defined in § 242.600 of this chapter, that are common stock or depositary shares.

(b) * * *

(2) * * *

(ii) * * *

(B) The 675 securities with the largest dollar value of ADTV shall be identified from the universe of all NMS securities as defined in § 242.600 of this chapter that are common stock or depositary shares.

* * * * *

13. Section 240.3b–16 is amended by revising paragraph (d) to read as follows:

§ 240.3b–16 Definitions of terms used in Section 3(a)(1) of the Act.

* * * * *

(d) For the purposes of this section, the terms *bid and offer* shall have the same meaning as under § 242.600 of this chapter.

* * * * *

14. Section 240.10a–1 is amended by revising paragraphs (a)(1), (e)(5)(ii) and (e)(11) to read as follows:

§ 240.10a–1 Short sales.

(a)(1)(i) No person shall, for his own account or for the account of any other person, effect a short sale of any security registered on, or admitted to unlisted trading privileges on, a national securities exchange, if trades in such securities are reported pursuant to an ''effective transaction reporting plan'' as defined in § 242.600 of this chapter and information as to such trades is made available in accordance with such plan on a real-time basis to vendors of market transaction information:

(A) Below the price at which the last sale thereof, regular way, was reported pursuant to an effective transaction reporting plan; or

(B) At such price unless such price is above the next proceeding different price at which a sale of such security, regular way, was reported pursuant to an effective transaction reporting plan.

(ii) The provisions of paragraph (a)(1)(i) of this section hereof shall not apply to transactions by any person in Nasdaq securities as defined in § 242.600 of this chapter, except for those Nasdaq securities for which transaction reports are collected, processed, and made available pursuant to the plan originally submitted to the Commission pursuant to § 240.17a–15 (subsequently amended and redesignated as § 240.11Aa3–1 and subsequently redesignated as § 242.601 of this chapter), which plan was declared effective as of May 17, 1974.

* * * * *

(e) * * *

(5) * * *

(ii) Effected at a price equal to the most recent offer communicated for the security by such registered specialist, registered exchange market maker or third market maker to an exchange or a national securities association (''association'') pursuant to § 242.602 of this chapter, if such offer, when communicated, was equal to or above the last sale, regular way, reported for such security pursuant to an effective transaction reporting plan:

Provided, *however*, That any exchange, by rule, may prohibit its registered specialist and registered exchange market makers from availing themselves of the exemption afforded by this paragraph (e)(5) if that exchange

determines that such action is necessary or appropriate in its market in the public interest or for the protection of investors;

* * * * *

(11) Any sale of a security covered by paragraph (a) of this section (except a sale to a stabilizing bid complying with § 242.104 of this chapter) by any broker or dealer, for his own account or for the account of any other person, effected at a price equal to the most recent offer communicated by such broker or dealer to an exchange or association pursuant to § 242.602 of this chapter in an amount less than or equal to the quotation size associated with such offer, if such offer, when communicated, was:

(i) Above the price at which the last sale, regular way, for such security was reported pursuant to an effective transaction reporting plan; or

(ii) At such last sale price, if such last sale price is above the next preceding different price at which a sale of such security, regular way, was reported pursuant to an effective transaction reporting plan.

* * * * *

15. Section 240.10b–10 is amended by:

a. Revising paragraphs (a)(2)(i)(C), (a)(2)(ii)(B) and (d)(7);

b. Removing paragraph (d)(8); and

c. Redesignating paragraphs (d)(9) and (d)(10) as paragraphs (d)(8) and (d)(9).

The revisions read as follows:

§ 240.10b–10 Confirmation of transactions.

* * * * *

(a) * * *

(1) * * *

(i) * * *

(C) For a transaction in any NMS stock as defined in § 242.600 of this chapter or a security authorized for quotation on an automated interdealer quotation system that has the characteristics set forth in section 17B of the Act (15 U.S.C. 78q–2), a statement whether payment for order flow is received by the broker or dealer for transactions in such securities and the fact that the source and nature of the compensation received in connection with the particular transaction will be furnished upon written request of the customer; *provided, however,* that brokers or dealers that do not receive payment for order flow in connection with any transaction have no disclosure obligations under this paragraph; and

* * * * *

(ii) * * *

(B) In the case of any other transaction in an NMS stock as defined by § 242.600 of this chapter, or an equity security that is traded on a national securities exchange and that is subject to last sale reporting, the reported trade price, the price to the customer in the transaction, and the difference, if any, between the reported trade price and the price to the customer.

* * * * *

(d) * * *

(7) NMS stock shall have the meaning provided in § 242.600 of this chapter.

* * * * *

16. Section 240.10b–18 is amended by revising paragraph (a)(6) to read as follows:

§ 240.10b–18 Purchases of certain equity securities by the issuer and others.

* * * * *

(a) * * *

(6) *Consolidated system* means a consolidated transaction or quotation reporting system that collects and publicly disseminates on a current and continuous basis transaction or quotation information in common equity securities pursuant to an effective transaction reporting plan or an effective national market system plan (as those terms are defined in § 242.600 of this chapter).

* * * * *

§ 240.11Aa2–1 through 240.11Ac1–6 [Removed]

17. The undesignated center heading preceding § 240.11Aa2–1 and §§ 240.11Aa2–1 through 240.11Ac1–6 are removed.

18. Section 240.12a–7 is amended by revising the introductory text of paragraph (a)(2) to read as follows:

§ 240.12a–7 Exemption of stock contained in standardized market baskets from section 12(a) of the Act.

(a) * * *

(2) The stock is an NMS stock as defined in § 242.600 of this chapter and is either:

* * * * *

19. Section 240.12f–1 is amended by:

a. Removing the authority citation following the section;

b. Removing ''and'' at the end of paragraph (a)(3); and

c. Revising paragraph (a)(4).

The revision reads as follows:

§ 240.12f–1 Applications for permission to reinstate unlisted trading privileges.

(a) * * *

(4) Whether transaction information concerning such security is reported pursuant to an effective transaction reporting plan contemplated by § 242.601 of this chapter;

* * * * *

20. Section 240.12f–2 is amended by revising paragraph (a) to read as follows:

§ 240.12f–2 Extending unlisted trading privileges to a security that is the subject of an initial public offering.

(a) *General provision.* A national securities exchange may extend unlisted trading privileges to a subject security when at least one transaction in the subject security has been effected on the national securities exchange upon which the security is listed and the transaction has been reported pursuant to an effective transaction reporting plan, as defined in § 242.600 of this chapter.

* * * * *

21. Section 240.15b9–1 is amended by:

a. Removing the authority citation following the section; and

b. Revising paragraph (c).

The revision reads as follows:

§ 240.15b9–1 Exemption for certain exchange members.

* * * * *

(c) For purposes of this section, the term *Intermarket Trading System* shall mean the intermarket communications linkage operated jointly by certain self-regulatory organizations pursuant to a plan filed with, and approved by, the Commission pursuant to § 242.608 of this chapter.

22. Section 240.15c2–11 is amended by revising paragraph (f)(5) to read as follows:

§ 240.15c2–11 Initiation or resumption of quotations without specified information.

* * * * *

(a) * * *

(5) The publication or submission of a quotation respecting a Nasdaq security (as defined in § 242.600 of this chapter), and such security's listing is not suspended, terminated, or prohibited.

* * * * *

23. Section 240.19c–3 is amended by revising paragraph (b)(6) to read as follows:

§ 240.19c–3 Governing off-board trading by members of national securities exchanges.

* * * * *

(b) * * *

(6) The term *effective transaction reporting plan* shall mean any plan approved by the Commission pursuant to § 242.601 of this chapter for collecting, processing, and making available transaction reports with respect to transactions in an equity security or class of equity securities.

24. Section 240.19c–4 is amended by revising paragraph (e)(6) to read as follows:

§ 240.19c–4 Governing certain listing or authorization determinations by national securities exchanges and associations.

* * * * *

(e) * * *

(6) The term *exchange* shall mean a national securities exchange, registered as such with the Securities and Exchange Commission pursuant to section 6 of the Act (15 U.S.C. 78f), which makes transaction reports available pursuant to § 242.601 of this chapter; and

* * * * *

25. Section 240.31 is amended by revising paragraph (a)(11)(v) to read as follows:

§ 240.31 Section 31 transaction fees.

(a) Definitions. For the purpose of this section, the following definitions shall apply:

* * * * *

(11) * * *

(v) Any sale of a security that is executed outside the United States and is not reported, or required to be reported, to a transaction reporting association as defined in § 242.600 and any approved plan filed thereunder;

* * * * *

PART 242—REGULATIONS M, SHO, ATS, AC, AND NMS AND CUSTOMER MARGIN REQUIREMENTS FOR SECURITY FUTURES

26. The authority citation for part 242 is revised to read as follows:

Authority: 15 U.S.C. 77g, 77q(a), 77s(a), 78b, 78c, 78g(c)(2), 78i(a), 78j, 78k–1(c), 78*l*, 78m, 78n, 78o(b), 78o(c), 78o(g), 78q(a), 78q(b), 78q(h), 78w(a), 78dd–1, 78mm, 80a–23, 80a–29, and 80a–37.

27. The part heading for part 242 is revised as set forth above.

28. Section 242.100 is amended by revising the definition for ''electronic communications network'' and ''Nasdaq'' found in paragraph (b) to read as follows:

§ 242.100 Preliminary note; definitions.

* * * * *

(b) * * *

Electronic communications network has the meaning provided in § 242.600.

* * * * *

Nasdaq means the electronic dealer quotation system owned and operated by The Nasdaq Stock Market, Inc.

* * * * *

29. Section 242.300 is amended by:

a. Revising paragraphs (g) and (h);

b. Removing paragraphs (i) and (j); and

c. Redesignating paragraphs (k), (l), and (m) as paragraphs (i), (j), and (k).

The revisions read as follows:

§ 242.300 Definitions.

* * * * *

(g) *NMS stock* shall have the meaning provided in § 242.600; *provided, however,* that a debt or convertible security shall not be deemed an NMS stock for purposes of this Regulation ATS.

(h) *Effective transaction reporting plan* shall have the meaning provided in § 242.600.

* * * * *

30. Section 242.301 is amended by revising paragraphs (b)(3), (b)(5), and (b)(6) to read as follows:

§ 242.301 Requirements for alternative trading systems.

* * * * *

(b) * * *

(3) *Order display and execution access.*

(i) An alternative trading system shall comply with the requirements set forth in paragraph (b)(3)(ii) of this section, with respect to any NMS stock in which the alternative trading system:

(A) Displays subscriber orders to any person (other than alternative trading system employees); and

(B) During at least 4 of the preceding 6 calendar months, had an average daily trading volume of 5 percent or more of the aggregate average daily share volume for such NMS stock as reported by an effective transaction reporting plan.

(ii) Such alternative trading system shall provide to a national securities exchange or national securities association the prices and sizes of the orders at the highest buy price and the lowest sell price for such NMS stock, displayed to more than one person in the alternative trading system, for inclusion in the quotation data made available by the national securities exchange or national securities association to vendors pursuant to § 242.602.

(i) With respect to any order displayed pursuant to paragraph (b)(3)(ii) of this section, an alternative trading system shall provide to any broker-dealer that has access to the national securities exchange or national securities association to which the alternative trading system provides the prices and sizes of displayed orders pursuant to paragraph (b)(3)(ii) of this section, the ability to effect a transaction with such orders that is:

(A) Equivalent to the ability of such broker-dealer to effect a transaction with other orders displayed on the exchange or by the association; and

(B) At the price of the highest priced buy order or lowest priced sell order displayed for the lesser of the cumulative size of such priced orders entered therein at such price, or the size of the execution sought by such broker-dealer.

* * * * *

(5) *Fair access.*

(i) An alternative trading system shall comply with the requirements in paragraph (b)(5)(ii) of this section, if during at least 4 of the preceding 6 calendar months, such alternative trading system had:

(A) With respect to any NMS stock, 5 percent or more of the average daily volume in that security reported by an effective transaction reporting plan;

(B) With respect to an equity security that is not an NMS stock and for which transactions are reported to a self-regulatory organization, 5 percent or more of the average daily trading volume in that security as calculated by the self-regulatory organization to which such transactions are reported;

(C) With respect to municipal securities, 5 percent or more of the average daily volume traded in the United States;

(D) With respect to investment grade corporate debt, 5 percent or more of the average daily volume traded in the United States; or

(E) With respect to non-investment grade corporate debt, 5 percent or more of the average daily volume traded in the United States.

(ii) An alternative trading system shall:

(A) Establish written standards for granting access to trading on its system;

(B) Not unreasonably prohibit or limit any person in respect to access to services offered by such alternative trading system by applying the standards established under paragraph (b)(5)(ii)(A) of this section in an unfair or discriminatory manner;

(C) Make and keep records of:

(*1*) All grants of access including, for all subscribers, the reasons for granting such access; and

(*2*) All denials or limitations of access and reasons, for each applicant, for denying or limiting access; and

(D) Report the information required on Form ATS–R (§ 249.638 of this chapter) regarding grants, denials, and limitations of access.

(iii) Notwithstanding paragraph (b)(5)(i) of this section, an alternative trading system shall not be required to comply with the requirements in paragraph (b)(5)(ii) of this section, if such alternative trading system:

(A) Matches customer orders for a security with other customer orders;

(B) Such customers' orders are not displayed to any person, other than

employees of the alternative trading system; and

(C) Such orders are executed at a price for such security disseminated by an effective transaction reporting plan, or derived from such prices.

(6) *Capacity, integrity, and security of automated systems.*

(i) The alternative trading system shall comply with the requirements in paragraph (b)(6)(ii) of this section, if during at least 4 of the preceding 6 calendar months, such alternative trading system had:

(A) With respect to any NMS stock, 20 percent or more of the average daily volume reported by an effective transaction reporting plan;

(B) With respect to equity securities that are not NMS stocks and for which transactions are reported to a self-regulatory organization, 20 percent or more of the average daily volume as calculated by the self-regulatory organization to which such transactions are reported;

(C) With respect to municipal securities, 20 percent or more of the average daily volume traded in the United States;

(D) With respect to investment grade corporate debt, 20 percent or more of the average daily volume traded in the United States; or

(E) With respect to non-investment grade corporate debt, 20 percent or more of the average daily volume traded in the United States.

(i) With respect to those systems that support order entry, order routing, order execution, transaction reporting, and trade comparison, the alternative trading system shall:

(A) Establish reasonable current and future capacity estimates;

(B) Conduct periodic capacity stress tests of critical systems to determine such system's ability to process transactions in an accurate, timely, and efficient manner;

(C) Develop and implement reasonable procedures to review and keep current its system development and testing methodology;

(D) Review the vulnerability of its systems and data center computer operations to internal and external threats, physical hazards, and natural disasters;

(E) Establish adequate contingency and disaster recovery plans;

(F) On an annual basis, perform an independent review, in accordance with established audit procedures and standards, of such alternative trading system's controls for ensuring that paragraphs (b)(6)(ii)(A) through (E) of this section are met, and conduct a review by senior management of a report containing the recommendations and conclusions of the independent review; and

(G) Promptly notify the Commission staff of material systems outages and significant systems changes.

(iii) Notwithstanding paragraph (b)(6)(i) of this section, an alternative trading system shall not be required to comply with the requirements in paragraph (b)(6)(ii) of this section, if such alternative trading system:

(A) Matches customer orders for a security with other customer orders;

(B) Such customers' orders are not displayed to any person, other than employees of the alternative trading system; and

(C) Such orders are executed at a price for such security disseminated by an effective transaction reporting plan, or derived from such prices.

* * * * *

31. Part 242 is amended by adding Regulation NMS, §§ 242.600 through 242.612 to read as follows:

Sec.

Regulation NMS—Regulation of the National Market System

Regulation NMS—Regulation of the National Market System

§ 242.600 NMS security designation and definitions.

(a) The term *national market system security* as used in section 11A(a)(2) of the Act (15 U.S.C. 78k–1(a)(2)) shall mean any NMS security as defined in paragraph (b) of this section.

(b) For purposes of Regulation NMS (§§ 242.600 through 242.612), the following definitions shall apply:

(1) *Aggregate quotation size* means the sum of the quotation sizes of all responsible brokers or dealers who have communicated on any national securities exchange bids or offers for an NMS security at the same price.

(2) *Alternative trading system* has the meaning provided in § 242.300(a).

(3) *Automated quotation* means a quotation displayed by a trading center that:

(i) Permits an incoming order to be marked as immediate-or-cancel;

(ii) Immediately and automatically executes an order marked as immediate-or-cancel against the displayed quotation up to its full size;

(iii) Immediately and automatically cancels any unexecuted portion of an order marked as immediate-or-cancel without routing the order elsewhere;

(iv) Immediately and automatically transmits a response to the sender of an order marked as immediate-or-cancel indicating the action taken with respect to such order; and

(v) Immediately and automatically displays information that updates the displayed quotation to reflect any change to its material terms.

(4) *Automated trading center* means a trading center that:

(i) Has implemented such systems and rules as are necessary to render it capable of displaying quotations that meet the requirements for an automated quotation set forth in paragraph (b)(3) of this section;

(ii) Identifies all quotations other than automated quotations as manual quotations;

(iii) Immediately identifies its quotations as manual quotations whenever it has reason to believe that it is not capable of displaying automated quotations; and

(iv) Has adopted reasonable standards limiting when its quotations change from automated quotations to manual quotations, and vice versa, to specifically defined circumstances that promote fair and efficient access to its automated quotations and are consistent with the maintenance of fair and orderly markets.

(5) *Average effective spread* means the share-weighted average of effective spreads for order executions calculated, for buy orders, as double the amount of difference between the execution price and the midpoint of the national best bid and national best offer at the time of order receipt and, for sell orders, as double the amount of difference between the midpoint of the national best bid and national best offer at the time of order receipt and the execution price.

(6) *Average realized spread* means the share-weighted average of realized spreads for order executions calculated, for buy orders, as double the amount of

difference between the execution price and the midpoint of the national best bid and national best offer five minutes after the time of order execution and, for sell orders, as double the amount of difference between the midpoint of the national best bid and national best offer five minutes after the time of order execution and the execution price; *provided, however,* that the midpoint of the final national best bid and national best offer disseminated for regular trading hours shall be used to calculate a realized spread if it is disseminated less than five minutes after the time of order execution.

(7) *Best bid and best offer* mean the highest priced bid and the lowest priced offer.

(8) *Bid* or *offer* means the bid price or the offer price communicated by a member of a national securities exchange or member of a national securities association to any broker or dealer, or to any customer, at which it is willing to buy or sell one or more round lots of an NMS security, as either principal or agent, but shall not include indications of interest.

(9) *Block size with respect to* an order means it is:

(i) Of at least 10,000 shares; or

(ii) For a quantity of stock having a market value of at least $200,000.

(10) *Categorized by order size* means dividing orders into separate categories for sizes from 100 to 499 shares, from 500 to 1999 shares, from 2000 to 4999 shares, and 5000 or greater shares.

(11) *Categorized by order type* means dividing orders into separate categories for market orders, marketable limit orders, inside-the-quote limit orders, at-the-quote limit orders, and near-the-quote limit orders.

(12) *Categorized by security* means dividing orders into separate categories for each NMS stock that is included in a report.

(13) *Consolidated display* means:

(i) The prices, sizes, and market identifications of the national best bid and national best offer for a security; and

(ii) Consolidated last sale information for a security.

(14) *Consolidated last sale information* means the price, volume, and market identification of the most recent transaction report for a security that is disseminated pursuant to an effective national market system plan.

(15) *Covered order* means any market order or any limit order (including immediate-or-cancel orders) received by a market center during regular trading hours at a time when a national best bid and national best offer is being disseminated, and, if executed, is executed during regular trading hours, but shall exclude any order for which the customer requests special handling for execution, including, but not limited to, orders to be executed at a market opening price or a market closing price, orders submitted with stop prices, orders to be executed only at their full size, orders to be executed on a particular type of tick or bid, orders submitted on a ''not held'' basis, orders for other than regular settlement, and orders to be executed at prices unrelated to the market price of the security at the time of execution.

(16) *Customer* means any person that is not a broker or dealer.

(17) *Customer limit order* means an order to buy or sell an NMS stock at a specified price that is not for the account of either a broker or dealer; *provided, however,* that the term *customer limit order* shall include an order transmitted by a broker or dealer on behalf of a customer.

(18) *Customer order* means an order to buy or sell an NMS security that is not for the account of a broker or dealer, but shall not include any order for a quantity of a security having a market value of at least $50,000 for an NMS security that is an option contract and a market value of at least $200,000 for any other NMS security.

(19) *Directed order* means a customer order that the customer specifically instructed the broker or dealer to route to a particular venue for execution.

(20) *Dynamic market monitoring device* means any service provided by a vendor on an interrogation device or other display that:

(i) Permits real-time monitoring, on a dynamic basis, of transaction reports, last sale data, or quotation information with respect to a particular security; and

(ii) Displays the most recent transaction report, last sale data, or quotation information with respect to that security until such report, data, or information has been superseded or supplemented by the display of a new transaction report, last sale data, or quotation information reflecting the next reported transaction or quotation in that security.

(21) *Effective national market system plan* means any national market system plan approved by the Commission (either temporarily or on a permanent basis) pursuant to § 242.608.

(22) *Effective transaction reporting plan* means any transaction reporting plan approved by the Commission pursuant to § 242.601.

(23) *Electronic communications network* means any electronic system that widely disseminates to third parties orders entered therein by an exchange market maker or OTC market maker, and permits such orders to be executed against in whole or in part; except that the term *electronic communications network* shall not include:

(i) Any system that crosses multiple orders at one or more specified times at a single price set by the system (by algorithm or by any derivative pricing mechanism) and does not allow orders to be crossed or executed against directly by participants outside of such times; or

(ii) Any system operated by, or on behalf of, an OTC market maker or exchange market maker that executes customer orders primarily against the account of such market maker as principal, other than riskless principal.

(24) *Exchange market maker* means any member of a national securities exchange that is registered as a specialist or market maker pursuant to the rules of such exchange.

(25) *Exchange-traded security* means any NMS security or class of NMS securities listed and registered, or admitted to unlisted trading privileges, on a national securities exchange; *provided, however,* that securities not listed on any national securities exchange that are traded pursuant to unlisted trading privileges are excluded.

(26) *Executed at the quote* means, for buy orders, execution at a price equal to the national best offer at the time of order receipt and, for sell orders, execution at a price equal to the national best bid at the time of order receipt.

(27) *Executed outside the quote* means, for buy orders, execution at a price higher than the national best offer at the time of order receipt and, for sell orders, execution at a price lower than the national best bid at the time of order receipt.

(28) *Executed with price improvement* means, for buy orders, execution at a price lower than the national best offer at the time of order receipt and, for sell orders, execution at a price higher than the national best bid at the time of order receipt.

(29) *Inside-the-quote limit order, at-the-quote limit order,* and *near-the-quote limit order* mean non-marketable buy orders with limit prices that are, respectively, higher than, equal to, and lower by $0.10 or less than the national best bid at the time of order receipt, and non-marketable sell orders with limit prices that are, respectively, lower than, equal to, and higher by $0.10 or less than the national best offer at the time of order receipt.

(30) *Intermarket sweep order* means a limit order for an NMS stock that meets the following requirements:

(i) When routed to a trading center, the limit order is identified as an intermarket sweep order; and

(ii) Simultaneously with the routing of the limit order identified as an intermarket sweep order, one or more additional limit orders, as necessary, are routed to execute against the full displayed size of any protected bid, in the case of a limit order to sell, or the full displayed size of any protected offer, in the case of a limit order to buy, for the NMS stock with a price that is superior to the limit price of the limit order identified as an intermarket sweep order. These additional routed orders also must be marked as intermarket sweep orders.

(31) *Interrogation device* means any securities information retrieval system capable of displaying transaction reports, last sale data, or quotation information upon inquiry, on a current basis on a terminal or other device.

(32) *Joint self-regulatory organization plan* means a plan as to which two or more self-regulatory organizations, acting jointly, are sponsors.

(33) *Last sale data* means any price or volume data associated with a transaction.

(34) *Listed equity security* means any equity security listed and registered, or admitted to unlisted trading privileges, on a national securities exchange.

(35) *Listed option* means any option traded on a registered national securities exchange or automated facility of a national securities association.

(36) *Make publicly available* means posting on an Internet Web site that is free and readily accessible to the public, furnishing a written copy to customers on request without charge, and notifying customers at least annually in writing that a written copy will be furnished on request.

(37) *Manual quotation* means any quotation other than an automated quotation.

(38) *Market center* means any exchange market maker, OTC market maker, alternative trading system, national securities exchange, or national securities association.

(39) *Marketable limit order* means any buy order with a limit price equal to or greater than the national best offer at the time of order receipt, or any sell order with a limit price equal to or less than the national best bid at the time of order receipt.

(40) *Moving ticker* means any continuous real-time moving display of transaction reports or last sale data (other than a dynamic market monitoring device) provided on an interrogation or other display device.

(41) *Nasdaq security* means any registered security listed on The Nasdaq Stock Market, Inc.

(42) *National best bid and national best offer* means, with respect to quotations for an NMS security, the best bid and best offer for such security that are calculated and disseminated on a current and continuing basis by a plan processor pursuant to an effective national market system plan; *provided,* that in the event two or more market centers transmit to the plan processor pursuant to such plan identical bids or offers for an NMS security, the best bid or best offer (as the case may be) shall be determined by ranking all such identical bids or offers (as the case may be) first by size (giving the highest ranking to the bid or offer associated with the largest size), and then by time (giving the highest ranking to the bid or offer received first in time).

(43) *National market system plan* means any joint self-regulatory organization plan in connection with:

(i) The planning, development, operation or regulation of a national market system (or a subsystem thereof) or one or more facilities thereof; or

(ii) The development and implementation of procedures and/or facilities designed to achieve compliance by self-regulatory organizations and their members with any section of this Regulation NMS and part 240, subpart A of this chapter promulgated pursuant to section 11A of the Act (15 U.S.C. 78k–1).

(44) *National securities association* means any association of brokers and dealers registered pursuant to section 15A of the Act (15 U.S.C. 78o–3).

(45) *National securities exchange* means any exchange registered pursuant to section 6 of the Act (15 U.S.C. 78f).

(46) *NMS security* means any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan, or an effective national market system plan for reporting transactions in listed options.

(47) *NMS stock* means any NMS security other than an option.

(48) *Non-directed order* means any customer order other than a directed order.

(49) *Odd-lot* means an order for the purchase or sale of an NMS stock in an amount less than a round lot.

(50) *Options class* means all of the put option or call option series overlying a security, as defined in section 3(a)(10) of the Act (15 U.S.C. 78c(a)(10)).

(51) *Options series* means the contracts in an options class that have the same unit of trade, expiration date, and exercise price, and other terms or conditions.

(52) *OTC market maker* means any dealer that holds itself out as being willing to buy from and sell to its customers, or others, in the United States, an NMS stock for its own account on a regular or continuous basis otherwise than on a national securities exchange in amounts of less than block size.

(53) *Participants,* when used in connection with a national market system plan, means any self-regulatory organization which has agreed to act in accordance with the terms of the plan but which is not a signatory of such plan.

(54) *Payment for order flow* has the meaning provided in § 240.10b–10 of this chapter.

(55) *Plan processor* means any self-regulatory organization or securities information processor acting as an exclusive processor in connection with the development, implementation and/or operation of any facility contemplated by an effective national market system plan.

(56) *Profit-sharing relationship* means any ownership or other type of affiliation under which the broker or dealer, directly or indirectly, may share in any profits that may be derived from the execution of non-directed orders.

Alternative A

Proposed Market BBO Alternative for Paragraph (b)(57) of This Section

(57) *Protected bid* or *protected offer* means a quotation in an NMS stock that:

(i) Is displayed by an automated trading center;

(ii) Is disseminated pursuant to an effective national market system plan; and

(iii) Is an automated quotation that is the best bid or best offer of a national securities exchange, the best bid or best offer of The Nasdaq Stock Market, Inc., or the best bid or best offer of a national securities association other than the best bid or best offer of The Nasdaq Stock Market, Inc.

Alternative B

Proposed Voluntary Depth Alternative for Paragraph (b)(57) of This Section

(57) *Protected bid* or *protected offer* means a quotation in an NMS stock that:

(i) Is displayed by an automated trading center;

(ii) Is disseminated pursuant to an effective national market system plan; and

(iii) Is an automated quotation that is the best bid or best offer of a national securities exchange, the best bid or best

offer of The Nasdaq Stock Market, Inc., or the best bid or best offer of a national securities association other than the best bid or best offer of The Nasdaq Stock Market, Inc., or such additional bids or offers that are designated as protected bids or protected offers pursuant to an effective national market system plan.

(58) *Protected quotation* means a protected bid or a protected offer.

(59) *Published aggregate quotation size* means the aggregate quotation size calculated by a national securities exchange and displayed by a vendor on a terminal or other display device at the time an order is presented for execution to a responsible broker or dealer.

(60) *Published bid and published offer* means the bid or offer of a responsible broker or dealer for an NMS security communicated by it to its national securities exchange or association pursuant to § 242.602 and displayed by a vendor on a terminal or other display device at the time an order is presented for execution to such responsible broker or dealer.

(61) *Published quotation size* means the quotation size of a responsible broker or dealer communicated by it to its national securities exchange or association pursuant to § 242.602 and displayed by a vendor on a terminal or other display device at the time an order is presented for execution to such responsible broker or dealer.

(62) *Quotation size,* when used with respect to a responsible broker's or dealer's bid or offer for an NMS security, means:

(i) The number of shares (or units of trading) of that security which such responsible broker or dealer has specified, for purposes of dissemination to vendors, that it is willing to buy at the bid price or sell at the offer price comprising its bid or offer, as either principal or agent; or

(ii) In the event such responsible broker or dealer has not so specified, a normal unit of trading for that NMS security.

(63) *Quotations* and *quotation information* mean bids, offers and, where applicable, quotation sizes and aggregate quotation sizes.

(64) *Regular trading hours* means the time between 9:30 a.m. and 4:00 p.m. Eastern Time, or such other time as is set forth in the procedures established pursuant to § 242.605(a)(2).

(65) *Responsible broker or dealer* means:

(i) When used with respect to bids or offers communicated on a national securities exchange, any member of such national securities exchange who communicates to another member on such national securities exchange, at the location (or locations) or through the facility or facilities designated by such national securities exchange for trading in an NMS security a bid or offer for such NMS security, as either principal or agent; *provided, however,* that, in the event two or more members of a national securities exchange have communicated on or through such national securities exchange bids or offers for an NMS security at the same price, each such member shall be considered a *responsible broker or dealer* for that bid or offer, subject to the rules of priority and precedence then in effect on that national securities exchange; and further *provided,* that for a bid or offer which is transmitted from one member of a national securities exchange to another member who undertakes to represent such bid or offer on such national securities exchange as agent, only the last member who undertakes to represent such bid or offer as agent shall be considered the *responsible broker or dealer* for that bid or offer; and

(ii) When used with respect to bids and offers communicated by an OTC market maker to a broker or dealer or a customer, the OTC market maker communicating the bid or offer (regardless of whether such bid or offer is for its own account or on behalf of another person).

(66) *Revised bid or offer* means a market maker's bid or offer which supersedes its published bid or published offer.

(67) *Revised quotation size* means a market maker's quotation size which supersedes its published quotation size.

(68) *Self-regulatory organization* means any national securities exchange or national securities association.

(69) *Specified persons,* when used in connection with any notification required to be provided pursuant to § 242.602(a)(3) and any election (or withdrawal thereof) permitted under § 242.602(a)(5), means:

(i) Each vendor;

(ii) Each plan processor; and

(iii) The processor for the Options Price Reporting Authority (in the case of a notification for a subject security which is a class of securities underlying options admitted to trading on any national securities exchange).

(70) *Sponsor,* when used in connection with a national market system plan, means any self-regulatory organization which is a signatory to such plan and has agreed to act in accordance with the terms of the plan.

(71) *SRO display-only facility* means a facility operated by a national securities exchange or national securities association that displays quotations in a security, but does not execute orders against such quotations or present orders for execution.

(72) *SRO trading facility* means a facility operated by a national securities exchange or a national securities association that executes orders in a security or presents orders to members for execution.

(73) *Subject security* means:

(i) With respect to a national securities exchange:

(A) Any exchange-traded security other than a security for which the executed volume of such exchange, during the most recent calendar quarter, comprised one percent or less of the aggregate trading volume for such security as reported pursuant to an effective transaction reporting plan or effective national market system plan; and

(B) Any other NMS security for which such exchange has in effect an election, pursuant to § 242.602(a)(5)(i), to collect, process, and make available to a vendor bids, offers, quotation sizes, and aggregate quotation sizes communicated on such exchange; and

(ii) With respect to a member of a national securities association:

(A) Any exchange-traded security for which such member acts in the capacity of an OTC market maker unless the executed volume of such member, during the most recent calendar quarter, comprised one percent or less of the aggregate trading volume for such security as reported pursuant to an effective transaction reporting plan or effective national market system plan; and

(B) Any other NMS security for which such member acts in the capacity of an OTC market maker and has in effect an election, pursuant to § 242.602(a)(5)(ii), to communicate to its association bids, offers, and quotation sizes for the purpose of making such bids, offers, and quotation sizes available to a vendor.

(74) *Time of order execution* means the time (to the second) that an order was executed at any venue.

(75) *Time of order receipt* means the time (to the second) that an order was received by a market center for execution.

(76) *Time of the transaction* has the meaning provided in § 240.10b–10 of this chapter.

(77) *Trade-through* means the purchase or sale of an NMS stock during regular trading hours, either as principal or agent, at a price that is lower than a protected bid or higher than a protected offer.

(78) *Trading center* means a national securities exchange or national securities association that operates an

SRO trading facility, an alternative trading system, an exchange market maker, an OTC market maker, or any other broker or dealer that executes orders internally by trading as principal or crossing orders as agent.

(79) *Trading rotation* means, with respect to an options class, the time period on a national securities exchange during which:

(i) Opening, re-opening, or closing transactions in options series in such options class are not yet completed; and

(ii) Continuous trading has not yet commenced or has not yet ended for the day in options series in such options class.

(80) *Transaction report* means a report containing the price and volume associated with a transaction involving the purchase or sale of one or more round lots of a security.

(81) *Transaction reporting association* means any person authorized to implement or administer any transaction reporting plan on behalf of persons acting jointly under § 242.601(a).

(82) *Transaction reporting plan* means any plan for collecting, processing, making available or disseminating transaction reports with respect to transactions in NMS stocks filed with the Commission pursuant to, and meeting the requirements of, § 242.601.

(83) *Vendor* means any securities information processor engaged in the business of disseminating transaction reports, last sale data, or quotation information with respect to NMS securities to brokers, dealers, or investors on a real-time or other current and continuing basis, whether through an electronic communications network, moving ticker, or interrogation device.

§ 242.601 Dissemination of transaction reports and last sale data with respect to transactions in NMS stocks.

(a)(1) Every national securities exchange shall file a transaction reporting plan regarding transactions in listed equity and Nasdaq securities executed through its facilities, and every national securities association shall file a transaction reporting plan regarding transactions in listed equity and Nasdaq securities executed by its members otherwise than on a national securities exchange.

(2) Any transaction reporting plan, or any amendment thereto, filed pursuant to this section shall be filed with the Commission, and considered for approval, in accordance with the procedures set forth in § 242.608(a) and (b). Any such plan, or amendment thereto, shall specify, at a minimum:

(i) The listed equity and Nasdaq securities or classes of such securities for which transaction reports shall be required by the plan;

(ii) Reporting requirements with respect to transactions in listed equity securities and Nasdaq securities, for any broker or dealer subject to the plan;

(iii) The manner of collecting, processing, sequencing, making available and disseminating transaction reports and last sale data reported pursuant to such plan;

(iv) The manner in which such transaction reports reported pursuant to such plan are to be consolidated with transaction reports from national securities exchanges and national securities associations reported pursuant to any other effective transaction reporting plan;

(v) The applicable standards and methods which will be utilized to ensure promptness of reporting, and accuracy and completeness of transaction reports;

(vi) Any rules or procedures which may be adopted to ensure that transaction reports or last sale data will not be disseminated in a fraudulent or manipulative manner;

(vii) Specific terms of access to transaction reports made available or disseminated pursuant to the plan; and

(viii) That transaction reports or last sale data made available to any vendor for display on an interrogation device identify the marketplace where each transaction was executed.

(3) No transaction reporting plan filed pursuant to this section, or any amendment to an effective transaction reporting plan, shall become effective unless approved by the Commission or otherwise permitted in accordance with the procedures set forth in § 242.608.

(b) *Prohibitions and reporting requirements.*

(1) No broker or dealer may execute any transaction in, or induce or attempt to induce the purchase or sale of, any NMS stock:

(i) On or through the facilities of a national securities exchange unless there is an effective transaction reporting plan with respect to transactions in such security executed on or through such exchange facilities; or

(ii) Otherwise than on a national securities exchange unless there is an effective transaction reporting plan with respect to transactions in such security executed otherwise than on a national securities exchange by such broker or dealer.

(2) Every broker or dealer who is a member of a national securities exchange or national securities association shall promptly transmit to the exchange or association of which it is a member all information required by any effective transaction reporting plan filed by such exchange or association (either individually or jointly with other exchanges and/or associations).

(c) *Retransmission of transaction reports or last sale data.* Notwithstanding any provision of any effective transaction reporting plan, no national securities exchange or national securities association may, either individually or jointly, by rule, stated policy or practice, transaction reporting plan or otherwise, prohibit, condition or otherwise limit, directly or indirectly, the ability of any vendor to retransmit, for display in moving tickers, transaction reports or last sale data made available pursuant to any effective transaction reporting plan; *provided, however,* that a national securities exchange or national securities association may, by means of an effective transaction reporting plan, condition such retransmission upon appropriate undertakings to ensure that any charges for the distribution of transaction reports or last sale data in moving tickers permitted by paragraph (d) of this section are collected.

(d) *Charges.* Nothing in this section shall preclude any national securities exchange or national securities association, separately or jointly, pursuant to the terms of an effective transaction reporting plan, from imposing reasonable, uniform charges (irrespective of geographic location) for distribution of transaction reports or last sale data.

(e) *Appeals.* The Commission may, in its discretion, entertain appeals in connection with the implementation or operation of any effective transaction reporting plan in accordance with the provisions of § 242.608(d).

(f) *Exemptions.* The Commission may exempt from the provisions of this section, either unconditionally or on specified terms and conditions, any national securities exchange, national securities association, broker, dealer, or specified security if the Commission determines that such exemption is consistent with the public interest, the protection of investors and the removal of impediments to, and perfection of the mechanisms of, a national market system.

§ 242.602 Dissemination of quotations in NMS securities.

(a) *Dissemination requirements for national securities exchanges and national securities associations.*

(1) Every national securities exchange and national securities association shall

establish and maintain procedures and mechanisms for collecting bids, offers, quotation sizes, and aggregate quotation sizes from responsible brokers or dealers who are members of such exchange or association, processing such bids, offers, and sizes, and making such bids, offers, and sizes available to vendors, as follows:

(i) Each national securities exchange shall at all times such exchange is open for trading, collect, process, and make available to vendors the best bid, the best offer, and aggregate quotation sizes for each subject security listed or admitted to unlisted trading privileges which is communicated on any national securities exchange by any responsible broker or dealer, but shall not include:

(A) Any bid or offer executed immediately after communication and any bid or offer communicated by a responsible broker or dealer other than an exchange market maker which is cancelled or withdrawn if not executed immediately after communication; and

(B) Any bid or offer communicated during a period when trading in that security has been suspended or halted, or prior to the commencement of trading in that security on any trading day, on that exchange.

(ii) Each national securities association shall, at all times that last sale information with respect to NMS securities is reported pursuant to an effective transaction reporting plan, collect, process, and make available to vendors the best bid, best offer, and quotation sizes communicated otherwise than on an exchange by each member of such association acting in the capacity of an OTC market maker for each subject security and the identity of that member (excluding any bid or offer executed immediately after communication), except during any period when over-the-counter trading in that security has been suspended.

(2) Each national securities exchange shall, with respect to each published bid and published offer representing a bid or offer of a member for a subject security, establish and maintain procedures for ascertaining and disclosing to other members of that exchange, upon presentation of orders sought to be executed by them in reliance upon paragraph (b)(2) of this section, the identity of the responsible broker or dealer who made such bid or offer and the quotation size associated with it.

(3)(i) If, at any time a national securities exchange is open for trading, such exchange determines, pursuant to rules approved by the Commission pursuant to section 19(b)(2) of the Act (15 U.S.C. 78s(b)(2)), that the level of trading activities or the existence of unusual market conditions is such that the exchange is incapable of collecting, processing, and making available to vendors the data for a subject security required to be made available pursuant to paragraph (a)(1) of this section in a manner that accurately reflects the current state of the market on such exchange, such exchange shall immediately notify all specified persons of that determination. Upon such notification, responsible brokers or dealers that are members of that exchange shall be relieved of their obligation under paragraphs (b)(2) and (c)(3) of this section and such exchange shall be relieved of its obligations under paragraphs (a)(1) and (2) of this section for that security; *provided, however,* that such exchange will continue, to the maximum extent practicable under the circumstances, to collect, process, and make available to vendors data for that security in accordance with paragraph (a)(1) of this section.

(ii) During any period a national securities exchange, or any responsible broker or dealer that is a member of that exchange, is relieved of any obligation imposed by this section for any subject security by virtue of a notification made pursuant to paragraph (a)(3)(i) of this section, such exchange shall monitor the activity or conditions which formed the basis for such notification and shall immediately renotify all specified persons when that exchange is once again capable of collecting, processing, and making available to vendors the data for that security required to be made available pursuant to paragraph (a)(1) of this section in a manner that accurately reflects the current state of the market on such exchange. Upon such renotification, any exchange or responsible broker or dealer which had been relieved of any obligation imposed by this section as a consequence of the prior notification shall again be subject to such obligation.

(4) Nothing in this section shall preclude any national securities exchange or national securities association from making available to vendors indications of interest or bids and offers for a subject security at any time such exchange or association is not required to do so pursuant to paragraph (a)(1) of this section.

(5)(i) Any national securities exchange may make an election for purposes of the definition of *subject security* in § 242.600(b)(73) for any NMS security, by collecting, processing, and making available bids, offers, quotation sizes, and aggregate quotation sizes in that security; except that for any NMS security previously listed or admitted to unlisted trading privileges on only one exchange and not traded by any OTC market maker, such election shall be made by notifying all specified persons, and shall be effective at the opening of trading on the business day following notification.

(ii) Any member of a national securities association acting in the capacity of an OTC market maker may make an election for purposes of the definition of *subject security* in § 242.600(b)(73) for any NMS security, by communicating to its association bids, offers, and quotation sizes in that security; except that for any other NMS security listed or admitted to unlisted trading privileges on only one exchange and not traded by any other OTC market maker, such election shall be made by notifying its association and all specified persons, and shall be effective at the opening of trading on the business day following notification.

(iii) The election of a national securities exchange or member of a national securities association for any NMS security pursuant to this paragraph (a)(5) shall cease to be in effect if such exchange or member ceases to make available or communicate bids, offers, and quotation sizes in such security.

(b) *Obligations of responsible brokers and dealers.*

(1) Each responsible broker or dealer shall promptly communicate to its national securities exchange or national securities association, pursuant to the procedures established by that exchange or association, its best bids, best offers, and quotation sizes for any subject security.

(2) Subject to the provisions of paragraph (b)(3) of this section, each responsible broker or dealer shall be obligated to execute any order to buy or sell a subject security, other than an odd-lot order, presented to it by another broker or dealer, or any other person belonging to a category of persons with whom such responsible broker or dealer customarily deals, at a price at least as favorable to such buyer or seller as the responsible broker's or dealer's published bid or published offer (exclusive of any commission, commission equivalent or differential customarily charged by such responsible broker or dealer in connection with execution of any such order) in any amount up to its published quotation size.

(3)(i) No responsible broker or dealer shall be obligated to execute a transaction for any subject security as provided in paragraph (b)(2) of this section to purchase or sell that subject

security in an amount greater than such revised quotation if:

(A) Prior to the presentation of an order for the purchase or sale of a subject security, a responsible broker or dealer has communicated to its exchange or association, pursuant to paragraph (b)(1) of this section, a revised quotation size; or

(B) At the time an order for the purchase or sale of a subject security is presented, a responsible broker or dealer is in the process of effecting a transaction in such subject security, and immediately after the completion of such transaction, it communicates to its exchange or association a revised quotation size, such responsible broker or dealer shall not be obligated by paragraph (b)(2) of this section to purchase or sell that subject security in an amount greater than such revised quotation size.

(ii) No responsible broker or dealer shall be obligated to execute a transaction for any subject security as provided in paragraph (b)(2) of this section if:

(A) Before the order sought to be executed is presented, such responsible broker or dealer has communicated to its exchange or association pursuant to paragraph (b)(1) of this section, a revised bid or offer; or

(B) At the time the order sought to be executed is presented, such responsible broker or dealer is in the process of effecting a transaction in such subject security, and, immediately after the completion of such transaction, such responsible broker or dealer communicates to its exchange or association pursuant to paragraph (b)(1) of this section, a revised bid or offer; *provided, however,* that such responsible broker or dealer shall nonetheless be obligated to execute any such order in such subject security as provided in paragraph (b)(2) of this section at its revised bid or offer in any amount up to its published quotation size or revised quotation size.

(4) Subject to the provisions of paragraph (a)(4) of this section:

(i) No national securities exchange or OTC market maker may make available, disseminate or otherwise communicate to any vendor, directly or indirectly, for display on a terminal or other display device any bid, offer, quotation size, or aggregate quotation size for any NMS security which is not a subject security with respect to such exchange or OTC market maker; and

(ii) No vendor may disseminate or display on a terminal or other display device any bid, offer, quotation size, or aggregate quotation size from any national securities exchange or OTC market maker for any NMS security which is not a subject security with respect to such exchange or OTC market maker.

(5)(i) Entry of any priced order for an NMS security by an exchange market maker or OTC market maker in that security into an electronic communications network that widely disseminates such order shall be deemed to be:

(A) A bid or offer under this section, to be communicated to the market maker's exchange or association pursuant to this paragraph (b) for at least the minimum quotation size that is required by the rules of the market maker's exchange or association if the priced order is for the account of a market maker, or the actual size of the order up to the minimum quotation size required if the priced order is for the account of a customer; and

(B) A communication of a bid or offer to a vendor for display on a display device for purposes of paragraph (b)(4) of this section.

(ii) An exchange market maker or OTC market maker that has entered a priced order for an NMS security into an electronic communications network that widely disseminates such order shall be deemed to be in compliance with paragraph (b)(5)(i)(A) of this section if the electronic communications network:

(A)(*1*) Provides to a national securities exchange or national securities association (or an exclusive processor acting on behalf of one or more exchanges or associations) the prices and sizes of the orders at the highest buy price and the lowest sell price for such security entered in, and widely disseminated by, the electronic communications network by exchange market makers and OTC market makers for the NMS security, and such prices and sizes are included in the quotation data made available by such exchange, association, or exclusive processor to vendors pursuant to this section; and

(*2*) Provides, to any broker or dealer, the ability to effect a transaction with a priced order widely disseminated by the electronic communications network entered therein by an exchange market maker or OTC market maker that is:

(*i*) Equivalent to the ability of any broker or dealer to effect a transaction with an exchange market maker or OTC market maker pursuant to the rules of the national securities exchange or national securities association to which the electronic communications network supplies such bids and offers; and

(*ii*) At the price of the highest priced buy order or lowest priced sell order, or better, for the lesser of the cumulative size of such priced orders entered therein by exchange market makers or OTC market makers at such price, or the size of the execution sought by the broker or dealer, for such security; or

(B) Is an alternative trading system that:

(*1*) Displays orders and provides the ability to effect transactions with such orders under § 242.301(b)(3); and

(*2*) Otherwise is in compliance with Regulation ATS (§ 242.300 through § 242.303).

(c) *Transactions in listed options.*

(1) A national securities exchange or national securities association:

(i) Shall not be required, under paragraph (a) of this section, to collect from responsible brokers or dealers who are members of such exchange or association, or to make available to vendors, the quotation sizes and aggregate quotation sizes for listed options, if such exchange or association establishes by rule and periodically publishes the quotation size for which such responsible brokers or dealers are obligated to execute an order to buy or sell an options series that is a subject security at its published bid or offer under paragraph (b)(2) of this section;

(ii) May establish by rule and periodically publish a quotation size, which shall not be for less than one contract, for which responsible brokers or dealers who are members of such exchange or association are obligated under paragraph (b)(2) of this section to execute an order to buy or sell a listed option for the account of a broker or dealer that is in an amount different from the quotation size for which it is obligated to execute an order for the account of a customer; and

(iii) May establish and maintain procedures and mechanisms for collecting from responsible brokers and dealers who are members of such exchange or association, and making available to vendors, the quotation sizes and aggregate quotation sizes in listed options for which such responsible broker or dealer will be obligated under paragraph (b)(2) of this section to execute an order from a customer to buy or sell a listed option and establish by rule and periodically publish the size, which shall not be less than one contract, for which such responsible brokers or dealers are obligated to execute an order for the account of a broker or dealer.

(2) If, pursuant to paragraph (c)(1) of this section, the rules of a national securities exchange or national securities association do not require its members to communicate to it their quotation sizes for listed options, a responsible broker or dealer that is a

member of such exchange or association shall:

(i) Be relieved of its obligations under paragraph (b)(1) of this section to communicate to such exchange or association its quotation sizes for any listed option; and

(ii) Comply with its obligations under paragraph (b)(2) of this section by executing any order to buy or sell a listed option, in an amount up to the size established by such exchange's or association's rules under paragraph (c)(1) of this section.

(3) *Thirty second response.* Each responsible broker or dealer, within thirty seconds of receiving an order to buy or sell a listed option in an amount greater than the quotation size established by a national securities exchange's or national securities association's rules pursuant to paragraph (c)(1) of this section, or its published quotation size must:

(i) Execute the entire order; or

(ii)(A) Execute that portion of the order equal to at least:

(*1*) The quotation size established by a national securities exchange's or national securities association's rules, pursuant to paragraph (c)(1) of this section, to the extent that such exchange or association does not collect and make available to vendors quotation size and aggregate quotation size under paragraph (a) of this section; or

(*2*) Its published quotation size; and

(B) Revise its bid or offer.

(4) Notwithstanding paragraph (c)(3) of this section, no responsible broker or dealer shall be obligated to execute a transaction for any listed option as provided in paragraph (b)(2) of this section if:

(i) Any of the circumstances in paragraph (b)(3) of this section exist; or

(ii) The order for the purchase or sale of a listed option is presented during a trading rotation in that listed option.

(d) *Exemptions.* The Commission may exempt from the provisions of this section, either unconditionally or on specified terms and conditions, any responsible broker or dealer, electronic communications network, national securities exchange, or national securities association if the Commission determines that such exemption is consistent with the public interest, the protection of investors and the removal of impediments to and perfection of the mechanism of a national market system.

§ 242.603 Distribution, consolidation, and display of information with respect to quotations for and transactions in NMS stocks.

(a) *Distribution of information.*

(1) Any exclusive processor, or any broker or dealer with respect to information for which it is the exclusive source, that distributes information with respect to quotations for or transactions in an NMS stock to a securities information processor shall do so on terms that are fair and reasonable.

(2) Any national securities exchange, national securities association, broker, or dealer that distributes information with respect to quotations for or transactions in an NMS stock to a securities information processor, broker, dealer, or other persons shall do so on terms that are not unreasonably discriminatory.

(b) *Consolidation of information.* Every national securities exchange on which an NMS stock is traded and national securities association shall act jointly pursuant to one or more effective national market system plans to disseminate consolidated information, including a national best bid and national best offer, on quotations for and transactions in NMS stocks. Such plan or plans shall provide for the dissemination of all consolidated information for an individual NMS stock through a single plan processor.

(c) *Display of information.*

(1) No securities information processor, broker, or dealer shall provide, in a context in which a trading or order-routing decision can be implemented, a display of any information with respect to quotations for or transactions in an NMS stock without also providing, in an equivalent manner, a consolidated display for such stock.

(2) The provisions of paragraph (c)(1) of this section shall not apply to a display of information on the trading floor or through the facilities of a national securities exchange or to a display in connection with the operation of a market linkage system implemented in accordance with an effective national market system plan.

(d) *Exemptions.* The Commission, by order, may exempt from the provisions of this section, either unconditionally or on specified terms and conditions, any person, security, or item of information, or any class or classes of persons, securities, or items of information, if the Commission determines that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.

§ 242.604 Display of customer limit orders.

(a) *Specialists and OTC market makers.* For all NMS stocks:

(1) Each member of a national securities exchange that is registered by that exchange as a specialist, or is authorized by that exchange to perform functions substantially similar to that of a specialist, shall publish immediately a bid or offer that reflects:

(i) The price and the full size of each customer limit order held by the specialist that is at a price that would improve the bid or offer of such specialist in such security; and

(ii) The full size of each customer limit order held by the specialist that:

(A) Is priced equal to the bid or offer of such specialist for such security;

(B) Is priced equal to the national best bid or national best offer; and

(C) Represents more than a *de minimis* change in relation to the size associated with the specialist's bid or offer.

(2) Each registered broker or dealer that acts as an OTC market maker shall publish immediately a bid or offer that reflects:

(i) The price and the full size of each customer limit order held by the OTC market maker that is at a price that would improve the bid or offer of such OTC market maker in such security; and

(ii) The full size of each customer limit order held by the OTC market maker that:

(A) Is priced equal to the bid or offer of such OTC market maker for such security;

(B) Is priced equal to the national best bid or national best offer; and

(C) Represents more than a *de minimis* change in relation to the size associated with the OTC market maker's bid or offer.

(b) *Exceptions.* The requirements in paragraph (a) of this section shall not apply to any customer limit order:

(1) That is executed upon receipt of the order.

(2) That is placed by a customer who expressly requests, either at the time that the order is placed or prior thereto pursuant to an individually negotiated agreement with respect to such customer's orders, that the order not be displayed.

(3) That is an odd-lot order.

(4) That is a block size order, unless a customer placing such order requests that the order be displayed.

(5) That is delivered immediately upon receipt to a national securities exchange or national securities association-sponsored system, or an electronic communications network that complies with the requirements of § 242.602(b)(5)(ii) with respect to that order.

(6) That is delivered immediately upon receipt to another exchange member or OTC market maker that complies with the requirements of this section with respect to that order.

(7) That is an ''all or none'' order.

(c) *Exemptions.* The Commission may exempt from the provisions of this

section, either unconditionally or on specified terms and conditions, any responsible broker or dealer, electronic communications network, national securities exchange, or national securities association if the Commission determines that such exemption is consistent with the public interest, the protection of investors and the removal of impediments to and perfection of the mechanism of a national market system.

§ 242.605 Disclosure of order execution information.

Preliminary Note: Section 242.605 requires market centers to make available standardized, monthly reports of statistical information concerning their order executions. This information is presented in accordance with uniform standards that are based on broad assumptions about order execution and routing practices. The information will provide a starting point to promote visibility and competition on the part of market centers and broker-dealers, particularly on the factors of execution price and speed. The disclosures required by this section do not encompass all of the factors that may be important to investors in evaluating the order routing services of a broker-dealer. In addition, any particular market center's statistics will encompass varying types of orders routed by different broker-dealers on behalf of customers with a wide range of objectives. Accordingly, the statistical information required by this section alone does not create a reliable basis to address whether any particular broker-dealer failed to obtain the most favorable terms reasonably available under the circumstances for customer orders.

(a) *Monthly electronic reports by market centers.*

(1) Every market center shall make available for each calendar month, in accordance with the procedures established pursuant to paragraph (a)(2) of this section, a report on the covered orders in NMS stocks that it received for execution from any person. Such report shall be in electronic form; shall be categorized by security, order type, and order size; and shall include the following columns of information:

(i) For market orders, marketable limit orders, inside-the-quote limit orders, at-the-quote limit orders, and near-the-quote limit orders:

(A) The number of covered orders;

(B) The cumulative number of shares of covered orders;

(C) The cumulative number of shares of covered orders cancelled prior to execution;

(D) The cumulative number of shares of covered orders executed at the receiving market center;

(E) The cumulative number of shares of covered orders executed at any other venue;

(F) The cumulative number of shares of covered orders executed from 0 to 9 seconds after the time of order receipt;

(G) The cumulative number of shares of covered orders executed from 10 to 29 seconds after the time of order receipt;

(H) The cumulative number of shares of covered orders executed from 30 seconds to 59 seconds after the time of order receipt;

(I) The cumulative number of shares of covered orders executed from 60 seconds to 299 seconds after the time of order receipt;

(J) The cumulative number of shares of covered orders executed from 5 minutes to 30 minutes after the time of order receipt; and

(K) The average realized spread for executions of covered orders; and

(ii) For market orders and marketable limit orders:

(A) The average effective spread for executions of covered orders;

(B) The cumulative number of shares of covered orders executed with price improvement;

(C) For shares executed with price improvement, the share-weighted average amount per share that prices were improved;

(D) For shares executed with price improvement, the share-weighted average period from the time of order receipt to the time of order execution;

(E) The cumulative number of shares of covered orders executed at the quote;

(F) For shares executed at the quote, the share-weighted average period from the time of order receipt to the time of order execution;

(G) The cumulative number of shares of covered orders executed outside the quote;

(H) For shares executed outside the quote, the share-weighted average amount per share that prices were outside the quote; and

(I) For shares executed outside the quote, the share-weighted average period from the time of order receipt to the time of order execution.

(2) Every national securities exchange on which NMS stocks are traded and each national securities association shall act jointly in establishing procedures for market centers to follow in making available to the public the reports required by paragraph (a)(1) of this section in a uniform, readily accessible, and usable electronic form. In the event there is no effective national market system plan establishing such procedures, market centers shall prepare their reports in a consistent, usable, and machine-readable electronic format, and make such reports available for downloading from an Internet website that is free and readily accessible to the public.

(3) A market center shall make available the report required by paragraph (a)(1) of this section within one month after the end of the month addressed in the report.

(b) *Exemptions.* The Commission may, by order upon application, conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of this section, if the Commission determines that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.

§ 242.606 Disclosure of order routing information.

(a) *Quarterly report on order routing.*

(1) Every broker or dealer shall make publicly available for each calendar quarter a report on its routing of non-directed orders in NMS securities during that quarter. For NMS stocks, such report shall be divided into three separate sections for securities that are listed on the New York Stock Exchange, Inc., securities that are qualified for inclusion in The Nasdaq Stock Market, Inc., and securities that are listed on the American Stock Exchange LLC or any other national securities exchange. Such report also shall include a separate section for NMS securities that are option contracts. Each of the four sections in a report shall include the following information:

(i) The percentage of total customer orders for the section that were non-directed orders, and the percentages of total non-directed orders for the section that were market orders, limit orders, and other orders;

(ii) The identity of the ten venues to which the largest number of total non-directed orders for the section were routed for execution and of any venue to which five percent or more of non-directed orders were routed for execution, the percentage of total non-directed orders for the section routed to the venue, and the percentages of total non-directed market orders, total non-directed limit orders, and total non-directed other orders for the section that were routed to the venue; and

(iii) A discussion of the material aspects of the broker's or dealer's relationship with each venue identified

pursuant to paragraph (a)(1)(ii) of this section, including a description of any arrangement for payment for order flow and any profit-sharing relationship.

(2) A broker or dealer shall make the report required by paragraph (a)(1) of this section publicly available within one month after the end of the quarter addressed in the report.

(b) *Customer requests for information on order routing.*

(1) Every broker or dealer shall, on request of a customer, disclose to its customer the identity of the venue to which the customer's orders were routed for execution in the six months prior to the request, whether the orders were directed orders or non-directed orders, and the time of the transactions, if any, that resulted from such orders.

(2) A broker or dealer shall notify customers in writing at least annually of the availability on request of the information specified in paragraph (b)(1) of this section.

(c) *Exemptions.* The Commission may, by order upon application, conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of this section, if the Commission determines that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.

§ 242.607 Customer account statements.

(a) No broker or dealer acting as agent for a customer may effect any transaction in, induce or attempt to induce the purchase or sale of, or direct orders for purchase or sale of, any NMS stock or a security authorized for quotation on an automated inter-dealer quotation system that has the characteristics set forth in section 17B of the Act (15 U.S.C. 78q-2), unless such broker or dealer informs such customer, in writing, upon opening a new account and on an annual basis thereafter, of the following:

(1) The broker's or dealer's policies regarding receipt of payment for order flow from any broker or dealer, national securities exchange, national securities association, or exchange member to which it routes customers' orders for execution, including a statement as to whether any payment for order flow is received for routing customer orders and a detailed description of the nature of the compensation received; and

(2) The broker's or dealer's policies for determining where to route customer orders that are the subject of payment for order flow absent specific instructions from customers, including a description of the extent to which orders can be executed at prices superior to the national best bid and national best offer.

(b) *Exemptions.* The Commission, upon request or upon its own motion, may exempt by rule or by order, any broker or dealer or any class of brokers or dealers, security or class of securities from the requirements of paragraph (a) of this section with respect to any transaction or class of transactions, either unconditionally or on specified terms and conditions, if the Commission determines that such exemption is consistent with the pubic interest and the protection of investors.

§ 242.608 Filing and amendment of national market system plans.

(a) *Filing of national market system plans and amendments thereto.*

(1) Any two or more self-regulatory organizations, acting jointly, may file a national market system plan or may propose an amendment to an effective national market system plan (''proposed amendment'') by submitting the text of the plan or amendment to the Secretary of the Commission, together with a statement of the purpose of such plan or amendment and, to the extent applicable, the documents and information required by paragraphs (a)(4) and (5) of this section.

(2) The Commission may propose amendments to any effective national market system plan by publishing the text thereof, together with a statement of the purpose of such amendment, in accordance with the provisions of paragraph (b) of this section.

(3) Self-regulatory organizations are authorized to act jointly in:

(i) Planning, developing, and operating any national market subsystem or facility contemplated by a national market system plan;

(ii) Preparing and filing a national market system plan or any amendment thereto; or

(iii) Implementing or administering an effective national market system plan.

(4) Every national market system plan filed pursuant to this section, or any amendment thereto, shall be accompanied by:

(i) Copies of all governing or constituent documents relating to any person (other than a self-regulatory organization) authorized to implement or administer such plan on behalf of its sponsors; and

(ii) To the extent applicable:

(A) A detailed description of the manner in which the plan or amendment, and any facility or procedure contemplated by the plan or amendment, will be implemented;

(B) A listing of all significant phases of development and implementation (including any pilot phase) contemplated by the plan or amendment, together with the projected date of completion of each phase;

(C) An analysis of the impact on competition of implementation of the plan or amendment or of any facility contemplated by the plan or amendment;

(D) A description of any written understandings or agreements between or among plan sponsors or participants relating to interpretations of the plan or conditions for becoming a sponsor or participant in the plan; and

(E) In the case of a proposed amendment, a statement that such amendment has been approved by the sponsors in accordance with the terms of the plan.

(5) Every national market system plan, or any amendment thereto, filed pursuant to this section shall include a description of the manner in which any facility contemplated by the plan or amendment will be operated. Such description shall include, to the extent applicable:

(i) The terms and conditions under which brokers, dealers, and/or self-regulatory organizations will be granted or denied access (including specific procedures and standards governing the granting or denial of access);

(ii) The method by which any fees or charges collected on behalf of all of the sponsors and/or participants in connection with access to, or use of, any facility contemplated by the plan or amendment will be determined and imposed (including any provision for distribution of any net proceeds from such fees or charges to the sponsors and/or participants) and the amount of such fees or charges;

(iii) The method by which, and the frequency with which, the performance of any person acting as plan processor with respect to the implementation and/or operation of the plan will be evaluated; and

(iv) The method by which disputes arising in connection with the operation of the plan will be resolved.

(6) In connection with the selection of any person to act as plan processor with respect to any facility contemplated by a national market system plan (including renewal of any contract for any person to so act), the sponsors shall file with the Commission a statement identifying the person selected, describing the material terms under which such person is to serve as plan processor, and indicating the solicitation efforts, if any, for alternative plan processors, the alternatives

considered and the reasons for selection of such person.

(7) Any national market system plan (or any amendment thereto) which is intended by the sponsors to satisfy a plan filing requirement contained in any other section of this Regulation NMS and part 240, subpart A of this chapter shall, in addition to compliance with this section, also comply with the requirements of such other section.

(b) *Effectiveness of national market system plans.*

(1) The Commission shall publish notice of the filing of any national market system plan, or any proposed amendment to any effective national market system plan (including any amendment initiated by the Commission), together with the terms of substance of the filing or a description of the subjects and issues involved, and shall provide interested persons an opportunity to submit written comments. No national market system plan, or any amendment thereto, shall become effective unless approved by the Commission or otherwise permitted in accordance with paragraph (b)(3) of this section.

(2) Within 120 days of the date of publication of notice of filing of a national market system plan or an amendment to an effective national market system plan, or within such longer period as the Commission may designate up to 180 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or as to which the sponsors consent, the Commission shall approve such plan or amendment, with such changes or subject to such conditions as the Commission may deem necessary or appropriate, if it finds that such plan or amendment is necessary or appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system, or otherwise in furtherance of the purposes of the Act. Approval of a national market system plan, or an amendment to an effective national market system plan (other than an amendment initiated by the Commission), shall be by order. Promulgation of an amendment to an effective national market system plan initiated by the Commission shall be by rule.

(3) A proposed amendment may be put into effect upon filing with the Commission if designated by the sponsors as:

(i) Establishing or changing a fee or other charge collected on behalf of all of the sponsors and/or participants in connection with access to, or use of, any facility contemplated by the plan or amendment (including changes in any provision with respect to distribution of any net proceeds from such fees or other charges to the sponsors and/or participants);

(ii) Concerned solely with the administration of the plan, or involving the governing or constituent documents relating to any person (other than a self-regulatory organization) authorized to implement or administer such plan on behalf of its sponsors; or

(iii) Involving solely technical or ministerial matters. At any time within 60 days of the filing of any such amendment, the Commission may summarily abrogate the amendment and require that such amendment be refiled in accordance with paragraph (a)(1) of this section and reviewed in accordance with paragraph (b)(2) of this section, if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system or otherwise in furtherance of the purposes of the Act.

(4) Notwithstanding the provisions of paragraph (b)(1) of this section, a proposed amendment may be put into effect summarily upon publication of notice of such amendment, on a temporary basis not to exceed 120 days, if the Commission finds that such action is necessary or appropriate in the public interest, for the protection of investors or the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system or otherwise in furtherance of the purposes of the Act.

(5) Any plan (or amendment thereto) in connection with:

(i) The planning, development, operation, or regulation of a national market system (or a subsystem thereof) or one or more facilities thereof; or

(ii) The development and implementation of procedures and/or facilities designed to achieve compliance by self-regulatory organizations and/or their members of any section of this Regulation NMS and part 240, subpart A of this chapter promulgated pursuant to section 11A of the Act (15 U.S.C. 78k–1), approved by the Commission pursuant to section 11A of the Act (or pursuant to any rule or regulation thereunder) prior to the effective date of this section (either temporarily or permanently) shall be deemed to have been filed and approved pursuant to this section and no additional filing need be made by the sponsors with respect to such plan or amendment; *provided, however,* that all terms and conditions associated with any such approval (including time limitations) shall continue to be applicable; *provided, further,* that any amendment to such plan filed with or approved by the Commission on or after the effective date of this section shall be subject to the provisions of, and considered in accordance with the procedures specified in, this section.

(c) *Compliance with terms of national market system plans.* Each self-regulatory organization shall comply with the terms of any effective national market system plan of which it is a sponsor or a participant. Each self-regulatory organization also shall, absent reasonable justification or excuse, enforce compliance with any such plan by its members and persons associated with its members.

(d) *Appeals.* The Commission may, in its discretion, entertain appeals in connection with the implementation or operation of any effective national market system plan as follows:

(1) Any action taken or failure to act by any person in connection with an effective national market system plan (other than a prohibition or limitation of access reviewable by the Commission pursuant to section 11A(b)(5) or section 19(d) of the Act (15 U.S.C. 78k–1(b)(5) or 78s(d))) shall be subject to review by the Commission, on its own motion or upon application by any person aggrieved thereby (including, but not limited to, self-regulatory organizations, brokers, dealers, issuers, and vendors), filed not later than 30 days after notice of such action or failure to act or within such longer period as the Commission may determine.

(2) Application to the Commission for review, or the institution of review by the Commission on its own motion, shall not operate as a stay of any such action unless the Commission determines otherwise, after notice and opportunity for hearing on the question of a stay (which hearing may consist only of affidavits or oral arguments).

(3) In any proceedings for review, if the Commission, after appropriate notice and opportunity for hearing (which hearing may consist solely of consideration of the record of any proceedings conducted in connection with such action or failure to act and an opportunity for the presentation of reasons supporting or opposing such action or failure to act) and upon consideration of such other data, views, and arguments as it deems relevant, finds that the action or failure to act is in accordance with the applicable provisions of such plan and that the applicable provisions are, and were,

applied in a manner consistent with the public interest, the protection of investors, the maintenance of fair and orderly markets, and the removal of impediments to, and the perfection of the mechanisms of a national market system, the Commission, by order, shall dismiss the proceeding. If the Commission does not make any such finding, or if it finds that such action or failure to act imposes any burden on competition not necessary or appropriate in furtherance of the purposes of the Act, the Commission, by order, shall set aside such action and/or require such action with respect to the matter reviewed as the Commission deems necessary or appropriate in the public interest, for the protection of investors, and the maintenance of fair and orderly markets, or to remove impediments to, and perfect the mechanisms of, a national market system.

(e) *Exemptions.* The Commission may exempt from the provisions of this section, either unconditionally or on specified terms and conditions, any self-regulatory organization, member thereof, or specified security, if the Commission determines that such exemption is consistent with the public interest, the protection of investors, the maintenance of fair and orderly markets and the removal of impediments to, and perfection of the mechanisms of, a national market system.

§ 242.609 Registration of securities information processors: form of application and amendments.

(a) An application for the registration of a securities information processor shall be filed on Form SIP (§ 249.1001) in accordance with the instructions contained therein.

(b) If any information reported in items 1–13 or item 21 of Form SIP or in any amendment thereto is or becomes inaccurate for any reason, whether before or after the registration has been granted, the securities information processor shall promptly file an amendment on Form SIP correcting such information.

(c) The Commission, upon its own motion or upon application by any securities information processor, may conditionally or unconditionally exempt any securities information processor from any provision of the rules or regulations adopted under section 11A(b) of the Act (15 U.S.C. 78k–1(b)).

(d) Every amendment filed pursuant to this section shall constitute a ''report'' within the meaning of sections 17(a), 18(a) and 32(a) of the Act (15 U.S.C. 78q(a), 78r(a), and 78ff(a)).

§ 242.610 Access to quotations.

(a) *Quotations of SRO trading facility.* A national securities exchange or national securities association shall not impose unfairly discriminatory terms that prevent or inhibit any person from obtaining efficient access through a member of the national securities exchange or national securities association to the quotations in an NMS stock displayed through its SRO trading facility.

(b) *Quotations of SRO display-only facility.*

(1) Any trading center that displays quotations in an NMS stock through an SRO display-only facility shall provide a level and cost of access to such quotations that is substantially equivalent to the level and cost of access to quotations displayed by SRO trading facilities in that stock.

(2) Any trading center that displays quotations in an NMS stock through an SRO display-only facility shall not impose unfairly discriminatory terms that prevent or inhibit any person from obtaining efficient access to such quotations through a member, subscriber, or customer of the trading center.

(c) *Fees for access to protected quotations.* A trading center shall not impose, nor permit to be imposed, any fee or fees for the execution of orders against its protected quotations in an NMS stock that exceed or accumulate to more than the following limits:

(1) If the price of a protected quotation is $1.00 or more, the fee or fees cannot exceed or accumulate to more than $0.003 per share; or

(2) If the price of a protected quotation is less than $1.00, the fee or fees cannot exceed or accumulate to more than 0.3% of the quotation price per share.

(d) *Locking or crossing quotations.* Each national securities exchange and national securities association shall establish and enforce rules that:

(1) Require its members reasonably to avoid displaying quotations that lock or cross any protected quotation in an NMS stock, and to avoid displaying manual quotations that lock or cross any quotation in an NMS stock disseminated pursuant to an effective national market system plan;

(2) Are reasonably designed to assure the reconciliation of locked or crossed quotations in an NMS stock; and

(3) Prohibit its members from engaging in a pattern or practice of displaying quotations that lock or cross any protected quotation in an NMS stock, or of displaying manual quotations that lock or cross any quotation in an NMS stock disseminated pursuant to an effective national market system plan.

(e) *Exemptions.* The Commission, by order, may exempt from the provisions of this section, either unconditionally or on specified terms and conditions, any person, security, quotations, orders, or fees, or any class or classes of persons, securities, quotations, orders, or fees, if the Commission determines that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.

§ 242.611 Order protection rule.

(a) *Reasonable policies and procedures.*

(1) A trading center shall establish, maintain, and enforce written policies and procedures that are reasonably designed to prevent trade-throughs of protected quotations in NMS stocks that do not fall within an exception set forth in paragraph (b) of this section and, if relying on such an exception, that are reasonably designed to assure compliance with the terms of the exception.

(2) A trading center shall regularly surveil to ascertain the effectiveness of the policies and procedures required by paragraph (a)(1) of this section and shall take prompt action to remedy deficiencies in such policies and procedures.

(b) *Exceptions.*

(1) The transaction that constituted the trade-through was effected when the trading center displaying the protected quotation that was traded through was experiencing a failure, material delay, or malfunction of its systems or equipment when the trade-through occurred.

(2) The transaction that constituted the trade-through was not a ''regular way'' contract.

(3) The transaction that constituted the trade-through was a single-priced opening, reopening, or closing transaction by the trading center.

(4) The transaction that constituted the trade-through was executed at a time when a protected bid was priced higher than a protected offer in the NMS stock.

(5) The transaction that constituted the trade-through was the execution of an order identified as an intermarket sweep order.

(6) The transaction that constituted the trade-through was effected by a trading center that simultaneously routed an intermarket sweep order to execute against the full displayed size of any protected quotation in the NMS stock that was traded through.

(7) The transaction that constituted the trade-through was the execution of an order at a price that was not based, directly or indirectly, on the quoted

price of the NMS stock at the time of execution and for which the material terms were not reasonably determinable at the time the commitment to execute the order was made.

(8) The trading center displaying the protected quotation that was traded through had displayed, within one second prior to execution of the transaction that constituted the trade-through, a best bid or best offer, as applicable, for the NMS stock with a price that was equal or inferior to the price of the trade-through transaction.

(c) *Intermarket sweep orders.* The trading center, broker, or dealer responsible for the routing of an intermarket sweep order shall take reasonable steps to establish that such order meets the requirements set forth in § 242.600(b)(30).

(d) *Exemptions.* The Commission, by order, may exempt from the provisions of this section, either unconditionally or on specified terms and conditions, any person, security, transaction, quotation, or order, or any class or classes of persons, securities, quotations, or orders, if the Commission determines that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.

§ 242.612 Minimum pricing increment.

(a) No national securities exchange, national securities association, alternative trading system, vendor, or broker or dealer shall display, rank, or accept from any person a bid or offer, an order, or an indication of interest in any NMS stock equal to or greater than $1.00 in an increment smaller than $0.01.

(b) No national securities exchange, national securities association, alternative trading system, vendor, or broker or dealer shall display, rank, or accept from any person a bid or offer, an order, or an indication of interest in any NMS stock less than $1.00 in an increment smaller than $0.0001.

(c) *Exemptions.* The Commission, by order, may exempt from the provisions of this section, either unconditionally or on specified terms and conditions, any person, security, quotation, or order, or any class or classes or persons, securities, quotations, or orders, if the Commission determines that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

32. The authority citation for part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a *et seq.* and 7201 *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

33. Section 249.1001 is revised to read as follows:

§ 249.1001 Form SIP, for application for registration as a securities information processor or to amend such an application or registration.

This form shall be used for application for registration as a securities information processor, pursuant to section 11A(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78k–1(b)) and § 242.609 of this chapter, or to amend such an application or registration.

34. Form SIP (referenced in § 249.1001) is amended by revising Instruction 6 of General Instructions for Preparing and Filing Form SIP to read as follows:

Note: The text of Form SIP does not and this amendment will not appear in the Code of Federal Regulations.

FORM SIP

* * * * *

GENERAL INSTRUCTIONS FOR PREPARING AND FILING FORM SIP

* * * * *

6. Rule 609(b) of Regulation NMS requires that if any information contained in items 1 through 13 or item 21 of this application, or any supplement or amendment thereto, is or becomes inaccurate for any reason, an amendment must be filed promptly on Form SIP correcting such information.

* * * * *

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

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

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

* * * * *

36. Section 270.17a–7 is amended by revising paragraph (b)(1) to read as follows:

§ 270.17a–7 Exemption of certain purchase or sale transactions between an investment company and certain affiliated persons thereof.

* * * * *

(b) * * *

(1) If the security is an ''NMS stock'' as that term is defined in 17 CFR 242.600, the last sale price with respect to such security reported in the consolidated transaction reporting system (''consolidated system'') or the average of the highest current independent bid and lowest current independent offer for such security (reported pursuant to 17 CFR 242.602) if there are no reported transactions in the consolidated system that day; or

* * * * *

By the Commission.

Dated: December 16, 2004.

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. 04–27934 Filed 12–26–04; 8:45 am]

BILLING CODE 8010–01–P

Federal Register

Monday,

December 27, 2004

Part IV

Federal Communications Commission

47 CFR Parts 1, 24, et al.

Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets; Final Rule and Proposed Rule

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1, 24, and 90

[WT Docket No. 00–230; FCC 04–167]

Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission (''Commission'') adopts final rules that take additional steps to facilitate the development of more robust secondary markets in radio spectrum usage rights. In particular, the Commission builds upon the policies adopted in 2003 to facilitate the ability of licensees in our Wireless Radio Services that hold ''exclusive'' authority to lease some or all of their spectrum usage rights to third parties and to streamline approval procedures for license assignments and transfers of control in these Wireless Radio Services. First, the Commission adopts immediate processing procedures for certain classes of spectrum leasing arrangements and license transfers and assignments that do not raise potential public interest concerns. In addition, the Commission extends the spectrum leasing policies to additional services. The Commission also adopts a new regulatory concept, the ''private commons.'' Finally, the Commission addresses several petitions for reconsideration, and revises and further clarifies the Commission's spectrum leasing policies and rules.

DATES: Effective February 25, 2005, except for §§ 1.913(a)(5), 1.948(j)(2), 1.2003, 1.9003, 1.9020(e)(2), 1.9030(e)(2), 1.9035(e), and 1.9080, which contain information collection requirements that have not been approved by the Office of Management and Budget (OMB). The Commission will publish a document in the **Federal Register** announcing the effective date of these rules.

FOR FURTHER INFORMATION CONTACT: Paul Murray, Wireless Telecommunications Bureau, at (202) 418–7240, or via the Internet at *Paul.Murray@fcc.gov;* for additional information concerning the information collections contained in this document, contact Judith B-Herman at (202) 418–0214, or via the Internet at *Judith.B-Herman@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Second Report and Order and Order on Reconsideration portion (*Second Report and Order* and *Order on Reconsideration,* respectively) of the Commission's Second Report and Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking, FCC 04–167, in WT Docket No. 00–230, adopted on July 8, 2004, and released on September 2, 2004. Contemporaneous with this document, the Commission issues a Second Proposed Rule of Proposed Rulemaking (*Second FNPRM*), published elsewhere in this publication. The full text of this document is available for inspection and copying during normal business hours in the FCC Reference Information Center, 445 12th Street, SW., Washington, DC 20554. The complete text may be purchased from the FCC's copy contractor, Best Copy & Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554. The full text may also be downloaded at: *http://www.fcc.gov*. Alternative formats are available to persons with disabilities by contacting Brian Millin at (202) 418–7426 or TTY (202) 418–7365 or at *Brian.Millin@fcc.gov.*

Paperwork Reduction Act

This *Second Report and Order* contains two modified information collections, as described in the Final Regulatory Flexibility Analysis, which will become effective upon approval by the Office of Management and Budget (OMB). The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public to comment on the information collection(s) contained in this *Second Report and Order* as required by the Paperwork Reduction Act of 1995, Public Law 104–13. These information collection(s) will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new or modified information collection(s) contained in this proceeding. Public and agency comments are due February 25, 2005. Comments should address: (a) Whether the new or modified 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 estimates; (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.

Synopsis of the Second Report and Order and Order on Reconsideration

I. Introduction

1. In the *Second Report and Order* and the *Order on Reconsideration*, we build on the framework established in the *Report and Order* portion of the Commission's *Report and Order and Further Notice of Proposed Rulemaking* in WT Docket No. 00–230 (*First Report and Order*), 68 FR 66252 (November 25, 2003), in which we adopted policies, rules, and procedures designed to facilitate the ability of many Wireless Radio Services licensees, including many small businesses, to lease spectrum usage rights and to transfer and assign licenses to third parties. In this *Second Report and Order*, we take additional steps to further reduce regulatory delay so that spectrum leasing parties in our Wireless Radio Services can implement certain classes of spectrum leasing arrangements and can transfer and assign licenses in a more timely fashion, in accordance with evolving marketplace demands and customer needs. In the Order on Reconsideration, we address a variety of issues addressed in the *First Report and Order*, including the respective responsibilities of licensees and spectrum lessees regarding particular service rules.

2. As with the underlying *First Report and Order*, these actions take us further down the path toward greater reliance on the marketplace, thus expanding the scope of available wireless services and devices and enabling more efficient and dynamic use of spectrum to the ultimate benefit of consumers throughout the country. The steps taken in the *Second Report and Order* and in the *Order on Reconsideration* to facilitate the development of secondary markets in wireless spectrum expand upon and complement several of the Commission's major policy initiatives and public interest objectives. These include our efforts to encourage the development of broadband services for all Americans, promote increased facilities-based competition among service providers, enhance economic opportunities and access for the provision of communications services by designated entities, and enable development of additional and innovative services in rural areas.

II. Background

3. In the *First Report and Order*, we took important first steps to facilitate significantly broader access to valuable spectrum resources by enabling a wide array of facilities-based providers of broadband and other communications

services to enter into spectrum leasing arrangements with Wireless Radio Service licensees. Specifically, we established two different spectrum leasing approaches based on the scope of the rights and responsibilities to be assumed by the spectrum lessee. Under the first leasing option—''spectrum manager'' leasing—we enabled parties to enter into spectrum leasing arrangements without prior Commission approval so long as the licensee retains both *de jure* control of the license and *de facto* control over the leased spectrum pursuant to the updated *de facto* control standard for leasing. Under the second option—''*de facto* transfer'' leasing—we permitted parties, pursuant to a streamlined approval process, to enter into leasing arrangements whereby the licensee retains *de jure* control of their licenses while *de facto* control over the use of the leased spectrum, and associated rights and responsibilities, are transferred for a defined period to the spectrum lessees. Parties may enter into either long-term or short-term *de facto* transfer leases, with some variation in the policies and procedures that apply to each type. We also adopted streamlined Commission approval procedures for license assignments and transfers of control involving many of our Wireless Radio Services.

4. In the *Further Notice of Proposed Rulemaking* portion of the Commission's *Report and Order and Further Notice of Proposed Rulemaking* in WT Docket No. 00–230 (*FNPRM*), 68 FR 66232 (November 25, 2003), we sought comment on various ways in which the Commission could further enhance opportunities for spectrum access, efficiency, and innovation by removing unnecessary regulatory barriers and implementing more market-oriented policies that would facilitate moving spectrum to its highest valued uses. In particular, we sought comment on whether we could further streamline our processing of spectrum leasing arrangements and license assignments and transfers of control that did not raise a specified set of potential public interest concerns—relating to eligibility and use restrictions, foreign ownership, designated entity/entrepreneur issues, or competition—that would merit individualized Commission review. We requested comment on whether our spectrum leasing policies should be extended to additional services, and whether other actions should be taken to facilitate the development of secondary markets in spectrum usage rights. Finally, we inquired as to what specific steps we could take, in the context of secondary markets, to maximize the potential public benefits enabled by advanced technologies, such as opportunistic devices. In response to the *FNPRM*, we received twenty-one (21) comments and ten (10) reply comments. Five parties filed petitions for reconsideration of the *First Report and Order*, and several parties filed oppositions or comments in response.

III. Second Report and Order

A. Spectrum Leasing Arrangements

1. Additional Streamlining of Procedures for Certain Categories of Spectrum Leases

a. Immediate Approval of Certain Categories of *de facto* Transfer Leases That Are Subject to Our Forbearance Authority

5. Under current spectrum leasing policies and procedures, as adopted in the *First Report and Order*, licensees and spectrum lessees may enter into both long- and short-term *de facto* transfer leases pursuant to streamlined application and approval procedures. Specifically, parties that seek to enter into long-term *de facto* transfer leasing arrangements submit their applications, which are then placed on public notice and subject to further individualized Commission review prior to grant. The applications then are approved (or denied) by the Wireless Telecommunications Bureau (Bureau) within twenty-one (21) days unless they are removed from streamlined processing for further review based on potential public interest concerns identified by the Commission or in petitions to deny. Parties that seek to enter into short-term *de facto* transfer leases do so pursuant to the same processes applicable to Special Temporary Authority authorizations (STAs). These applications, which are not placed on prior public notice, are acted upon by the Bureau within ten (10) days if specified conditions are met. Consistent with our policies for other approvals, approval of both of these types of *de facto* transfer lease applications also is subject to the Commission's reconsideration procedures.

6. In the *FNPRM*, we sought comment on whether we could minimize delay in the timely implementation of *de facto* transfer leases by eliminating unnecessary regulatory review for certain classes of spectrum leases. For *de facto* transfer leases subject to our forbearance authority under Section 10 of the Communications Act, we proposed to forbear, to the extent necessary, from requiring prior public notice and individualized Commission review and approval for spectrum leasing arrangements that did not raise any of a specified set of potential public interest concerns.

7. Consistent with the broad support by commenters for the general forbearance proposal set forth in the *FNPRM*, we adopt this proposal, with certain modifications, as discussed herein. Under the approach we adopt, spectrum leasing parties that seek to enter into *de facto* transfer spectrum leases that qualify under this forbearance approach may file their spectrum lease application with the Commission, which in turn will be immediately approved under the procedures set forth below. Because we determine that *de facto* transfer leases meeting the specifications described below do not raise potential public interest concerns that would necessitate prior public notice or more individualized review, we believe that removing this unnecessary round of notice and regulatory review is appropriate, pursuant to our forbearance authority. Elements of *de facto* transfer leasing transactions that would not require prior public notice and individualized Commission review.

(i) Elements of *de facto* Transfer Leasing Transactions That Would Not Require Prior Public Notice and Individualized Commission Review

8. We will permit all *de facto* transfer spectrum leases that are subject to the Commission's forbearance authority and that do not potentially raise certain specified public interest concerns to proceed pursuant to the application and immediate grant procedures set forth herein. If a particular *de facto* transfer leasing arrangement does not raise potential concerns relating to eligibility and use restrictions, foreign ownership restrictions, designated entity/entrepreneur restrictions, or competition, we conclude, under our forbearance authority, that we need no longer require prior public notice and individualized Commission review before the spectrum lease may become effective. Therefore, once parties file a spectrum leasing application consistent with these requirements, it will immediately be approved under the policies and rules we are adopting herein, and spectrum lessees may commence operations as provided under the terms of the lease.

9. *Eligibility and use restrictions.* As proposed in the *FNPRM*, parties seeking to use the application/immediate approval procedures adopted under this forbearance approach for *de facto* transfer spectrum leases must comply, *inter alia*, with the applicable eligibility

and use restrictions. Accordingly, we require that, in the spectrum leasing application submitted to the Commission, the spectrum lessee must certify that it meets the basic qualification requirements for holding the license authorization associated with the lease and that it will comply with all applicable use restrictions. We believe that spectrum lessee compliance with these requirements is necessary because, in many services, we continue to have eligibility and use restrictions that were adopted in furtherance of certain public interest objectives. While we seek to promote licensee flexibility and facilitate secondary markets where appropriate, we do not intend for policies adopted in this proceeding to be used as a means for evading requirements that remain in effect for a given service. Having spectrum lessees certify to the Commission that they will comply with applicable eligibility and use restrictions will ensure that spectrum leasing arrangements approved under the forbearance approach do not undermine these policies.

10. Consistent with the policies we adopted in the *First Report and Order*, the applicable eligibility restrictions are the same for both long-term and short-term *de facto* transfer leases. The applicable use restrictions may, however, differ depending on whether a long or short-term *de facto* transfer lease is involved. As provided in the *First Report and Order*, we permit some additional flexibility under short-term *de facto* transfer leasing with respect to one particular set of use restrictions; specifically, we permit licensees with service authorizations that restrict use of spectrum to non-commercial uses to enter into short-term *de facto* transfer leases to allow the spectrum lessee to use it commercially.

11. *Foreign ownership.* As we generally proposed in the *FNPRM*, we determine that spectrum lessees seeking to enter into *de facto* transfer leases under this forbearance approach must be able to certify that they comply with specific requirements, described below, to ensure that the spectrum lease does not raise foreign ownership concerns under Section 310 of the Act that remain unaddressed prior to implementation of the lease. This approach will enable most *de facto* transfer leases to proceed immediately, while ensuring that the Commission and the Executive Branch have the opportunity to review any lease that may raise potential foreign ownership concerns prior to that spectrum lease going into effect.

12. Under the policy we are adopting, the spectrum lessee must certify that it is not a foreign government or representative thereof, consistent with the section 310(a) requirements. Second, if the spectrum lease involves a common carrier radio authorization, the spectrum lessee must certify that it is not an alien or representative thereof, a corporation organized under the laws of any foreign government, or have more than 20 percent direct foreign ownership, in accord with the requirements of sections 310(b)(1)–(3).

13. Finally, consistent with our policies under section 310(b)(4), as explained in the *FNPRM*, the spectrum lessee must certify either (1) that it does not have more than 25 percent indirect foreign ownership or (2) that it has previously obtained a declaratory ruling from the Commission in advance of entering into the subject spectrum lease that establishes that the spectrum lease falls within the scope of that declaratory ruling (including the type of service and geographic coverage area) and that there has been no change in foreign ownership in the meantime. We emphasize that the spectrum lessee is primarily and directly responsible for ensuring that the scope of its prior declaratory ruling covers the proposed lease transaction. If it does not, the spectrum lessee must obtain a supplemental ruling that would apply to the particular transaction, and must do so prior to filing under the new immediate approval procedures. For example, a spectrum lessee may have previously received a ruling that approved its acquisition of a specific group of common carrier microwave licenses, or that approved its acquisition of a controlling interest in a carrier that holds a specific group of common carrier microwave licenses. Such a ruling would not cover a future spectrum lease of PCS spectrum. In such circumstances, in order for the spectrum lessee to be able to satisfy the certification requirement, it must first request and obtain from the Commission a supplemental ruling to cover the spectrum leasing arrangements involving PCS spectrum.

14. We note that because the same foreign ownership policies apply to both long-term and short-term *de facto* transfer leasing arrangements, spectrum lessees under both of these types of *de facto* transfer lease applications will be required to make these certifications.

15. *Designated entity/entrepreneur eligibility.* Because designated entity and entrepreneur licensees have been conferred special benefits (*e.g.*, bidding credits, installment payment plans, or participation in closed bidding) by the Commission, and because these licensees may enter into long-term *de facto* transfer spectrum leasing arrangements only so long as such arrangements are consistent with our policies relating to applicable transfer restrictions and unjust enrichment payment obligations, we believe it is both necessary and appropriate to retain the ability to review all long-term *de facto* transfer spectrum leasing arrangements involving designated entity or entrepreneur licensees to ensure compliance with applicable policies and rules, and thus such leasing arrangements cannot be processed under these procedures. As we stated in the *FNPRM*, we do not intend for the forbearance approach to be used as a means to evade Commission rules, and we believe this to be especially important where the rules have been implemented to fulfill our statutory obligations. Given, however, that we have eliminated all of these restrictions with regard to short-term *de facto* transfer leases, we determine that applications involving short-term *de facto* transfer leases do not raise any potential public interest concerns relating to our designated entity or entrepreneur policies that would preclude the spectrum leasing parties from proceeding under our forbearance approach.

16. *Competition.* In light of the Commission's competition policies for Wireless Radio Services, we will permit spectrum leasing parties to proceed under our forbearance approach so long as the *de facto* transfer leasing arrangement does not raise potential competition concerns that merit prior public notice and Commission review before the application is approved. Consistent with our competition policies, however, we will exclude from this approach, at this time, all long-term *de facto* transfer leases involving spectrum that (1) is, or may reasonably be, used to provide interconnected mobile voice and/or data services and (2) creates a ''geographic overlap'' with other spectrum used to provide these services in which the spectrum lessee holds a direct or indirect interest (of 10 percent or more), either as a licensee or as a spectrum lessee. Because the latter class of *de facto* transfer leases potentially raise competition concerns, they will continue to be subject to case-by-case review and approval under the policies we adopted in the *First Report and Order.*

17. As we noted in the *First Report and Order*, assessment of potential competitive effects of spectrum leasing transactions remains an important element of our policies to promote

facilities-based competition and guard against the harmful effects of anticompetitive conduct, and we thus apply the Commission's general competition policies to transactions involving long-term *de facto* transfer spectrum leases (as well as to spectrum manager leases). The approach we adopt herein, pursuant to our forbearance authority, is designed to be consistent with our current competition policies with regard to Wireless Radio Services. In examining transactions for possible competitive harm, the Commission has primarily focused its efforts in recent years on services that could potentially affect the product market for mobile telephony, which includes interconnected mobile voice and/or data services. Cellular, broadband Personal Communications Service (PCS), and Specialized Mobile Radio (SMR) services currently are used to provide CMRS services that potentially affect the mobile telephony market, and expressly are subject to the Commission's competition policies. In addition, spectrum in several other services may currently, or at some time in the future, be used to provide such CMRS services; these services include several services licensed under part 27 of our rules—including the Wireless Communications Service (WCS), Broadband Radio Service, Advanced Wireless Service (AWS), the upper and lower 700 MHz bands, and the 1390–1392 MHz, 1392–1395/1432–1435 MHz, and 2385–2390 MHz bands—as well as narrowband PCS, various paging services, and mobile satellite service where the use of ancillary terrestrial components (ATC) is permissible. Accordingly, under the policies we adopt herein, we find that long-term *de facto* transfer leasing transactions that involve a geographic overlap between or among any of these listed services, and are to be used to provide mobile telephony service, continue to merit public notice and case-by-case review by the Commission prior to approval. Such transactions potentially raise public interest concerns relating to competition, and thus will not be subject to our forbearance approach at this time.

18. *Other public interest concerns.* Finally, we note that *de facto* transfer leasing arrangements that would require waiver of Commission policies or rules, or a declaratory ruling relating to them, may not use the streamlined processing we are adopting under this forbearance approach. Requests for a waiver or declaratory ruling implicates other potential public interest concerns associated with the license or spectrum leasing authorization, and would first need to be approved by the Commission. This policy will be applied with respect to both long- and short-term *de facto* transfer leasing arrangements.

(ii) Application and Immediate Approval Procedures

19. *Application/immediate approval procedures.* Consistent with the general proposal set forth in the *FNPRM*, we will no longer require prior public notice and individualized Commission review of *de facto* transfer leases that meet the requirements specified above. Under the policies and rules adopted herein, parties seeking to enter into such leasing arrangements will notify the Commission by filing *de facto* transfer lease applications, which in turn will be immediately approved under the procedures we are adopting herein. Specifically, if the spectrum leasing parties file their *de facto* transfer lease application in the Universal Licensing System (ULS), and the application establishes the requisite elements explained above and are otherwise complete and the payment of the requisite filing fees have been confirmed, the Bureau will process the application and provide immediate approval through ULS processing. Approval will be reflected in ULS on the next business day after filing the application. Upon receiving approval, spectrum lessees will have the authority to commence operations under the terms of the spectrum lease. The Bureau also will place the approved application on public notice.

20. *Post-approval reconsideration procedures.* We adopt the reconsideration procedures set forth in the *FNPRM*. Accordingly, we will place the approved *de facto* transfer leases on a weekly informational public notice. Any interested party may file a petition for reconsideration within 30 days of the public notice date. Similarly, the Bureau will be able to reconsider the grant on its own motion within 30 days of the public notice date, and the Commission can reconsider the grant on its own motion within 40 days of the public notice date.

21. *Other issues.* Parties will be held accountable for any certifications they make in the spectrum leasing applications that enable them to take advantage of the immediate approval procedures set forth herein. To the extent that the Commission determines, post-approval, that any certification provided on the application, by either the licensee or spectrum lessee, is not true, complete, correct, and made in good faith, the Commission will be vigilant in taking appropriate enforcement action, potentially including forfeitures or termination of the spectrum leasing arrangement.

(iii) Compliance With Forbearance Requirements

22. As stated above, we determine that for all qualifying *de facto* transfer leases—*i.e.*, those subject to our section 10 forbearance authority and satisfying the elements set forth above—we will forbear from the applicable prior public notice requirements and individualized review requirements of sections 308, 309, and 310(d) of the Communications Act, to the extent necessary, so that these spectrum leases may be approved pursuant to the procedures set forth above. Our decision to forbear meets the requirements of Section 10 of the Act, which enables the Commission to forbear from applying any regulation or provision of the Act to a telecommunications carrier or service, or class of telecommunications carriers or services, in any or some of its geographic markets, if the following three-prong test is satisfied: (1) Enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest.

b. Immediate Approval of Certain Categories of *de facto* Transfer Leases That Are Not Subject to Forbearance

23. We will permit *de facto* transfer leases involving non-telecommunications providers and carriers, and thus are not eligible for section 10 forbearance, to proceed under the same application/immediate approval policies as adopted above for *de facto* transfer leases subject to forbearance so long as the leasing parties can establish that the arrangements meet the same kinds of criteria as required for telecommunications providers. These procedures comply with the statutory requirements of Sections 308, 309, and 310(d). In addition, our decision accords with commenters' support of our goal to streamline *de facto* transfer lease transactions involving non-telecommunications carriers in a manner similar to that adopted under the forbearance approach.

24. Under the policies we are adopting, so long as the parties establish in their *de facto* transfer lease application—by provision of sufficient information and related certifications—that the spectrum lessee complies with the applicable eligibility, use, and foreign ownership-related requirements, and does not seek a waiver or declaratory ruling, the Commission will immediately approve the application as consistent with statutory requirements and the public interest. As with *de facto* transfer lease applications filed under our forbearance approach, we will announce the grant of these *de facto* transfer leases involving non-telecommunications services in a weekly informational public notice, subject to reconsideration within 30 days by interested parties or the Bureau, and within 40 days by the Commission on its own motion.

25. Streamlined processing of qualifying spectrum leases involving non-telecommunications services serves the public interest and is necessary in order to place substantively similar wireless spectrum leasing transactions involving different types of licenses on a comparable basis and to minimize unnecessary regulatory discrimination. The policies and procedures we adopt are also consistent with the statutory requirements of sections 308, 309, and 310(d). First, consistent with these provisions, we continue to require an application and approval process. In addition, in order to determine whether to approve these transactions, the Commission requires that each application establish a distinct set of facts and representations concerning the particular spectrum leasing transaction before it will be approved. Thus, before any particular spectrum lease application will be approved, the Commission will determine, based on the particulars of that application, that all of the criteria relevant to establishing that the public interest would be served by the granting of the application have been established, and the statutory requirements for case-by-case review and approval of the application will have been satisfied.

c. Applying the Immediate Approval Procedures to Short-Term *de facto* Transfer Leases

26. Under procedures adopted in the *First Report and Order,* short-term *de facto* transfer leasing arrangements are processed in the same manner as authorized pursuant to section 309(f) of the Communications Act. Under these procedures, parties wishing to enter into short-term arrangements must establish through requisite certifications in their application that they qualify for these procedures and must also meet any additional requirements associated with our STA procedures.

27. We determine that short-term *de facto* transfer leasing arrangements should qualify for processing under the application/immediate grant procedures that we are adopting for qualifying long-term *de facto* transfer leases. Accordingly, we determine to process these arrangements under the new procedures we are adopting, and we will no longer process them under the Special Temporary Authority (STA) procedures.

28. Under the policies and rules adopted in the *First Report and Order,* short-term *de facto* transfer leases do not raise potential public interest concerns relating to eligibility, use restrictions, or foreign ownership that would require either prior public notice or additional Commission review before being approved. In order to qualify to enter into short-term *de facto* transfer leases, spectrum lessees are already required, under existing policies, to meet the same eligibility and foreign ownership restrictions that we have adopted above for determining whether a long-term *de facto* transfer lease qualifies for the application/immediate approval procedures. Short-term *de facto* transfer lease applicants must also certify that they would comply with certain applicable use restrictions. In addition, we have determined that short-term *de facto* transfer leasing arrangements do not raise potential public interest concerns relating either to designated entity/entrepreneur or competition matters. Accordingly, these issues do not prevent a short-term *de facto* transfer lease application from qualifying for the immediate approval procedures we are adopting herein.

29. Eliminating the requirement that short-term *de facto* transfer leases be processed under the procedures applicable to STAs enables us to remove unnecessary regulatory requirements and simplify the applicable rules. First, we will no longer require short-term lease applicants to include a public interest statement in accordance with the applicable rules derived from our STA procedures. In addition, we will no longer require that the term of a short-term *de facto* transfer lease be limited to 180 days and renewable for up to a total of 360 days. Instead, for purposes of administrative efficiency and general clarity, we will simplify the application requirements to do away with multiple filings, and to permit parties to enter into a short-term *de facto* transfer lease for a term of up to one year (365 days) by submitting a single application.

d. Immediate Processing of Certain Categories of Spectrum Manager Leases

30. The *First Report and Order* provided that parties entering into spectrum manager leases are required to file the leasing notification with the Commission within 14 days of when they execute the lease and at least 21 days prior to commencing operations (10 days prior if the lease is for one year or less).

31. Upon further consideration, we have decided to revise our policies for spectrum manager lease notifications to be consistent with the policies for *de facto* transfer leases as described above. Accordingly, where parties seek to enter into spectrum manager leases that do not raise specified potential public interest concerns—*i.e.*, those relating to eligibility, use restrictions, foreign ownership, designated entity/entrepreneur, or competition—we will permit them to commence operations under those leasing arrangements once they have notified the Commission of the lease, have made the necessary certifications to qualify for immediate processing, and have determined, through ULS, that the notification has been successfully processed. These immediate processing procedures for spectrum manager leases will ensure parity in the regulatory treatment of spectrum manager and long-term *de facto* transfer leasing arrangements, thus eliminating unnecessary delay for parties seeking to enter into similar categories of spectrum manager leases and minimizing the possibility that our regulatory policies would be a factor in potential leasing parties' decision-making. Our determination also grants, in part, one party's petition for reconsideration, in which it sought elimination of unnecessary delay between the time the licensee filed a spectrum manager lease notification and the time in which leasing parties could commence operation under the spectrum leasing arrangement.

32. We adopt these similar policies for spectrum manager leases because the public interest concerns relating to these leases are either identical or similar to those associated with long-term *de facto* transfer leases. In particular, the policies relating to eligibility and use restrictions, foreign ownership, and competition apply with equal force, regardless of whether the spectrum lease is a spectrum manager lease or a long-term *de facto* transfer lease. In addition, designated entity or entrepreneur licensees seeking to lease spectrum under spectrum manager leases are subject to certain restrictions associated with designated entity and entrepreneur

policies, just as long-term *de facto* transfer leases are subject to certain restrictions.

33. Accordingly, under the new policies we are adopting, if the spectrum manager lease satisfies the same qualifying elements as required for long-term *de facto* transfer leases as set forth above—and thus does not raise potential public interest concerns regarding eligibility and use restrictions, foreign ownership restrictions, designated entity/entrepreneur restrictions, or competition—we do not believe it necessary to review these notifications in advance of operations, and the leasing parties are entitled to commence operations once they have received the requisite confirmation through ULS. As with *de facto* transfer leases, spectrum manager leases that proceed pursuant to these immediate processing procedures are subject to post-notification review. Under these procedures, any interested party may file a petition for reconsideration within 30 days of the date of the public notice listing the notification as accepted. Similarly, the Bureau will have 30 days from the public notice date, and the Commission 40 days, to reconsider whether the spectrum manager lease is in the public interest.

34. Finally, we determine to eliminate the requirement that parties file their spectrum lease notifications within 14 days of execution of their contractual agreement. We conclude that this requirement is superfluous so long as parties file the lease notification within the time frame required by our spectrum manager lease policies, either under the newly streamlined procedures adopted in this order (for qualifying spectrum manager leases) or at least 21 days in advance of commencing operations (10 days in advance if the lease is no longer than a year).

2. Extending Spectrum Leasing Policies to Additional Spectrum-Based Services

35. In the *FNPRM,* we sought comment on whether the spectrum leasing policies should be extended to a variety of services that had been excluded from the spectrum leasing policies adopted in the *First Report and Order.* We determine that we will extend the spectrum leasing policies to some additional Wireless Radio Services, as identified below, but will not extend these policies to other services at this time, as explained herein.

36. *Public Safety Services.* With regard to the Public Safety Services in part 90, we will permit public safety licensees with exclusive use rights to lease their spectrum usage rights to other public safety entities and entities providing communications in support of public safety operations. We, however, decline at this time to permit public safety licensees to enter into spectrum leasing arrangements for commercial or other non-public safety operations.

37. We will permit public safety licensees in these services to enter into spectrum leasing arrangements with other public safety entities and entities that provide communications in support of public safety operations, consistent with the policies we adopted last year in concerning the 4.9GHz band. We established new licensing and service rules for the 4940–4990 MHz band (4.9 GHz band) that were designed to increase the effectiveness of public safety communications, foster interoperability, and further ongoing and future homeland security initiatives within the 4.9 GHz band. We believed that these objectives would be best accomplished by basing the eligibility criteria for being licensed in the 4.9 GHz band on the ''public safety services'' definition set forth in section 90.523 of our rules, which the Commission adopted in 1998 to implement section 337(f)(1) of the Communications Act. Under this definition, ''public safety services'' are services: (A) The sole or principal purpose of which is to protect the safety of life, health, or property; (B) that are provided—(i) by State or local government entities; or (ii) by nongovernmental organizations that are authorized by a government entity whose primary mission is the provision of such services; and (C) that are not made commercially available to the public. For the same reasons that we decided to permit non-traditional public safety entities to be licensed in the 4.9 GHz band for use in support of public safety operations, we now conclude that it is appropriate to permit public safety licensees to lease spectrum for such use. In addition, we believe that our decision herein to permit spectrum leasing among public safety entities achieves an appropriate balance between commenters that supported extension of our spectrum leasing policies to these services and those that expressed concern about possible abuses. Further, spectrum would not be used by commercial entities to the potential detriment of public safety operations.

38. *ITFS/MMDS services.* All of the comments received in this docket were previously transferred to and considered in WT Docket No. 03–66, in which we comprehensively reviewed our policies and rules relating to the Instructional Television Fixed Services (ITFS) and Multipoint Distribution Service (MDS) services. In a recently issued order in that proceeding, we converted the MDS service into the Broadband Radio Service and the ITFS service into the Educational Radio Service, and extended the secondary markets spectrum leasing policies to those services, but included certain modifications in order to maintain the educational purpose of ITFS. We also grandfathered pre-existing ''excess capacity'' leasing arrangements that were entered into under the previous ITFS-specific leasing rules.

39. *Maritime services.* Consistent with the spectrum leasing policies adopted in the *First Report and Order,* we will extend the spectrum leasing rules to Automated Maritime Telecommunications Systems (AMTS) services in part 80. As discussed by commenters that supported this extension, the AMTS service involves a geographic licensing approach similar to another part 80 service, VHF Public Coast stations, which also involves exclusive use licenses and already is permitted to enter into spectrum leasing arrangements under the leasing policies pursuant to the *First Report and Order.* We do not, however, extend our spectrum leasing policies to any of our high seas public coast stations. No commenters supported extending our spectrum leasing policies to these services, and they differ significantly from that of VHF Public Coast and AMTS stations. These frequencies are allocated internationally by the International Telecommunication Union (ITU) to facilitate interoperable radio communications among vessels of all nations and stations on land worldwide. Flexible use is not permitted; instead, the ITU Radio Regulations specify how each frequency may be used (*i.e.*, for radiotelephone, radiotelegraph, facsimile, narrow-band direct printing, or data transmission). In addition, unlike VHF Public Coast and AMTS stations, high seas public coast stations are not permitted to serve units on land. Finally, high seas stations are licensed only on a site-by-site basis. The Commission declined to adopt a geographic licensing approach for this spectrum because of special considerations relating to the extensive international coordination required, the need to conform to changing international allocations and allotments, and the fact that some of the spectrum is shared with the Federal Government.

40. *MVDDS services.* We will extend our spectrum leasing policies to the Multichannel Video Distribution and Data Service (MVDDS) services consistent with the comments we have received. We conclude that licensees will have similar ''exclusive use'' rights

as other licensees to whom these policies currently apply, and that the benefits of spectrum leasing should be made available to licensees and potential spectrum lessees in these services. Consistent with the service rules for these services, which permit partitioning along county lines and prohibit disaggregation under any license authorization, we will permit MVDDS licensees to lease different geographic portions (divided along county borders) to eligible spectrum lessees, but will permit only one entity, either the licensee or spectrum lessee, to operate in a given geographic area.

41. *Services/authorizations involving shared frequencies.* We will not extend spectrum leasing to shared services at this time. As we noted in the *FNPRM,* we had previously declined to allow leasing on shared frequencies because parties can readily obtain access to the spectrum by obtaining their own authorizations on shared frequencies and they are not foreclosed from applying for authorizations by the existence of another licensee in the same geographic area. Although we sought comment on whether there might nonetheless be reasons to extend spectrum leasing to shared services, commenters opposed extension of the leasing rules to services/authorizations involving shared frequencies services.

42. *Various part 90 services.* We determine not to revise current spectrum leasing policies with regard to part 90 services. In particular, we will not extend these policies to Private Land Mobile Radio (PLMR) stations below 470 MHz (including those with ''FB8'' status). These stations share spectrum below 470 MHz, and while there is some degree of ''exclusivity'' (because the stations are trunked and cannot share in the usual way), the operations nonetheless are still on shared spectrum often occupied by others. Accordingly, we determine that, consistent with our current policies regarding shared services/ authorizations, these stations should not be included among those services to which the spectrum leasing policies apply. In addition, we do not extend our spectrum leasing policies to non-multilateration Location and Monitoring Service (LMS) services because licensing in these services is shared and non-exclusive. Entities seeking access to spectrum for these non-multilateration LMS uses can gain access to spectrum without the need to enter into spectrum leasing arrangements with licensees.

43. *Other services.* We decline, at this time, to extend the spectrum leasing policies to any additional services on which we had sought comment, including the 700 MHz Guard Band Service, Amateur Services, Personal Radio Services, Aviation Services, Cable Television Relay Services, and satellite services.

44. We do not believe it appropriate to extend the spectrum leasing policies adopted in the *First Report and Order* to the Guard Band Manager Service. This service already has its own distinct set of policies and rules regarding leasing arrangements, and no commenters proposed replacing those policies. Accordingly, we see no reason at this time to replace those policies at this time. Nor do we extend spectrum leasing policies to the part 97 Amateur Radio Services. An individual Amateur Radio licensee gains access to particular bands of spectrum after obtaining an operator license by successfully completing the relevant exam requirements for those particular bands. The amateur licensee must share access to the spectrum with all amateur operators who have also successfully passed examinations for the same privileges.

45. We also do not extend our spectrum leasing policies to additional services among the part 95 Personal Radio Services. Apart from the 218–219 MHz service (to which spectrum leasing policies already apply), the Personal Radio Services are either licensed by rule and/or operate on shared spectrum. For example, Citizens Band Radio operators are authorized by rule to operate without individual licenses on any of 40 channels nationwide (choosing one at a time). Radio Control operators are authorized by rule to operate without individual licenses on any of the radio control channels nationwide.

46. Nor do we extend our spectrum leasing policies to our part 87 Aviation Services. No commenter proposed that the spectrum leasing policies be applied to these services. In addition, most of the spectrum in these services is licensed on a shared basis, and thus is not assigned for the exclusive use of any particular licensee. Finally, aviation safety concerns among the Aviation Services that do involve exclusive use rights—*i.e.*, aeronautical advisory stations (unicoms) at uncontrolled airports and aeronautical enroute stations—recommend against extending our spectrum leasing policies to these services. In particular, the Commission has determined that the licensees in these services should, for aviation safety purposes, be limited to one operator at any one location.

47. Finally, we do not extend our spectrum leasing policies applicable to Wireless Radio Services to two services, the Cable Television Relay Service and satellite services, that are administered by bureaus outside of the Wireless Telecommunications Bureau. No commenters proposed extending the spectrum leasing policies to these two services, and the general policies applicable to these two services differ, in many respects, from those administered by the Wireless Bureau. Accordingly, we will not extend our spectrum leasing policies to these two services at this time.

3. Spectrum Leasing Policies Applicable to Designated Entity/Entrepreneur Licensees

48. In the *First Report and Order,* we decided that designated entity and entrepreneur licensees would be permitted to enter into a spectrum manager lease with any qualified lessee, regardless of the lessee's designated entity or entrepreneur eligibility, and avoid the application of our unjust enrichment rules and transfer restrictions, so long as the lease did not result in the lessee's becoming a ''controlling interest'' or affiliate of the licensee that would cause the licensee to lose its designated entity or entrepreneur eligibility under section 1.2110 of our rules. We further determined that, to the extent that any conflict arose between the revised *de facto* control standard for spectrum leasing arrangements as set forth in the *First Report and Order* and the controlling interest standard in our rules for determining designated entity and entrepreneur eligibility, we would apply the latter in determining whether the licensee had maintained the requisite degree of ownership and control to allow it to remain eligible for the licenses or for other benefits such as bidding credits and installment payments. We also decided in the *First Report and Order* that designated entity and entrepreneur licensees would be allowed to enter into long-term *de facto* transfer leasing arrangements subject to any existing transfer restrictions and unjust enrichment payment obligations.

49. *Affirmation of existing rules.* We affirm the rules we established in the *First Report and Order* for spectrum leasing by designated entity and entrepreneur licensees, declining requests that we provide such licensees with the unfettered right to lease spectrum to any entity, without regard to our eligibility rules for designated entities and entrepreneurs.

50. We decline to adopt the suggestion of some commenters (one of which is also a petitioner) that we allow designated entity and entrepreneur licensees to lease spectrum to any

entity, without regard to how the spectrum lease might affect the licensee's designated entity or entrepreneur eligibility. We believe that adopting such a change to our rules would contravene the requirements and objectives of Section 309(j) of the Act. Section 309(j) requires, among other things, that the Commission ensure that small businesses are given the opportunity to participate in the provision of spectrum-based services and that, to further this goal, it consider the use of bidding preferences. These statutory directives were not intended to provide generalized economic assistance to small businesses, but rather to facilitate their ability to acquire licenses, build out systems, and provide service. In such a way, Congress sought to promote diversity among service providers, as well as the rapid deployment of new technologies for the benefit of, among others, rural customers.

51. Section 309(j) also directs the Commission to prescribe anti-trafficking restrictions and payment schedules as necessary to prevent designated entity benefits from giving rise to unjust enrichment. If we were to allow designated entities and entrepreneurs to enter into spectrum manager leasing arrangements without considering whether the spectrum lessee had acquired an attributable interest in the licensee, we would run the risk that designated entity and entrepreneur incentives would benefit, indirectly, entities that do not qualify for such incentives in the primary market. In other words, we would be paving the way for the very unjust enrichment Congress wanted us to prevent.

52. We also reject recommendations that we allow licensees to avoid unjust enrichment payment obligations and transfer restrictions in situations where the spectrum lessee will use the spectrum lease to serve rural areas. Section 309(j) requires that the Commission ''seek to promote,'' as one of many, sometimes conflicting goals, the objective that service be developed and rapidly deployed to rural customers, and requires further that the Commission ensure that rural telephone companies be given the ''opportunity'' to participate in the provision of spectrum-based services.

53. To facilitate these ends within the context of competitive bidding, the Commission has provided small businesses with bidding credits and entrepreneurs with license set-asides, while specifically declining to establish an independent bidding credit for large telephone companies serving rural areas. When initially considering whether to create a separate bidding credit for rural telephone companies, the Commission determined that telephone companies providing service in rural areas do not *per se* have the same difficulty accessing capital as other groups, such as small businesses. In subsequent decisions considering this issue, the Commission has not changed its determination. If we provided small businesses and entrepreneurs with the unrestricted ability to enter into spectrum leasing arrangements with non-eligible entities planning to serve rural areas, without regard to our eligibility rules, we would, in effect, be allowing small business and entrepreneur incentives to benefit, indirectly, the very entities which we had expressly found no basis for assisting in that fashion in the primary market.

54. For similar reasons, we also reject a suggestion that we lift unjust enrichment repayment obligations and entrepreneur transfer restrictions for licensees owned and controlled by Alaska Native Corporations and Indian tribes that lease rural area spectrum rights to non-eligible entities pursuant to long-term *de facto* transfer leasing arrangements. Indian tribes and Alaska Regional or Village Corporations already enjoy enhanced access to designated entity and entrepreneur benefits through an exclusion from our affiliation rules available only to them.

55. To summarize, in affirming our rules and in declining to adopt proposals to the contrary, we have determined that we will continue to rely on our existing attribution rules, including our definitions of controlling interest and affiliation, for all determinations of whether a licensee undertaking a lease has maintained its designated entity and/or entrepreneur eligibility. We, nonetheless, recognize that further guidance on the application of those rules in the context of leasing might be useful. Accordingly, we offer such guidance below.

56. *Application of Existing Attribution Rules to Spectrum Manager Leasing Arrangements.* In response to requests from two commenters (one of which is also a petitioner), we clarify here how our attribution rules, including the criteria set forth in *Intermountain Microwave,* 12 FCC Rcd 2d 559 (1963), are applied in determining whether spectrum manager leasing arrangements by designated entity and entrepreneur licensees satisfy our eligibility requirements. We note, as a preliminary matter, that we expect a licensee to conduct an analysis of possible control by, or affiliation with, the proposed spectrum lessee before entering into a spectrum manager leasing arrangement and before certifying that the spectrum lease does not affect the licensee's continued designated entity or entrepreneur eligibility. That analysis should take into account the Commission's definitions of control and affiliation, which will help to determine, as they do in non-spectrum leasing contexts, whether the gross revenues (and, in the case of entrepreneurs, the total assets) of a spectrum lessee are to be attributed to a designated entity or entrepreneur licensee. Such a determination will be made by evaluating the licensee's Commission-regulated business in the context of a spectrum lessee's involvement with the licensee. For example, a spectrum lessee would become an attributable interest holder in the licensee if the lessee were to become an officer or director of the licensee. An attributable affiliation might also be created if a lease called for the licensee and spectrum lessee ''to combine their efforts, property, money, skill and knowledge.'' Similarly, a spectrum lease might create a contractual affiliation between licensee and spectrum lessee if the leasing arrangement represented a significant portion of the licensee's day-to-day business operations. While one commenter suggests that a licensee can preserve its designated entity or entrepreneur eligibility simply by maintaining day-to-day control over a spectrum leasing business, we believe that, in order to satisfy the requirements of section 309(j) of the Act and avoid unjust enrichment obligations or transfer restrictions, the licensee cannot make spectrum leasing its primary business and must, as discussed above, continue to provide facilities-based network services under its licenses.

57. In examining whether a spectrum lessee would, under a spectrum manager lease, become a controlling interest or affiliate of the licensee, the licensee should look to all of the relevant circumstances, including how large a portion of its total capacity to provide spectrum-based services would be leased, what involvement it would have with the spectrum lessee as a result of the spectrum lease, and what relationship the two parties have with one another apart from the lease. Referring to an example provided by one commenter, we conclude that a spectrum manager lease between a designated entity or entrepreneur licensee and a non-designated entity/entrepreneur spectrum lessee with a prior business relationship where substantially all of the spectrum capacity of the licensee is to be leased

would cause the spectrum lessee to become an attributable affiliate of the licensee. Such affiliation would render the licensee ineligible for designated entity or entrepreneur benefits and, therefore, would make such a spectrum lease impermissible. On the other hand, a spectrum manager lease involving a small portion of the designated entity or entrepreneur licensee's spectrum capacity where no relationship existed between the licensee and spectrum lessee apart from the lease would likely be permissible. Situations falling somewhere between these two examples would have to be evaluated according to the individual circumstances involved.

58. While we direct licensees to continue to rely on our existing attribution rules to determine whether a proposed spectrum manager leasing arrangement would affect their continuing eligibility for designated entity or entrepreneur benefits, we recognize that certain of our affiliation criteria do not contemplate spectrum leasing and are therefore incompatible with spectrum manager leasing arrangements. For instance, under our attribution rules, affiliation generally arises where another entity shares office space, employees, or other facilities with a designated entity or entrepreneur licensee and, through these sharing arrangements, gains control or potential control of the licensee. In addition, under *Intermountain Microwave,* one indication of affiliation is the use by another entity of the licensee's facilities and equipment. However, because spectrum leasing arrangements, by their very nature, always involve the spectrum lessee's construction or use of facilities in the licensee's service area and/or operation of those facilities over the licensee's bandwidth, it would be unworkable to apply our facilities-related indicia of affiliation in the customary manner to spectrum leasing situations. We clarify, therefore, that a spectrum lessee's construction or use of facilities in the licensee's service area or over its bandwidth does not, by itself, transform the lessee into a controlling interest or affiliate of the licensee. On the other hand, joint use of office space, employees, or equipment or other facilities by the licensee and the spectrum lessee might indicate affiliation and would require an analysis of whether the spectrum lessee would, through such use, acquire control or potential control of the licensee.

59. Likewise, we clarify that the existence of spectrum manager leasing arrangement does not, by itself, create an ''identity of interest'' between the licensee and lessee resulting in an attributable affiliation under 47 CFR 1.2110(c)(5)(i)(D). However, every designated entity or entrepreneur licensee should take care to examine, and we will continue to review, whether there is an identity of interest between the licensee and its spectrum lessee beyond the mere existence of the spectrum lease that confers attributable affiliation under our rules. For example, members of the same family or entities with common investments should be considered affiliates and treated, for purposes of attribution, as one person or entity. Similarly, we clarify that a spectrum manager leasing arrangement does not, per se, constitute a management agreement or joint marketing arrangement resulting in the spectrum lessee's being considered a controlling interest of the licensee under 47 CFR 1.2110(c)(2)(ii)(H) through (c)(2)(ii)(I). We, nonetheless, caution designated entities and entrepreneurs that specific provisions in spectrum manager leasing arrangements, or other agreements with their spectrum lessees, might constitute management agreements or joint marketing arrangements. As our rules state, ''affiliation generally arises where one concern is dependent upon another concern for contracts and business to such a degree that one concern has control or potential control, of the other concern.''

60. When entering into a spectrum manager leasing arrangement, the licensee must retain both *de jure* and *de facto* control over the leased spectrum pursuant to the updated *de facto* control standard. Consistent with this requirement, a designated entity or entrepreneur licensee cannot use this spectrum leasing vehicle to circumvent our attribution rules. The designated entity or entrepreneur must, if it wishes to undertake a spectrum manager lease, preserve its existing eligibility. As we have discussed, to do so, the designated entity or entrepreneur must evaluate and certify that nothing concerning its spectrum manager lease alters its ongoing eligibility for the benefits it has received. Leasing arrangements that would create a controlling interest or attributable affiliation that altered the designated entity or entrepreneur licensee's eligibility are prohibited. In lieu of using a spectrum manager leasing arrangement in such a situation, designated entities or entrepreneurs are free to undertake a *de facto* transfer lease, subject to the Commission's unjust enrichment requirements and any applicable transfer restrictions.

61. We will also amend the language of our rules to clarify that, subject to the other eligibility restrictions set forth in the *First Report and Order* and in 47 CFR 1.9020(d) of our rules, including those discussed above, a designated entity or entrepreneur licensee may enter into a spectrum manager leasing arrangement with any spectrum lessee, regardless of the lessee's eligibility for designated entity or entrepreneur benefits.

62. *Application of Controlling Interest Standard to Designated Entity and Entrepreneur Eligibility Determinations.* Insofar as we have determined to continue to rely upon our existing attribution rules (including our definitions of controlling interest and affiliation) as well as existing Commission precedent for all determinations of designated entity and entrepreneur eligibility, we decline to follow recommendations that we should instead rely on the new *de facto* control standard adopted for leasing for our eligibility determinations. As we have earlier explained, Congress specifically intended that, in order to prevent unjust enrichment, the licensee receiving designated entity benefits actually provide facilities-based services as authorized by its license.

4. Application of the *De facto* Control Standard for Spectrum Leasing With Regard to Other Issues and Types of Arrangements

63. In the *First Report and Order,* we limited the application of the revised *de facto* control standard to the context of spectrum leasing arrangements, while leaving in place the existing *de facto* control tests—including those based on *Intermountain Microwave* and other facilities-based analyses—for designated entity and entrepreneur eligibility issues, management agreements, and other similar types of agreements. We sought comment on whether and how the revised *de facto* control standard should be extended to apply in these and any other contexts.

64. Based on the record before us, we decline in this proceeding to extend the revised *de facto* transfer standard applicable to spectrum leasing arrangements to other types of arrangements outside the context of spectrum leasing. Although commenters supported applying the revised standard more broadly, there are significant legal and practical difficulties that commenters have failed to address. It is not clear from the sparse record how such a change would affect existing rules and policies relating to management agreements or other spectrum transactions, or what benefits would be achieved, and we are concerned that revising our rules in these areas may cause a host of

unintended consequences or ambiguities.

B. Policies To Facilitate Advanced Technologies

65. In the *FNPRM,* we emphasized the benefits of ''smart'' or ''opportunistic'' technologies, especially the potential for increased access to unused spectrum. In addition, the Commission's recently issued notice of proposed rulemaking in the Cognitive Radio proceeding, on the use of advanced technologies, ET Docket No. 03–108, 69 FR 7397 (February 17, 2004), describes how they may enable devices to search across many bands, sense the level of emissions, and then operate in spectrum that is either not in use by other parties or below a certain level of emissions. The *FNPRM* sought comment on the use of advanced technologies in licensed bands in the context of secondary markets and, in particular, requested comment on whether the Commission should focus on advancing and improving access to spectrum by opportunistic devices through a secondary markets approach, at least in the near term. The *FNPRM* also inquired as to whether the *First Report and Order* provided sufficient flexibility for more ''dynamic'' leasing arrangements made possible by opportunistic devices.

1. Facilitating Advanced Technologies Within Existing Regulatory Frameworks, Including Dynamic Spectrum Leasing Arrangements

66. We clarify that our spectrum leasing policies and rules permit parties to enter into a variety of dynamic forms of spectrum leasing arrangements that take advantage of the capabilities associated with advanced technologies. Such a clarification generally accords with comments we received. For example, one commenter specifically recommended that the Commission's secondary markets policies and rules be expanded to accommodate ''dynamic'' spectrum leasing arrangements, and other commenters also endorsed adoption of spectrum leasing policies in which licensees could take fuller advantage of technological advances, including opportunistic use devices, through secondary markets arrangements. Consistent with these views, we clarify that parties may enter into spectrum leasing arrangements in which licensees and spectrum lessees share use of the same spectrum, on a non-exclusive basis, during the term of the lease. For example, a licensee and spectrum lessee may enter into a spectrum manager or *de facto* transfer lease in which use of the same spectrum is shared with each other by employing opportunistic devices. In another variation, a licensee could enter into a spectrum manager lease with one party that has access to the spectrum on a priority basis, while also leasing use of the same spectrum to another party on a lower-priority basis, with the requirement that the lower-priority spectrum lessee employ opportunistic technology to avoid interfering with the priority lessee. Of course, the licensee may not lease spectrum usage rights that exceed the rights it currently holds and, as these examples illustrate, the licensee may choose to lease a more restricted bundle of usage rights.

67. Significantly, these arrangements could facilitate opportunistic use by parties operating at the same power level and under similar technical parameters as the licensee, or they could promote such use at lower power levels. We also emphasize that neither scenario would affect unlicensed operations to the extent they are permitted in that particular licensed band pursuant to Commission rules under part 15. For example, as set forth in § 15.209 of the Commission's rules and augmented on a band-by-band basis, part 15 users (*e.g.,* Ultra-Wide Band operators) can operate pursuant to applicable technical and operational rules whether or not opportunistic use or other advanced technologies are employed or authorized by the licensee. We would also expect that new and innovative radiofrequency devices would be agile enough to function on an unlicensed basis or as part of licensed operations.

2. Private Commons

68. To facilitate the use of advanced technologies, and thus better promote access to and the efficient use of spectrum, we expand the spectrum licensing framework by identifying an additional option that may be utilized by current and future licensees and spectrum lessees. This concept, which we call a ''private commons,'' will allow licensees and spectrum lessees to make spectrum available to individual users or groups of users that do not fit squarely within the current options for spectrum leasing or within the traditional end-user arrangements associated with the licensee's (or spectrum lessee's) subscriber-based services and network infrastructures. New technologies enable users, through use of advanced devices, to engage in a wide range of communications that do not require use of a licensee's (or lessee's) network infrastructure. To facilitate the use of these technologies, we adopt the private commons option, which will permit, and be restricted to, peer-to-peer communications between devices in a non-hierarchical network arrangement that does not utilize the network infrastructure of the licensee (or spectrum lessee).

69. The private commons option provides a cooperative mechanism for licensees (or lessees) to make licensed spectrum available to users employing these advanced technologies in a manner similar to that by which unlicensed users gain access to spectrum to suit their particular needs, and to do so without the necessity of entering into individual spectrum leasing arrangements under our existing rules. In the 2.4 GHz and 5 GHz bands, for instance, users gain access and use of the spectrum with specified types of low-power communications devices provided they comply with technical requirements established by the Commission and set forth in our part 15 rules. In these bands, users then can create their own networks—such as those that are *ad hoc* or ''mesh'' in nature—using equipment that complies with Commission-established requirements. The private commons option provides a potentially complementary access model, in which licensees (or spectrum lessees) would determine to make access available to a similar class of users, and would do so under technical requirements for sharing use of the licensed band established and managed by the licensee (or lessee). The nature of these types of users' access to spectrum under this private commons option thus differs qualitatively from the nature of access provided to spectrum lessees under the Commission's spectrum leasing policies and procedures. In the private commons, the licensee (or lessee) authorizes users of devices operating at particular technical parameters specified by the licensee (or lessee) to operate on the licensed frequencies, consistent with the applicable technical requirements and use restrictions under the license authorization, using peer-to-peer (device-to-device) technologies. In spectrum leasing arrangements, individually negotiated spectrum access rights are provided to entities that traditionally obtained licenses and that would then provide traditional network-based services to end-users.

70. These private commons arrangements may take a variety of forms, but will share a number of defining characteristics, as described herein. The private commons option will allow for flexible uses of licensed spectrum rights in which the licensee or lessee does not necessarily offer services (in whole or part) over its own end-to-end physical network of base stations, mobile stations, and other elements. The

licensee or spectrum lessee, as a manager of a private commons, will set terms and conditions for use in the private commons by users (consistent with the terms of the license and applicable service rules), and retain both *de facto* control of the use of the spectrum within the private commons and direct responsibility for compliance with the Commission's rules. And, while private commons arrangements will not be subject to the same notification requirements that are required by our spectrum leasing rules, licensees (or spectrum lessees) managing the commons will be required at this time to notify the Commission about any private commons they establish prior to users being permitted to operate within that private commons.

71. We anticipate at least two types of private commons that licensees (or spectrum lessees) could make available to individuals or groups of users. In the first example, a private commons could be created by a licensee (or spectrum lessee), which may or may not otherwise have a network infrastructure to provide services, by granting access for a fee (*e.g.*, on a transaction, usage, fixed, or other basis) to users who employ smart or opportunistic wireless devices that conform to the terms and conditions established by the licensee (or lessee), such as a requirement that devices operating in the licensed band use a particular technology, hardware, or software. The users' devices may be used to engage in peer-to-peer (device-to-device) communications, such as by becoming part of compatible *ad hoc* or ''mesh'' wireless networks. Such users may need access to a particular licensed spectrum band in lieu of (or perhaps in addition to) gaining access to other bands that may be more heavily used or that do not allow for the quality of service necessary for a particular application. This type of private commons might be particularly valuable to users that find existing bands that provide for unlicensed operations to be crowded or otherwise less desirable.

72. Under a second potential type of private commons arrangement, the licensee (or spectrum lessee) would not charge an ongoing access fee or otherwise have any direct relationship with the users. For instance, manufacturers of smart or opportunistic devices, or the developers of software or hardware used within such devices, may wish, as licensees or spectrum lessees, to provide spectrum access to anyone who purchases their devices, or devices with their hardware or software. This type of arrangement might be particularly effective in promoting new technologies or new uses by providing an opportunity for equipment developers to capitalize on their investments and innovations without having to get a license directly from the Commission, but could arrange for users of the equipment to access the spectrum usage rights from an existing licensee. Because a licensee (or spectrum lessee) could offer to private commons users the interference protection rights of its license, this arrangement could provide some additional benefits as compared with possible lower-powered, unlicensed operation in the same or other bands.

73. We will require licensees and spectrum lessees that seek to allow spectrum access on a private commons basis to notify the Commission of the arrangement at this time. This notification will be similar to, but simpler than, the notification required for spectrum manager leases. It would provide certain information and certifications regarding the general terms and conditions for spectrum access to users in the private commons, including the term and coverage area of the arrangement, general information on the technical requirements and the equipment that the licensee or spectrum lessee has approved for operation in the private commons, as well as a description of the types of uses that are allowed. Consistent with our approach to part 15 devices, we will not require the notification to include specific information about each individual user. We examine this notification requirement, and the continued need for the notification, in the *Second FNPRM.* We also recognize the need to clearly identify the distinguishing elements of spectrum leases, managed private commons, and end-user arrangements, respectively, as means to create spectrum access. Accordingly, in the Second *FNPRM,* we seek comment on the specifications necessary to make such distinctions consistent with the Commission's regulatory and enforcement objectives, and we seek comment on other arrangements and regulatory changes that may facilitate spectrum access and that should be considered within a private commons framework.

C. License Assignments and Transfers of Control

1. Immediate Approval Procedures for Certain Categories of License Assignments and Transfers of Control

74. In the *First Report and Order,* we streamlined the regulatory process for transfers of control and license assignments in the same Wireless Radio Services covered by our new spectrum leasing policies. In the FNPRM, we proposed to take additional steps to remove unnecessary delay in processing certain categories of transfers of control and license assignments to the extent doing so would be consistent with our statutory obligation to determine whether such transactions would be in the public interest. In particular, we inquired whether the policies that we adopted with regard to *de facto* transfer leasing under our forbearance authority should also be applied to license assignments and transfers of control.

75. We adopt immediate approval procedures for the same categories of license assignments and transfers of control involving Wireless Radio Services as are subject to our immediate approval procedures for *de facto* transfer spectrum leasing arrangements, as set forth previously. This decision comports with the comments we received. Accordingly, we conclude that an application for assignment or transfer of control of Wireless Radio Service licenses qualifies for immediate approval if, consistent with our policies for *de facto* transfer leases, the application establishes, through required certifications, that the transaction does not raise any specified potential public interest concerns relating to eligibility and use restrictions, foreign ownership restrictions, designated entity/entrepreneur restrictions, or competition, or does not require a waiver or declaratory ruling. In such cases, we will not require prior public notice or additional individualized Commission review before the transaction is approved. In addition, the applications must not involve license authorizations that are subject to Commission review or investigation that potentially affects the status of the license authorization itself. Finally, as with the approach we adopt with regard to *de facto* transfer leasing, our approval of the license assignment or transfer of control will be placed on public notice, subject to reconsideration by interested parties or the Bureau within 30 days, and by the Commission within 40 days. The additional streamlining of our processing of these specified categories of license assignments and transfers of control helps us to achieve these goals while at the same time meeting our statutory obligations, under sections 308, 309, and 310(d), to review license assignments and transfers of control to ensure that they are consistent with the public interest.

76. *License assignments and transfers of control subject to our forbearance authority.* Thus, for license assignment and transfer of control applications that

fall within the scope of our forbearance authority and that meet the specified requirements (*i.e.*, do not raise any of the potential public interest concerns identified above) for immediate approval, we will forbear from prior public notice and additional individualized review requirements. We find that such forbearance satisfies each prong of the test under section 10, and will serve the public interest.

77. *License assignments and transfers of control not subject to forbearance.* Similarly, we also determine that the streamlined approach we are adopting for qualifying license assignments and transfers of control involving services that are not subject to our forbearance authority is consistent with the statutory requirements of sections 308, 309, and 310(d). Consistent with these provisions, we continue to require an application and approval process. In addition, in order to determine whether to approve these transactions, the Commission requires that each application establish a distinct set of facts and representations concerning the particular license assignment or transfer of control application before it can be approved. Thus, before any particular application will be approved under these immediate approval procedures, the Commission will have determined, based on the particulars of that application, that all of the criteria relevant to establishing that the public interest would be served by the granting of the application had been supplied, and the statutory requirements for case-by-case review and approval of the application will have been satisfied.

2. Extending the Streamlined Processing Policies Relating to License Assignments and Transfers of Control to Additional Wireless Radio Services

78. In the *First Report and Order,* we limited our streamlined processing policies relating to license assignments and transfers of control to include only those services to which our spectrum leasing policies applied. In the *FNPRM,* we inquired whether we should expand these streamlined processing rules to include additional services.

79. We will apply the streamlined processing procedures adopted in the *First Report and Order* for license assignment and transfer of control applications, as modified by this order for qualifying applications, to all license assignment and transfer of control applications involving Wireless Radio Services authorizations regulated by the Bureau. Thus, under the policies we are adopting herein, license assignment and transfer of control applications that raise potential public interest concerns (*i.e.*, concerns relating to eligibility and use restrictions, foreign ownership restrictions, designated entity/entrepreneur restrictions, or competition) will be processed according to the 21-day processing procedures for license assignments and transfers of control set forth in the *First Report and Order,* while those applications that qualify under the immediate approval procedures adopted in this order will be processed under the procedures adopted for license assignments and transfers of control set forth herein. We believe that there should be parity among these Wireless Radio Services when it comes to processing of license assignments and transfers of control. This will allow licensees and assignees/transferees in each service to benefit from streamlined processing that minimizes administrative delay, reduces transaction costs, and otherwise generally facilitates the movement of spectrum toward new, higher valued uses.

D. The Commission's Role in Providing Secondary Markets Information and Facilitating Exchanges

80. In the *FNPRM*, we sought comment on a variety of approaches the Commission could take to promote access to the information needed to make possible spectrum leases or exchanges of spectrum usage rights in the secondary market. We also sought comment on whether the Commission should collect additional information, support establishment of services such as listing offers to transfer, assign, or lease, or support the establishment of exchange mechanisms or brokering exchanges. Finally, we invited comment on the potential for independent third parties to emerge as ''market-makers'' that negotiate, broker, or otherwise facilitate spectrum leasing transactions.

81. We recognize that the Commission plays a critical role in the development of efficient secondary markets for spectrum usage rights. We believe that the spectrum leasing procedures established in the *First Report and Order*, combined with the information made available through our ULS database, will help in the development of these secondary markets. At the same time, we recognize that it may be necessary to evaluate, and perhaps expand, the information made available by the Commission as secondary markets in spectrum usage rights develop.

82. We continue to believe that the private sector is better suited both to determine what types of information parties might demand, and to develop and maintain information on the licensed spectrum that might be available for use by third parties. Our decision is consistent with most of the comments we received on this question. Accordingly, while we will continue to collect and make available to the public the basic details related to spectrum licensees and lessees as provided in the *First Report and Order*, we will not gather or provide additional information at this time. We take no action at this time to establish the Commission as either a market-maker or exchange, nor do we take action to favor any particular type of private exchange mechanism. Similarly, we decline at this time to establish requirements for market-makers or other parties that may emerge to facilitate transactions. We will, however, continue to monitor the development of information services and market mechanisms in the private sector, and are prepared to revisit this issue at a later time if circumstances warrant.

IV. Order on Reconsideration

83. Five groups—rural carriers represented by the Blooston Law Firm (Blooston Rural Carriers), Cingular Wireless, First Avenue Networks, National Telecommunications Cooperative Association (NTCA), and Verizon Wireless—filed petitions for reconsideration seeking clarification or revision of a number of different issues addressed in the *First Report and Order*. Four parties filed responses to these petitions.

84. Blooston Rural Carriers, Cingular Wireless, and NTCA each sought clarification of the licensee's responsibility for ensuring that spectrum lessees comply with Commission policies and rules, while Verizon Wireless sought clarification of the licensee's ability to terminate a spectrum lease for non-compliance by the lessee. Cingular Wireless and Verizon Wireless requested additional procedural protections for licensees and spectrum lessees in the event the Commission sought to terminate a spectrum lease, while Blooston Rural Carriers, Cingular Wireless, and NTCA sought additional procedural protections for spectrum lessees if the license was terminated, either as a result of the licensee's bankruptcy or for some other unanticipated reason. Blooston Rural Carriers also sought clarification of Commission policies regarding the licensee's responsibility for meeting application construction requirements when entering into spectrum leasing arrangements. And, Cingular Wireless requested clarification with respect to the licensee's responsibility for the cost-

sharing obligations associated with relocation of incumbent microwave licensees in broadband PCS spectrum. We address these issues and petitions below. Issues raised by two of the petitioners overlap with matters that we already have addressed in the *Second Report and Order*, above. First Avenue Networks recommended that we eliminate the requirement that parties file spectrum manager leases days in advance of being permitted to commence operations under the lease, an issue we addressed in the *Second Report and Order*, above. Cingular Wireless sought clarification of the Commission's policies regarding spectrum leasing by designated entities and entrepreneurs, which we also have addressed in *Second Report and Order*. Because we have already considered and addressed the substance of these petitions, we will not discuss them further in this section.

A. Licensee Responsibility To Ensure That Spectrum Lessees Comply With Commission Policies and Rules

1. The licensee's Responsibility To Ensure the Spectrum Lessee's Compliance With Commission Policies and Rules

a. Spectrum Manager Leasing Arrangements

85. *Background.* In the *First Report and Order,* we provided that licensees in spectrum manager leasing arrangements will be held directly accountable for lessee violations. In addition, we stated that if the licensee or the Commission determines that there is any violation of the Commission's rules or that the lessee's system is causing harmful interference, the licensee must immediately take steps to remedy the violation, resolve the interference, suspend or terminate the operation of the system, or take other measures to prevent further harmful interference until the situation can be remedied. Finally, if the spectrum lessee refuses to resolve the interference, remedy the violation, or suspend or terminate operations, either at the direction of the licensee or by order of the Bureau or Commission, we provided that the licensee ''must use all legal means necessary to enforce the order,'' as codified in 47 CFR 1.9010(b)(1)(iii).

86. In its petition for reconsideration, Cingular Wireless contended that a spectrum manager licensee should not be held accountable for the spectrum lessee's violations of any rules if the licensee exercises some form of ''due diligence.'' In their petition, Blooston Rural Carriers asserted that requiring that a spectrum manager licensee use ''all legal means necessary'' to ensure that a spectrum lessee does not continue to violate rules imposes an ambiguous and potentially onerous requirement on the licensee even if the licensee takes reasonable steps to ensure compliance; they requested that we clarify the provision by including a ''reasonableness'' element in the requirement.

87. *Discussion.* We affirm the *First Report and Order* in holding that licensees in spectrum manager leasing arrangements are directly responsible and accountable for violations of Commission policies and rules by their spectrum lessees, and thus we deny Cingular Wireless's petition. In entering into spectrum manager leasing arrangements, licensees have chosen to retain *de facto* control of the leased spectrum, which includes ongoing oversight responsibilities as well as direct accountability for ensuring their lessees' compliance with the rules. Spectrum lessees in this type of leasing arrangement are not held directly accountable, but instead are secondarily liable. Accordingly, holding spectrum manager licensees directly accountable is the only means of ensuring that some entity is directly accountable for compliance with Commission rules pertaining to the use of the leased spectrum. We note, however, that while licensees, as a policy and legal matter, will be held accountable for their lessees' compliance, the Commission retains discretion, based on the facts and circumstances regarding the licensee's exercise of its oversight responsibilities, as to whether and how it may proceed against the licensee when a spectrum lessee violates Commission policies. Thus, we agree with Cingular Wireless that the extent of a licensee's due diligence should be considered in determining the appropriate course of action.

88. In addition, consistent with the concerns raised by Blooston Rural Carriers, we modify 47 CFR 1.9010(b)(1)(iii) of the Commission's rules by adding a reasonableness element to the provision. As modified, the rule will now state that the spectrum manager licensee must ''use all reasonable legal means necessary to enforce compliance.'' This clarification should ameliorate any concern that the licensee would have to exhaust all legal means, no matter how unreasonable, to ensure its lessees' compliance. Nevertheless, we emphasize that licensees that enter into spectrum manager leasing arrangements must maintain *de facto* control over the leased spectrum, which includes retention of the necessary legal rights, and the responsibility for taking legal action when necessary, to enforce their lessees' compliance with Commission policies and rules.

b. *De facto* Transfer Leasing Arrangements

89. *Background.* In contrast to licensee responsibilities in spectrum manager leasing arrangements, we significantly limited licensee responsibilities in *de facto* transfer leasing arrangements by relieving licensees of primary and direct responsibility for ensuring that their lessees' operations comply with Commission policies and rules. We did, nonetheless, provide that licensees in *de facto* transfer leases retain ''some residual responsibilities'' regarding the leased spectrum. While noting that we were seeking to carefully limit licensee responsibilities so as not to impede commercially viable leasing arrangements, we also stated that it ''may be appropriate to hold the licensee responsible in specific cases for ongoing violations or other egregious behavior on the part of the spectrum lessee about which the licensee has knowledge or should have knowledge.''

90. In its petition, Cingular Wireless objected to stating that the Commission ''may'' hold licensees potentially responsible for ''ongoing violations'' or ''egregious behavior,'' subject to forfeitures or license cancellation, contending that this standard is ''extremely vague'' and provides licensees insufficient guidance. Cingular Wireless sought either elimination of the licensee's residual responsibility with regard to *de facto* transfer leases or clarification of the standard to which the licensee would be held accountable. Blooston Rural Carriers objected to holding the licensee accountable for what it ''should have known,'' and requested that the Commission clarify that the licensee will have fully discharged its oversight responsibilities if it includes certain express covenants in a spectrum lease; under such a revised standard, if a licensee becomes aware of a violation, the licensee would then be accountable for enforcing the lease terms. Finally, NTCA requested in its petition that the Commission not hold the licensee liable for its lessee's violations so long as the licensee abides by some basic guidelines; NTCA recommended that we establish a safe harbor for *de facto* transfer leasing with regard to a licensee's residual responsibilities, but did not elaborate on what that safe harbor would entail.

91. *Discussion.* We affirm the *First Report and Order* and deny the petitions

for reconsideration on this issue. We believe that the language in the *First Report and Order* achieves the right balance with regard to the accountability of licensees in *de facto* transfer leasing arrangements for the violations of Commission policies and rules by their spectrum lessees.

92. In the *First Report and Order,* we significantly limited licensee responsibilities in *de facto* transfer leasing arrangements by relieving licensees of primary and direct responsibility for ensuring that their lessees' operations comply with Commission policies and rules. Instead, as we made clear in the *First Report and Order,* spectrum lessees are primarily and directly responsible for ensuring such compliance, and we will first approach the lessee when we have questions about interference or other technical performance issues to demand that it bring its operations into compliance. We also have the direct authority to pursue remedies against lessees under Section 503(b) of the Communications Act. Thus, although licensees are generally relieved of responsibility for their lessees' actions, they are not relieved of all responsibility no matter the circumstance. Given that licensees under this type of leasing arrangement continue to hold *de jure* control of the leased spectrum, as well as non-delegable duties regarding their license, we find that holding them potentially accountable, in certain limited circumstances, is commensurate with their ongoing responsibilities, as licensees, to the Commission.

93. As we have indicated, such potential residual accountability is quite circumscribed, and would only attach to ongoing violations or other egregious behavior by the spectrum lessees about which the licensee had knowledge or should have knowledge. For instance, our rules require that any agreement between a licensee and spectrum lessee must contain provisions that the spectrum lessee comply at all times with applicable Commission rules. Accordingly, to the extent that a licensee is found complicit with ongoing violations by the spectrum lessee about which the licensee is aware and does nothing to ensure compliance, we believe it is appropriate to hold that licensee accountable. While we would expect that instances in which licensees that have entered into *de facto* transfer leases may be held accountable for ongoing or egregious acts of their lessees will be quite rare indeed, we cannot relieve these licensees altogether, in all cases no matter how egregious, for responsibility for any act of their spectrum lessees. Finally, although we decline to adopt petitioners' proposals for codifying dispositive rules as to what would or would not constitute such ongoing violations or other egregious acts of a spectrum lessee for which a licensee would be held accountable, we do believe that the kinds of factors proposed by them could be relevant to our case-by-case review of whether a particular licensee had in fact appropriately exercised its residual, non-delegable duties with regard to such actions by its spectrum lessee.

2. The Licensee's Responsibility To Terminate a Spectrum Lease for Violations by the Spectrum Lessee

94. *Background.* In the *First Report and Order,* we required that the licensee always retain broad authority to terminate a lease if the spectrum lessee was violating Commission rules. Section 1.9040(a)(i) of our rules codified this policy in part, stating: ''The spectrum lessee must comply at all times with applicable rules set forth in this chapter and other applicable law, and the spectrum leasing arrangement may be revoked, cancelled, or terminated by the licensee or Commission if the spectrum lessee fails to comply with applicable requirements.''

95. In its petition, Verizon Wireless asserted that the wording of 47 CFR 1.9040(a)(i) is overly broad, and would discourage potential spectrum lessees from entering into spectrum leases. Specifically, Verizon Wireless contended that the provision, as worded, could be read to allow the licensee to terminate a lease for the lessee's failure to comply with *any* of the Commission's rules or any other applicable law. Such a broad interpretation, it contended, could enable a licensee to claim the absolute right to terminate a spectrum lease even in the event of the most minor infraction, regardless of any agreement otherwise reached between the leasing parties. Verizon Wireless argued that a licensee might use this provision as pretext for terminating a lease when economic circumstances might make it no longer in the licensee's interest to honor the leasing arrangement. Accordingly, Verizon Wireless requested that we clarify that our rules do not create an absolute right to terminate a lease for any violation whatsoever regardless of the contractual terms of the spectrum lease.

96. *Discussion.* In establishing policies that promote use of spectrum leasing arrangements, we have been careful to distinguish between the rights of licensees and spectrum lessees. Licensees, who always retain *de jure* control of the license and retain certain core obligations that cannot be delegated to spectrum lessees, always retain greater rights and authority over the license and leased spectrum than spectrum lessees. Consistent with these policies, we require that licensees retain broad authority and, as provided in 47 CFR 1.9040(a)(1), that they may terminate a spectrum lease if the spectrum lessee violates Commission rules. We did not intend, however, to provide licensees with completely arbitrary authority to terminate a spectrum lease for any violation whatsoever, regardless of the contractual agreement between the parties. Such a broad reading of 47 CFR 1.9040(a)(1) could have a chilling effect on parties' incentives to enter into a spectrum lease. Accordingly, we grant Verizon Wireless's petition in part by clarifying our intent with regard to this provision.

97. We expect that leasing parties will negotiate certain terms in their lease agreement that delineate the circumstances under which the licensee would have the right to terminate the spectrum lease. We will not dictate the specific terms of such a provision. We will, however, require that those terms be consistent with the respective rights of licensees and spectrum lessees as defined by our policies and rules on spectrum manager and *de facto* transfer leases, respectively. As a general matter, licensees entering into spectrum manager leases retain both *de jure* control of the license and *de facto* control of the leased spectrum, and are directly responsible to the Commission for ensuring their lessees' compliance with Commission policies and rules. Accordingly, such licensees' retention of the contractual right to terminate spectrum leases for their spectrum lessees' non-compliance must be commensurate with the licensees' retention of *de facto* control over the leased spectrum and their ongoing responsibilities to the Commission, as spectrum manager licensees, to ensure compliance. As for *de facto* transfer leases, licensees retain *de jure* control of the license and have certain residual responsibilities for ensuring that spectrum lessees do not commit ongoing or other egregious violations, as discussed previously. In sum, these licensees' retention of the contractual right to terminate a spectrum lease for lessee non-compliance must be commensurate with the licensees' ongoing residual responsibilities. Thus, as long as the licensee retains sufficient ability to ensure its spectrum lessee's compliance with Commission policies and rules, and retains the authority to

terminate a spectrum leasing arrangement commensurate with the licensee's responsibilities under our policies and rules (as discussed above), the spectrum leasing arrangement may contain specific provisions that offer the spectrum lessee certain protections against the licensee's otherwise arbitrary termination of the spectrum lease.

B. Protections for Licensees and Spectrum Lessees in the Event of Termination of the Spectrum Lease or the License

1. Procedural Protections for Licensees and Spectrum Lessees With Regard to Commission Termination of a Spectrum Leasing Arrangement

a. Spectrum Manager Leasing Arangements

98. *Background.* Under the spectrum leasing policies we adopted in the *First Report and Order,* leasing parties must notify the Commission of their spectrum manager leasing arrangement at least 21 days before commencing operations (or, if a spectrum lease for a year or less, at least 10 days before commencing operations). As we explained in the *First Report and Order,* while Commission approval is not required for spectrum manager leases, we determined that the Commission retains the authority to investigate and terminate a spectrum manager leasing arrangement under certain circumstances. Specifically, the Commission can terminate any spectrum manager leasing arrangement to the extent it determines, post-notification, that the arrangement constitutes an unauthorized transfer of *de facto* control under our new standard or raises foreign ownership, competitive, or other public interest concerns.

99. Cingular Wireless petitioned the Commission to adopt a policy by which licensees would have the procedural protections, under sections 312 and 316 of the Act, including notice and opportunity to be heard, prior to the Commission deciding to terminate a spectrum manager lease.

100. *Discussion.* We conclude that the procedural protections afforded licensees under sections 312 and 316 do not apply to decisions by the Commission to terminate spectrum manager leasing arrangements. Sections 312 and 316 of the Act expressly apply only to revocation or modification of licenses or construction permits, and spectrum manager leases, which do not involve an authorization or permit under the Act, are neither. Accordingly, we deny Cingular Wireless's petition.

101. We affirm and further clarify our procedures for Commission examination, and possible termination, of spectrum manager leasing arrangements to the extent that these arrangements do not qualify for immediate processing under the procedures discussed in the *Second Report and Order.* As noted above, leasing parties that seek to enter into spectrum manager leases pursuant to the policies established in the *First Report and Order* (*i.e.*, those that do not qualify for immediate processing) must file their notifications at least 21 days before commencing operations (or, if a lease for a year or less, at least 10 days before commencing operations), thus giving the Commission the opportunity to review these arrangements prior to commencement of operations. Interested parties may then seek informal guidance or a formal determination from the Commission regarding the particular spectrum manager lease by means of a letter, a complaint, or a petition for reconsideration. To the extent the Bureau determines that the leasing arrangement may raise potential public interest concerns relating to eligibility, foreign ownership, designated entity or entrepreneur policies, or competition, and believes further investigation is necessary prior to commencement of operations under the spectrum manager lease, it will take whatever steps it deems appropriate to investigate or address those concerns, including notifying the licensee and possibly requiring that parties not commence operations under the lease until such concerns have been resolved. The Commission also retains the right to terminate any lease to the extent that it determines at any time, post-notification, that the arrangement constitutes an unauthorized transfer of control under the *de facto* control standard for spectrum leasing or otherwise is found to violate Commission policies regarding spectrum leasing. In addition, if the Commission determines, post-notification, that any certification provided in the notification, by either the licensee or spectrum lessee, is not true, complete, correct, and made in good faith, the Commission will be vigilant in taking appropriate enforcement action, potentially including forfeitures or termination of the spectrum manager leasing arrangement.

b. *De facto* Transfer Leasing Arrangements

102. *Background.* In the *First Report and Order,* we provided that spectrum lessees entering into *de facto* transfer leases will be granted an instrument of authorization when the Commission approves of the leasing application, and that they will be held primarily and directly responsible for compliance with Commission policies and rules and will be subject to forfeiture proceedings under section 503(b) of the Communications Act. Verizon Wireless petitioned to request that the Commission clarify that the spectrum lessee will be subject to the same due process protections as licensees with regard to the notice, forfeiture, and other enforcement procedures currently applicable to licensees, including the Commission's decision to terminate the *de facto* transfer spectrum leasing authorization.

103. *Discussion.* We agree with Verizon Wireless that because spectrum lessees in *de facto* transfer leasing arrangements receive an instrument of authorization, and are directly accountable to the Commission and subject to forfeiture proceedings under section 503(b), they are entitled to the same procedural protections as licensees pertaining to the forfeiture proceedings. Accordingly, to the extent the Commission pursues forfeiture actions against a *de facto* transfer spectrum lessee for alleged violation of Commission policies or rules, the spectrum lessee is entitled to the procedural protections afforded other holders of authorizations under section 503(b).

104. However, we do not agree with Verizon Wireless to the extent it requests that spectrum lessees in *de facto* transfer leases be accorded the same rights as licensees in cases where the Commission decides to terminate the lease. Termination of a spectrum lease is not the equivalent of a license revocation, and thus spectrum lessees are not subject to the same procedural protections afforded licensees under sections 312 and 316. As noted above, those procedural protections only apply to revocations or modifications of licenses or construction permits. A termination of a spectrum lease, in which a spectrum lessee holds temporary and subsidiary rights to the leased spectrum, does not rise to the level of either a revocation of a license or construction permit. Thus, spectrum lessees that gain their limited and temporary rights to access to spectrum through a spectrum leasing arrangement with licensees are not entitled to the same procedural protections, vis-a-vis the Commission, as a licensee that is authorized by the Commission to hold their authorizations.

2. Protections for Spectrum Lessees in the Event of License Termination

105. *Background.* In the *First Report and Order,* we stated that, in the event the licensee's authorization was revoked or cancelled, the spectrum lessee under either a spectrum manager or *de facto* transfer lease arrangement would have to terminate its operations. As we noted, termination was necessary because the spectrum lessee gains access to the licensed spectrum only through the licensee's authorization. We recognized that termination of the spectrum lease might require service termination by the lessee and, accordingly, we stated that the Commission would take into account the public interest in affording a reasonable transition period to users of the service in order to minimize disruption to consumers, ongoing businesses, and other activities. In addition, we determined that the spectrum lessee would have no greater right to obtain a comparable license than any other interested parties.

106. Three petitioners sought additional protections for spectrum lessees in the event that the license is cancelled or terminated, or if the licensee goes bankrupt. Specifically, Cingular Wireless requested clarification that, in the event of an unanticipated license termination, a valid spectrum lease does not terminate simply because the license is sold, unless the lease so provides. Blooston Rural Carriers, meanwhile, asserted that the Commission should provide more protection for lessees in the event of licensee bankruptcy or license termination. They believed that merely stating that the Commission would provide a spectrum lessee a reasonable transition period is too vague and does not adequately protect the spectrum lessee's investments. Instead, Blooston Rural Carriers contended that, in event of bankruptcy, the Commission should either require the leased spectrum to be partitioned/disaggregated to the lessee, or require the new licensee to assume the lease on substantially the same terms as the original licensee. Finally, NTCA asserted that lack of certain protections for lessees is a disincentive to spectrum leasing, and that the Commission should provide that long-term *de facto* transfer lessees retain some rights if the licensee goes bankrupt; in particular, NTCA argued that the Commission should permit spectrum lessees to continue operations and take over as the primary licensee, or have time to gradually transition to other available spectrum. RTG, in reply to the latter two petitions, generally supported Blooston Rural Carriers' and NTCA's contentions.

107. *Discussion.* Because we conclude that the *First Report and Order* achieves the right balance respecting the rights of spectrum lessees with regard to the license authorization itself, in the event of license cancellation, we deny these petitions. Axiomatic to spectrum leasing is that spectrum lessees do not hold the underlying license authorization and that they lease spectrum usage rights contingent on the licensee continuing to hold that authorization. Since spectrum lessees do not hold the authorization, they do not, as spectrum lessees, have the same rights as licensees. Similarly, because spectrum lessees do not hold the license authorization, and lease spectrum only contingent upon the licensee continuing to hold that authorization, the lessees' rights to the leased spectrum terminates in the event the license is cancelled and from that point forward they have no greater rights than any other entity to the license itself.

108. While spectrum lessees are not granted special protections by the Commission with regard to the license itself, they are of course free to obtain certain appropriate contractual protections from licensees when they enter into spectrum leasing arrangements. For instance, to address the concerns that Cingular Wireless has raised, spectrum lessees could enter into agreements to protect their interests in the event the licensee sells the license. Similarly, the concerns raised in the petitions regarding the potential bankruptcy of the licensee could be addressed contractually by requiring the licensee to alert the spectrum lessee in the event the licensee begins to experience financial problems that may pose a risk of bankruptcy. Finally, as discussed above, if there is an unanticipated termination or cancellation of the license that requires service termination by the spectrum lessee, we provide spectrum lessees adequate protections by affording them the opportunity to obtain certain protections during a reasonable transition period in order to minimize disruption to business and other activities.

C. Licensee Responsibility for Meeting Construction Obligations

109. *Background.* The spectrum leasing rules adopted in the *First Report and Order* permit licensees to rely on the activities of their lessees, if they so choose, for purposes of complying with the buildout obligations that are conditions of the license authorization. In the event that the licensee chooses to rely on its lessee's activities, but the lessee fails to build out, the Commission will enforce the rules against the licensee consistent with existing rules. In their petition, Blooston Rural Carriers argued that the Commission should be more flexible regarding construction requirements when a licensee's failure to meet those obligations is jeopardized by the spectrum lessee's breach of its lease agreement with the licensee. They contended that strict enforcement of the Commission's policy would discourage spectrum leasing, and proposed that licensees be given a reasonable extension of buildout deadlines if they can show that they entered into good faith, arms-length leases with spectrum lessees and reasonably depended on the lessees to meet the applicable buildout requirements. RTG supported this petition.

110. *Discussion.* We reaffirm the *First Report and Order* in holding that meeting the applicable buildout obligations remains a condition of the license authorization, such that a licensee is ultimately responsible for meeting those requirements regardless of whether it seeks to rely on spectrum lessees to meet some of those obligations. As a condition of the license authorization, the licensee must remain responsible to the Commission for meeting these licensee obligations, and cannot escape those obligations by delegating them to another entity that does not hold the license. We note that a licensee is free to negotiate a contractual provision in its leasing agreement with a spectrum lessee that could protect the licensee against the spectrum lessee's failure to meet such obligations.

D. Responsibility for Compliance With Cost-Sharing Obligations for Relocation of Microwave Licensees in Broadband PCS

111. *Background.* The *First Report and Order* did not directly address which entity, licensee or spectrum lessee, would be deemed the ''PCS entity'' for purposes of certain relocation responsibilities applicable in the broadband PCS services. Under 47 CFR 24.239 through 24.253 of the Commission's rules, which govern the relocation of microwave incumbents from certain frequencies in the 1850–1990 MHz Broadband PCS band, any ''PCS entity'' that benefits from spectrum clearance performed either by other PCS entities or by microwave incumbents that voluntarily relocate must contribute to such relocation costs.

112. In its petition, Cingular Wireless requested that we clarify whether, in the context of spectrum leasing and absent

specific lease provisions to the contrary, the licensee or the spectrum lessee would be deemed a ''PCS entity'' under the microwave relocation rules. In reply, the Fixed Wireless Communications Coalition asserted that a licensee's microwave relocation obligations cannot be delegated to spectrum lessees under either the spectrum manager or the *de facto* transfer option. PCIA's Microwave Cost Sharing Clearinghouse, which administers the cost sharing plan, contended that licensees should be responsible for all cost-sharing obligations triggered by spectrum lessees in spectrum manager leases, while spectrum lessees in *de facto* transfer leases should assume the obligations and rights of the licensee under the cost sharing rules because they are akin to holders of partitioned or disaggregated spectrum.

113. *Discussion.* We clarify that broadband PCS licensees are the ''PCS entities'' responsible, under §§ 24.239 through 24.253 of our rules, for cost sharing obligations triggered by spectrum lessees under both spectrum manager and *de facto* transfer leases. Thus, we agree with the Fixed Wireless Communications Coalition that these responsibilities cannot be delegated to spectrum lessees, and disagree with the contention of PCIA's Microwave Cost Sharing Clearinghouse that spectrum lessees under *de facto* transfer leases are tantamount to partitionees or disaggregatees and therefore should be treated alike under the relocation rules. Spectrum lessees under *de facto* transfer leases, unlike partitionees and disaggregatees, are not licensees and, in particular, do not exercise *de jure* control over the leased spectrum. We find that it is reasonable to hold licensees responsible for the cost sharing obligations triggered by spectrum lessees of both spectrum manager and *de facto* transfer leases because licensees may attribute lessee buildout towards meeting their own buildout obligations. It would be incongruous to allow licensees to benefit from the spectrum lessees' buildout while allowing them to avoid cost-sharing obligations triggered by such buildout. Under our clarification, any party that is owed reimbursement under the cost-sharing rules will have direct recourse to the licensee. We recognize that a licensee may, by contract, account for a spectrum lessee's obligations to the licensee should the spectrum lessee trigger a reimbursement obligation. Finally, relocations performed by licensees and spectrum lessees do not trigger obligations between the parties under our rules, although leasing parties may account for this possibility by contract.

E. Miscellaneous Additional Clarifications and Revisions

114. Finally, on our own motion for reconsideration of the *First Report and Order*, we determine that the following clarifications and revisions are appropriate.

115. *Term of a spectrum leasing arrangement.* Under the spectrum leasing policies established in the *First Report and Order*, we permit spectrum lessees to lease spectrum usage rights for any period or time during the term of the license. We also stated that existing spectrum leasing arrangements could also be renewable provided that the licensee obtained renewal of the underlying license authorization. We limit the term of spectrum leases in such a manner because spectrum lessees cannot have any greater right to the use of licensed spectrum than the licensee. Accordingly, although spectrum leasing parties are free to extend an existing spectrum leasing arrangement beyond the term of the license authorization if the license is renewed, no spectrum manager lease notification or *de facto* transfer lease application can propose a lease term that extends beyond the term of the license authorization itself. We will clarify our rules to reflect this policy.

116. *Leasing of excess capacity by part 101 licensees.* We note that, prior to adoption of policies and rules for spectrum leasing arrangements, as set forth in our part 1 subpart X rules, licensees in Part 101 services have been permitted to lease excess capacity, as set forth in 47 CFR 101.603(b) for private operational fixed services and 47 CFR 101.701 for common carriers. Nothing in our secondary markets rules established in the *First Report and Order* supplants the excess capacity leasing rules for part 101 services, and licensees may continue to lease excess capacity consistent with 47 CFR 101.603(b) and 101.701 of our rules.

117. *Loading requirements relating to certain services.* Another issue we wish to clarify regards channel loading requirements pertaining to applications for obtaining licenses in certain services, and how our spectrum leasing policies will be applied with respect to those applications. In some services, our rules require an applicant to demonstrate that it will ''load'' a channel with a certain number of mobile units in order to obtain exclusive use of that channel, or require a licensee to load a channel to full capacity before it can request additional spectrum. An applicant must demonstrate a genuine need for the number of mobile units for which it seeks authorization, and the uses for which those channels can be obtained are governed by the rules governing the channel in question.

118. The spectrum leasing rules do not relax or otherwise modify the initial eligibility requirements for any Commission license. Indeed, we specifically stated in the *First Report and Order* that the spectrum leasing policies could not be used as a tool for evading applicable requirements that remain in effect, and that we were not taking any action that could lead to the evisceration of rules and policies that have not been directly and specifically revised by us in this proceeding. That is, an entity that does not qualify under our existing loading rules for a particular authorization cannot use the prospect of spectrum leasing to other entities in order to establish its own eligibility for that license. Consequently, we hereby clarify that an applicant's required showing of loading under our rules must consist only of that entity's mobile units, consistent with the rules governing the channel in question, rather than mobile units that would be operated by spectrum lessees pursuant to the spectrum leasing rules. Counting spectrum lessees' mobile units toward the applicant's initial loading would in effect make the applicant eligible for something it could not otherwise obtain under the relevant service rules. Such a result would contravene our stated intent in the *First Report and Order*.

119. *Definition of ''spectrum lessee.''* We revise the definition of ''spectrum lessee,'' as set forth in the under 47 CFR 1.9003 of our rules, to state: ''*Spectrum lessee*. Any third-party entity that leases, pursuant to the spectrum leasing rules set forth in this subpart, certain spectrum usage rights held by a licensee. This term includes reference to third-party entities that lease spectrum usage rights as spectrum sublessees under spectrum subleasing arrangements.'' Such a revision clarifies that spectrum lessees include spectrum lessees that lease spectrum usage rights under spectrum subleasing arrangements.

120. *Section 1.9045(b).* We revise the language of 47 CFR 1.9045(b) of our rules to read as follows: ''(b) If a licensee holds a license subject to the installment payment program rules (*see* § 1.2110 and related service-specific rules), the licensee and any spectrum lessee must execute the Commission-approved financing documents. No licensee or potential spectrum lessee may file a spectrum leasing notification or application without having first executed such Commission-approved

financing documentation. In addition, they must certify in the spectrum leasing notification or application that they have both executed such documentation.'' This revision more clearly effectuates the intent of the applicable spectrum leasing policies regarding installment payment licensees, as set forth in the *First Report and Order*, which require that each such licensee has executed Commission-approved financing documents that establish, in every spectrum leasing arrangement, that the licensee bears sole responsibility to repay the entire amount of its debt obligation(s) to the Commission, and that each such licensee and spectrum lessee entering into a spectrum leasing arrangement with such a licensee have included, as part of the lease agreement, all Commission-required provisions.

121. *Requirements relating to cellular cross-interests.* The *First Report and Order* applied the existing policies relating to cellular cross-interests to spectrum leasing arrangements. Because we have recently eliminated the cellular cross-interest rule in another proceeding, we also will eliminate reference in our spectrum leasing rules to these policies and their applicability to such arrangements.

122. *Spectrum leasing forms.* In the rules adopted to implement the *First Report and Order*, we required that spectrum leasing parties file spectrum manager lease notifications and *de facto* transfer lease applications using a modified FCC Form 603, a form previously used in the context of assignments of existing authorizations and transfers of control involving entities holding authorizations. In the interest of administrative efficiency, we now determine to create a separate filing form, FCC Form 608 that pertains specifically to spectrum leasing arrangements, and our rules will be revised to so reflect.

V. Procedural Matters

123. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), *see* 5 U.S.C. 603, an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *FNPRM*. The Commission sought written public comment on the proposals in the *FNPRM*, including comment on the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

A. Need for, and Objectives of, the Second Report and Order and Order on Reconsideration

124. In the *Second Report and Order* and the *Order on Reconsideration*, we build on the framework established in the *First Report and Order*, in which we adopted policies, rules, and procedures designed to facilitate the ability of many Wireless Radio Services licensees, including many small businesses, to lease spectrum usage rights and to transfer and assign licenses to third parties. In this *Second Report and Order*, we take additional steps to further reduce regulatory delay so that spectrum leasing parties in our Wireless Radio Services can implement certain classes of spectrum leasing arrangements and can transfer and assign licenses in a more timely fashion, in accordance with evolving marketplace demands and customer needs. In the *Order on Reconsideration*, we address a variety of issues addressed in the *First Report and Order*, including the respective responsibilities of licensees and spectrum lessees regarding particular service rules.

125. As with the underlying *First Report and Order*, these actions take us further down the path toward greater reliance on the marketplace, thus expanding the scope of available wireless services and devices and enabling more efficient and dynamic use of spectrum to the ultimate benefit of consumers throughout the country. The steps taken in the *Second Report and Order* and in the *Order on Reconsideration* to facilitate the development of secondary markets in wireless spectrum expand upon and complement several of the Commission's major policy initiatives and public interest objectives. These include our efforts to encourage the development of broadband services for all Americans, promote increased facilities-based competition among service providers, enhance economic opportunities and access for the provision of communications services by designated entities, and enable development of additional and innovative services in rural areas.

126. *Second Report and Order.* Consistent with the proposals set forth in the *FNPRM*, the *Second Report and Order* further streamlines our processing of certain classes of spectrum leasing transactions—both *de facto* transfer and spectrum manager leases—by adopting immediate processing procedures (*i.e.*, overnight processing through the Universal Licensing System (ULS)) for transactions that do not raise certain specified potential public interest concerns. Thus, leasing parties submitting qualifying spectrum leasing transactions will be able to proceed immediately with implementation of their spectrum leases, instead of having to wait 21 days (10 days if a short-term lease), as required under existing spectrum leasing rules for both *de facto* transfer and spectrum manager leases.

127. With respect to both long-term and short-term *de facto* transfer leasing, we adopt immediate approval procedures for certain categories of *de facto* transfer leasing arrangements that do not raise potential public interest concerns relating to eligibility and use, foreign ownership, designated entity/entrepreneur matters, or competition. For transactions that involve telecommunications carriers subject to the Commission's section 10 forbearance authority, the *Second Report and Order* forbears from the 21-day prior public notice requirements (10 days for short-term *de facto* transfer spectrum leasing). For transactions that do not involve telecommunications carriers (and thus are not subject to forbearance), we permit spectrum leases to proceed under the immediate approval procedures because their application establishes all of the requisite elements necessary for determining that approval is consistent with the public interest. The *Second Report and Order* also adopts similar immediate processing for qualifying spectrum manager lease notifications. Post-approval reconsideration procedures (for *de facto* transfer leases) and post-notification reconsideration procedures (for spectrum manager leases) apply, providing interested parties an opportunity to seek reconsideration, and similarly providing the Wireless Telecommunications Bureau (Bureau) 30 days, and the Commission 40 days, to reconsider whether the spectrum leasing is in the public interest. The Bureau (or Commission) also retains the right to take appropriate action for any false certifications that leasing parties make in their application or notification.

128. The *Second Report and Order* affirms and further clarifies the policy set forth in the *First Report and Order* that permits designated entity (DE) and entrepreneur licensees to enter into spectrum manager leases with any entity, but only provided that the lease does not cause the DE or entrepreneur licensee to lose its eligibility under the applicable Commission policies and rules. DE and entrepreneur licensees must therefore undertake the same kind of determination required when evaluating eligibility for auctions or license transfers prior to certifying that their spectrum leasing arrangement is in compliance with our rules. Because spectrum leasing arrangements entered into by DE and entrepreneur licensees are not subject to the immediate processing procedures, the Commission

will have the ability to review, on a case-by-case basis, any leasing certification that it believes gives rise to a question of the licensee's continued eligibility.

129. Also, the *Second Report and Order* extends spectrum leasing policies to three additional services. Specifically, it permits public safety licensees in the part 90 Radio Safety Pool to lease spectrum to other public safety entities and to entities that provide communications in support of public safety operations. In addition, it extends the spectrum leasing policies to the Multichannel Video Distribution and Data Service (MVDDS) and Automated Maritime Communications Systems (AMTS) Services in which licensees hold exclusive use rights. It does not, however, extend the spectrum leasing policies to other wireless radio services that involve sharing of the authorizations or to services in which the spectrum leasing policies might undermine policies related to the underlying authorization.

130. Furthermore, the *Second Report and Order* establishes the new regulatory concept of a ''private commons'' that would be available to individual users or groups of users that do not fit squarely within the current options for spectrum leasing or within traditional end-user models associated with subscriber-based services and network architectures. The private commons option is similar to ''public'' commons of the kind associated with the current uses and applications of unlicensed devices under part 15 rules, except that it would involve licensed spectrum in which the licensee (or spectrum lessee) would not necessarily offer services over its own end-to-end physical network of base stations, mobile stations, and other elements; as manager of the commons, the licensee (or lessee) sets the terms and conditions for users, notifies the Commission about the private commons prior to users' operations, and retains direct responsibility for users' compliance with the rules.

131. In addition, the *Second Report and Order* extends immediate approval procedures for certain classes of license assignments and transfers of control. The order adopts the same immediate approval procedures for license assignments and transfer of control transactions that would not raise specified public interest concerns (*i.e.*, those relating to eligibility and use, foreign ownership, designated entity, or competition), consistent with the policies adopted in the order for *de facto* transfer leases. The *Second Report and Order* also extends the applicable streamlined approval procedures—either the immediate approval or 21-day streamlined approval (or longer if additional review is necessary)—to all wireless radio services regulated by the Bureau, regardless of whether spectrum leasing is permitted.

132. Finally, in the *Second Report and Order* we conclude that the information already provided by spectrum leasing parties when they file applications or notifications relating to entering into spectrum leasing arrangements is sufficient for enabling secondary markets the development of efficient markets in spectrum usage rights. Accordingly, we determine that we will not, at this time, require the spectrum leasing parties to provide the Commission with any additional information than that already required under existing rules. We also decline, at this time, to take action to establish the Commission as either a market-maker or exchange.

133. *Order on Reconsideration.* In the Order on Reconsideration, we address five petitions for reconsideration that we received with regard to the *First Report and Order.* These petitions touched on a variety of issues, including the licensee's responsibility to ensure its spectrum lessee's compliance with Commission policies and rules, protections for the licensee or spectrum lessee in the event a spectrum lease or a license is terminated, and the respective responsibilities of licensees and spectrum lessees regarding particular service rules. In the *Order on Reconsideration*, we provide additional clarification to our spectrum leasing policies and rules.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

134. *Second Report and Order.* We received no comments in response to the previous IRFA. We note, however that several commenting parties that represent small entities or rural carriers expressed support for the Commission's efforts to provide additional streamlining of our processing of certain categories of spectrum leasing arrangements and license assignments and transfers of control.

135. For instance, the Rural Telecommunications Group (RTG) supported additional streamlining of Commission processing of certain classes of spectrum leasing arrangements and licensee transfer and assignments. It asserted that such a process would help stimulate secondary market transactions by substantially lowering the cost of such transactions and decreasing the time in which such transactions may be completed. Similarly, Blooston Rural Carriers supported the Commission's general proposal, set forth in the *FNPRM*, to remove unnecessary regulatory barriers to the development of secondary markets, and believed that the kinds of rules proposed, and ultimately adopted in the *Second Report and Order*, would further facilitate broader access to spectrum resources. In addition, Blooston Rural Carriers supported that Commission's decision to forbear from certain categories of spectrum leases and assignments, stating that such forbearance would beneficially affect a significant number of arrangements without undermining the Commission's public interest objectives.

136. In addition to these general observations, we inquired in the *FNPRM* whether the Commission should alter the *de facto* transfer leasing policies adopted in the *First Report and Order* and allow a designated entity or entrepreneur licensee to lease some or all of its spectrum usage rights to any entity, regardless of whether that entity would qualify for the same eligibility status as that of the licensee. In particular, we sought comment on how, if such a policy change were made, the Commission could ensure continued compliance with our statutory obligations to prevent unjust enrichment. We also sought comment on whether to use the new *de facto* control standard, rather than the existing controlling interest standard (including the criteria set forth in *Intermountain Microwave*, 12 FCC 2d 559 (1963)), when evaluating affiliation and eligibility for designated entity and entrepreneur benefits. We specifically asked whether this latter change would be consistent with the statutory objectives of section 309(j).

137. Some commenters, including AT&T Wireless, Cingular Wireless (which also is a petitioner), Council Tree, and Salmon PCS, suggested that the Commission should permit designated entity and entrepreneur licensees to enter into spectrum leasing arrangements with any entity, regardless of how that arrangement might affect the licensee's designated entity or entrepreneur eligibility. One of these commenters, Council Tree, further suggested that the Commission should eliminate unjust enrichment obligations and entrepreneur transfer restrictions for licensees owned and controlled by Alaska Native Corporations and Indian tribes. These commenters argued generally that designated entity and entrepreneur licensees should benefit from the same flexibility with regard to entering into spectrum leasing

arrangements as any other licensees. In addition, while two commenters acknowledged the importance of ensuring the spectrum leasing by designated entity and entrepreneur licensees did not undermine the Commission's designated entity or entrepreneur policies, Blooston Rural Carriers and RTG recommended that if such licensees enter into spectrum leasing arrangements that serve rural areas, they should not be subject to any unjust enrichment obligations or transfer restrictions. They generally contended that such a result would be consistent with the purpose of those policies to promote services in rural communities.

138. The Commission devoted significant consideration to the applicability of its designated entity qualification rules to potential spectrum lessees seeking access to spectrum licensed to designated entities, as well as the applicability of its unjust enrichment policies. Reaching a decision on these issues required a balancing of complex competing considerations. The Commission concluded, however, that its statutory obligations under section 309(j) of the Communications Act and its goals to promote opportunities for designated entities (which includes a significant number of small businesses) would be better served by affirming, but clarifying, its designated entity and unjust enrichment policies adopted in the *First Report and Order* in the context of spectrum leases involving both spectrum manager leasing arrangements and long-term *de facto* transfer leasing arrangements.

139. *Order on Reconsideration*. Five parties petitioned the Commission seeking revision or clarification of the *First Report and Order* on several particular issues pertaining to the spectrum leasing policies that were adopted. These included Cingular Wireless' and NTCA's petitions for clarification of the licensee's responsibility for ensuring that spectrum lessees comply with Commission policies and rules, Verizon Wireless' petition for Cingular Wireless' and Verizon Wireless' petitions for clarification of the licensee's ability to terminate a spectrum lease for non-compliance by the lessee, Blooston Rural Carriers' petition for clarification of Commission policies regarding the licensee's responsibility for meeting application construction requirements when entering into spectrum leasing arrangements, and Cingular Wireless's petition for clarification with respect to the licensee's responsibility for the cost-sharing obligations associated with relocation of incumbent microwave licensees in broadband PCS spectrum. Four parties, requested additional procedural protections for licensees and spectrum lessees. Specifically, Cingular Wireless and Verizon Wireless sought additional protections for licensees in the event the Commission sought to terminate a spectrum lease, while Blooston Rural Carriers, Cingular Wireless, and NTCA requested additional procedural protections for spectrum lessees if the license was terminated, either as a result of the licensee's bankruptcy or for some other unanticipated reason. In the *Order on Reconsideration*, the Commission generally affirmed, and further clarified, the spectrum leasing policies adopted in the *First Report and Order* with regard to these issues. None of these petitioners noted that revisions or clarifications should be made in order to better accommodate the needs of small businesses.

140. In addition, as noted above, Cingular Wireless petitioned the Commission, requesting that it permit designated entity and entrepreneur licensees to enter into spectrum leasing arrangements with any entity, regardless of how that arrangement might affect the licensee's designated entity or entrepreneur eligibility. Because this issue was addressed in the *Second Report and Order*, it will not be discussed again here.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

141. The RFA directs agencies to provide a description of, and, where feasible, an estimate of, the number of small entities that may be affected by the rules adopted herein. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A ''small business concern'' is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

142. In the following paragraphs, we further describe and estimate the number of small entity licensees that may be affected by the rules we adopt in the *Second Report and Order*. Since this rulemaking proceeding applies to multiple services, we will analyze the number of small entities affected on a service-by-service basis. Because we have adopted streamlined processing procedures for all license assignment and transfer of control applications involving Wireless Radio Services authorizations regulated by the Bureau, we describe all of the services regulated by the Bureau.

143. As adopted, the *Second Report and Order* will further streamline the processing of certain spectrum leasing arrangements and license assignments and transfers of control, as well as create new opportunities and obligations for three additional Wireless Radio Services licensees to enter into spectrum leasing arrangements with third parties. When identifying small entities that could be affected by our new rules, we provide information describing auctions results, including the number of small entities that are winning bidders. We note, however, that the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily reflect the total number of small entities currently in a particular service. The Commission does not generally require that applicants provide business size information, except in the context of an assignment or transfer of control application where unjust enrichment issues are implicated.

144. *Cellular Licensees.* The SBA has developed a small business size standard for small businesses in the category ''Cellular and Other Wireless Telecommunications.'' Under that SBA category, a business is small if it has 1,500 or fewer employees. According to the Bureau of the Census, only twelve firms out of a total of 977 cellular and other wireless telecommunications firms that operated for the entire year in 1997 had 1,000 or more employees. Therefore, even if all twelve of these firms were cellular telephone companies, nearly all cellular carriers are small businesses under the SBA's definition.

145. *220 MHz Radio Service—Phase I Licensees.* The 220 MHz service has both Phase I and Phase II licenses. Phase I licensing was conducted by lotteries in 1992 and 1993. There are approximately 1,515 such non-nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has not developed a definition of small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, we apply the small business size standard under the SBA rules applicable to ''Cellular and Other Wireless Telecommunications'' companies. This category provides that a small business is a wireless company employing no

more than 1,500 persons. According to the Census Bureau data for 1997, only twelve firms out of a total of 977 such firms that operated for the entire year in 1997, had 1,000 or more employees. If this general ratio continues in the context of Phase I 220 MHz licensees, the Commission estimates that nearly all such licensees are small businesses under the SBA's small business standard.

146. *220 MHz Radio Service—Phase II Licensees.* The 220 MHz service has both Phase I and Phase II licenses. The Phase II 220 MHz service is subject to spectrum auctions. We adopted a small business size standard for defining ''small'' and ''very small'' businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. This small business standard indicates that a ''small business'' is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. A ''very small business'' is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that do not exceed $3 million for the preceding three years. The SBA has approved these small size standards. Auctions of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998. In the first auction, 908 licenses were auctioned in three different-sized geographic areas: three nationwide licenses, 30 Regional Economic Area Group (EAG) Licenses, and 875 Economic Area (EA) Licenses. Of the 908 licenses auctioned, 693 were sold. Thirty-nine small businesses won 373 licenses in the first 220 MHz auction. A second auction included 225 licenses: 216 EA licenses and 9 EAG licenses. Fourteen companies claiming small business status won 158 licenses. A third auction included four licenses: 2 BEA licenses and 2 EAG licenses in the 220 MHz Service. No small or very small business won any of these licenses.

147. *Lower 700 MHz Band Licenses.* We adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits. We have defined a small business as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years. A very small business is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years. Additionally, the lower 700 MHz Service has a third category of small business status that may be claimed for Metropolitan/Rural Service Area (MSA/RSA) licenses. The third category is entrepreneur, which is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years. The SBA has approved these small size standards. An auction of 740 licenses (one license in each of the 734 MSAs/RSAs and one license in each of the six Economic Area Groupings (EAGs)) commenced on August 27, 2002, and closed on September 18, 2002. Of the 740 licenses available for auction, 484 licenses were sold to 102 winning bidders. Seventy-two of the winning bidders claimed small business, very small business or entrepreneur status and won a total of 329 licenses. A second auction commenced on May 28, 2003, and closed on June 13, 2003, and included 256 licenses: 5 EAG licenses and 476 CMA licenses. Seventeen winning bidders claimed small or very small business status and won sixty licenses, and nine winning bidders claimed entrepreneur status and won 154 licenses.

148. *Upper 700 MHz Band Licenses.* The Commission released a *Report and Order*, authorizing service in the upper 700 MHz band. This auction, previously scheduled for January 13, 2003, has been postponed.

149. *Paging.* We adopted a size standard for ''small businesses'' for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. A small business is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. The SBA has approved this definition. An auction of Metropolitan Economic Area (MEA) licenses commenced on February 24, 2000, and closed on March 2, 2000. Of the 2,499 licenses auctioned, 985 were sold. Fifty-seven companies claiming small business status won 440 licenses. An auction of Metropolitan Economic Area (MEA) and Economic Area (EA) licenses commenced on October 30, 2001, and closed on December 5, 2001. Of the 15,514 licenses auctioned, 5,323 were sold. 132 companies claiming small business status purchased 3,724 licenses. A third auction, consisting of 8,874 licenses in each of 175 EAs and 1,328 licenses in all but three of the 51 MEAs commenced on May 13, 2003, and closed on May 28, 2003. Seventy-seven bidders claiming small or very small business status won 2,093 licenses. Currently, there are approximately 24,000 Private Paging site-specific licenses and 74,000 Common Carrier Paging licenses. According to one 2002 study, 608 private and common carriers reported that they were engaged in the provision of either paging or ''other mobile'' services. Of these, we estimate that 589 are small, under the SBA-approved small business size standard. We estimate that the majority of private and common carrier paging providers would qualify as small entities under the SBA definition.

150. *Broadband Personal Communications Service (PCS).* The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission has created a small business size standard for Blocks C and F as an entity that has average gross revenues of less than $40 million in the three previous calendar years. For Block F, an additional small business size standard for ''very small business'' was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years. These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA. No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 ''small'' and ''very small'' business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F. On March 23, 1999, the Commission re-auctioned 155 C, D, E, and F Block licenses; there were 113 small business winning bidders.

151. *Narrowband PCS.* The Commission held an auction for Narrowband PCS licenses that commenced on July 25, 1994, and closed on July 29, 1994. A second commenced on October 26, 1994 and closed on November 8, 1994. For purposes of the first two Narrowband PCS auctions, ''small businesses'' were entities with average gross revenues for the prior three calendar years of $40 million or less. Through these auctions, the Commission awarded a total of forty-one licenses, 11 of which were obtained by four small businesses. To ensure meaningful participation by small business entities in future auctions, the Commission adopted a two-tiered small business size standard. A ''small business'' is an entity that, together with affiliates and controlling

interests, has average gross revenues for the three preceding years of not more than $40 million. A ''very small business'' is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $15 million. The SBA has approved these small business size standards. A third auction commenced on October 3, 2001 and closed on October 16, 2001. Here, five bidders won 317 (MTA and nationwide) licenses. Three of these claimed status as a small or very small entity and won 311 licenses.

152. *Specialized Mobile Radio (SMR).* The Commission awards ''small entity'' bidding credits in auctions for Specialized Mobile Radio (SMR) geographic area licenses in the 800 MHz and 900 MHz bands to firms that had revenues of no more than $15 million in each of the three previous calendar years. The Commission awards ''very small entity'' bidding credits to firms that had revenues of no more than $3 million in each of the three previous calendar years. The SBA has approved these small business size standards for the 900 MHz Service. The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz bands. The 900 MHz SMR auction began on December 5, 1995, and closed on April 15, 1996. Sixty bidders claiming that they qualified as small businesses under the $15 million size standard won 263 geographic area licenses in the 900 MHz SMR band. The 800 MHz SMR auction for the upper 200 channels began on October 28, 1997, and was completed on December 8, 1997. Ten bidders claiming that they qualified as small businesses under the $15 million size standard won 38 geographic area licenses for the upper 200 channels in the 800 MHz SMR band. A second auction for the 800 MHz band was held on January 10, 2002 and closed on January 17, 2002 and included 23 BEA licenses. One bidder claiming small business status won five licenses.

153. The auction of the 1,050 800 MHz SMR geographic area licenses for the General Category channels began on August 16, 2000, and was completed on September 1, 2000. Eleven bidders won 108 geographic area licenses for the General Category channels in the 800 MHz SMR band qualified as small businesses under the $15 million size standard. In an auction completed on December 5, 2000, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service were sold. Of the 22 winning bidders, 19 claimed ''small business'' status and won 129 licenses. Thus, combining all three auctions, 40 winning bidders for geographic licenses in the 800 MHz SMR band claimed status as small business. In addition, there are numerous incumbent site-by-site SMR licensees and licensees with extended implementation authorizations in the 800 and 900 MHz bands. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than $15 million. One firm has over $15 million in revenues. We assume, for purposes of this analysis, that all of the remaining existing extended implementation authorizations are held by small entities, as that small business size standard is established by the SBA.

154. *Private Land Mobile Radio (PLMR).* PLMR systems serve an essential role in a range of industrial, business, land transportation, and public safety activities. These radios are used by companies of all sizes operating in all U.S. business categories, and are often used in support of the licensee's primary (non-telecommunications) business operations. For the purpose of determining whether a licensee of a PLMR system is a small business as defined by the SBA, we could use the definition for ''Cellular and Other Wireless Telecommunications.'' This definition provides that a small entity is any such entity employing no more than 1,500 persons. The Commission does not require PLMR licensees to disclose information about number of employees, so the Commission does not have information that could be used to determine how many PLMR licensees constitute small entities under this definition. Moreover, because PMLR licensees generally are not in the business of providing cellular or other wireless telecommunications services but instead use the licensed facilities in support of other business activities, we are not certain that the Cellular and Other Wireless Telecommunications category is appropriate for determining how many PLMR licensees are small entities for this analysis. Rather, it may be more appropriate to assess PLMR licensees under the standards applied to the particular industry sub-sector to which the licensee belongs.

155. *Fixed Microwave Services.* Fixed microwave services include common carrier, private-operational fixed, and broadcast auxiliary radio services. Currently, there are approximately 22,015 common carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The Commission has not yet defined a small business with respect to microwave services. For purposes of this FRFA, we will use the SBA's definition applicable to ''Cellular and Other Wireless Telecommunications'' companies—that is, an entity with no more than 1,500 persons. The Commission does not have data specifying the number of these licensees that have more than 1,500 employees, and thus is unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA's small business size standard. Consequently, the Commission estimates that there are 22,015 or fewer small common carrier fixed licensees and 61,670 or fewer small private operational-fixed licensees and small broadcast auxiliary radio licensees in the microwave services that may be affected by the rules and policies adopted herein. The Commission notes, however, that the common carrier microwave fixed licensee category includes some large entities.

156. *Wireless Communications Services.* This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission defined ''small business'' for the wireless communications services (WCS) auction as an entity with average gross revenues of $40 million for each of the three preceding years, and a ''very small business'' as an entity with average gross revenues of $15 million for each of the three preceding years. The SBA has approved these definitions. The FCC auctioned geographic area licenses in the WCS service. In the auction, which commenced on April 15, 1997 and closed on April 25, 1997, there were seven bidders that won 31 licenses that qualified as very small business entities, and one bidder that won one license that qualified as a small business entity. An auction for one license in the 1670–1674 MHz band commenced on April 30, 2003 and closed the same day. One license was awarded. The winning bidder was not a small entity.

157. *39 GHz Service.* The Commission defines ''small entity'' for 39 GHz licenses as an entity that has average gross revenues of less than $40 million in the three previous calendar years. ''Very small business'' is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years. The SBA has approved these definitions. The auction of the 2,173 39 GHz licenses began on April 12, 2000, and closed on May 8, 2000.

The 18 bidders who claimed small business status won 849 licenses.

158. *Local Multipoint Distribution Service.* An auction of the 986 Local Multipoint Distribution Service (LMDS) licenses began on February 18, 1998, and closed on March 25, 1998. The Commission defined ''small entity'' for LMDS licenses as an entity that has average gross revenues of less than $40 million in the three previous calendar years. An additional classification for ''very small business'' was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years. These regulations defining ''small entity'' in the context of LMDS auctions have been approved by the SBA. There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. On March 27, 1999, the Commission re-auctioned 161 licenses; there were 32 small and very small business winning bidders that won 119 licenses.

159. *218–219 MHz Service.* The first auction of 218–219 MHz (previously referred to as the Interactive and Video Data Service or IVDS) spectrum resulted in 178 entities winning licenses for 594 Metropolitan Statistical Areas (MSAs). Of the 594 licenses, 567 were won by 167 entities qualifying as a small business. For that auction, we defined a small business as an entity that, together with its affiliates, has no more than a $6 million net worth and, after federal income taxes (excluding any carry over losses), has no more than $2 million in annual profits each year for the previous two years. We defined a small business as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and their affiliates, has average annual gross revenues not exceeding $15 million for the preceding three years. A very small business is defined as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and its affiliates, has average annual gross revenues not exceeding $3 million for the preceding three years. The SBA has approved of these definitions. At this time, we cannot estimate the number of licenses that will be won by entities qualifying as small or very small businesses under our rules in future auctions of 218–219 MHz spectrum. Given the success of small businesses in the previous auction, and the prevalence of small businesses in the subscription television services and message communications industries, we assume for purposes of this FRFA that in future auctions, many, and perhaps all, of the licenses may be awarded to small businesses.

160. *Location and Monitoring Service (LMS).* Multilateration LMS systems use non-voice radio techniques to determine the location and status of mobile radio units. For purposes of auctioning LMS licenses, the Commission has defined ''small business'' as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding $15 million. A ''very small business'' is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding $3 million. These definitions have been approved by the SBA. An auction for LMS licenses commenced on February 23, 1999, and closed on March 5, 1999. Of the 528 licenses auctioned, 289 licenses were sold to four small businesses. We cannot accurately predict the number of remaining licenses that could be awarded to small entities in future LMS auctions.

161. *Rural Radiotelephone Service.* We use the SBA definition applicable to cellular and other wireless telecommunication companies, *i.e.,* an entity employing no more than 1,500 persons. There are approximately 1,000 licensees in the Rural Radiotelephone Service, and the Commission estimates that there are 1,000 or fewer small entity licensees in the Rural Radiotelephone Service that may be affected by the rules and policies adopted herein.

162. *Air-Ground Radiotelephone Service.* We use the SBA definition applicable to cellular and other wireless telecommunication companies, *i.e.,* an entity employing no more than 1,500 persons. There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and the Commission estimates that almost all of them qualify as small entities under the SBA definition.

163. *Offshore Radiotelephone Service.* This service operates on several ultra high frequency (UHF) TV broadcast channels that are not used for TV broadcasting in the coastal area of the states bordering the Gulf of Mexico. At present, there are approximately 55 licensees in this service. We use the SBA definition applicable to cellular and other wireless telecommunication companies, *i.e.,* an entity employing no more than 1,500 persons. The Commission is unable at this time to estimate the number of licensees that would qualify as small entities under the SBA definition. The Commission assumes, for purposes of this FRFA, that all of the 55 licensees are small entities, as that term is defined by the SBA.

164. *Multiple Address Systems (MAS).* Entities using MAS spectrum, in general, fall into two categories: (1) those using the spectrum for profit-based uses, and (2) those using the spectrum for private internal uses. With respect to the first category, the Commission defines ''small entity'' for MAS licenses as an entity that has average gross revenues of less than $15 million in the three previous calendar years. ''Very small business'' is defined as an entity that, together with its affiliates, has average gross revenues of not more than $3 million for the preceding three calendar years. The SBA has approved of these definitions. The majority of these entities will most likely be licensed in bands where the Commission has implemented a geographic area licensing approach that would require the use of competitive bidding procedures to resolve mutually exclusive applications. The Commission's licensing database indicates that, as of January 20, 1999, there were a total of 8,670 MAS station authorizations. Of these, 260 authorizations were associated with common carrier service. In addition, an auction for 5,104 MAS licenses in 176 EAs began November 14, 2001, and closed on November 27, 2001. Seven winning bidders claimed status as small or very small businesses and won 611 licenses.

165. With respect to the second category, which consists of entities that use, or seek to use, MAS spectrum to accommodate their own internal communications needs, we note that MAS serves an essential role in a range of industrial, safety, business, and land transportation activities. MAS radios are used by companies of all sizes, operating in virtually all U.S. business categories, and by all types of public safety entities. For the majority of private internal users, the definitions developed by the SBA would be more appropriate. The applicable definition of small entity in this instance appears to be the ''Cellular and Other Wireless Telecommunications'' definition under the SBA rules. This definition provides that a small entity is any entity employing no more than 1,500 persons. The Commission's licensing database indicates that, as of January 20, 1999, of the 8,670 total MAS station authorizations, 8,410 authorizations were for private radio service, and of these, 1,433 were for private land mobile radio service.

166. *Incumbent 24 GHz Licensees.* The rules that we adopt could affect incumbent licensees who were relocated

to the 24 GHz band from the 18 GHz band, and applicants who wish to provide services in the 24 GHz band. The Commission did not develop a definition of small entities applicable to existing licensees in the 24 GHz band. Therefore, the applicable definition of small entity is the definition under the SBA rules for ''Cellular and Other Wireless Telecommunications.'' This definition provides that a small entity is any entity employing no more than 1,500 persons. We believe that there are only two licensees in the 24 GHz band that were relocated from the 18 GHz band, Teligent and TRW, Inc. It is our understanding that Teligent and its related companies have less than 1,500 employees, though this may change in the future. TRW is not a small entity. Thus, only one incumbent licensee in the 24 GHz band is a small business entity.

167. *Future 24 GHz Licensees.* With respect to new applicants in the 24 GHz band, we have defined ''small business'' as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the three preceding years not exceeding $15 million. ''Very small business'' in the 24 GHz band is defined as an entity that, together with controlling interests and affiliates, has average gross revenues not exceeding $3 million for the preceding three years. The SBA has approved these definitions. The Commission will not know how many licensees will be a small or very small business until the auction, if required, is held.

168. *700 MHz Guard Band Licenses.* We adopted size standards for ''small businesses'' and ''very small businesses'' for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. A small business in this service is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years. Additionally, a ''very small business'' is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years. SBA approval of these definitions is not requires. An auction of 52 Major Economic Area (MEA) licenses commenced on September 6, 2000, closed on September 21, 2000. Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced on February 13, 2001, and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.

169. *Broadband Radio Service (formerly Multipoint Distribution Service) and Educational Broadband Service (formerly Instructional Television Fixed Service).* Multichannel Multipoint Distribution Service (MMDS) systems often referred to as ''wireless cable,'' transmit video programming to subscribers using the microwave frequencies of the Multipoint Distribution Service (MDS) and Instructional Television Fixed Service (ITFS). In an order issued in July 2004 in WT Docket No. 03–66, the Commission comprehensively reviewed our policies and rules relating to the ITFS and MDS services, and replacing the Multipoint Distribution Service (MDS) with the Broadband Radio Service and Instructional Television Fixed Service (ITFS) with the Educational Broadband Service. In connection with the 1996 MDS auction, the Commission defined ''small business'' as an entity that, together with its affiliates, has average gross annual revenues that are not more than $40 million for the preceding three calendar years. The SBA has approved of this standard. The MDS auction resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 claimed status as a small business. At this time, we estimate that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent MDS licensees that have gross revenues that are not more than $40 million and are thus considered small entities.

170. In addition, the SBA has developed a small business size standard for Cable and Other Program Distribution, which includes all such companies generating $12.5 million or less in annual receipts. According to Census Bureau data for 1997, there were a total of 1,311 firms in this category, total, that had operated for the entire year. Of this total, 1,180 firms had annual receipts of under $10 million, and an additional 52 firms had receipts of $10 million or more but less than $25 million. Consequently, we estimate that the majority of providers in this service category are small businesses that may be affected by the rules and policies in the *Second Report and Order*.

171. Finally, while SBA approval for a Commission-defined small business size standard applicable to ITFS is pending, educational institutions are included in this analysis as small entities. There are currently 2,032 ITFS licensees, and all but 100 of these licenses are held by educational institutions. Thus, we tentatively conclude that at least 1,932 ITFS licensees are small businesses.

172. *Multichannel Video Distribution and Data Service.* MVDDS is a terrestrial fixed microwave service operating in the 12.2–12.7 GHz band. Licenses in this service were auctioned in January 2004, with 10 winning bidders for 192 licenses. Eight of these 10 winning bidders claimed small businesses status for 144 of these licenses.

173. *Aviation and Marine Services.* Small businesses in the aviation and marine radio services use a very high frequency (VHF) marine or aircraft radio and, as appropriate, an emergency position-indicating radio beacon (and/or radar) or an emergency locator transmitter. The Commission has not developed a small business size standard specifically applicable to these small businesses. For purposes of this analysis, the Commission uses the SBA small business size standard for the category ''Cellular and Other Telecommunications,'' which is 1,500 or fewer employees. Most applicants for recreational licenses are individuals. Approximately 581,000 ship station licensees and 131,000 aircraft station licensees operate domestically and are not subject to the radio carriage requirements of any statute or treaty. For purposes of our evaluations in this analysis, we estimate that there are up to approximately 712,000 licensees that are small businesses (or individuals) under the SBA standard. In addition, between December 3, 1998 and December 14, 1998, the Commission held an auction of 42 VHF Public Coast licenses in the 157.1875–157.4500 MHz (ship transmit) and 161.775–162.0125 MHz (coast transmit) bands. For purposes of the auction, the Commission defined a ''small'' business as an entity that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed $15 million dollars. In addition, a ''very small'' business is one that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed $3 million dollars. There are approximately 10,672 licensees in the Marine Coast Service, and the Commission estimates that almost all of them qualify as ''small'' businesses under the above special small business size standards.

174. *Public Safety Radio Services.* Public Safety radio services include police, fire, local government, forestry

conservation, highway maintenance, and emergency medical services. There are a total of approximately 127,540 licensees in these services. Governmental entities as well as private businesses comprise the licensees for these services. All governmental entities with populations of less than 50,000 fall within the definition of a small entity.

D. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

175. The projected reporting, recordkeeping, and other compliance requirements resulting from the *Second Report and Order and the Order on Reconsideration* will apply to all entities in the same manner, consistent with the approach we adopted in the *First Report and Order.* We believe that applying the same rules equally to all entities helps to promote fairness in the spectrum leasing process, as well in the license assignment and transfer of control process, and we do not believe that the costs and/or administrative burdens associated with the rules, as revised for certain classes of spectrum leasing and license transfer and assignment transactions will disproportionately or unduly burden small entities. The revisions we adopt today should benefit small entities by giving them more information, more flexibility, and more options for gaining access to valuable wireless spectrum.

176. *Immediate processing procedures for qualifying transactions.* One of our goals is to further streamline Commission processing of certain spectrum leasing arrangements and of license assignment and transfer of control applications in order to minimize administrative delays, reduce transaction costs, encourage more efficient use of spectrum, and otherwise facilitate the movement of spectrum toward new and higher valued uses. Additional streamlining, including adoption of immediate processing procedures for certain categories of these transactions that do not raise specified potential public interest concerns, helps us to achieve these goals while at the same time meeting our statutory obligations, under sections 308, 309, and 310(d), to review license assignments and transfers of control to ensure that they are consistent with the public interest.

177. Under the rules adopted in the *Second Report and Order,* parties seeking to benefit from the Commission's immediate processing procedures for spectrum leasing arrangements and for license transfers and assignments must submit filings with the Commission using our Universal Licensing System (ULS), just as such filings were required under the procedures adopted in the underlying *First Report and Order.* In order to qualify for such immediate processing under these new procedures, we require parties to make certain additional certifications. Otherwise, the reporting requirements are not substantially different that those already required when parties seek to enter into spectrum leasing arrangements, as already established under the underlying *First Report and Order.* If parties qualify, they benefit by having their arrangements processed immediately, and thus have less delay in gaining access to the spectrum by implementing the transactions.

178. *Extending spectrum leasing policies to additional spectrum-based services.* We extend the spectrum leasing policies to permit public safety licensees in the part 90 Radio Safety Pool to lease spectrum to other public safety entities and to entities that provide communications in support of public safety operations. We also extend the spectrum leasing policies to two other services in which licensees hold exclusive use rights, the Multichannel Video Distribution and Data Services (MVDDS) and the Automated Maritime Communications Systems (AMTS) Services. The reporting requirements for these services are no different from the reporting requirements already required for all other services to which our spectrum leasing policies apply.

179. *Adoption of the ''private commons'' option.* In the *Second Report and Order,* we adopt the private commons option under which licensees and spectrum lessees may make licensed spectrum available to individuals or groups of users employing certain advanced wireless technologies in a manner similar to that by which unlicensed users gain access to spectrum, and to do so without the need for entering into individual spectrum leasing arrangements. While we do require that licensees or spectrum lessees that establish a private commons to notify the Commission, we do not require the same amount of information as required for spectrum leasing arrangements.

180. *Immediate approval procedures for certain categories of license assignment and transfer of control applications.* We adopt streamlined application processes for license assignments and transfers of control involving Wireless Radio similar to those we have adopted for *de facto* transfer spectrum leasing arrangements. As with *de facto* transfer leasing arrangements, in order to qualify for such immediate processing under these new procedures, we require parties to make certain additional certifications. Otherwise, the reporting requirements are not substantially different that those already required when parties seek to enter into spectrum leasing arrangements.

181. *Extending the streamlined processing policies relating to license assignments and transfers of control to additional wireless services.* We also determine to apply the streamlined processing procedures adopted in the *First Report and Order* for license assignments and transfer of control applications, as well as the immediate approval processing for qualifying transactions as adopted in this Second Report and Order, to all of the Wireless Radio Services authorizations regulated by the Bureau. Thus, while new services now may benefit from more streamlined processing of license transfer and assignment applications, the reporting requirements do not differ from those already required for licensees and assignees/transferees under the policies established in the *First Report and Order.*

182. *Order on Reconsideration.* In the Order on Reconsideration, we generally affirm the spectrum leasing policies and rules established in the underlying *First Report and Order,* and do not impose any additional reporting requirements on licensees and spectrum lessees.

E. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

183. The RFA requires an agency to describe any significant alternatives that it considered in reaching its final decision, which may include the following four alternatives, (among others): ''(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.''

184. *Immediate processing of certain categories de facto transfer leasing arrangements.* Consistent with the broad support by commenters, we generally adopt the forbearance proposal set forth in the *FNPRM* with a few modifications. We do not anticipate any adverse impact on small entities as a result of our decision to adopt immediate processing of certain categories of spectrum leasing arrangements, both *de*

facto transfer leases and spectrum manager leases.

185. In particular, we permit all *de facto* transfer leases involving telecommunications services that are subject to the Commission's forbearance authority to proceed pursuant to the application and immediate grant procedures set forth in the *Second Report and Order.* In particular, we require that, in the spectrum leasing application submitted to the Commission, the spectrum lessee must make certain additional certifications (*e.g.*, those in which the spectrum leasing arrangement involves license authorizations that permit interconnected mobile voice and/or data services) in order to qualify for immediate approval processing (in lieu of the general 21-day processing procedures under the rules adopted in the *First Report and Order*). Consistent with the general proposal set forth in the *FNPRM,* we will no longer require prior public notice and individualized Commission review of these leases that meet the requirements specified above. Specifically, if the spectrum leasing parties file their *de facto* transfer lease application in the Universal Licensing System (ULS), and the application established the requisite elements explained above, and are otherwise complete, the Bureau will process the application and provide immediate approval through ULS processing, reflected on the next business day after filing the application. We believe that forbearing from pubic notice and additional Commission review of the qualifying *de facto* transfer spectrum leasing arrangements that do not raise potential public interest concerns, is consistent with the public interest and will benefit all entities, including small entities, by allowing them gain immediate access to spectrum to implement their business plans with reduced regulatory delay and transaction costs.

186. We also permit *de facto* transfer leases that involve spectrum leasing arrangements not subject to forbearance to proceed under the same application/immediate approval policies as adopted above for *de facto* transfer leases subject to forbearance, so long as the leasing parties can establish that the arrangements are consistent with the public interest because they establish the same specified qualifications. As above, permitting entities that seek to enter into these leasing arrangements that qualify for immediate approval serves to benefit all such entities, including small entities.

187. In addition, we revise our rules for processing short-term *de facto* transfer leases so that they may be approved pursuant to the immediate approval procedures. Because such short-term *de facto* transfer leasing arrangements, under the policies applicable to them, would qualify for immediate approval processing because they do not potential public interest concerns that merit prior public notice or additional review, we no longer will require such applications to be processed pursuant to our Special Temporary Authority (STA) 10-day review procedures. These immediate processing procedures benefit all entities entering into short-term *de facto* transfer leases, including small entities.

188. *Immediate processing of certain categories of spectrum manager leasing arrangements.* We also revise our policies for spectrum manager lease notifications to be consistent with the policies for *de facto* transfer leases as described previously. Accordingly, where parties seek to enter into spectrum manager leases that do not raise specified potential public interest concerns (*e.g.*, potential competition concerns), we will permit them to commence operations under those leasing arrangements once they have notified the Commission of the lease, and have made the necessary certifications to qualify for immediate processing. If the spectrum manager lease satisfies the qualifying elements, we do not believe it necessary to review these notifications in advance of operations. The immediate processing procedures adopted for these qualifying spectrum manager leases will benefit all entities that qualify, including small entities, and will facilitate more rapid and efficient use of wireless radio spectrum.

189. *Extending spectrum leasing policies to additional spectrum-based services.* We extend the spectrum leasing policies to permit public safety licensees in the part 90 Radio Safety Pool to lease spectrum to other public safety entities and to entities that provide communications in support of public safety operations. We also extend the spectrum leasing policies to two other services in which licensees hold exclusive use rights, the Multichannel Video Distribution and Data Services (MVDDS) and the Automated Maritime Communications Systems (AMTS) Services. For these public safety licensees, we facilitate more efficient and effective use of public safety communications, foster interoperability, and further our various homeland security initiatives. For MVDDS and AMTS, we permit the same benefits of spectrum leasing to be extended to these services as well. Extension of our spectrum leasing policies in these services will benefit all entities in these services, both small and large.

190. *Clarification of the spectrum leasing policies applicable to designated entity and entrepreneur licensees.* We affirm and clarify the rules established in the *First Report and Order* for spectrum leasing by designated entity and entrepreneur licensees. On so doing, we decline requests that we choose an alternative providing such licensees with the right to lease spectrum to any entity, without regard to our eligibility rules for designated entities and entrepreneurs. Although a few commenters suggest that we adopt the alternative policy, we believe that adopting such a change would contravene the requirements and objectives of section 309(j) of the Act. Under section 309(j), Congress sought to promote diversity among service providers, as well as the rapid deployment of new technologies for the benefit of, among others, rural customers. If we allow designated entities and entrepreneurs to enter into spectrum manager leasing arrangements without considering whether the spectrum lessee acquires an interest in the licensee, we run the risk that entities that do not qualify for such incentives in the primary market will be unjustly enriched.

191. We also reject recommendations that we allow licensees to maintain their designated entity and/or entrepreneur eligibility without the imposition of unjust enrichment payment obligations and transfer restrictions in situations where the spectrum lessee will use the lease to serve rural areas. The Commission is not required to ensure both the rapid deployment of service to telecommunications service to rural areas and the participation of rural telephone companies. Section 309(j) only requires that the Commission seek to promote the objective that service be developed and rapidly deployed to rural customers and only ensure that rural telephone companies are given the opportunity to participate. The Commission has provided small businesses with bidding credits and entrepreneurs with license set-asides in order for them to have the opportunity to participate in the provision of spectrum based services. The Commission has determined that telephone companies providing service in rural areas do not have *per se* the same difficulty accessing capital as other groups and allowing unrestricted ability to lease to non-eligible entities planning to serve rural areas would be allowing the larger entities to benefit indirectly from small businesses.

192. *Clarification that ''dynamic'' spectrum leasing arrangements are permitted.* We clarify that our spectrum leasing policies and rules permit spectrum leasing parties to enter into a variety of dynamic forms of spectrum leasing arrangements that take advantage of the capabilities associated with advanced technologies. Thus, spectrum leasing parties may enter into spectrum leasing arrangements in which licensees and spectrum lessees share use of the same spectrum, on a non-exclusive basis, during the term of the spectrum lease. For example, a licensee and spectrum lessee may enter into a spectrum manager or *de facto* transfer lease in which use of the same spectrum is shared with each other by employing opportunistic devices. In another variation, a licensee could enter into a spectrum manager lease with one party that has access to the spectrum on a priority basis, while also leasing use of the same spectrum to another party on a lower-priority basis, with the requirement that the lower-priority spectrum lessee employ opportunistic technology to avoid interfering with the priority lessee. Both small and large entities will benefit from these dynamic leasing arrangements.

193. *Adoption of the ''private commons'' option.* We adopt the private commons option in the *Second Report and Order* to facilitate the use of advanced technologies and thus better promote access to and the efficient use of spectrum. The private commons option will allow licensees or spectrum lessees to make spectrum available to individual users or groups of users that may not fit squarely within the current options for spectrum leasing or within the traditional models associated with subscriber-based services and network architectures. The private commons would be similar to ''public'' commons of the kind associated with the current uses and applications of unlicensed devices under part 15 rules, except that is would involve licensed spectrum in which the licensee (or lessee) would not necessarily offer services over its own end-to-end physical network of base stations, mobile stations, and other elements. As manager of the commons, the licensee (or lessee) would set terms and conditions for users, retain direct responsibility for users' compliance with the rules, and notify the Commission about the private commons prior to users' operations. The private commons option will help small (and large) entities by allowing for more flexible uses of licensed spectrum to incorporate new means of implementing advanced technologies and provides an important complement to the spectrum leasing policies we have already adopted to facilitate spectrum access.

194. *Immediate approval procedures for certain categories of license assignment and transfer of control applications.* We adopt streamlined application processes for license assignments and transfers of control involving Wireless Radio similar to those we have adopted for *de facto* transfer spectrum leasing arrangements. This policy will help all entities, including small entities, by reducing transaction costs, minimizing administrative delay, and encouraging more efficient use of spectrum.

195. *Extending the streamlined processing policies relating to license assignments and transfers of control to additional wireless services.* We will apply the streamlined processing procedures adopted in the *First Report and Order* for license assignments and transfer of control applications, as well as the immediate approval processing for qualifying transactions as adopted in this Second Report and Order, to all of the Wireless Radio Services authorizations regulated by the Bureau. This decision enables all license transfers and assignments involving these Wireless Radio Services, not just those Wireless Radio Services for which spectrum leasing is permitted, to benefit from streamlined processing or immediate processing, whichever is applicable. This ensures that an addition set of Wireless Radio Services licensees, both small entities and large ones, may now take advantage of these procedures that minimize administrative delays and reduce transaction costs.

196. *Clarification of spectrum leasing policies and rules in the Order on Reconsideration.* The *Order on Reconsideration* addresses petitions that seek clarification on a variety of issues, including: (1) the licensee's responsibility to ensure its spectrum lessee's compliance with Commission policies and rules; (2) protections for the licensee or spectrum lessee in the event of a spectrum lease or a license is terminated; and (3) the respective responsibilities of licensees and spectrum lessees regarding particular service rules. As a general matter, the Order on Reconsideration affirms and further clarifies the policies adopted in the underlying *First Report and Order.* We do not anticipate any adverse impact on small entities as a result of this action. Our approach here should benefit small entities by reducing regulatory uncertainty and further enhancing the development of a more robust secondary markets and access to spectrum.

F. Report to Congress

197. The Commission will send a copy of the *Second Report and Order* and the *Order on Reconsideration,* including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act. In addition, the Commission will send a copy of the *Second Report and Order* and the *Order on Reconsideration,* including this FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Second Report and Order,* the *Order on Reconsideration,* and the FRFA (or summaries thereof) will also be published in the **Federal Register**.

198. In addition, the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this *Second Report and Order* and the *Order on Reconsideration,* including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

VI. Ordering Clauses

199. Pursuant to sections 1, 4(i), 8, 9, 10, 301, 303(r), 308, 309, 310, 332, and 503 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 158, 161, 301, 303(r), 308, 309, 310, 332, and 503, this *Second Report and Order* and *Order on Reconsideration* and the policies set forth herein are *adopted,* and that parts 1, 24, and 90 of the Commission's rules, 47 CFR parts 1, 24, and 90, are *amended,* as specified in the discussion of ''Rule Changes'' below, to revise rules and procedures to further facilitate spectrum leasing arrangements under the policies enunciated in the *Second Report and Order* and *Order on Reconsideration,* to establish rules and procedures applicable to private commons arrangements established in the *Second Report and Order,* and to further streamline the processing of license assignment and transfer of control applications under the policies enunciated in the *Second Report and Order,* effective February 25, 2005, except for §§ 1.913(a)(5), 1.948(j)(2), 1.2003, 1.9003, 1.9020(e)(2), 1.9030(e)(2), 1.9035(e), and 1.9080, which contain information collection requirements that have not been approved by the Office of Management and Budget (OMB). The Commission will publish a document in the **Federal Register** announcing the effective date of these rules.

200. Pursuant to the authority of section 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. 5(c), the Wireless Telecommunications Bureau

and the Office of the Managing Director *are granted delegated authority* to implement the policies set forth in this *Second Report and Order,* including, but not limited to, the development and implementation of the revised forms necessary to implement the policies adopted in this *Second Report and Order.*

201. Pursuant to the authority of sections 4(i), 5(b), 5(c)(1), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 155(b), 155(c)(1), and 303(r), Blooston Rural Carrier's Petition for Partial Reconsideration and/or Clarification is *granted in part* and *denied* in all other respects.

202. Pursuant to the authority of sections 4(i), 5(b), 5(c)(1), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 155(b), 155(c)(1), and 303(r), Cingular Wireless' Petition for Reconsideration and Clarification is *granted in part* and *denied* in all other respects.

203. Pursuant to the authority of sections 4(i), 5(b), 5(c)(1), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 155(b), 155(c)(1), and 303(r), First Avenue Network's Petition for Reconsideration is *granted in part* and *denied* in all other respects.

204. Pursuant to the authority of sections 4(i), 5(b), 5(c)(1), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 155(b), 155(c)(1), and 303(r), NTCA's Petition for Partial Reconsideration is *denied.*

205. Pursuant to the authority of sections 4(i), 5(b), 5(c)(1), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 155(b), 155(c)(1), and 303(r), Verizon Wireless's Petition for Reconsideration and Clarification is *granted in part* and *denied* in all other respects.

206. The Commission's Consumer Information Bureau, Reference Information Center, *shall send* a copy of the *Second Report and Order* and *Order on Reconsideration,* including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects

47 CFR Part 1

Administrative practice and procedure, Communications common carriers, Radio, Reporting and recordkeeping requirements, Telecommunications.

47 CFR Part 24

Personal communications services, Radio.

47 CFR Part 90

Business and industry, Common carriers, Radio, Reporting and recordkeeping requirements.

Federal Communications Commission.

William F. Caton,

Deputy Secretary.

Rule Changes

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR parts 1, 24, and 90, as follows:

PART 1—PRACTICE AND PROCEDURE

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

Authority: 47 U.S.C. 151, 154(i), 154(j), 155, 225, 303(r), 309 and 325(e).

■ 2. Amend § 1.913 by revising paragraphs (a)(3), (b) introductory text, and (d)(1) introductory text, and by adding paragraph (a)(5), to read as follows:

§ 1.913 Application and notification forms; electronic and manual filing.

(a) * * *

(3) *FCC Form 603, Application for Assignment of Authorization or Transfer of Control.* FCC Form 603 is used by applicants and licensees to apply for Commission consent to assignments of existing authorizations, to apply for Commission consent to transfer control of entities holding authorizations, to notify the Commission of the consummation of assignments or transfers, and to request extensions of time for consummation of assignments or transfers. It is also used for Commission consent to partial assignments of authorization, including partitioning and disaggregation.

* * * * *

(5) *FCC Form 608, Notification or Application for Spectrum Leasing Arrangement.* FCC Form 608 is used by licensees and spectrum lessees (*see* § 1.9003) to notify the Commission regarding spectrum manager leasing arrangements and to apply for Commission consent for *de facto* transfer leasing arrangements pursuant to the rules set forth in part 1, subpart X. It is also used to notify the Commission if a licensee or spectrum lessee establishes a private commons (*see* § 1.9080).

* * * * *

(b) *Electronic filing.* Except as specified in paragraph (d) of this section or elsewhere in this chapter, all applications and other filings using FCC Forms 601 through 608 or associated schedules must be filed electronically in accordance with the electronic filing instructions provided by ULS. For each Wireless Radio Service that is subject to mandatory electronic filing, this paragraph is effective on July 1, 1999, or six months after the Commission begins use of ULS to process applications in the service, whichever is later. The Commission will announce by public notice the deployment date of each service in ULS.

* * * * *

(d) * * *

(1) ULS Forms 601, 603, 605, and 608 may be filed manually or electronically by applicants and licensees in the following services:

* * * * *

■ 3. Amend § 1.948 by revising paragraph (j) to read as follows:

§ 1.948 Assignment of authorization or transfer of control, notification of consummation.

* * * * *

(j) *Processing of applications.* Applications for assignment of authorization or transfer of control relating to the Wireless Radio Services will be processed pursuant either to general approval procedures or the immediate approval procedures, as discussed herein.

(1) *General approval procedures.* Applications will be processed pursuant to the general approval procedures set forth in this paragraph unless they are submitted and qualify for the immediate approval procedures set forth in paragraph (j)(2) of this section.

(i) To be accepted for filing under these general approval procedures, the application must be sufficiently complete and contain all necessary information and certifications requested on the applicable form, FCC Form 603, including any information and certifications (including those of the proposed assignee or transferee relating to eligibility, basic qualifications, and foreign ownership) required by the rules of this chapter and any rules pertaining to the specific service for which the application is filed, and must include payment of the required application fee(s) (*see* § 1.1102).

(ii) Once accepted for filing, the application will be placed on public notice, except no prior public notice will be required for applications involving authorizations in the Private Wireless Services, as specified in § 1.933(d)(9).

(iii) Petitions to deny filed in accordance with section 309(d) of the Communications Act must comply with the provisions of § 1.939, except that such petitions must be filed no later than 14 days following the date of the

public notice listing the application as accepted for filing.

(iv) No later than 21 days following the date of the public notice listing an application as accepted for filing, the Wireless Telecommunications Bureau (Bureau) will affirmatively consent to the application, deny the application, or determine to subject the application to further review. For applications for which no prior public notice is required, the Bureau will affirmatively consent to the application, deny the application, or determine to subject the application to further review no later than 21 days following the date on which the application has been filed, if filed electronically, and any required application fee has been paid (*see* § 1.1102); if filed manually, the Bureau will affirmatively consent to the application, deny the application, or determine to subject the application to further review no later than 21 days after the necessary data in the manually filed application is entered into ULS.

(v) If the Bureau determines to subject the application to further review, it will issue a public notice so indicating. Within 90 days following the date of that public notice, the Bureau will either take action upon the application or provide public notice that an additional 90-day period for review is needed.

(vi) Consent to the application is not deemed granted until the Bureau affirmatively acts upon the application.

(vii) Grant of consent to the application will be reflected in a public notice (see § 1.933(a)) promptly issued after the grant.

(viii) If any petition to deny is filed, and the Bureau grants the application, the Bureau will deny the petition(s) and issue a concise statement of the reason(s) for denial, disposing of all substantive issues raised in the petition(s).

(2) *Immediate approval procedures.* Applications that meet the requirements of paragraph (j)(2)(i) of this section qualify for the immediate approval procedures.

(i) To qualify for the immediate approval procedures, the application must be sufficiently complete, contain all necessary information and certifications (including those relating to eligibility, basic qualifications, and foreign ownership), and include payment of the requisite application fee(s), as required for an application processed under the general approval procedures set forth in paragraph (j)(1) of this section, and also must establish, through certifications, that the following additional qualifications are met:

(A) The license does not involve spectrum licensed in a Wireless Radio Service that may be used to provide interconnected mobile voice and/or data services under the applicable service rules and that would, if assigned or transferred, create a geographic overlap with spectrum in any licensed Wireless Radio Service (including the same service) in which the proposed assignee or transferee already holds a direct or indirect interest of 10% or more (*see* § 1.2112), either as a licensee or a spectrum lessee, and that could be used by the assignee or transferee to provide interconnected mobile voice and/or data services;

(B) The licensee is not a designated entity or entrepreneur subject to unjust enrichment requirements and/or transfer restrictions under applicable Commission rules (*see* §§ 1.2110 and 1.2111, and §§ 24.709, 24.714, and 24.839 of this chapter); and,

(C) The assignment or transfer of control does not require a waiver of, or declaratory ruling pertaining to, any applicable Commission rules, and there is no pending issue as to whether the license is subject to revocation, cancellation, or termination by the Commission.

(ii) Provided that the application establishes that it meets all of the requisite elements to qualify for these immediate approval procedures, consent to the assignment or transfer of control will be reflected in ULS. If the application is filed electronically, consent will be reflected in ULS on the next business day after the filing of the application; if filed manually, consent will be reflected in ULS on the next business day after the necessary data in the manually filed application is entered into ULS. Consent to the application is not deemed granted until the Bureau affirmatively acts upon the application.

(iii) Grant of consent to the application under these immediate approval procedures will be reflected in a public notice (*see* § 1.933(a)) promptly issued after the grant, and is subject to reconsideration (*see* §§ 1.106(f), 1.108, 1.113).

■ 4. Amend § 1.2003 by revising the paragraph entitled ''FCC 603'' and by adding a paragraph entitled ''FCC 608,'' in numerical order, to read as follows:

§ 1.2003 Applications affected.

* * * * *

FCC 603 Wireless Telecommunications Bureau Application for Assignment of Authorization and Transfer of Control;

* * * * *

FCC 608 Notification or Application for Spectrum Leasing Arrangement;

* * * * *

■ 5. Amend § 1.9001 by revising paragraph (a) to read as follows:

§ 1.9001 Purpose and scope.

(a) The purpose of part 1, subpart X is to implement policies and rules pertaining to spectrum leasing arrangements between licensees in the services identified in this subpart and spectrum lessees. This subpart also implements policies for private commons arrangements. These policies and rules also implicate other Commission rule parts, including parts 1, 2, 20, 22, 24, 26, 27, 80, 90, 95, and 101 of title 47, chapter I of the Code of Federal Regulations.

* * * * *

■ 6. Amend § 1.9003 by removing the definition of ''FCC Form 603,'' revising the definitions of ''Long-term *de facto* transfer leasing arrangement,'' ''Short-term *de facto* transfer leasing arrangement,'' and ''Spectrum lessee,'' and by adding the new definition ''Private commons,'' in alphabetical order, to read as follows:

§ 1.9003 Definitions.

* * * * *

FCC Form 608. FCC Form 608 is the form to be used by licensees and spectrum lessees that enter into spectrum leasing arrangements pursuant to the rules set forth in this subpart. Parties are required to submit this form electronically when entering into spectrum leasing arrangements under this subpart, except that licensees falling within the provisions of § 1.913(d), may file the form either electronically or manually.

Long-term de facto transfer leasing arrangement. A long-term *de facto* transfer leasing arrangement is a *de facto* transfer leasing arrangement that has an individual term, or series of combined terms, of more than one year.

Private commons. A ''private commons'' arrangement is an arrangement, distinct from a spectrum leasing arrangement but permitted in the same services for which spectrum leasing arrangements are allowed, in which a licensee or spectrum lessee makes certain spectrum usage rights under a particular license authorization available to a class of third-party users employing advanced communications technologies that involve peer-to-peer (device-to-device) communications and that do not involve use of the licensee's or spectrum lessee's end-to-end physical network infrastructure (*e.g.*, base stations, mobile stations, or other related elements).

Short-term de facto transfer leasing arrangement. A short-term *de facto* transfer leasing arrangement is a *de facto* transfer leasing arrangement that has an individual or combined term of not longer than one year.

* * * * *

Spectrum lessee. Any third-party entity that leases, pursuant to the spectrum leasing rules set forth in this subpart, certain spectrum usage rights held by a licensee. This term includes reference to third-party entities that lease spectrum usage rights as spectrum sublessees under spectrum subleasing arrangements.

* * * * *

■ 7. Section 1.9005 is revised to read as follows:

§ 1.9005 Included services.

The spectrum leasing policies and rules of this subpart apply to the following services in the Wireless Radio Services in which commercial or private licensees hold exclusive use rights:

(a) The Paging and Radiotelephone Service (part 22 of this chapter);

(b) The Rural Radiotelephone Service (part 22 of this chapter);

(c) The Air-Ground Radiotelephone Service (part 22 of this chapter);

(d) The Cellular Radiotelephone Service (part 22 of this chapter);

(e) The Offshore Radiotelephone Service (part 22 of this chapter);

(f) The narrowband Personal Communications Service (part 24 of this chapter);

(g) The broadband Personal Communications Service (part 24 of this chapter);

(h) The Broadband Radio Service (part 27 of this chapter);

(i) The Educational Broadband Service (part 27 of this chapter);

(j) The Wireless Communications Service in the 698–746 MHz band (part 27 of this chapter);

(k) The Wireless Communications Service in the 746–764 MHz and 776–794 MHz bands (part 27 of this chapter);

(l) The Wireless Communications Service in the 1390–1392 MHz band (part 27 of this chapter);

(m) The Wireless Communications Service in the paired 1392–1395 MHz and 1432–1435 MHz bands (part 27 of this chapter);

(n) The Wireless Communications Service in the 1670–1675 MHz band (part 27 of this chapter);

(o) The Wireless Communications Service in the 2305–2320 and 2345–2360 MHz bands (part 27 of this chapter);

(p) The Wireless Communications Service in the 2385–2390 MHz band (part 27 of this chapter);

(q) The Advanced Wireless Services (part 27 of this chapter);

(r) The VHF Public Coast Station service (part 80 of this chapter);

(s) The Automated Maritime Telecommunications Systems service (part 80 of this chapter);

(t) The Public Safety Radio Services (part 90 of this chapter);

(u) The 220 MHz Service (excluding public safety licensees) (part 90 of this chapter);

(v) The Specialized Mobile Radio Service in the 800 MHz and 900 MHz bands (including exclusive use SMR licenses in the General Category channels) (part 90 of this chapter);

(w) The Location and Monitoring Service (LMS) with regard to licenses for multilateration LMS systems (part 90 of this chapter);

(x) Paging operations under part 90 of this chapter;

(y) The Business and Industrial/Land Transportation (B/ILT) channels (part 90 of this chapter) (including all B/ILT channels above 512 MHz and those in the 470–512 MHz band where a licensee has achieved exclusivity, but excluding B/ILT channels in the 470–512 MHz band where a licensee has not achieved exclusivity and those channels below 470 MHz, including those licensed pursuant to 47 CFR 90.187(b)(2)(v));

(z) The 218–219 MHz band (part 95 of this chapter);

(aa) The Local Multipoint Distribution Service (part 101 of this chapter);

(bb) The 24 GHz Band (part 101 of this chapter);

(cc) The 39 GHz Band (part 101 of this chapter);

(dd) The Multiple Address Systems band (part 101 of this chapter);

(ee) The Local Television Transmission Service (part 101 of this chapter);

(ff) The Private-Operational Fixed Point-to-Point Microwave Service (part 101 of this chapter);

(gg) The Common Carrier Fixed Point-to-Point Microwave Service (part 101 of this chapter); and,

(hh) The Multipoint Video Distribution and Data Service (part 101 of this chapter).

■ 8. Amend § 1.9010 by revising the last sentence of paragraph (b)(1)(iii), and by revising paragraph (b)(2)(i), to read as follows:

§ 1.9010 *De facto* control standard for spectrum leasing arrangements.

* * * * *

(b) * * *

(1) * * *

(iii) * * * If the spectrum lessee refuses to resolve the interference, remedy the violation, or suspend or terminate operations, either at the direction of the licensee or by order of the Commission, the licensee must use all reasonable legal means necessary to enforce compliance.

(2) * * *

(i) The licensee must file the necessary notification with the Commission, as required under § 1.9020(e).

* * * * *

■ 9. Section 1.9020 is amended by revising paragraphs (a) and (d) through (l), and by adding paragraph (m) to read as follows:

§ 1.9020 Spectrum manager leasing arrangements.

(a) *Overview.* Under the provisions of this section, a licensee (in any of the included services) and a spectrum lessee may enter into a spectrum manager leasing arrangement, without the need for prior Commission approval, provided that the licensee retains *de jure* control of the license and *de facto* control, as defined and explained in this subpart, of the leased spectrum. The licensee must notify the Commission of the spectrum leasing arrangement pursuant to the rules set forth in this section. The term of a spectrum manager leasing arrangement may be no longer than the term of the license authorization.

* * * * *

(d) *Applicability of particular service rules and policies.* Under a spectrum manager leasing arrangement, the service rules and policies apply in the following manner to the licensee and spectrum lessee:

(1) *Interference-related rules.* The interference and radiofrequency (RF) safety rules applicable to use of the spectrum by the licensee as a condition of its license authorization also apply to the use of the spectrum leased by the spectrum lessee.

(2) *General eligibility rules.* (i) The spectrum lessee must meet the same eligibility and qualification requirements that are applicable to the licensee under its license authorization, with the following exceptions. A spectrum lessee entering into a spectrum leasing arrangement involving a licensee in the Educational Broadband Service (*see* § 27.1201 of this chapter) is not required to comply with the eligibility requirements pertaining to such a licensee so long as the spectrum lessee meets the other eligibility and qualification requirements applicable to part 27 services (*see* § 27.12 of this chapter). A spectrum lessee entering into a spectrum leasing arrangement involving a licensee in the Public Safety Radio Services (*see* part 90, subpart B

and § 90.311(a)(1)(i) of this chapter) is not required to comply with the eligibility requirements pertaining to such a licensee so long as the spectrum lessee is an entity providing communications in support of public safety operations (*see* § 90.523(b) of this chapter).

(ii) The spectrum lessee must meet applicable foreign ownership eligibility requirements (*see* sections 310(a), 310(b) of the Communications Act).

(iii) The spectrum lessee must satisfy any qualification requirements, including character qualifications, applicable to the licensee under its license authorization.

(iv) The spectrum lessee must not be a person subject to the denial of Federal benefits under the Anti-Drug Abuse Act of 1988 (*see* § 1.2001 *et seq.* of subpart P of this part).

(v) The licensee may reasonably rely on the spectrum lessee's certifications that it meets the requisite eligibility and qualification requirements contained in the notification required by this section.

(3) *Use restrictions.* To the extent that the licensee is restricted from using the licensed spectrum to offer particular services under its license authorization, the use restrictions apply to the spectrum lessee as well.

(4) *Designated entity/entrepreneur rules.* A licensee that holds a license pursuant to small business and/or entrepreneur provisions (*see* § 1.2110 and § 24.709 of this chapter) and continues to be subject to unjust enrichment requirements (*see* § 1.2111 and § 24.714 of this chapter) and/or transfer restrictions (*see* § 24.839 of this chapter) may enter into a spectrum manager leasing arrangement with a spectrum lessee, regardless of whether the spectrum lessee meets the Commission's designated entity eligibility requirements (*see* § 1.2110) or its entrepreneur eligibility requirements to hold certain C and F block licenses in the broadband personal communications services (*see* § 1.2110 and § 24.709 of this chapter), so long as the spectrum manager leasing arrangement does not result in the spectrum lessee's becoming a ''controlling interest'' or ''affiliate'' (*see § 1.2110) of the licensee such that the licensee would* lose its eligibility as a designated entity or entrepreneur. To the extent there is any conflict between the revised *de facto* control standard for spectrum leasing arrangements, as set forth in this subpart, and the definition of controlling interest (including its *de facto* control standard) set forth in § 1.2110, the latter definition governs for determining whether the licensee has maintained the requisite degree of ownership and control to allow it to remain eligible for the license or for other benefits such as bidding credits and installment payments.

(5) *Construction/performance requirements.* Any performance or build-out requirement applicable under a license authorization (*e.g.,* a requirement that the licensee construct and operate one or more specific facilities, cover a certain percentage of geographic area, cover a certain percentage of population, or provide substantial service) always remains a condition of the license, and legal responsibility for meeting such obligation is not delegable to the spectrum lessee(s).

(i) The licensee may attribute to itself the build-out or performance activities of its spectrum lessee(s) for purposes of complying with any applicable performance or build-out requirement.

(ii) If a licensee relies on the activities of a spectrum lessee to meet the licensee's performance or build-out obligation, and the spectrum lessee fails to engage in those activities, the Commission will enforce the applicable performance or build-out requirements against the licensee, consistent with the applicable rules.

(iii) If there are rules applicable to the license concerning the discontinuance of operation, the licensee is accountable for any such discontinuance and the rules will be enforced against the licensee regardless of whether the licensee was relying on the activities of a lessee to meet particular performance requirements.

(6) *Regulatory classification.* If the regulatory status of the licensee (*e.g.*, common carrier or non-common carrier status) is prescribed by rule, the regulatory status of the spectrum lessee is prescribed in the same manner, except that § 20.9(a) of this chapter shall not preclude a licensee in the services covered by that rule from entering into a spectrum leasing arrangement with a spectrum lessee that chooses to operate on a Private Mobile Radio Service (PMRS), private, or non-commercial basis.

(7) *Regulatory fees.* The licensee remains responsible for payment of the required regulatory fees that must be paid in advance of its license term (*see* § 1.1152). Where, however, regulatory fees are paid annually on a per-unit basis (such as for Commercial Mobile Radio Services (CMRS) pursuant to § 1.1152), the licensee and spectrum lessee are each required to pay fees for those units associated with its respective operations.

(8) *E911 requirements.* If E911 obligations apply to the licensee (*see* § 20.18 of this chapter), the licensee retains the obligations with respect to leased spectrum.

(e) *Notifications regarding spectrum manager leasing arrangements.* A licensee that seeks to enter into a spectrum manager leasing arrangement must notify the Commission of the arrangement in advance of the spectrum lessee's commencement of operations. The spectrum manager lease notification will be processed pursuant either to the general notification procedures or the immediate processing procedures, as set forth herein. The licensee must submit the notification to the Commission by electronic filing using the Universal Licensing System (ULS) and FCC Form 608, except that a licensee falling within the provisions of § 1.913(d) may file the notification either electronically or manually.

(1) *General notification procedures.* Notifications of spectrum manager leasing arrangements will be processed pursuant the general notification procedures set forth in this paragraph unless they are submitted and qualify for the immediate processing procedures set forth in paragraph (e)(2) of this section.

(i) To be accepted under these general notification procedures, the notification must be sufficiently complete and contain all information and certifications requested on the applicable form, FCC Form 608, including any information and certifications (including those of the spectrum lessee relating to eligibility, basic qualifications, and foreign ownership) required by the rules in this chapter and any rules pertaining to the specific service for which the notification is filed. No application fees are required for the filing of a spectrum manager leasing notification.

(ii) The licensee must submit such notification at least 21 days in advance of commencing operations unless the arrangement is for a term of one year or less, in which case the licensee must provide notification to the Commission at least ten (10) days in advance of operation. If the licensee and spectrum lessee thereafter seek to extend this leasing arrangement for an additional term beyond the initial term, the licensee must provide the Commission with notification of the new spectrum leasing arrangement at least 21 days in advance of operation under the extended term.

(iii) A notification filed pursuant to these general notification procedures will be placed on an informational public notice on a weekly basis (*see* § 1.933(a)) once accepted, and is subject

to reconsideration (*see* §§ 1.106(f), 1.108, 1.113).

(2) *Immediate processing procedures.* Notifications that meet the requirements of paragraph (e)(2)(i) of this section qualify for the immediate processing procedures.

(i) To qualify for these immediate processing procedures, the notification must be sufficiently complete and contain all necessary information and certifications (including those relating to eligibility, basic qualifications, and foreign ownership) required for notifications processed under the general notification procedures set forth in paragraph (e)(1)(i) of this section, and also must establish, through certifications, that the following additional qualifications are met:

(A) The license does not involve spectrum licensed in a Wireless Radio Service that may be used to provide interconnected mobile voice and/or data services under the applicable service rules and that would, if the spectrum leasing arrangement were consummated, create a geographic overlap with spectrum in any licensed Wireless Service (including the same service) in which the proposed spectrum lessee already holds a direct or indirect interest of 10% or more (*see* § 1.2112), either as a licensee or a spectrum lessee, and that could be used by the spectrum lessee to provide interconnected mobile voice and/or data services;

(B) The licensee is not a designated entity or entrepreneur subject to unjust enrichment requirements and/or transfer restrictions under applicable Commission rules (*see* §§ 1.2110 and 1.2111, and §§ 24.709, 24.714, and 24.839 of this chapter); and,

(C) The spectrum leasing arrangement does not require a waiver of, or declaratory ruling pertaining to, any applicable Commission rules.

(ii) Provided that the notification establishes that the proposed spectrum manager leasing arrangement meets all of the requisite elements to qualify for these immediate processing procedures, ULS will reflect that the notification has been accepted. If a qualifying notification is filed electronically, the acceptance will be reflected in ULS on the next business day after filing of the notification; if filed manually, the acceptance will be reflected in ULS on the next business day after the necessary data from the manually filed notification is entered into ULS. Once the notification has been accepted, as reflected in ULS, the spectrum lessee may commence operations under the spectrum leasing arrangement, consistent with the term of the arrangement.

(iii) A notification filed pursuant to these immediate processing procedures will be placed on an informational public notice on a weekly basis (*see* § 1.933(a)) once accepted, and is subject to reconsideration (*see* §§ 1.106(f), 1.108, 1.113).

(f) *Effective date of a spectrum manager leasing arrangement.* The spectrum manager leasing arrangement will be deemed effective in the Commission's records, and for purposes of the application of the rules set forth in this section, as of the beginning date of the term as specified in the spectrum leasing notification.

(g) *Commission termination of a spectrum manager leasing arrangement.* The Commission retains the right to investigate and terminate any spectrum manager leasing arrangement if it determines, post-notification, that the arrangement constitutes an unauthorized transfer of *de facto* control of the leased spectrum, is otherwise in violation of the rules in this chapter, or raises foreign ownership, competitive, or other public interest concerns. Information concerning any such termination will be placed on public notice.

(h) *Expiration, extension, or termination of a spectrum leasing arrangement.* (1) Absent Commission termination or except as provided in paragraph (h)(2) or (h)(3) of this section, a spectrum leasing arrangement entered into pursuant to this section will expire on the termination date set forth in the spectrum leasing notification.

(2) A spectrum leasing arrangement may be extended beyond the initial term set forth in the spectrum leasing notification provided that the licensee notifies the Commission of the extension in advance of operation under the extended term and does so pursuant to the general notification procedures or immediate processing procedures set forth in this section, whichever is applicable. If the general notification procedures are applicable, the licensee must notify the Commission at least 21 days in advance of operation under the extended term.

(3) If a spectrum leasing arrangement is terminated earlier than the termination date set forth in the notification, either by the licensee or by the parties' mutual agreement, the licensee must file a notification with the Commission, no later than ten (10) days after the early termination, indicating the date of the termination. If the parties fail to put the spectrum leasing arrangement into effect, they must so notify the Commission consistent with the provisions of this section.

(4) The Commission will place information concerning an extension or an early termination of a spectrum leasing arrangement on public notice.

(i) *Assignment of a spectrum leasing arrangement.* The spectrum lessee may assign its spectrum leasing arrangement to another entity provided that the licensee has agreed to such an assignment, is in privity with the assignee, and notifies the Commission before the consummation of the assignment, pursuant to the applicable notification procedures set forth in this section. In the case of a non-substantial (*pro forma*) assignment that falls within the class of *pro forma* transactions for which prior Commission approval would not be required under § 1.948(c)(1), the licensee must file notification of the assignment with the Commission, using FCC Form 608 and providing any necessary updates of ownership information, within 30 days of its completion. The Commission will place information related to the assignment, whether substantial or *pro forma,* on public notice.

(j) *Transfer of control of a spectrum lessee.* The licensee must notify the Commission of any transfer of control of a spectrum lessee before the consummation of the transfer of control, pursuant to the applicable notification procedures of this section. In the case of a non-substantial (*pro forma*) transfer of control that falls within the class of *pro forma* transactions for which prior Commission approval would not be required under § 1.948(c)(1), the licensee must file notification of the transfer of control with the Commission, using FCC Form 608 and providing any necessary updates of ownership information, within 30 days of its completion. The Commission will place information related to the transfer of control, whether substantial or *pro forma,* on public notice.

(k) *Revocation or automatic cancellation of a license or a spectrum lessee's operating authority.* (1) In the event an authorization held by a licensee that has entered into a spectrum leasing arrangement is revoked or cancelled, the spectrum lessee will be required to terminate its operations no later than the date on which the licensee ceases to have any authority to operate under the license, except as provided in paragraph (j)(2) of this section.

(2) In the event of a license revocation or cancellation, the Commission will consider a request by the spectrum lessee for special temporary authority (*see* § 1.931) to provide the spectrum

lessee with an opportunity to transition its users in order to minimize service disruption to business and other activities.

(3) In the event of a license revocation or cancellation, and the required termination of the spectrum lessee's operations, the former spectrum lessee does not, as a result of its former status, receive any preference over any other party should the spectrum lessee seek to obtain the revoked or cancelled license.

(l) *Subleasing.* A spectrum lessee may sublease the leased spectrum usage rights subject to the licensee's consent and the licensee's establishment of privity with the spectrum sublessee. The licensee must submit a notification regarding the spectrum subleasing arrangement in accordance with the applicable notification procedures set forth in this section.

(m) *Renewal.* Although the term of a spectrum manager leasing arrangement may not be longer than the term of a license authorization, a licensee and spectrum lessee that have entered into an arrangement whose term continues to the end of the current term of the license authorization may, contingent on the Commission's grant of the license renewal, renew the spectrum leasing arrangement to extend into the term of the renewed license authorization. The Commission must be notified of the renewal of the spectrum leasing arrangement at the same time that the licensee submits its application for license renewal (*see* § 1.949). The spectrum lessee may operate under the extended term, without further action by the Commission, until such time as the Commission shall make a final determination with respect to the renewal of the license authorization and the extension of the spectrum leasing arrangement into the term of the renewed license authorization.

■ 10. Section 1.9030 is amended by revising paragraphs (a) and (d) through (k), and by adding paragraph (l) to read as follows:

§ 1.9030 Long-term *de facto* transfer leasing arrangements.

(a) *Overview.* Under the provisions of this section, a licensee (in any of the included services) and a spectrum lessee may enter into a long-term *de facto* transfer leasing arrangement in which the licensee retains *de jure* control of the license while *de facto* control of the leased spectrum is transferred to the spectrum lessee for the duration of the spectrum leasing arrangement, subject to prior Commission consent pursuant to the application procedures set forth in this section. A ''long-term'' *de facto* transfer leasing arrangement has an individual term, or series of combined terms, of more than one year. The term of a long-term *de facto* transfer leasing arrangement may be no longer than the term of the license authorization.

* * * * *

(d) *Applicability of particular service rules and policies.* Under a long-term *de facto* transfer leasing arrangement, the service rules and policies apply in the following manner to the licensee and spectrum lessee:

(1) *Interference-related rules.* The interference and radiofrequency (RF) safety rules applicable to use of the spectrum by the licensee as a condition of its license authorization also apply to the use of the spectrum leased by the spectrum lessee.

(2) *General eligibility rules.* (i) The spectrum lessee must meet the same eligibility and qualification requirements that are applicable to the licensee under its license authorization. A spectrum lessee entering into a spectrum leasing arrangement involving a licensee in the Educational Broadband Service (*see* § 27.1201 of this chapter) is not required to comply with the eligibility requirements pertaining to such a licensee so long as the spectrum lessee meets the other eligibility and qualification requirements applicable to part 27 services (*see* § 27.12 of this chapter). A spectrum lessee entering into a spectrum leasing arrangement involving a licensee in the Public Safety Radio Services (*see* part 90, subpart B and § 90.311(a)(1)(i) of this chapter) is not required to comply with the eligibility requirements pertaining to such a licensee so long as the spectrum lessee is an entity providing communications in support of public safety operations (*see* § 90.523(b) of this chapter).

(ii) The spectrum lessee must meet applicable foreign ownership eligibility requirements (see sections 310(a), 310(b) of the Communications Act).

(iii) The spectrum lessee must satisfy any qualification requirements, including character qualifications, applicable to the licensee under its license authorization.

(iv) The spectrum lessee must not be a person subject to denial of Federal benefits under the Anti-Drug Abuse Act of 1988 (*see* § 1.2001 *et seq.* of subpart P of this part).

(3) *Use restrictions.* To the extent that the licensee is restricted from using the licensed spectrum to offer particular services under its license authorization, the use restrictions apply to the spectrum lessee as well.

(4) *Designated entity/entrepreneur rules.* (i) A licensee that holds a license pursuant to small business and/or entrepreneur provisions (*see* § 1.2110 and § 24.709 of this chapter) and continues to be subject to unjust enrichment requirements (*see* § 1.2111 and § 24.714 of this chapter) and/or transfer restrictions (*see* § 24.839 of this chapter) may enter into a long-term *de facto* transfer leasing arrangement with any entity under the streamlined processing procedures described in this section, subject to any applicable unjust enrichment payment obligations and/or transfer restrictions (*see* § 1.2111 and § 24.839 of this chapter).

(ii) A licensee holding a license won in closed bidding (*see* § 24.709 of this chapter) may, during the first five years of the license term, enter into a spectrum leasing arrangement with an entity not eligible to hold such a license pursuant to the requirements of § 24.709(a) of this chapter so long as it has met its five-year construction requirement (*see* §§ 24.203, 24.839(a)(6) of this chapter).

(iii) The amount of any unjust enrichment payment will be determined by the Commission as part of its review of the application under the same rules that apply in the context of a license assignment or transfer of control (*see* § 1.2111 and § 24.714 of this chapter). If the spectrum leasing arrangement involves only part of the license area and/or part of the bandwidth covered by the license, the unjust enrichment obligation will be apportioned as though the license were being partitioned and/or disaggregated (*see* § 1.2111(e) and § 24.714(c) of this chapter). A licensee will receive no reduction in its unjust enrichment payment obligation for a spectrum leasing arrangement that ends prior to the end of the fifth year of the license term.

(iv) A licensee that participates in the Commission's installment payment program (*see* § 1.2110(g) may enter into a long-term *de facto* transfer leasing arrangement without triggering unjust enrichment obligations provided that the lessee would qualify for as favorable a category of installment payments. A licensee using installment payment financing that seeks to lease to an entity not meeting the eligibility standards for as favorable a category of installment payments must make full payment of the remaining unpaid principal and any unpaid interest accrued through the effective date of the spectrum leasing arrangement (*see* § 1.2111(c)). This requirement applies regardless of whether the licensee is leasing all or a portion of its bandwidth and/or license area.

(5) *Construction/performance requirements.* Any performance or

build-out requirement applicable under a license authorization (*e.g.*, a requirement that the licensee construct and operate one or more specific facilities, cover a certain percentage of geographic area, cover a certain percentage of population, or provide substantial service) always remains a condition of the license, and the legal responsibility for meeting such obligation is not delegable to the spectrum lessee(s).

(i) The licensee may attribute to itself the build-out or performance activities of its spectrum lessee(s) for purposes of complying with any applicable build-out or performance requirement.

(ii) If a licensee relies on the activities of a spectrum lessee to meet the licensee's performance or build-out obligation, and the spectrum lessee fails to engage in those activities, the Commission will enforce the applicable performance or build-out requirements against the licensee, consistent with the applicable rules.

(iii) If there are rules applicable to the license concerning the discontinuance of operation, the licensee is accountable for any such discontinuance and the rules will be enforced against the licensee regardless of whether the licensee was relying on the activities of a lessee to meet particular performance requirements.

(6) *Regulatory classification.* If the regulatory status of the licensee (*e.g.*, common carrier or non-common carrier status) is prescribed by rule, the regulatory status of the spectrum lessee is prescribed in the same manner, except that § 20.9(a) of this chapter shall not preclude a licensee in the services covered by that rule from entering into a spectrum leasing arrangement with a spectrum lessee that chooses to operate on a PMRS, private, or non-commercial basis.

(7) *Regulatory fees.* The licensee remains responsible for payment of the required regulatory fees that must be paid in advance of its license term (*see* § 1.1152). Where, however, regulatory fees are paid annually on a per-unit basis (such as for CMRS services pursuant to § 1.1152), the licensee and spectrum lessee each are required to pay fees for those units associated with its respective operations.

(8) *E911 requirements.* To the extent the licensee is required to meet E911 obligations (*see* § 20.18 of this chapter), the spectrum lessee is required to meet those obligations with respect to the spectrum leased under the spectrum leasing arrangement insofar as the spectrum lessee's operations are encompassed within the E911 obligations.

(e) *Applications for long-term de facto transfer leasing arrangements.* Applications for long-term *de facto* transfer leasing arrangements will be processed either pursuant to the general approval procedures or the immediate approval procedures, as discussed herein. Spectrum leasing parties must submit the application by electronic filing using ULS and FCC Form 608, and obtain Commission consent prior to consummating the transfer of *de facto* control of the leased spectrum, except that parties falling within the provisions of § 1.913(d) may file the application either electronically or manually.

(1) *General approval procedures.* Applications for long-term *de facto* transfer leasing arrangements will be processed pursuant to the general approval procedures set forth in this paragraph unless they are submitted and qualify for the immediate approval procedures set forth in paragraph (e)(2) of this section.

(i) To be accepted for filing under these general approval procedures, the application must be sufficiently complete and contain all information and certifications requested on the applicable form, FCC Form 608, including any information and certifications (including those of the spectrum lessee relating to eligibility, basic qualifications, and foreign ownership) required by the rules in this chapter and any rules pertaining to the specific service for which the application is filed. In addition, the spectrum leasing application must include payment of the required application fee(s); for purposes of determining the applicable application fee(s), the application will be treated as a transfer of control (*see* § 1.1102).

(ii) Once accepted for filing, the application will be placed on public notice, except no prior public notice will be required for applications involving authorizations in the Private Wireless Services, as specified in § 1.933(d)(9).

(iii) Petitions to deny filed in accordance with section 309(d) of the Communications Act must comply with the provisions of § 1.939, except that such petitions must be filed no later than 14 days following the date of the public notice listing the application as accepted for filing.

(iv) No later than 21 days following the date of the public notice listing an application as accepted for filing, the Wireless Telecommunications Bureau (Bureau) will affirmatively consent to the application, deny the application, or determine to subject the application to further review. For applications for which no prior public notice is required, the Bureau will affirmatively consent to the application, deny the application, or determine to subject the application to further review no later than 21 days following the date on which the application has been filed and any required application fee has been paid (*see* § 1.1102).

(v) If the Bureau determines to subject the application to further review, it will issue a public notice so indicating. Within 90 days following the date of that public notice, the Bureau will either take action upon the application or provide public notice that an additional 90-day period for review is needed.

(vi) Consent to the application is not deemed granted until the Bureau affirmatively acts upon the application.

(vii) Grant of consent to the application will be reflected in a public notice (*see* § 1.933(a)) promptly issued after the grant, and is subject to reconsideration (*see* §§ 1.106(f), 1.108, 1.113).

(viii) If any petition to deny is filed, and the Bureau grants the application, the Bureau will deny the petition(s) and issue a concise statement of the reason(s) for denial, disposing of all substantive issues raised in the petition(s).

(2) *Immediate approval procedures.* Applications that meet the requirements of paragraph (e)(2)(i) of this section qualify for the immediate approval procedures.

(i) To qualify for the immediate approval procedures, the application must be sufficiently complete, contain all necessary information and certifications (including those relating to eligibility, basic qualifications, and foreign ownership), and include payment of the requisite application fee(s), as required for an application processed under the general approval procedures set forth in paragraph (e)(1)(i) of this section, and also must establish, through certifications, that the following additional qualifications are met:

(A) The license does not involve spectrum licensed in a Wireless Radio Service that may be used to provide interconnected mobile voice and/or data services under the applicable service rules and that would, if the spectrum leasing arrangement were consummated, create a geographic overlap with spectrum in any licensed Wireless Service (including the same service) in which the proposed spectrum lessee already holds a direct or indirect interest of 10% or more (*see* § 1.2112), either as a licensee or a spectrum lessee, and that could be used by the spectrum lessee to provide

interconnected mobile voice and/or data services;

(B) The licensee is not a designated entity or entrepreneur subject to unjust enrichment requirements and/or transfer restrictions under applicable Commission rules (*see* §§ 1.2110 and 1.2111, and §§ 24.709, 24.714, and 24.839 of this chapter); and,

(C) The spectrum leasing arrangement does not require a waiver of, or declaratory ruling pertaining to, any applicable Commission rules.

(ii) Provided that the application establishes that it meets all of the requisite elements to qualify for these immediate approval procedures, consent to the *de facto* transfer spectrum leasing arrangement will be reflected in ULS. If the application is filed electronically, consent will be reflected in ULS on the next business day after filing of the application; if filed manually, consent will be reflected in ULS on the next business day after the necessary data from the manually filed application is entered into ULS. Consent to the application is not deemed granted until the Bureau affirmatively acts upon the application, as reflected in ULS.

(iii) Grant of consent to the application under these immediate approval procedures will be reflected in a public notice (*see* § 1.933(a)) promptly issued after grant, and is subject to reconsideration (*see* §§ 1.106(f), 1.108, 1.113).

(f) *Effective date* of a *de facto transfer leasing arrangement.* If the Commission consents to the *de facto* transfer leasing arrangement, the *de facto* transfer leasing arrangement will be deemed effective in the Commission's records, and for purposes of the application of the rules set forth in this section, on the date set forth in the application. If the Commission consents to the arrangement after that specified date, the spectrum leasing application will become effective on the date of the Commission affirmative consent.

(g) *Expiration, extension, or termination of spectrum leasing arrangement.* (1) Except as provided in paragraph (g)(2) or (g)(3) of this section, a spectrum leasing arrangement entered into pursuant to this section will expire on the termination date set forth in the application. The Commission's consent to the *de facto* transfer leasing application includes consent to return the leased spectrum to the licensee at the end of the term of the spectrum leasing arrangement.

(2) A spectrum leasing arrangement may be extended beyond the initial term set forth in the spectrum leasing application pursuant to the applicable application procedures set forth in § 1.9030(e). Where there is pending before the Commission at the date of termination of the spectrum leasing arrangement a proper and timely application seeking to extend the arrangement, the parties may continue to operate under the original spectrum leasing arrangement without further action by the Commission until such time as the Commission shall make a final determination with respect to the application.

(3) If a spectrum leasing arrangement is terminated earlier than the termination date set forth in the notification, either by the licensee or by the parties' mutual agreement, the licensee must file a notification with the Commission, no later than ten (10) days after the early termination, indicating the date of the termination. If the parties fail to put the spectrum leasing arrangement into effect, they must so notify the Commission consistent with the provisions of this section.

(4) The Commission will place information concerning an extension or an early termination of a spectrum leasing arrangement on public notice.

(h) *Assignment of spectrum leasing arrangement.* The spectrum lessee may assign its lease to another entity provided that the licensee has agreed to such an assignment, there is privity between the licensee and the assignee, and the assignment is approved by the Commission pursuant to the same application and approval procedures set forth in this section. In the case of a non-substantial (*pro forma*) assignment that falls within the class of *pro forma* transactions for which prior Commission approval would not be required under § 1.948(c)(1), the parties involved in the assignment must file notification of the assignment with the Commission, using FCC Form 608 and providing any necessary updates of ownership information, within 30 days of its completion. The Commission will place information related to the assignment, whether substantial or *pro forma*, on public notice.

(i) *Transfer of control of a spectrum lessee.* A spectrum lessee seeking the transfer of control must obtain Commission consent using the same application and Commission consent procedures set forth in this section. In the case of a non-substantial (*pro forma*) transfer of control that falls within the class of *pro forma* transactions for which prior Commission approval would not be required under § 1.948(c)(1), the parties involved in the transfer of control must file notification of the transfer of control with the Commission, using FCC Form 608 and providing any necessary updates of ownership information, within 30 days of its completion. The Commission will place information related to the transfer of control, whether substantial or *pro forma,* on public notice.

(j) *Revocation or automatic cancellation of a license or the spectrum lessee's operating authority.* (1) In the event an authorization held by a licensee that has entered into a spectrum leasing arrangement is revoked or cancelled, the spectrum lessee will be required to terminate its operations no later than the date on which the licensee ceases to have authority to operate under the license, except as provided in paragraph (i)(2) of this section.

(2) In the event of a license revocation or cancellation, the Commission will consider a request by the spectrum lessee for special temporary authority (*see* § 1.931) to provide the spectrum lessee with an opportunity to transition its users in order to minimize service disruption to business and other activities.

(3) In the event of a license revocation or cancellation, and the required termination of the spectrum lessee's operations, the former spectrum lessee does not, as a result of its former status, receive any preference over any other party should the spectrum lessee seek to obtain the revoked or cancelled license.

(k) *Subleasing.* A spectrum lessee may sublease spectrum usage rights subject to the following conditions. Parties entering into a spectrum subleasing arrangement are required to comply with the Commission's rules for obtaining approval for spectrum leasing arrangements provided in this subpart and are governed by those same policies. The application filed by parties to a spectrum subleasing arrangement must include written consent from the licensee to the proposed arrangement. Once a spectrum subleasing arrangement has been approved by the Commission, the sublessee becomes the party primarily responsible for compliance with Commission rules and policies.

(l) *Renewal.* Although the term of a long-term *de facto* transfer spectrum leasing arrangement may not be longer than the term of a license authorization, a licensee and spectrum lessee that have entered into an arrangement whose term continues to the end of the current term of the license authorization may, contingent on the Commission's grant of the license renewal, extend the spectrum leasing arrangement into the term of the renewed license authorization. The Commission must be notified of the renewal of the spectrum

leasing arrangement at the same time that the licensee submits its application for license renewal (*see* § 1.949). The spectrum lessee may operate under the extended term, without further action by the Commission, until such time as the Commission shall make a final determination with respect to the renewal of the license authorization and the extension of the spectrum leasing arrangement into the term of the renewed license authorization.

■ 11. Section 1.9035 is amended by revising paragraphs (a) and (d) through (m), and by adding paragraph (n) to read as follows:

§ 1.9035 Short-term *de facto* transfer leasing arrangements.

(a) *Overview.* Under the provisions of this section, a licensee (in any of the included services) and a spectrum lessee may enter into a short-term *de facto* transfer leasing arrangement in which the licensee retains *de jure* control of the license while *de facto* control of the leased spectrum is transferred to the spectrum lessee for the duration of the spectrum leasing arrangement, subject to prior Commission consent pursuant to the application procedures set forth in this section. A ''short-term'' *de facto* transfer leasing arrangement has an individual or combined term of not longer than one year. The term of a short-term *de facto* transfer leasing arrangement may be no longer than the term of the license authorization.

* * * * *

(d) *Applicability of particular service rules and policies.* Under a short-term *de facto* leasing arrangement, the service rules and policies apply to the licensee and spectrum lessee in the same manner as under long-term *de facto* transfer leasing arrangements (*see* § 1.9030(d)), except as provided herein:

(1) *Use restrictions and regulatory classification.* Use restrictions applicable to the licensee also apply to the spectrum lessee except that § 20.9(a) of this chapter shall not preclude a licensee in the services covered by that rule from entering into a spectrum leasing arrangement with a spectrum lessee that chooses to operate on a PMRS, private, or non-commercial basis, and except that a licensee with an authorization that restricts use of spectrum to non-commercial uses may enter into a short-term *de facto* transfer leasing arrangement that allows the spectrum lessee to use the spectrum commercially.

(2) *Designated entity/entrepreneur rules.* Unjust enrichment provisions (*see* § 1.2111) and transfer restrictions (*see* § 24.839 of this chapter) do not apply with regard to a short-term *de facto* transfer leasing arrangement.

(3) *Construction/performance requirements.* The licensee is not permitted to attribute to itself the activities of its spectrum lessee when seeking to establish that performance or build-out requirements applicable to the licensee have been met.

(4) *E911 requirements.* If E911 obligations apply to the licensee (see § 20.18 of this chapter), the licensee retains the obligations with respect to leased spectrum. A spectrum lessee entering into a short-term *de facto* transfer leasing arrangement is not separately required to comply with any such obligations in relation to the leased spectrum.

(e) *Spectrum leasing application.* Short-term *de facto* transfer leasing arrangements will be processed pursuant to immediate approval procedures, as discussed herein. Parties entering into a short-term *de facto* transfer leasing arrangement are required to file an electronic application with the Commission, using FCC Form 608, and obtain Commission consent prior to consummating the transfer of *de facto* control of the leased spectrum, except that parties falling within the provisions of § 1.913(d) may file the application either electronically or manually.

(1) To be accepted for filing under these immediate approval procedures, the application must be sufficiently complete and contain all information and certifications requested on the applicable form, FCC Form 608, including any information and certifications (including those relating to the spectrum lessee relating to eligibility, basic qualifications, and foreign ownership) required by the rules of this chapter and any rules pertaining to the specific service for which the application is required. In addition, the application must include payment of the required application fee; for purposes of determining the applicable application fee, the application will be treated as a transfer of control (*see* § 1.1102). Finally, the spectrum leasing arrangement must not require a waiver of, or declaratory ruling, pertaining to any applicable Commission rules.

(2) Provided that the application establishes that it meets all of the requisite elements to qualify for these immediate approval procedures, consent to the short-term *de facto* transfer spectrum leasing arrangement will be reflected in ULS. If the application is filed electronically, consent will be reflected in ULS on the next business day after filing of the application; if filed manually, consent will be reflected in ULS on the next business day after the necessary data from the manually filed application is entered into ULS. Consent to the application is not deemed granted until the Bureau affirmatively acts upon the application, as reflected in ULS.

(3) Grant of consent to the application under these procedures will be reflected in a public notice (*see* § 1.933(a)) promptly issued after grant, and is subject to reconsideration (*see* §§ 1.106(f), 1.108, 1.113).

(f) *Effective date of spectrum leasing arrangement.* The spectrum leasing arrangement will be deemed effective in the Commission's records, and for purposes of the application of the rules set forth in this section, on the date set forth in the application. If the Commission consents to the arrangement after that specified date, the spectrum leasing application will become effective on the date of the Commission affirmative consent.

(g) *Restrictions on the use of short-term de facto transfer leasing arrangements.* (1) The licensee and spectrum lessee are not permitted to use the special rules and expedited procedures applicable to short-term *de facto* transfer leasing arrangements for arrangements that in fact will exceed one year, or that the parties reasonably expect to exceed one year.

(2) The licensee and spectrum lessee must submit, in sufficient time prior to the expiration of the short-term *de facto* transfer spectrum leasing arrangement, the appropriate application under the rules and procedures applicable to long-term *de facto* leasing arrangements, and obtain Commission consent pursuant to those procedures.

(h) *Expiration, extension, or termination of the spectrum leasing arrangement.* (1) Except as provided in paragraph (h)(2) or (h)(3) of this section, a spectrum leasing arrangement entered into pursuant to this section will expire on the termination date set forth in the short-term *de facto* transfer leasing arrangement. The Commission's approval of the short-term *de facto* transfer leasing application includes consent to return the leased spectrum to the licensee at the end of the term of the spectrum leasing arrangement.

(2) Upon proper application (*see* paragraph (e) of this section), a short-term *de facto* transfer leasing arrangement may be extended beyond the initial term set forth in the application provided that the initial term and extension(s) together would not result in a leasing arrangement that exceeds a total of one year.

(3) If a spectrum leasing arrangement is terminated earlier than the

termination date set forth in the notification, either by the licensee or by the parties' mutual agreement, the licensee must file a notification with the Commission, no later than ten (10) days after the early termination, indicating the date of the termination. If the parties fail to put the spectrum leasing arrangement into effect, they must so notify the Commission consistent with the provisions of this section.

(i) *Conversion of a short-term spectrum leasing arrangement into a long-term de facto transfer leasing arrangement.* (1) In the event the licensee and spectrum lessee involved in a short-term *de facto* transfer leasing arrangement seek to extend the spectrum leasing arrangement beyond the one-year limit for short-term *de facto* transfer leasing arrangements, the parties may do so provided that they meet the conditions set forth in paragraphs (i)(2) and (i)(3) of this section.

(2) If a licensee that holds a license that continues to be subject to transfer restrictions and/or requirements relating to unjust enrichment pursuant to the Commission's small business and/or entrepreneur provisions (*see* § 1.2110 and § 24.709 of this chapter) seeks to extend a short-term *de facto* transfer leasing arrangement with its spectrum lessee (or related entities, as determined pursuant to § 1.2110(b)(2)) beyond one year, it may convert its arrangement into a long-term *de facto* transfer spectrum leasing arrangement provided that it complies with the procedures for entering into a long-term *de facto* transfer leasing arrangement and that it pays any unjust enrichment that would have been owed had the licensee filed a long-term *de facto* transfer spectrum leasing application at the time it applied for the initial short-term *de facto* transfer leasing arrangement.

(3) The licensee and spectrum lessee are not permitted to convert a short-term *de facto* transfer leasing arrangement into a long-term *de facto* transfer leasing arrangement if the parties would have been restricted, in the first instance, from entering into a long-term *de facto* transfer leasing arrangement because of a transfer, use, or other restriction applicable to the particular service (*see* § 1.9030).

(j) *Assignment of spectrum leasing arrangement.* The rule applicable to long-term *de facto* transfer leasing arrangements (*see* § 1.9030(g)) applies in the same manner to short-term *de facto* transfer leasing arrangements.

(k) *Transfer of control of spectrum lessee.* The rule applicable to long-term *de facto* transfer leasing arrangements (*see* § 1.9030(h)) applies in the same manner to short-term *de facto* transfer leasing arrangements.

(l) *Revocation or automatic cancellation of a license or the spectrum lessee's operating authority.* The rule applicable to long-term *de facto* transfer leasing arrangements (see § 1.9030(i)) applies in the same manner to short-term *de facto* transfer leasing arrangements.

(m) *Subleasing.* A spectrum lessee that has entered into a short-term *de facto* transfer leasing arrangement is not permitted to enter into a spectrum subleasing arrangement.

(n) *Renewal.* The rule applicable with regard to long-term *de facto* transfer leasing arrangements (*see* § 1.9030(l)) applies in the same manner to short-term *de facto* transfer leasing arrangements, except that the renewal of the short-term *de facto* transfer leasing arrangement to extend into the term of the renewed license authorization cannot enable the combined terms of the short-term *de facto* transfer leasing arrangements to exceed one year. The Commission must be notified of the renewal of the spectrum leasing arrangement at the same time that the licensee submits its application for license renewal (*see* § 1.949).

■ 12. Amend § 1.9045 by revising paragraph (b) to read as follows:

§ 1.9045 Requirements for spectrum leasing arrangements entered into by licensees participating in the installment payment program.

* * * * *

(b) If a licensee holds a license subject to the installment payment program rules (*see* § 1.2110 and related service-specific rules), the licensee and any spectrum lessee must execute the Commission-approved financing documents. No licensee or potential spectrum lessee may file a spectrum leasing notification or application without having first executed such Commission-approved financing documentation. In addition, they must certify in the spectrum leasing notification or application that they have both executed such documentation.

■ 13. Add § 1.9048 to read as follows:

§ 1.9048 Special provisions relating to spectrum leasing arrangements involving licensees in the Public Safety Radio Services.

Licensees in the Public Safety Radio Services (*see* part 90, subpart B and § 90.311(a)(1)(i) of this chapter) may enter into spectrum leasing arrangements with other public safety entities eligible for such a license authorization as well as with entities providing communications in support of public safety operations (*see* § 90.523(b) of this chapter).

■ 14. Add § 1.9080 to read as follows:

§ 1.9080 Private commons.

(a) *Overview.* A ''private commons'' arrangement is an arrangement, distinct from a spectrum leasing arrangement but permitted in the same services for which spectrum leasing arrangements are allowed, in which a licensee or spectrum lessee makes certain spectrum usage rights under a particular license authorization available to a class of third-party users employing advanced communications technologies that involve peer-to-peer (device-to-device) communications and that do not involve use of the licensee's or spectrum lessee's end-to-end physical network infrastructure (*e.g.*, base stations, mobile stations, or other related elements). In a private commons arrangement, the licensee or spectrum lessee authorizes users of certain communications devices employing particular technical parameters, as specified by the licensee or spectrum lessee, to operate under the license authorization. A private commons arrangement differs from a spectrum leasing arrangement in that, unlike spectrum leasing arrangements, a private commons arrangement does not involve individually negotiated spectrum access rights with entities that seek to provide network-based services to end-users. A private commons arrangement does not affect unlicensed operations in a particular licensed band to the extent that they are permitted pursuant to part 15.

(b) *Licensee/spectrum lessee responsibilities.* As the manager of any private commons, the licensee or spectrum lessee:

(1) Establishes the technical and operating terms and conditions of use by users of the private commons, including those relating to the types of communications devices that may be used within the private commons, consistent with the terms and conditions of the underlying license authorization;

(2) Retains *de facto* control of the use of spectrum by users within the private commons, including maintaining reasonable oversight over the users' use of the spectrum in the private commons so as to ensure that the use of the spectrum, and communications equipment employed, comply with all applicable technical and service rules (including requirements relating to radiofrequency radiation) and maintaining the ability to ensure such compliance; and,

(3) Retains direct responsibility for ensuring that the users of the private

commons, and the equipment employed, comply with all applicable technical and service rules, including requirements relating to radiofrequency radiation and requirements relating to interference.

(c) *Notification requirements.* Prior to permitting users to commence operations within a private commons, the licensee or spectrum lessee must notify the Commission, using FCC Form 608, that it is establishing a private commons arrangement. This notification must include information that describes: the location(s) or coverage area(s) of the private commons under the license authorization; the term of the arrangement; the general terms and conditions for users that would be gaining spectrum access to the private commons; the technical requirements and equipment that the licensee or spectrum lessee has approved for use within the private commons; and, the types of communications uses that are to be allowed within the private commons.

PART 24—PERSONAL COMMUNICATIONS SERVICES

■ 15. The authority citation for part 24 continues to read as follows:

Authority: 47 U.S.C. 154, 301, 302, 303, 309 and 332.

■ 16. Amend § 24.239 by adding the following sentence at the end of the paragraph, to read as follows:

§ 24.239 Cost-sharing requirements for broadband PCS.

* * * If a licensee in the Broadband PCS Service enters into a spectrum leasing arrangement (as set forth in part 1, subpart X of this chapter) and the spectrum lessee triggers a cost-sharing obligation, the licensee is the PCS entity responsible for satisfying the cost-sharing obligations under §§ 24.239 through 24.253.

PART 90—PRIVATE LAND MOBILE RADIO SERVICES

■ 17. The authority citation for part 90 continues to read as follows:

Authority: Sections 4(i), 11, 303(g), 303(r), and 332(c)(7) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 161, 303(g), 303(r), and 332(c)(7).

■ 18. Amend § 90.20 by adding a new paragraph (h) to read as follows:

§ 90.20 Public safety pool.

(h) *Spectrum leasing arrangements.* Notwithstanding any other provisions of this section to the contrary, licensees in the Public Safety Radio Services (*see* part 90, subpart B) may enter into spectrum leasing arrangements (*see* part 1, subpart X of this chapter) with entities providing communications in support of public safety operations.

[FR Doc. 04–27817 Filed 12–23–04; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1, 2, 20, 21, 22, 24, 25, 27, 74, 78, 80, 87, 90, 95, 97, and 101

[WT Docket No. 00–230; FCC 04–167]

Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Commission seeks comment on additional policies that could facilitate the development of advanced technologies, such as cognitive radio and ''opportunistic use'' devices. In particular, we request comment on whether additional revisions should be made to the spectrum leasing and private commons regulatory models, or whether other types of arrangements can better enable more users to gain spectrum access.

DATES: Comments by the public on the proposals set forth in the Second Further Notice of Proposed Rulemaking (*Second Further Notice*) are due January 18, 2005. Reply comments are due February 17, 2005.

FOR FURTHER INFORMATION CONTACT: Paul Murray, Wireless Telecommunications Bureau, at (202) 418–7240, or via the Internet at *Paul.Murray@fcc.gov;* for additional information concerning the information collections contained in this document, contact Judith-B. Herman at (202) 418–0214, or via the Internet at *Judith.B-Herman@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Second Further Notice* portion of the Commission's *Second Report and Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking,* FCC 04–167, in WT Docket No. 00–230, adopted on July 8, 2004, and released on September 2, 2004. Contemporaneous with this document, the Commission issues a *Second Report and Order* and *Order on Reconsideration* (published elsewhere in this publication). The full text of this document is available for inspection and copying during normal business hours in the FCC Reference Information Center, 445 12th Street, SW., Washington, DC 20554. The complete text may be purchased from the FCC's copy contractor, Qualex International, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. The full text may also be downloaded at: *http://www.fcc.gov.* Alternative formats are available to persons with disabilities by contacting Brian Millin at (202) 418–7426 or TTY (202) 418–7365 or at *Brian.Millin@fcc.gov.*

Synopsis of the Second Further Notice

I. Introduction and Background

1. In the *Second Report and Order,* which is set forth elsewhere in this publication, we provide examples of the ways in which advanced technologies, such as opportunistic devices, may be utilized within the context of current spectrum leasing policies. We observe that these do not comprise an exhaustive list of all permissible ways in which these advanced technologies may be utilized, but instead help illustrate the relevant regulatory issues before the Commission. We recognize that, due to the transaction costs associated with leasing or other market factors, licensees and other parties may wish to utilize other types of arrangements involving opportunistic use of licensed spectrum. To that end, we adopt a ''private commons'' option distinct from either spectrum leases or other existing arrangements.

II. Second Further Notice of Proposed Rulemaking

2. Because there may be many arrangements that would involve opportunistic use of spectrum and that would be consistent with Commission rules, we seek comment on additional ways in which licensees and spectrum lessees may enter into arrangements in which other users may employ advanced technologies to opportunistically use licensed spectrum. We wish to build on the examples listed in the *Second Report and Order* to provide licensees, spectrum lessees, and other parties with greater certainty as to the types of opportunistic use arrangements that would be permitted. To that end, we encourage commenters to describe additional means to increase spectrum access, how they might fit within the framework of the Commission's rules, or the extent to which we should consider revising our rules so as to accommodate these uses.

3. With regard to spectrum access through spectrum leasing arrangements, we seek comment on additional ways in which licensees and spectrum lessees may utilize advanced technologies, such as opportunistic devices, within the context of the Commission's spectrum leasing policies and rules. What types of uses have not been addressed by the Commission but nonetheless merit consideration due, for example, to an ability to enhance access? We encourage commenters to be specific as to the nature of the relationship between the licensees and spectrum lessee(s) in such arrangements, especially with regard to their responsibility for compliance with Commission rules.

4. With regard to spectrum access through private commons, we seek comment on the potential for this approach to improve access as well as the regulatory distinctions that are necessary to make this an effective regulatory model. Does the private commons established in the *Second Report and Order* sufficiently accommodate the wide variety of ways in which licensees (and spectrum lessees) and other users may wish to enter cooperative arrangements that employ ''smart'' or ''opportunistic'' devices? Should the private commons be modified or expanded so as to better accommodate the variety of arrangements that may be desired by the market? For example, should we adopt an approach to private commons that would allow intermediaries to facilitate transactions with users, design and set up communications networks for users or provide value-added services or applications? Are there alternative regulatory constructs that might help promote such arrangements? If so, how should these arrangements be structured, both in terms of licensees' reporting requirements before the Commission and the nature of the licensee's relationship with opportunistic users?

5. In addition, we seek comment on the technical parameters necessary to distinguish private commons from spectrum leasing arrangements or other arrangements. For example, at what point is a licensee with no physical infrastructure to use the spectrum engaged in providing a private commons to users, as opposed to a spectrum leasing arrangement with spectrum lessees? To what extent should a licensee (or spectrum lessee) with a private commons be permitted to grant access to another spectrum licensee (or spectrum lessee)? Should a licensee with an existing physical network and subscribers (*e.g.*, a CMRS provider) be permitted to be a subscriber in another licensee's private commons? If so, what would distinguish such use from a spectrum leasing arrangement?

6. We seek comment on the examples of private commons set forth in the *Second Report and Order* as well as other types of private commons arrangements. We also stated in the *Second Report and Order* that the licensee or spectrum lessee establishing and managing a private commons must retain both *de facto* control of the use

of the spectrum within the private commons and direct responsibility for the users' compliance with the Commission's rules. Are there any additional policies or requirements that are necessary to clarify the nature of this control or that could help ensure compliance? What is an efficient way to enforce users' compliance with the rules? For instance, would it be appropriate to require users to employ smart devices that include certain technologies (*e.g.*, a microchip set) that would enable private commons managers to shut down any devices found to be causing harmful interference?

7. Finally, we seek comment on the appropriate notification process for licensees or *de facto* transfer lessees that choose to offer a private commons. In the *Second Report and Order* above, we stated that a licensee or spectrum lessee managing the private commons must notify the Commission prior to permitting users to begin operating within the private commons. We propose here to give the licensee or spectrum lessee the option of notifying the Commission directly or, in the alternative, providing a URL that posts the terms and conditions. In the event these terms and conditions change, the licensee would have to make this information available on its website or, if this is not possible, by providing this information directly to the Commission. Is this an efficient notification procedure, and are there alternative means by which the Commission could collect this information in a less burdensome manner?

III. Procedural Matters

A. Initial Regulatory Flexibility Analysis Regarding the Second Further Notice

8. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), *see* 5 U.S.C. 603, the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this Second Further Notice of Proposed Rulemaking (*Second Further Notice*). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Second Further Notice.* The Commission will send a copy of the *Second Further Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). In addition, the *Second Further Notice* and IRFA (or summaries thereof) will be published in the **Federal Register**.

1. Need for, and Objectives of, the Proposed Rules

9. In the *Second Report and Order,* we adopt changes that further facilitate the leasing of spectrum usage rights and enhancing the functioning of the secondary spectrum marketplace generally. However, we believe that there may be additional measures that we might take to improve efficiency and promote access to a secondary spectrum market in order to ensure the greatest benefit to spectrum users and consumers. Thus, in the *Second Further Notice,* we seek comment on evaluating additional policies that could facilitate the development of advanced technologies through secondary market arrangements, such as spectrum leasing and private commons, and obtaining further clarification regarding the private commons options. We discuss the potential impact of these on small entities in the paragraphs that follow.

2. Legal Basis

10. The potential actions on which comment is sought in this *Second Further Notice* would be authorized under sections 1, 4(i), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), and 303(r).

3. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

11. The RFA directs agencies to provide a description of, and, where feasible, an estimate of, the number of small entities that may be affected by the rules adopted herein. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A ''small business concern'' is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

12. In the following paragraphs, we further describe and estimate the number of small entity licensees that may be affected by the rules we adopt in the *Second Further Notice.* Since this rulemaking proceeding applies to multiple services, we will analyze the number of small entities affected on a service-by-service basis.

13. As adopted, the *Second Report and Order* will create new opportunities and obligations for Wireless Radio Service's licensees and other entities that may lease spectrum usage rights from these licensees. When identifying small entities that could be affected by our new rules, we provide information describing auctions results, including the number of small entities that were winning bidders. We note, however, that the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily reflect the total number of small entities currently in a particular service. The Commission does not generally require that applicants provide business size information, except in the context of an assignment or transfer of control application where unjust enrichment issues are implicated. Consequently, to assist the Commission in analyzing the total number of potentially affected small entities, we requested commenters to estimate the number of small entities that may be affected by any rule changes resulting from this *Second Further Notice.*

14. In the *Second Further Notice,* we seek comment on possible further refinements to our existing policies and rules for spectrum leasing arrangements and for private commons arrangements. If any revisions were adopted, such revisions potentially could affect small entity licensees holding licenses in the Wireless Radio Services identified below.

15. *Cellular Licensees.* The SBA has developed a small business size standard for small businesses in the category ''Cellular and Other Wireless Telecommunications.'' Under that SBA category, a business is small if it has 1,500 or fewer employees. According to the Bureau of the Census, only twelve firms out of a total of 977 cellular and other wireless telecommunications firms that operated for the entire year in 1997 had 1,000 or more employees. Therefore, even if all twelve of these firms were cellular telephone companies, nearly all cellular carriers are small businesses under the SBA's definition.

16. *220 MHz Radio Service—Phase I Licensees.* The 220 MHz service has both Phase I and Phase II licenses. Phase I licensing was conducted by lotteries in 1992 and 1993. There are approximately 1,515 such non-nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has not developed a definition of small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such

licensees that are small businesses, we apply the small business size standard under the SBA rules applicable to ''Cellular and Other Wireless Telecommunications'' companies. This category provides that a small business is a wireless company employing no more than 1,500 persons. According to the Census Bureau data for 1997, only twelve firms out of a total of 977 such firms that operated for the entire year in 1997, had 1,000 or more employees. If this general ratio continues in the context of Phase I 220 MHz licensees, the Commission estimates that nearly all such licensees are small businesses under the SBA's small business standard.

17. *220 MHz Radio Service—Phase II Licensees.* The 220 MHz service has both Phase I and Phase II licenses. The Phase II 220 MHz service is subject to spectrum auctions. We adopted a small business size standard for defining ''small'' and ''very small'' businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. This small business standard indicates that a ''small business'' is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. A ''very small business'' is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that do not exceed $3 million for the preceding three years. The SBA has approved these small size standards. Auctions of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998. In the first auction, 908 licenses were auctioned in three different-sized geographic areas: Three nationwide licenses, 30 Regional Economic Area Group (EAG) Licenses, and 875 Economic Area (EA) Licenses. Of the 908 licenses auctioned, 693 were sold. Thirty-nine small businesses won 373 licenses in the first 220 MHz auction. A second auction included 225 licenses: 216 EA licenses and 9 EAG licenses. Fourteen companies claiming small business status won 158 licenses. A third auction included four licenses: 2 BEA licenses and 2 EAG licenses in the 220 MHz Service. No small or very small business won any of these licenses.

18. *Lower 700 MHz Band Licenses.* We adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits. We have defined a small business as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years. A very small business is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years. Additionally, the lower 700 MHz Service has a third category of small business status that may be claimed for Metropolitan/Rural Service Area (MSA/RSA) licenses. The third category is entrepreneur, which is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years. The SBA has approved these small size standards. An auction of 740 licenses (one license in each of the 734 MSAs/RSAs and one license in each of the six Economic Area Groupings (EAGs)) commenced on August 27, 2002, and closed on September 18, 2002. Of the 740 licenses available for auction, 484 licenses were sold to 102 winning bidders. Seventy-two of the winning bidders claimed small business, very small business or entrepreneur status and won a total of 329 licenses. A second auction commenced on May 28, 2003, and closed on June 13, 2003, and included 256 licenses: 5 EAG licenses and 476 CMA licenses. Seventeen winning bidders claimed small or very small business status and won sixty licenses, and nine winning bidders claimed entrepreneur status and won 154 licenses.

19. *Upper 700 MHz Band Licenses.* The Commission released a *Report and Order*, authorizing service in the upper 700 MHz band. This auction, previously scheduled for January 13, 2003, has been postponed.

20. *Paging.* We adopted a size standard for ''small businesses'' for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. A small business is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. The SBA has approved this definition. An auction of Metropolitan Economic Area (MEA) licenses commenced on February 24, 2000, and closed on March 2, 2000. Of the 2,499 licenses auctioned, 985 were sold. Fifty-seven companies claiming small business status won 440 licenses. An auction of Metropolitan Economic Area (MEA) and Economic Area (EA) licenses commenced on October 30, 2001, and closed on December 5, 2001. Of the 15,514 licenses auctioned, 5,323 were sold. 132 companies claiming small business status purchased 3,724 licenses. A third auction, consisting of 8,874 licenses in each of 175 EAs and 1,328 licenses in all but three of the 51 MEAs commenced on May 13, 2003, and closed on May 28, 2003. Seventy-seven bidders claiming small or very small business status won 2,093 licenses. Currently, there are approximately 24,000 Private Paging site-specific licenses and 74,000 Common Carrier Paging licenses. According to one 2002 study, 608 private and common carriers reported that they were engaged in the provision of either paging or ''other mobile'' services. Of these, we estimate that 589 are small, under the SBA-approved small business size standard. We estimate that the majority of private and common carrier paging providers would qualify as small entities under the SBA definition.

21. *Broadband Personal Communications Service (PCS).* The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission has created a small business size standard for Blocks C and F as an entity that has average gross revenues of less than $40 million in the three previous calendar years. For Block F, an additional small business size standard for ''very small business'' was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years. These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA. No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 ''small'' and ''very small'' business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F. On March 23, 1999, the Commission reauctioned 155 C, D, E, and F Block licenses; there were 113 small business winning bidders.

22. *Narrowband PCS.* The Commission held an auction for Narrowband PCS licenses that commenced on July 25, 1994, and closed on July 29, 1994. A second commenced on October 26, 1994 and closed on November 8, 1994. For purposes of the first two Narrowband PCS auctions, ''small businesses'' were entities with average gross revenues for the prior three calendar years of $40 million or less. Through these auctions, the Commission awarded a total of forty-one licenses, 11 of which were

obtained by four small businesses. To ensure meaningful participation by small business entities in future auctions, the Commission adopted a two-tiered small business size standard. A ''small business'' is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $40 million. A ''very small business'' is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $15 million. The SBA has approved these small business size standards. A third auction commenced on October 3, 2001 and closed on October 16, 2001. Here, five bidders won 317 (MTA and nationwide) licenses. Three of these claimed status as a small or very small entity and won 311 licenses.

23. *Specialized Mobile Radio (SMR).* The Commission awards ''small entity'' bidding credits in auctions for Specialized Mobile Radio (SMR) geographic area licenses in the 800 MHz and 900 MHz bands to firms that had revenues of no more than $15 million in each of the three previous calendar years. The Commission awards ''very small entity'' bidding credits to firms that had revenues of no more than $3 million in each of the three previous calendar years. The SBA has approved these small business size standards for the 900 MHz Service. The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz bands. The 900 MHz SMR auction began on December 5, 1995, and closed on April 15, 1996. Sixty bidders claiming that they qualified as small businesses under the $15 million size standard won 263 geographic area licenses in the 900 MHz SMR band. The 800 MHz SMR auction for the upper 200 channels began on October 28, 1997, and was completed on December 8, 1997. Ten bidders claiming that they qualified as small businesses under the $15 million size standard won 38 geographic area licenses for the upper 200 channels in the 800 MHz SMR band. A second auction for the 800 MHz band was held on January 10, 2002 and closed on January 17, 2002 and included 23 BEA licenses. One bidder claiming small business status won five licenses.

24. The auction of the 1,050 800 MHz SMR geographic area licenses for the General Category channels began on August 16, 2000, and was completed on September 1, 2000. Eleven bidders won 108 geographic area licenses for the General Category channels in the 800 MHz SMR band qualified as small businesses under the $15 million size standard. In an auction completed on December 5, 2000, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service were sold. Of the 22 winning bidders, 19 claimed ''small business'' status and won 129 licenses. Thus, combining all three auctions, 40 winning bidders for geographic licenses in the 800 MHz SMR band claimed status as small business. In addition, there are numerous incumbent site-by-site SMR licensees and licensees with extended implementation authorizations in the 800 and 900 MHz bands. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than $15 million. One firm has over $15 million in revenues. We assume, for purposes of this analysis, that all of the remaining existing extended implementation authorizations are held by small entities, as that small business size standard is established by the SBA.

25. *Private Land Mobile Radio (PLMR).* PLMR systems serve an essential role in a range of industrial, business, land transportation, and public safety activities. These radios are used by companies of all sizes operating in all U.S. business categories, and are often used in support of the licensee's primary (non-telecommunications) business operations. For the purpose of determining whether a licensee of a PLMR system is a small business as defined by the SBA, we could use the definition for ''Cellular and Other Wireless Telecommunications.'' This definition provides that a small entity is any such entity employing no more than 1,500 persons. The commission does not require PLMR licensees to disclose information about number of employees, so the Commission does not have information that could be used to determine how many PLMR licensees constitute small entities under this definition. Moreover, because PMLR licensees generally are not in the business of providing cellular or other wireless telecommunications services but instead use the licensed facilities in support of other business activities, we are not certain that the Cellular and Other Wireless Telecommunications category is appropriate for determining how many PLMR licensees are small entities for this analysis. Rather, it may be more appropriate to assess PLMR licensees under the standards applied to the particular industry subsector to which the licensee belongs.

26. *Fixed Microwave Services.* Fixed microwave services include common carrier, private-operational fixed, and broadcast auxiliary radio services. Currently, there are approximately 22,015 common carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The Commission has not yet defined a small business with respect to microwave services. For purposes of this FRFA, we will use the SBA's definition applicable to ''Cellular and Other Wireless Telecommunications'' companies—that is, an entity with no more than 1,500 persons. The Commission does not have data specifying the number of these licensees that have more than 1,500 employees, and thus is unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA's small business size standard. Consequently, the Commission estimates that there are 22,015 or fewer small common carrier fixed licensees and 61,670 or fewer small private operational-fixed licensees and small broadcast auxiliary radio licensees in the microwave services that may be affected by the rules and policies adopted herein. The Commission notes, however, that the common carrier microwave fixed licensee category includes some large entities.

27. *Wireless Communications Services.* This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission defined ''small business'' for the wireless communications services (WCS) auction as an entity with average gross revenues of $40 million for each of the three preceding years, and a ''very small business'' as an entity with average gross revenues of $15 million for each of the three preceding years. The SBA has approved these definitions. The FCC auctioned geographic area licenses in the WCS service. In the auction, which commenced on April 15, 1997 and closed on April 25, 1997, there were seven bidders that won 31 licenses that qualified as very small business entities, and one bidder that won one license that qualified as a small business entity. An auction for one license in the 1670–1674 MHz band commenced on April 30, 2003 and closed the same day. One license was awarded. The winning bidder was not a small entity.

28. *39 GHz Service.* The Commission defines ''small entity'' for 39 GHz licenses as an entity that has average gross revenues of less than $40 million in the three previous calendar years. ''Very small business'' is defined as an entity that, together with its affiliates,

has average gross revenues of not more than $15 million for the preceding three calendar years. The SBA has approved these definitions. The auction of the 2,173 39 GHz licenses began on April 12, 2000, and closed on May 8, 2000. The 18 bidders who claimed small business status won 849 licenses.

29. *Local Multipoint Distribution Service.* An auction of the 986 Local Multipoint Distribution Service (LMDS) licenses began on February 18, 1998, and closed on March 25, 1998. The Commission defined ''small entity'' for LMDS licenses as an entity that has average gross revenues of less than $40 million in the three previous calendar years. An additional classification for ''very small business'' was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years. These regulations defining ''small entity'' in the context of LMDS auctions have been approved by the SBA. There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. On March 27, 1999, the Commission re-auctioned 161 licenses; there were 32 small and very small business winning bidders that won 119 licenses.

30. *218–219 MHz Service.* The first auction of 218–219 MHz (previously referred to as the Interactive and Video Data Service or IVDS) spectrum resulted in 178 entities winning licenses for 594 Metropolitan Statistical Areas (MSAs). Of the 594 licenses, 567 were won by 167 entities qualifying as a small business. For that auction, we defined a small business as an entity that, together with its affiliates, has no more than a $6 million net worth and, after federal income taxes (excluding any carry over losses), has no more than $2 million in annual profits each year for the previous two years. We defined a small business as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and their affiliates, has average annual gross revenues not exceeding $15 million for the preceding three years. A very small business is defined as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and its affiliates, has average annual gross revenues not exceeding $3 million for the preceding three years. The SBA has approved of these definitions. At this time, we cannot estimate the number of licenses that will be won by entities qualifying as small or very small businesses under our rules in future auctions of 218–219 MHz spectrum. Given the success of small businesses in the previous auction, and the prevalence of small businesses in the subscription television services and message communications industries, we assume for purposes of this FRFA that in future auctions, many, and perhaps all, of the licenses may be awarded to small businesses.

31. *Location and Monitoring Service (LMS).* Multilateration LMS systems use non-voice radio techniques to determine the location and status of mobile radio units. For purposes of auctioning LMS licenses, the Commission has defined ''small business'' as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding $15 million. A ''very small business'' is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding $3 million. These definitions have been approved by the SBA. An auction for LMS licenses commenced on February 23, 1999, and closed on March 5, 1999. Of the 528 licenses auctioned, 289 licenses were sold to four small businesses. We cannot accurately predict the number of remaining licenses that could be awarded to small entities in future LMS auctions.

32. *Rural Radiotelephone Service.* We use the SBA definition applicable to cellular and other wireless telecommunication companies, *i.e.*, an entity employing no more than 1,500 persons. There are approximately 1,000 licensees in the Rural Radiotelephone Service, and the Commission estimates that there are 1,000 or fewer small entity licensees in the Rural Radiotelephone Service that may be affected by the rules and policies adopted herein.

33. *Air-Ground Radiotelephone Service.* We use the SBA definition applicable to cellular and other wireless telecommunication companies, *i.e.*, an entity employing no more than 1,500 persons. There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and the Commission estimates that almost all of them qualify as small entities under the SBA definition.

34. *Offshore Radiotelephone Service.* This service operates on several ultra high frequency (UHF) TV broadcast channels that are not used for TV broadcasting in the coastal area of the states bordering the Gulf of Mexico. At present, there are approximately 55 licensees in this service. We use the SBA definition applicable to cellular and other wireless telecommunication companies, *i.e.*, an entity employing no more than 1,500 persons. The Commission is unable at this time to estimate the number of licensees that would qualify as small entities under the SBA definition. The Commission assumes, for purposes of this FRFA, that all of the 55 licensees are small entities, as that term is defined by the SBA.

35. *Multiple Address Systems (MAS).* Entities using MAS spectrum, in general, fall into two categories: (1) those using the spectrum for profit-based uses, and (2) those using the spectrum for private internal uses. With respect to the first category, the Commission defines ''small entity'' for MAS licenses as an entity that has average gross revenues of less than $15 million in the three previous calendar years. ''Very small business'' is defined as an entity that, together with its affiliates, has average gross revenues of not more than $3 million for the preceding three calendar years. The SBA has approved of these definitions. The majority of these entities will most likely be licensed in bands where the Commission has implemented a geographic area licensing approach that would require the use of competitive bidding procedures to resolve mutually exclusive applications. The Commission's licensing database indicates that, as of January 20, 1999, there were a total of 8,670 MAS station authorizations. Of these, 260 authorizations were associated with common carrier service. In addition, an auction for 5,104 MAS licenses in 176 EAs began November 14, 2001, and closed on November 27, 2001. Seven winning bidders claimed status as small or very small businesses and won 611 licenses.

36. With respect to the second category, which consists of entities that use, or seek to use, MAS spectrum to accommodate their own internal communications needs, we note that MAS serves an essential role in a range of industrial, safety, business, and land transportation activities. MAS radios are used by companies of all sizes, operating in virtually all U.S. business categories, and by all types of public safety entities. For the majority of private internal users, the definitions developed by the SBA would be more appropriate. The applicable definition of small entity in this instance appears to be the ''Cellular and Other Wireless Telecommunications'' definition under the SBA rules. This definition provides that a small entity is any entity employing no more than 1,500 persons. The Commission's licensing database indicates that, as of January 20, 1999, of the 8,670 total MAS station authorizations, 8,410 authorizations

were for private radio service, and of these, 1,433 were for private land mobile radio service.

37. *Incumbent 24 GHz Licensees.* The rules that we adopt could affect incumbent licensees who were relocated to the 24 GHz band from the 18 GHz band, and applicants who wish to provide services in the 24 GHz band. The Commission did not develop a definition of small entities applicable to existing licensees in the 24 GHz band. Therefore, the applicable definition of small entity is the definition under the SBA rules for ''Cellular and Other Wireless Telecommunications.'' This definition provides that a small entity is any entity employing no more than 1,500 persons. We believe that there are only two licensees in the 24 GHz band that were relocated from the 18 GHz band, Teligent and TRW, Inc. It is our understanding that Teligent and its related companies have less than 1,500 employees, though this may change in the future. TRW is not a small entity. Thus, only one incumbent licensee in the 24 GHz band is a small business entity.

38. *Future 24 GHz Licensees.* With respect to new applicants in the 24 GHz band, we have defined ''small business'' as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the three preceding years not exceeding $15 million. ''Very small business'' in the 24 GHz band is defined as an entity that, together with controlling interests and affiliates, has average gross revenues not exceeding $3 million for the preceding three years. The SBA has approved these definitions. The Commission will not know how many licensees will be small or very small businesses until the auction, if required, is held.

39. *700 MHz Guard Band Licenses.* We adopted size standards for ''small businesses'' and ''very small businesses'' for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. A small business in this service is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years. Additionally, a ''very small business'' is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years. SBA approval of these definitions is not required. An auction of 52 Major Economic Area (MEA) licenses commenced on September 6, 2000, can closed on September 21, 2000. Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced on February 13, 2001, and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.

40. Broadband Radio Service (formerly Multipoint Distribution Service) and Educational Broadband Service (formerly Instructional Television Fixed Service). Multichannel Multipoint Distribution Service (MMDS) systems, often referred to as ''wireless cable,'' transmit video programming to subscribers using the microwave frequencies of the Multipoint Distribution Service (MDS) and Instructional Television Fixed Service (ITFS). In an order issued in July 2004 in WT Docket No. 03–66, the Commission comprehensively reviewed our policies and rules relating to the ITFS and MDS services, and replacing the Multipoint Distribution Service (MDS) with the Broadband Radio Service and Instructional Television Fixed Service (ITFS) with the Educational Broadband Service. In connection with the 1996 MDS auction, the Commission defined ''small business'' as an entity that, together with its affiliates, has average gross annual revenues that are not more than $40 million for the preceding three calendar years. The SBA has approved of this standard. The MDS auction resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 claimed status as a small business. At this time, we estimate that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent MDS licensees that have gross revenues that are not more than $40 million and are thus considered small entities.

41. In addition, the SBA has developed a small business size standard for Cable and Other Program Distribution, which includes all such companies generating $12.5 million or less in annual receipts. According to Census Bureau data for 1997, there were a total of 1,311 firms in this category, total, that had operated for the entire year. Of this total, 1,180 firms had annual receipts of under $10 million, and an additional 52 firms had receipts of $10 million or more but less than $25 million. Consequently, we estimate that the majority of providers in this service category are small businesses that may be affected by the rules and policies in the Second Report and Order.

42. Finally, while SBA approval for a Commission-defined small business size standard applicable to ITFS is pending, educational institutions are included in this analysis as small entities. There are currently 2,032 ITFS licensees, and all but 100 of these licenses are held by educational institutions. Thus, we tentatively conclude that at least 1,932 ITFS licensees are small businesses.

43. *Multichannel Video Distribution and Data Service.* MVDDS is a terrestrial fixed microwave service operating in the 12.2–12.7 GHz band. Licenses in this service were auctioned in January 2004, with 10 winning bidders for 192 licenses. Eight of these 10 winning bidders claimed small businesses status for 144 of these licenses.

44. *Aviation and Marine Services.* Small businesses in the aviation and marine radio services use a very high frequency (VHF) marine or aircraft radio and, as appropriate, an emergency position-indicating radio beacon (and/or radar) or an emergency locator transmitter. The Commission has not developed a small business size standard specifically applicable to these small businesses. For purposes of this analysis, the Commission uses the SBA small business size standard for the category ''Cellular and Other Telecommunications,'' which is 1,500 or fewer employees. Most applicants for recreational licenses are individuals. Approximately 581,000 ship station licensees and 131,000 aircraft station licensees operate domestically and are not subject to the radio carriage requirements of any statute or treaty. For purposes of our evaluations in this analysis, we estimate that there are up to approximately 712,000 licensees that are small businesses (or individuals) under the SBA standard. In addition, between December 3, 1998 and December 14, 1998, the Commission held an auction of 42 VHF Public Coast licenses in the 157.1875–157.4500 MHz (ship transmit) and 161.775–162.0125 MHz (coast transmit) bands. For purposes of the auction, the Commission defined a ''small'' business as an entity that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed $15 million dollars. In addition, a ''very small'' business is one that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed $3 million dollars. There are approximately 10,672 licensees in the Marine Coast Service, and the Commission estimates that almost all of them qualify as ''small''

businesses under the above special small business size standards.

45. *Public Safety Radio Services.* Public Safety radio services include police, fire, local government, forestry conservation, highway maintenance, and emergency medical services. There are a total of approximately 127,540 licensees in these services. Governmental entities as well as private businesses comprise the licensees for these services. All governmental entities with populations of less than 50,000 fall within the definition of a small entity.

4. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

46. The policies and proposals set forth in the *Second Report and Order* impact a number of Commission licensees and spectrum lessees in various wireless services. The *Second Further Notice* explores ways in which licensees and spectrum lessees may enter into arrangements in which advanced technologies are opportunistically employed. The *Second Further Notice* and seeks to provide parties with greater certainty as to the types of opportunistic use arrangements that would be permitted while fitting into the framework of the Commission's current rules.

47. Our proposals in the *Second Report and Order* to implement certain advanced technologies necessarily implicates potential reporting, recordkeeping and compliance requirements for licensees and spectrum lessees, including: (1) Retention of lease agreements; (2) reporting of spectrum leasing terms to the Commission; (3) licensee and lessee compliance with the Commission's technical and service rules; (4) licensee filings with the Commission on behalf of the lessee; (5) licensee verification of lessee compliance with Commission rules; (6) license supervision of a lessee's adherence to the Commission's rules and policies; and (7) the leasing of spectrum by entities designated as ''small business'' or ''very small business'' under the Commission's rules. Licensees and spectrum lessees may retain or hire outside professionals (*e.g.*, legal and engineering staff) to draft lease arrangements, provide consulting services, maintain records and comply with applicable Commission rules. They also may employ existing or new employees to be responsible for reporting, recordkeeping, and other compliance requirements.

48. The *Second Further Notice* also explores what steps the Commission should take to further enhance secondary markets and increase the efficient use of spectrum and the availability to the public of innovative wireless services. The *Second Further Notice* does not propose any specific reporting, recordkeeping or compliance requirements in these matters. We are open to comment on what, if any, requirements we should impose if we adopt these proposals.

5. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

49. The RFA requires an agency to describe any significant, specifically small business alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): ''(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.'' *See* 5 U.S.C. 603(c)(1)–(c)(4).

50. Regarding our inquiry on ways to facilitate further development of advanced technologies, we do not anticipate any adverse impact on small entities. In fact, small (and large) entities should benefit from the reduction in transaction costs associated with leasing and the availability of other types of arrangements involving opportunistic use of licensed spectrum. We encourage comments on ways in which others may employ advanced technologies to opportunistically use licensed spectrum. Specifically, commenters should propose additional means to increase spectrum access and how that would fit into the rules and policies already established by the Commission. We do not believe that a revision of our rules would adversely impact small entities.

51. With regard to spectrum access through spectrum leasing arrangements, we seek comment on additional ways in which licensees and spectrum lessees may utilize advanced technologies, such as opportunistic devices, within the context of the Commission's spectrum leasing policies and rules. We do not anticipate that any rules we adopt in this area would adversely impact small entities. We believe that small and large entities will benefit from increased access to spectrum and the utilization of advanced technologies.

52. With regard to spectrum access through private commons, we seek comment on the potential for this approach to improve access as well as the regulatory distinctions that are necessary to make this an effective regulatory model. We do not anticipate any adverse impact on small entities. We believe that both small and large entities that make use of ''smart'' or ''opportunistic'' technologies within their bands will benefit from the private commons option because this approach is designed to minimize some of the transaction costs associated with leasing or other market factors.

53. In addition, we seek comment on the technical parameters necessary to distinguish private commons from spectrum leasing arrangements or other arrangements. We do not anticipate any adverse impact on small entities as a result of setting these parameters. We believe that setting these parameters will benefit both small and large entities by reducing regulatory uncertainty and encouraging spectrum use.

54. We also seek comment on the examples of private commons set forth in the *Second Report and Order,* as well as other types of private commons arrangements. As stated in the *Second Report and Order,* licensee or spectrum lessees establishing a private commons retains direct responsibility for compliance with the Commission's rules. We encourage comment on whether there are any additional policies or requirements that could help ensure compliance. We do not anticipate any adverse impact on small entities as a result of establishing further compliance guidelines. We believe that establishing further compliance guidelines all entities, including small entities, will benefit from the additional control over their spectrum.

55. Finally, we seek comment on the appropriate notification process for licensees or spectrum lessees that choose to offer a private commons. In the *Second Report and Order,* we stated that a licensee or spectrum lessee managing the private commons must notify the Commission prior to permitting users to begin operating within the private commons. In the *Second Further Notice,* we propose to give the licensee or spectrum lessee the option of notifying the Commission directly or, in the alternative, providing a URL that posts the terms and conditions. We believe that this procedure will benefit all entities, including small entities, by taking an additional step toward increasing the efficient use of spectrum.

6. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

56. None.

57. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of this *Second Further Notice,* including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

B. Initial Paperwork Reduction Act of 1995 Analysis Regarding the Second Further Notice

58. In the *Second Further Notice,* this document seeks comment on a proposed information collection. As part of the Commission's continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. Public and agency comments are due at the same time as other comments on this document and must have a separate heading designating them as responses to the Initial Paperwork Reduction Analysis (IPRA). OMB comments are due February 25, 2005. Comments should address: (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 estimates; (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.

C. Comment Dates Regarding the Second Further Notice

59. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415 and 1.419, interested parties may file comments on the *Second Further Notice* on or before January 18, 2005, and reply comments on or before February 17, 2005. Comments and reply comments should be filed in WT Docket No. 00–230. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding.

60. Comments may be filed either by filing electronically, such as by using the Commission's Electronic Comment Filing System (ECFS), or by filing paper copies. Parties are strongly urged to file their comments using ECFS (given recent changes in the Commission's mail delivery system). Comments filed through the ECFS can be sent as an electronic file via the Internet to *http://www.fcc.gov/e-file/ecfs.html.* Only one copy of an electronic submission must be filed. In completing the transmittal screen, the electronic filer should include its full name, Postal Service mailing address, and the applicable docket or rulemaking number, WT Docket No. 00–230. Parties also may submit comments electronically by Internet e-mail. To receive filing instructions for e-mail comments, commenters should send an e-mail to *ecfs@fcc.gov,* and should include the following words in the body of the message, ''get form <your e-mail address>.'' A sample form and directions will be sent in reply.

61. Parties who choose to file by paper may submit such filings by hand or messenger delivery, by U.S. Postal Service mail (First Class, Priority, or Express Mail), or by commercial overnight courier. Parties must file an original and four copies of each filing in WT Docket No. 00–230. Parties that want each Commissioner to receive a personal copy of their comments must file an original plus nine copies. If paper filings are hand-delivered or messenger-delivered for the Commission's Secretary, they must be delivered to the Commission's contractor at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002–4913. To receive an official ''Office of the Secretary'' date stamp, documents must be addressed to Marlene H. Dortch, Secretary, Federal Communications Commission. (The filing hours at this facility are 8 a.m. to 7 p.m.) If paper filings are submitted by mail though the U.S. Postal Service (First Class mail, Priority Mail, and Express Mail), they must be sent to the Commission's Secretary, Marlene H. Dortch, Federal Communications Commission, Office of the Secretary, 445 12th Street, SW., Washington, DC 20554. If paper filings are submitted by commercial overnight courier (*i.e.*, by overnight delivery other than through the U.S. Postal Service), such as by Federal Express or United Parcel Service, they must be sent to the Commission's Secretary, Marlene H. Dortch, Federal Communications Commission, Office of the Secretary, 9300 East Hampton Drive, Capitol Heights, MD 20743. (The filing hours at this facility are 8 a.m. to 5:30 p.m.)

62. Parties may also file with the Commission some form of electronic media submission (*e.g.*, diskettes, CDs, tapes, etc.) as part of their filings. In order to avoid possible adverse affects on such media submissions (potentially caused by irradiation techniques used to ensure that mail is not contaminated), the Commission advises that they should not be sent through the U.S. Postal Service. Hand-delivered or messenger-delivered electronic media submissions should be delivered to the Commission's contractor, Natek, Inc., at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002–4913. Electronic media sent by commercial overnight courier should be sent to the Commission's Secretary, Marlene H. Dortch, Federal Communications Commission, Office of the Secretary, 9300 East Hampton Drive, Capitol Heights, MD 20743.

63. Regardless of whether parties choose to file electronically or by paper, they should also send one copy of any documents filed, either by paper or by e-mail, to each of the following: (1) Best Copy & Printing, Inc., Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, facsimile (202) 488–5563, or e-mail at *fcc@bcpiweb.com;* and (2) Paul Murray, Commercial Wireless Division, Wireless Telecommunications Bureau, 445 12th Street, SW., Washington, DC 20554, or e-mail at *Paul.Murray@fcc.gov.*

64. Comments, reply comments, and *ex parte* submissions will be available for public inspection during regular business hours in the FCC Reference Information Center, Federal Communications Commission, 445 12th Street, SW., Room CY–A257, Washington, D.C. 20554. These documents also will be available electronically at the Commission's Disabilities Issues Task Force Web site, *http://www.fcc.gov/dtf,* and from the Commission's Electronic Comment Filing System. Documents are available electronically in ASCII text, Word 97, and Adobe Acrobat. Copies of filings in this proceeding may be obtained from Best Copy & Printing, Inc., Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone (800) 378–3160, facsimile (202) 488–5563, or via e-mail at *fcc@bcpiweb.com.* This document is also available in alternative formats (computer diskette, large print, audio cassette, and Braille). Persons who need documents in such formats may contact Brian Millin at (202) 418–7426, TTY (202) 418–7365, *Brian.Millin@fcc.gov,* or send an e-mail to *access@fcc.gov.*

D. Ex Parte Rules Regarding the Second Further Notice—Permit-But-Disclose Proceeding

65. With regard to the *Second Further Notice,* this is a permit-but-disclose

notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 CFR 1.1202, 1.1203, and 1.1206.

IV. Ordering Clauses

66. Pursuant to the authority contained in sections 1, 4(i), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), and 303(r), the *Second Further Notice* is adopted.

67. The Commission's Consumer Information Bureau, Reference Information Center, *shall send* a copy of the Second Report and Order, Order on Reconsideration, and Second Further NPRM of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 04–27790 Filed 12–23–04; 8:45 am]

BILLING CODE 6712–01–P

Federal Register

Monday,

December 27, 2004

Part V

Department of Agriculture

Agricultural Marketing Service

7 CFR Part 1280

Lamb Promotion, Research, and Information Program; Procedures for the Conduct of a Referendum and Opportunity To Participate in the Referendum; Final Rule and Notice

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1280

[No. LS–04–06]

Lamb Promotion and Research Program: Procedures for the Conduct of a Referendum

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule establishes procedures the Department of Agriculture (USDA) will use in conducting the required referendum, as well as future referendums, for the Lamb Promotion, Research, and Information Order (Order) authorized under the Commodity Promotion, Research, and Information Act of 1996 (Act).

EFFECTIVE DATE: December 28, 2004.

FOR FURTHER INFORMATION CONTACT: Kenneth R. Payne, Chief, Marketing Programs Branch on (202) 720–1115, fax (202) 720–1125, or by e-mail at *Kenneth.Payne@usda.gov* or Linda Cronin, USDA, FSA, DAFO, on (202) 720–7228, fax (202) 690–0434, or by e-mail on *Linda.Cronin@usda.gov*.

Eligible voters can determine the location of county FSA offices by contacting (1) the nearest county FSA office, (2) the State FSA office, or (3) through an online search of FSA's Web site at *http://www.fsa.usda.gov/pas/default.asp*. From the options available on this Web page select ''Your local office,'' click on your State, and click on the map to select a county.

SUPPLEMENTARY INFORMATION:

Executive Order 12866

The Office of Management and Budget (OMB) has waived the review process required by Executive Order (E.O.) 12866 for this action.

Executive Order 12988

This final rule has been reviewed under E.O. 12988, Civil Justice Reform. It is not intended to have a retroactive effect.

Section 524 of the Act provides that the Act shall not affect or preempt any other Federal or State law authorizing promotion or research relating to an agricultural commodity.

Under § 519 of the Act, a person subject to the Order may file a petition with USDA stating that the Order, any provision of the Order, or any obligation imposed in connection with the Order, is not established in accordance with the law, and requesting a modification of the Order or an exemption from the Order. Any petition filed challenging the Order, any provision of the Order, or any obligation imposed in connection with the Order, shall be filed within 2 years after the effective date of the Order, provision, or obligation subject to challenge in the petition. The petitioner will have the opportunity for a hearing on the petition. Thereafter, USDA will issue a ruling on the petition. The Act provides that the district court of the United States for any district in which the petitioner resides or carries on business shall have the jurisdiction to review a final ruling on the petition, if the petitioner files a complaint for that purpose not later than 20 days after the date of the entry of the final ruling. Service of process in a proceeding may be made on USDA by delivering a copy of the complaint to USDA. If the court determines that the ruling is not in accordance with the law, the court shall remand the matter to USDA with direction to make such ruling as the court determining to be in accordance with the law or to take further action as, in the opinion of the court the law requires. The pendency of a petition filed or an action commended shall not operated as a stay of any action authorized by § 520 of the Act to be taken to enforce, including any rule, Order, or penalty in effect.

Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq*.), AMS has considered the economic effect of the final rule on small entities. The purpose of RFA is to fit the regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly burdened.

The Act, which authorizes USDA to consider industry proposals for generic programs of promotion, research, and information for agricultural commodities, became effective on April 4, 1996.

Section 518 of the Act provides three options for determining industry approval or continuation of a new research and promotion program. They are: (1) By a majority of those voting; (2) by a majority of the volume of the agricultural commodity voted in the referendum; or (3) by a majority of those persons voting who also represent a majority of the volume of the agricultural commodity voted in the referendum. In addition, § 518 of the Act provides for referendums to ascertain approval of an Order to be conducted either prior to its going into effect or within 3 years after assessments first begin under an Order. As recommended by representatives of the lamb industry, the final Order, which was published in the **Federal Register** on April 11, 2002 (67 FR 17848), provides that USDA conduct a referendum within 3 years after assessments begin and that the continuation of the Order be approved by at least a majority of those persons voting for approval who are engaged in the production, feeding, or slaughter of lambs and who also represent a majority of the volume of lambs produced, fed, or slaughtered.

This final rule establishes the procedures USDA will use for the conduct of a nationwide referendum among eligible persons to determine if the Order should be continued. This final rule will add a new subpart that establishes procedures to conduct the initial and future referendum. The new subpart will cover definitions, certification and voting procedures, eligibility, disposition of forms and records, FSA's role, and reporting the results.

There are approximately 67,468 persons engaged in the production, feeding, or slaughtering of lamb who are subject to the program. Most of the lamb producers, seedstock producers, and feeders, will be classified as small businesses under the criteria established by the Small Business Administration (SBA)(13 CFR 121.201). Most first handlers will not be classified as small businesses. SBA defines small agricultural service firms as those whose annual receipts are less than $5 million and small agricultural producers are defined as those having annual receipts of less than $750,000. This number and size data remains the same as it appeared in the earlier analyses for the Order.

The information collection requirements are minimal. Obtaining a ballot by mail, in-person, facsimile, or via the Internet and completing it in its entirety would not impose a significant economic burden on participants. Accordingly, the Administrator of AMS has determined that this final rule will not have a significant economic impact on a substantial number of small business entities.

Paperwork Reduction Act

In accordance with Paperwork Reduction Act (44 U.S.C. Chapter 35), the information collection requirements contained in this final rule have been approved under OMB number 0581–0227. The public reporting burden for this collection of information is estimated to average .03 hours per response. This rule requires eligible

persons to complete a ballot (Form LS–86) in its entirety. Eligible persons subject to the assessment will be required to vote ''yes'' or ''no'' to continue the program, vote the number of lambs (volume of production) owned and produced; owned and fed; or slaughtered during a period specified by the Secretary, and provide documentation that shows the person voting engaged in the production, feeding, or slaughtering of lambs during the representative period determined by the Secretary. The ballot will require the person to sign it certifying that they engaged in the production, feeding, or slaughtering of lambs during a representative period specified by the Secretary and that the volume of production voted is true and accurate to the best of one's knowledge.

Background

The Act (U.S.C. 7411–7425) which became effective on April 4, 1996, authorizes USDA to establish generic programs of promotion, research, and information for agricultural commodities designed to strengthen an industry's position in the marketplace and to maintain and expand existing domestic and foreign markets and uses for agricultural commodities. Pursuant to the Act, a proposed Order on the Lamb Checkoff Program was published in the **Federal Register** on September 21, 2001 (66 FR 48764). The final Order was published in the **Federal Register** on April 11, 2002 (67 FR 17848). Collection of assessments began on July 1, 2002.

This program is funded primarily by those persons engaged in the production and feeding of lambs in the amount of one-half cent ($.005) per pound when live lambs are sold. For purposes of this program, the term ''lamb'' as defined in the Order means, ''any ovine animal of any age, including ewes and rams.''

First handlers, which means the packer or other person who buys or takes possession of lambs from a producer or feeder for slaughter, including custom slaughter, are assessed an additional $.30 cents per head purchased for slaughter or slaughtered by such first handler pursuant to a custom slaughter arrangement. Each person who processes or causes to be processed lamb or lamb products of that person's own production and markets the processed products is assessed one-half cent ($.005) per pound on the live weight at the time of slaughter and is required to pay an additional assessment of $.30 per head. Assessment rates may be adjusted in accordance with applicable provisions of the Act and the Order. The Order also requires persons to collect and remit assessments to the American Lamb Board (Board). Each producer, feeder, or seedstock producer is obligated to pay that portion of the assessment that is equivalent to that producer's, feeder's, or seedstock producer's proportionate share and shall transfer the assessment to the subsequent purchaser. Additionally, a person who is a market agency; *i.e.*, commission merchant, auction market, or broker in the business of receiving such lamb or lamb products for sale on commission for or on behalf of a producer, feeder, or seedstock producer, is required to collect an assessment and transfer the collected assessment on to the subsequent purchaser(s). Such person will not be subject to the assessment and not eligible to participate in the referendum. Any person who processes or causes to be processed lamb or lamb products of that person's own production and markets the processed products will be required to pay an additional assessment and remit the total assessment to the Board. Each first handler who buys or takes possession of lambs from a producer or feeder for slaughter is required to pay an additional assessment and remit the total assessment to the Board.

The Act requires that a referendum to ascertain approval of an Order must be conducted either prior to the Order going into effect or within 3 years after assessments first begin. The industry recommended to USDA that the referendum be conducted no later than 3 years after assessments first begin to determine whether the Order should be continued. Assessments began on July 1, 2002. Thus, USDA is required to conduct a nationwide referendum among persons subject to the assessment by July 1, 2005. The Order will continue if a majority of those persons voting who also represent a majority of the volume of lambs voted in favor of continuing the program. If the continuation of the Order is not approved by eligible persons voting in the referendum, USDA will begin the process of terminating the program.

Eligible persons will be required to complete a ballot in its entirety, vote ''yes'' or ''no'' to continue the program, enter the number of lambs (volume of production) owned and produced; owned and fed; or slaughtered from January 1, 2004, through December 31, 2004, and provide supporting documentation such as a sale receipt or remittance form showing that they engaged in the production, feeding, or slaughter of lambs from January 1, 2004, through December 31, 2004. The person will sign the ballot certifying that they were engaged in the production, feeding, or slaughtering of lambs from January 1, 2004, through December 31, 2004, and that the volume of production voted is true and accurate. To vote volume of production, producers and seedstock producers will enter the total number of live domestic lambs owned and produced during calendar year 2004. Feeders will vote the total number of lambs owned and fed during calendar year 2004. First handlers will vote the total number of lambs slaughtered during calendar year 2004. The volume of production must be determined by the person voting prior to completing the ballot and be verifiable. Those persons whose only share in the proceeds of a sale of lambs is a sales commission, handling fee, or other service fee or the person acquired ownership of the lambs to facilitate the transfer of ownership of such lambs from the seller to a third party and resold such lambs no later than 10 days from the date on which the person acquired ownership are not considered producers, seedstock producers, or feeders and not subject to the assessment. Such person will not be eligible to participate in the referendum. The referendum period will be a 4-week period announced by the Secretary. Ballots may be cast in person, by facsimile, or by mail-in vote at the appropriate county FSA offices. Providing participants an opportunity to vote at the county FSA office will give those persons the greatest opportunity to vote in the referendum.

This final rule establishes procedures USDA will use in conducting the required referendum, as well as future referendums, provided under the Act. This final rule includes definitions, eligibility, certification and voting procedures, reporting results, and disposition of the forms and records. FSA will coordinate State and county FSA roles in conducting the referendum by (1) determining eligibility, (2) canvassing and counting ballots, and (3) reporting the results.

Comments

On October 15, 2004, USDA published in the **Federal Register** (FR 69 61159) a proposed rule on the procedures USDA will use for the conduct of a lamb referendum. The proposed rule provided interest persons the opportunity to submit comments on the procedures. That comment period ended November 4, 2004. USDA received nine comments from the American Lamb Board, other national and State industry organizations, and an interested person in a timely manner. All comments have been posted on

AMS' Web site at *http://www.ams.usda.gov./lsg/mpb/rp-lamb.htm*.

In addition, comments regarding the information collection under this action ended December 14, 2004. USDA did not receive any comments on the information collection.

Discussion of Comments

All comments, with one exception, supported the proposed rule as written. One commenter, however, suggested that the minimum voting age should be 18. The Act and the Order provides that any person subject to the assessment is eligible to participate in the referendum. Consequently, this comment is not adopted.

One commenter opposed any promotion of lamb slaughtering with funds collected from taxpayers. Under the provisions of the Act and Order, costs incurred under the Order are paid by lamb industry representatives through assessments collected under the Lamb Checkoff Program. Consequently, this comment is not adopted.

USDA updated the definition of § 1280.609, Farm Service Agency State Executive Director, to more accurately define the term.

Pursuant to 5 U.S.C. 553, it is found and determined that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register**. This action establishes procedures, which provides lamb producers, feeders, and first handlers the opportunity to vote in the referendum on the Order. By establishing this final rule in a timely manner, USDA will be able to begin the referendum no later than February 2005.

List of Subjects in 7 CFR Part 1280

Administrative practice and procedure, Advertising, Agricultural research, Marketing agreements, Lamb and lamb products, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, it is final that Title 7, part 1280 be amended to read as follows:

PART 1280—LAMB PROMOTION, RESEARCH, AND INFORMATION

■ 1. The authority citation for 7 CFR part 1280 continues to read as follows:

Authority: 7 U.S.C. 7411–7425.

■ 2. In part 1280, a new subpart E (§§ 1280.601–1280.634) is added to read as follows:

Subpart E—Procedures To Request a Referendum

Definitions

Procedures

Subpart E—Procedures To Request a Referendum

Definitions

§ 1280.601 Terms defined.

As used throughout this subpart, unless the context otherwise requires, terms shall have the same meaning as the definition of such terms in subpart A of this part.

§ 1280.602 Administrator, AMS.

Administrator, AMS, means the Administrator of the Agricultural Marketing Service, or any officer or employee of USDA to whom there has been delegated or may be delegated the authority to act in the Administrator's stead.

§ 1280.603 Administrator, FSA.

Administrator, FSA, means the Administrator, of the Farm Service Agency, or any officer or employee of USDA to whom there has been delegated or may be delegated the authority to act in the Administrator's stead.

§ 1280.604 Eligibility.

Eligibility is defined as any person subject to the assessment who during the representative period determined by the Secretary have engaged in the production, feeding, or slaughtering of lambs. Such persons are eligible to participate in the referendum. Those persons whose only share in the proceeds of a sale of lambs is a sales commission, handling fee or other service fee or the person acquired ownership of the lambs to facilitate the transfer of ownership of such lambs from the seller to a third party and resold such lambs no later than 10 days from the date on which the person acquired ownership are not considered are producers, seedstock producers, or feeders and not subject to the assessment. Such persons will not be eligible to participate in the referendum.

§ 1280.605 Farm Service Agency.

Farm Service Agency also referred to as ''FSA'' means the Farm Service Agency of USDA.

§ 1280.606 Farm Service Agency County Committee.

Farm Service Agency County Committee, also referred to as ''FSA County Committee or COC,'' means the group of persons within a county who are elected to act as the Farm Service Agency County Committee.

§ 1280.607 Farm Service Agency County Executive Director.

Farm Service Agency County Executive Director, also referred to as ''CED,'' means the person employed by the FSA County Committee to execute the policies of the FSA County Committee and to be responsible for the day-to-day operation of the FSA county office, or the person acting in such capacity.

§ 1280.608 Farm Service Agency State Committee.

Farm Service Agency State Committee, also referred to as ''FSA State Committee,'' means the group of persons within a State who are appointed by the Secretary to act as the Farm Service Agency State Committee.

§ 1280.609 Farm Service Agency State Executive Director.

Farm Service Agency State Executive Director, Farm Service Agency State Executive Director, also referred to as ''SED,'' means the person within a State who is appointed by the Secretary to be responsible for the day-to-day operation of the FSA State Office, or the person acting in such capacity.

§ 1280.610 Public notice.

Public notice means not later than 30-days before the referendum is conducted, the Secretary shall notify the eligible voters in such manner as determined by the Secretary, of the voting period during which voting in the referendum will occur. The notice shall explain any registration and voting procedures established under § 518 of the Act.

§ 1280.611 Representative period.

Representative period means the period designated by the Secretary pursuant to § 518 of the Act.

§ 1280.612 Volume of production.

(a) For producers and seedstock producers, the term *volume of production* means the total number of live domestic lambs owned and produced during the most recent calendar year.

(b) For feeders, *volume of production* means the total number of lambs owned and fed during the most recent calendar year.

(c) For first handlers, *volume of production* means the total number of lambs slaughtered during the most recent calendar year.

§ 1280.613 Voting period.

The term *voting period* means a 4-week period to be announced by the Secretary for voting the referendum.

Procedures

§ 1280.620 General.

A referendum to determine whether eligible persons favor the continuance of this part shall be carried out in accordance with this subpart.

(a) The referendum will be conducted at county FSA offices.

(b) The Secretary shall determine if at least a majority of those persons voting for approval who also represent a majority of the volume of lambs owned and produced; owned and fed; or slaughtered, favor the continuance of this part.

§ 1280.621 Supervision of the process for conducting a referendum.

The Administrator, AMS, shall be responsible for supervising the process of permitting persons to vote in a referendum in accordance with this subpart.

§ 1280.622 Eligibility.

(a) Any person subject to the assessment who during the representative period determined by the Secretary has engaged in the production, feeding, or slaughtering of lambs is eligible to participate in the referendum. Those persons whose only share in the proceeds of a sale of lambs is a sales commission, handling fee or other service fee or the person acquired ownership of the lambs to facilitate the transfer of ownership of such lambs from the seller to a third party and resold such lambs no later than 10 days from the date on which the person acquired ownership are not considered are producers, seedstock producers, or feeders and not subject to the assessment. Such persons will not be eligible to participate in the referendum.

(b) *Proxy Registration.* (1) Proxy registration is not authorized, except that an officer or employee of a corporate producer, feeder, seedstock producer, or first handler, or any guardian, administrator, executor, or trustee of a person's estate, or an authorized representative of any eligible producer, feeder, seedstock producer, or first handler entity (other than an individual person), such as a corporation or partnership, may vote on behalf of that entity. Further, an individual cannot vote on behalf of another individual (*i.e.,* spouse, sharecrop lease, etc.).

(2) Any individual, who votes on behalf of any producer, feeder, seedstock producer, or first handler entity, shall certify that he or she is authorized by such entity to take such action. Upon request of the county FSA office, the person voting may be required to submit adequate evidence of such authority.

(c) *Joint and group interest.* A group of individuals, such as members of a family, joint tenants, tenants in common, a partnership, owners of community property, or a corporation who engaged in the production, feeding, or slaughtering of lambs during the representative period as a producer, feeder, seedstock producer, or first handler entity shall be entitled to cast only one vote; provided, however, that any individual member of a group who is an eligible person separate from the group may vote separately.

§ 1280.623 Time and place of the referendum.

(a) The opportunity to vote in the referendum shall be provided during a 4-week period beginning and ending on a date determined by the Secretary. Eligible persons shall have the opportunity to vote following the procedures established in this subpart during the normal business hours of each county FSA office.

(b) Persons can determine the location of county FSA offices by contacting the nearest county FSA office, the State FSA office, or through an online search of FSA's Web site at *http://www.fsa.usda.gov/pas/default.asp.*

(c) Each eligible person shall cast a ballot in the county FSA office where FSA maintains the person's administrative farm records. For eligible persons not participating in FSA programs, the opportunity to vote will be provided at the county FSA office serving the county where the person owns or rents land. A person engaged in the production, feeding, slaughtering, of lambs in more than one county will vote in the county FSA office where the person does most of his or her business.

§ 1280.624 Facilities.

Each county FSA office will provide:

(a) a voting place that is well known and readily accessible to persons in the county and that is equipped and arranged so that each person can complete and submit their ballot in secret without coercion, duress, or interference of any sort whatsoever, and

(b) a holding container of sufficient size so arranged that no ballot or supporting documentation can be read or removed without breaking seals on the container.

§ 1280.625 Certification and referendum form ballot form.

Form LS–86 shall be used to vote in the referendum and certify eligibility. Eligible persons will be required to complete a ballot in its entirety, vote ''yes'' or ''no'' to continue the program, enter the number of lambs (volume of production) owned and produced; owned and fed; or slaughtered during a representative period and provide documentation such as a sales receipt or remittance form showing that the person voting was engaged in the production, feeding, or slaughtering of lambs during the representative period. The person or authorized representative shall sign the ballot certifying that they or the entity they represent were engaged in the production, feeding, or slaughtering of lambs during the representative period and that the volume of production voted is true and accurate.

§ 1280.626 Certification and voting procedures.

(a) Each eligible person shall be provided the opportunity to cast a ballot during the voting period announced by the Secretary.

(1) Each eligible person shall be required to complete form LS–86 in its entirety, sign it, and provide evidence that they were engaged in the production, feeding, or slaughtering of lambs during the representative period. The person must legibly place his or her name and, if applicable, the entity

represented, address, county, and telephone number. The person shall sign and certify on form LS–86 that:

(i) The person was engaged in the production, feeding, or slaughtering of lambs during the representative period;

(ii) The person voting on behalf of a corporation or other entity is authorized to do so;

(iii) The person has cast only one vote; and

(iv) The volume of production listed on the ballot is true and accurate.

(2) Only a completed and signed form LS–86 accompanied by supporting documentation showing that the person was engaged in the production, feeding, or slaughter of lambs during the representative period shall be considered a valid vote.

(b) To vote, eligible persons may obtain form LS–86 in-person, by mail, or by facsimile from county FSA offices or through the Internet during the voting period. A completed and signed form LS–86 and supporting documentation, such as a sales receipt or remittance form, must be returned to the appropriate county FSA office where FSA maintains and processes the person's administrative farm records. For a person not participating in FSA programs, the opportunity to vote in a referendum will be provided at the county FSA office serving the county where the person owns or rents land. A person engaged in the production, feeding, or slaughtering of lambs in more than one county will vote in the county FSA office where the person does most of his or her business. Forms obtained via the Internet will be located at *http://www.ams.usda.gov/lsg/mpb/rp-lamb.htm.*

(c) A completed and signed form LS–86 and the supporting documentation may be returned in-person, by mail, or facsimile to the appropriate county FSA office. Form LS–86 and supporting documentation returned in-person or by facsimile, must be received in the appropriate county FSA office prior to the close of the work day on the final day of the voting period to be considered a valid ballot. Form LS–86 and the accompanying documentation returned by mail must be postmarked no later than midnight of the final day of the voting period and must be received in the county FSA office on the 5th business day following the final day of the voting period.

(d) Persons who obtain form LS–86 in-person at the appropriate FSA county office may complete and return it the same day along with the supporting documentation.

§ 1280.627 Canvassing voting ballots.

(a) Canvassing of form LS–86 shall take place at the county FSA offices on the 6th business day following the final day of the voting period. Such canvassing, acting on behalf of the Administrator, AMS, shall be in the presence of at least two members of the county committee. If two or more of the counties have been combined and are served by one county office, the canvassing of the requests shall be conducted by at least one member of the county committee from each county served by the county office. The FSA State committee or the State Executive Director, if authorized by the State Committee, may designate the County Executive Director (CED) and a county or State FSA office employee to canvass the ballots and report the results instead of two members of the county committee when it is determined that the number of eligible voters is so limited that having two members of the county committee present for this function is impractical, and designate the CED and/or another county or State FSA office employee to canvass requests in any emergency situation precluding at least two members of the county committee from being present to carry out the functions required in this section.

(b) Form LS–86 should be canvassed as follows:

(1) *Number of valid ballots.* A person has been declared eligible by FSA to vote by completing form LS–86 in its entirety, signing it, voting volume of production, and providing supporting documentation that shows the person who cast the ballot during the voting period was engaged in the production, feeding, or slaughtering of lambs during the representative period. Such ballot will be considered a valid ballot.

(2) *Number of ineligible ballots.* If FSA cannot determine that a person is eligible based on the submitted documentation or if the person fails to submit the required supporting documentation, the person shall be determined to be ineligible. FSA shall notify ineligible persons in writing as soon as practicable but no later than the 8th business day following the final day of the voting period.

(c) *Appeal.* A person declared to be ineligible by FSA can appeal such decision and provide additional documentation to the FSA county office within 5 business days after the postmark date of the letter of notification of ineligibility. FSA will then make a final decision on the person's eligibility and notify the person of the decision.

(d) *Invalid ballots.* An invalid ballot includes, but is not limited to the following:

(1) Form LS–86 is not signed or all required information has not been provided;

(2) Form LS–86 and supporting documentation returned in-person or by facsimile was not received by close of business on the last business day of the voting period;

(3) Form LS–86 and supporting documentation returned by mail was not postmarked by midnight of the final day of the voting period;

(4) Form LS–86 and supporting documentation returned by mail was not received in the county FSA office by the 5th business day following the final day of the voting period;

(5) Form LS–86 or supporting documentation is mutilated or marked in such a way that any required information on the form is illegible; or

(6) Form LS–86 and supporting documentation not returned to the appropriate county FSA office.

§ 1280.628 Counting ballots.

(a) Form LS–86 shall be counted by county FSA offices on the same day as the ballots are canvassed if there are no ineligibility determinations to resolve. For those county FSA offices that do have ineligibility determinations, the requests shall be counted no later than the 14th business day following the final day of the voting period.

(b) Ballots shall be counted as follows:

(1) Number of valid ballots cast;

(2) Number of persons favoring the Order;

(3) Number of persons not favoring the Order;

(4) Volume of production voted favoring the continuation of the Order;

(5) Volume of production voted not favoring the continuation of the Order; and

(6) Number of invalid ballots.

§ 1280.629 FSA county office report.

The county FSA office report shall be certified as accurate and complete by the CED or designee, acting on behalf of the Administrator, AMS, as soon as may be reasonably possible, but in no event shall submit no later than 18th business day following the final day of the specified period. Each county FSA office shall transmit the results in its county to the FSA State office. The results in each county may be made available to the public upon notification by the Administrator, FSA, that the final results have been released by the Secretary. A copy of the report shall be posted for 30 calendar days following the date of notification by the

Administrator, FSA, in the county FSA office in a conspicuous place accessible to the public. One copy shall be kept on file in the county FSA office for a period of at least 12 months after notification by FSA that the final results have been released by the Secretary.

§ 1280.630 FSA State office report.

Each FSA State office shall transmit to the Administrator, FSA, as soon as possible, but in no event later than the 20th business day following the final day of the voting period, a report summarizing the data contained in each of the reports from the county FSA offices. One copy of the State summary shall be filed for a period of not less than 12 months after the results have been released and available for public inspection after the results have been released.

§ 1280.631 Results of the referendum.

(a) The Administrator, FSA, shall submit to the Administrator, AMS, the reports from all State FSA offices. The Administrator, AMS, shall tabulate the results of the ballots. USDA will issue an official press release announcing the results of referendum and publish the same results in the **Federal Register**. In addition, USDA will post the official results at the following website: *http://www.ams.usda.gov/lsg/mpb/rp-lamb.htm.* Subsequently, State reports and related papers shall be available for public inspection upon request during normal business hours in the Marketing Programs Branch; Livestock and Seed Program, AMS, USDA, Room 2638–S; STOP 0251; 1400 Independence Avenue, SW., Washington, DC.

(b) If the Secretary deems necessary, a State report or county report shall be reexamined and checked by such persons who may be designated by the Secretary.

§ 1280.632 Disposition of records.

Each FSA CED will place in sealed containers marked with the identification of the ''Lamb Checkoff Program Referendum,'' all of the form LS–86's along with the accompanying documentation and county summaries. Such records will be placed in a secure location under the custody of FSA CED for a period of not less than 12 months after the date of notification by the Administrator, FSA, that the final results have been announced by the Secretary. If the county FSA office receives no notice to the contrary from the Administrator, FSA, by the end of the 12 month period as described above, the CED or designee shall destroy the records.

§ 1280.633 Instructions and forms.

The Administrator, AMS, is authorized to prescribe additional instructions and forms not inconsistent with the provisions of this subpart.

§ 1280.634 Confidentiality.

The names of persons voting in the referendum and ballots shall be confidential and the contents of the ballots shall not be divulged except as the Secretary may direct. The public may witness the opening of the ballot box and the counting of the votes but may not interfere with the process.

Dated: December 20, 2004.

A.J. Yates,

Administrator, Agricultural Marketing Service.

[FR Doc. 04–28166 Filed 12–21–04; 11:38 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[No. LS–04–12]

Notice of Opportunity to Participate in the Lamb Promotion, Research, and Information Program Referendum

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice.

SUMMARY: The Agricultural Marketing Service (AMS) is announcing that a referendum will be conducted under the Lamb Promotion, Research, and Information Order (Order) to determine whether those persons voting favor the continuance of the Order.

DATES: This referendum will be conducted during a 4-week period beginning on January 31, 2005, and ending on February 28, 2005. To be eligible to participate in the referendum, persons must certify and provide supporting documentation that shows them, or the entity they are authorized to represent, have been engaged in the production, feeding, or slaughter of lambs between January 1, 2004, and December 31, 2004.

Form LS–86, Lamb Promotion, Research, and Information Referendum, may be obtained by mail, fax, or in person from the Farm Service Agency (FSA) county offices from January 1, 2005, through February 28, 2005. Form LS–86 may also be obtained via the Internet at: *http://www.ams.usda.gov/lsg/mpb/rp-lamb.htm* during the same time period. Completed forms and supporting documentation must be returned to the appropriate county FSA offices by fax or in person no later than close of business February 28, 2005, or if returned by mail must be postmarked by midnight February 28, 2005, and received in the county FSA office by close of business on March 7, 2005.

FOR FURTHER INFORMATION CONTACT: Kenneth R. Payne, Chief; Marketing Programs Branch, Livestock and Seed Program; Agricultural Marketing Service (AMS), USDA, Room 2638–S; STOP 0251; 1400 Independence Avenue, SW.; Washington, DC. 20250–0251, telephone number 202/720–1115, fax number 202/720–1125, or by e-mail at: *Kenneth.Payne@usda.gov* or Linda Cronin; DAFO, USDA, FSA; STOP 0542; 1400 Independence Avenue, SW.; Washington, DC 20250–0542, telephone number 202/690–8034, fax number 202/720–5900, or by e-mail at: *Linda.Cronin@usda.gov.*

SUPPLEMENTARY INFORMATION: Pursuant to the Commodity Promotion, Research, and Information Act of 1996 (Act) (7 U.S.C. 7411–7425), it is hereby directed that a referendum be conducted to ascertain whether continuance of the Order is favored by those persons who have been engaged in the production, feeding, or slaughtering of lamb from January 1, 2004, through December 31, 2004.

The representative period for establishing voter eligibility for the referendum shall be the period from January 1, 2004, through December 31, 2004. Persons who were engaged in the production, feeding, or slaughtering of lambs and who provide documentation, such as a sales receipt or remittance form, showing that they were engaged in the production, feeding, or slaughter of lambs from January 1, 2004, through December 31, 2004, are eligible to vote.

Eligible voters will be provided the opportunity to vote at the county FSA office where FSA maintains and processes the eligible voter's administrative farm records. For the eligible voter not participating in FSA programs, the opportunity to vote will be provided at the FSA office serving the county where the person owns or rents land. Participation in the referendum is not mandatory.

Elsewhere in this separate part of the **Federal Register**, USDA is publishing a final rule that sets forth procedures that will be used in conducting the referendum. The final rule includes definitions, provisions for supervising the referendum process, eligibility, procedures for obtaining and completing the form LS–86, required documentation showing that the person was engaged in the production, feeding, or slaughter of lambs from January 1, 2004, through December 31, 2004, where the referendum will be conducted, counting and reporting results, and disposition of the forms and records. Since the referendum will be conducted at the county FSA offices, FSA employees will assist AMS by determining eligibility, counting requests, and reporting results.

Pursuant to the Act, USDA is conducting the required referendum from January 31, 2005, through February 28, 2005.

Form LS–86 may be requested in person, by mail, or by facsimile from January 31, 2005 through February 28, 2005. Form LS–86 may also be obtained via the Internet at: *http://www.ams.usda.gov/lsg/mpb/rp-lamb.htm* during the same 4-week period. Eligible voters would vote at the FSA office where FSA maintains and processes the person's, corporation's, or other entity's administrative farm records. For the person, corporation, or other entity eligible to vote that does not participate in FSA programs, the opportunity to vote would be provided at the FSA office serving the county where the person, corporation, or other entity owns or rents land.

Voters can determine the location of county FSA offices by contacting (1) the nearest FSA office, (2) the State FSA office, or (3) through an online search of FSA's website at: *http://www.fsa.usda.gov/pas/default.asp.* From the options available on this Web site select ''Your local office,'' click on your State, and click on the map to select a county.

Form LS–86 and supporting documentation may be returned in person, by mail, or facsimile to the appropriate county FSA office. Form LS–86, and accompanying documentation returned in person or by facsimile, must be received in the appropriate FSA office prior to the close of business on February 28, 2005. Form LS–86 and accompanying documentation returned by mail must be postmarked no later than midnight of February 28, 2005, and received in the county office by close of business on March 7, 2005.

In accordance with Paperwork Reduction Act (44 U.S.C. Chapter 35), the information collection requirements have been approved under OMB number 0581–0227.

Authority: 7 U.S.C. 7411–7425.

Dated: December 20, 2004.

A.J. Yates,

Administrator, Agricultural Marketing Service.

[FR Doc. 04–28165 Filed 12–21–04; 11:38 am]

BILLING CODE 3410–02–P

Federal Register

Monday,
December 27, 2004

Part VI

Department of Veterans Affairs

38 CFR Part 5

Elections of Improved Pension; Old-Law and Section 306 Pension; Proposed Rule

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 5

RIN 2900–AL83

Elections of Improved Pension; Old-Law and Section 306 Pension

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to reorganize and rewrite in plain language its regulations relating to its ''old-law'' and ''section 306'' pension programs, as well as its regulations concerning elections of improved pension. These revisions are proposed as part of VA's reorganization of all of its compensation and pension regulations in a logical, claimant-focused, and user-friendly format. The intended effect of the proposed revisions is to assist readers in locating and understanding these regulations.

DATES: Comments must be received by VA on or before February 25, 2005.

ADDRESSES: Written comments may be submitted by: mail or hand-delivery to Director, Regulations Management (00REG1), Department of Veterans Affairs, 810 Vermont Avenue, NW., Room 1068, Washington, DC 20420; fax to (202) 273–9026; e-mail to *VAregulations@mail.va.gov*; or, through *http://www.Regulations.gov*. Comments should indicate that they are submitted in response to ''RIN 2900–AL83.'' All comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 273–9515 for an appointment.

FOR FURTHER INFORMATION CONTACT: Bill Russo, Chief, Regulation Rewrite Project (00REG2), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 273–9515.

SUPPLEMENTARY INFORMATION: The Secretary of Veterans Affairs has established an Office of Regulation Policy and Management (ORPM) to provide centralized management and coordination of VA's rulemaking process. One of the major functions of this office is to oversee a Regulation Rewrite Project (the Project) to improve the clarity and consistency of existing VA regulations. The Project responds to a recommendation made in the October 2001 ''VA Claims Processing Task Force: Report to the Secretary of Veterans Affairs.'' The Task Force recommended that the compensation and pension regulations be rewritten and reorganized in order to improve VA's claims adjudication process. Therefore, the Project began its efforts by reviewing, reorganizing and redrafting the regulations in 38 CFR part 3 governing the compensation and pension (C&P) program of the Veterans Benefits Administration (VBA). These regulations are among the most difficult VA regulations for readers to understand and apply.

Once rewritten, the proposed regulations will be published in several portions for public review and comment. This is one such portion. It includes proposed regulations regarding elections of Improved pension benefits as well as regulations concerning two prior pension programs, Old-Law pension and Section 306 pension.

Outline

Overview of New Part 5 Organization

We plan to remove the compensation and pension benefit regulations from 38 CFR part 3 and relocate them in new part 5. We also plan to reorganize the regulations so that all provisions governing a specific benefit are located in the same subpart, with general provisions pertaining to all compensation and pension benefits also grouped together. We believe this reorganization will allow claimants and their representatives, as well as VA personnel, to find information relating to a specific benefit more quickly.

The first major subdivision would be ''Subpart A—General Provisions.'' It would include information regarding the scope of the regulations in new part 5, delegations of authority, general definitions, and general policy provisions for this part.

''Subpart B—Service Requirements for Veterans'' would include information regarding a veteran's military service, including the minimum service requirement, types of service, periods of war, and service evidence requirements. This subpart was published as proposed on January 30, 2004. *See* 69 FR 4820.

''Subpart C—Adjudicative Process, General'' would inform readers about types of claims and filing procedures, VA's duties, rights and responsibilities of claimants, general evidence requirements, and general effective dates for new awards, as well as revision of decisions and protection of VA ratings.

''Subpart D—Dependents and Survivors of Veterans'' would inform readers how VA determines whether an individual is a dependent or a survivor of a veteran. It would also provide the evidence requirements for these determinations.

''Subpart E—Claims for Service Connection and Disability Compensation'' would define service-connected compensation, including direct and secondary service connection. This subpart would inform readers how VA determines entitlement to service connection. The subpart would also contain those provisions governing presumptions related to service connection, rating principles, and effective dates, as well as several special ratings. This subpart will be published as three separate Notices of Proposed Rulemaking (NPRMs) due to its size. The first, concerning presumptions related to service

connection, was published on July 27, 2004. *See* 69 FR 44614.

''Subpart F—Nonservice-Connected Disability Pensions and Death Pensions'' would include information regarding the three types of nonservice-connected pension: Improved pension, Old-Law pension, and Section 306 pension. This subpart would also include those provisions that state how to establish entitlement to Improved pension, and the effective dates governing each pension. The portion concerning Old-Law and Section 306 pension and elections of Improved pension is the subject of this document. A subsequent NPRM will cover Improved pension.

''Subpart G—Dependency and Indemnity Compensation, Death Compensation, Accrued Benefits, and Special Rules Applicable Upon Death of a Beneficiary'' would contain regulations governing claims for dependency and indemnity compensation (DIC); death compensation; accrued benefits; benefits awarded, but unpaid at death; and various special rules that apply to the disposition of VA benefits, or proceeds of VA benefits, when a beneficiary dies. This subpart would also include related definitions, effective-date rules, and rate-of-payment rules. This subpart will be published as two separate NPRMs due to its size. The portion concerning accrued benefits, special rules applicable upon the death of a beneficiary, and several effective date rules, was published as proposed on October 1, 2004. *See* 69 FR 59072. The portion concerning DIC benefits and general provisions relating to proof of death and service-connected cause of death will be the subject of a separate NPRM.

''Subpart H—Special and Ancillary Benefits for Veterans, Dependents, and Survivors'' would pertain to special and ancillary benefits, including benefits for children with various birth defects.

''Subpart I—Benefits for Certain Filipino Veterans and Survivors'' would pertain to the various benefits available to Filipino veterans.

''Subpart J—Burial Benefits'' would pertain to burial allowances.

''Subpart K—Matters Affecting Receipt of Benefits'' would contain provisions regarding bars to benefits, forfeiture of benefits, and renouncement of benefits.

''Subpart L—Payments and Adjustments to Payments'' would include general rate-setting rules, several adjustment and resumption regulations, and election-of-benefit rules.

The final subpart, ''Subpart M—Apportionments and Payments to Fiduciaries or Incarcerated Beneficiaries'' would include regulations governing apportionments, benefits for incarcerated beneficiaries, and guardianship.

Some of the regulations in this NPRM cross-reference other compensation and pension regulations. If those regulations have been published in this or earlier NPRMs for the Project, we cite the proposed part 5 section. We also include, in the relevant portion of the Supplementary Information, the **Federal Register** page where a proposed part 5 section published in an earlier NPRM may be found. However, where a regulation proposed in this NPRM would cross-reference a proposed part 5 regulation that has not yet been published, we cite to the current part 3 regulation that deals with the same subject matter. The current part 3 section we cite may differ from its eventual part 5 replacement in some respects, but we believe this method will assist readers in understanding these proposed regulations where no part 5 replacement has yet been published. If there is no part 3 counterpart to a proposed part 5 regulation that has not yet been published, we have inserted ''[regulation that will be published in a future Notice of Proposed Rulemaking]'' where the part 5 regulation citation would be placed.

Because of its large size, proposed part 5 will be published in a number of NPRMs, such as this one. VA will not adopt any portion of part 5 as final until all of the NPRMs have been published for public comment.

In connection with this rulemaking, VA will accept comments relating to a prior rulemaking issued as part of the Project, if the matter being commented on relates to both NPRMs. VA will provide a separate opportunity for public comment on each segment of the proposed part 5 regulations before adopting a final version of part 5.

Overview of Proposed Subpart F Organization

This NPRM proposes regulations governing elections of Improved pension and the requirements for maintaining entitlement to old-law or section 306 pension. These regulations would be contained in proposed subpart F of new 38 CFR part 5. Although these regulations have been substantially restructured and rewritten for greater clarity and ease of use, most of the basic concepts contained in these proposed regulations are the same as in their existing counterparts in 38 CFR part 3. In a future NPRM, we will propose regulations concerning the Improved pension program.

Table Comparing Current Part 3 Rules With Proposed Part 5 Rules

The following table shows the relationship between the current regulations in part 3 and those proposed or redesignated regulations contained in this NPRM:

Proposed part 5 section or paragraph	Based in whole or in part on 38 CFR part 3 section or paragraph (or ''new'')
5.460	3.1(u), (v), (x)
5.461(a) and (b)	3.711
5.461(b)(1) through (b)(3).	New
5.461(c)	3.711
5.461(d)	3.960(a)
5.462	3.712(a)
5.463	3.713(a)
5.464	3.700(a)(4)
5.470(a)	3.960(b), 3.252(a), (b)
5.470(b)	3.960(d)
5.470(c)	3.960(c)
5.471	3.28
5.472(a)	3.262(b)
5.472(b)(1) and (2)	3.252(c); 3.262(a)
5.472(b)(2)(i) and (ii)	3.262(h)
5.472(b)(3)	3.260(g)
5.472(b)(4)	Introduction to 3.260, 3.660(a)(4)
5.472(c)(1)	3.262(a)(2), (3)
5.472(c)(2)	3.262(j)(4)
5.472(c)(3)	3.261(a)(22), 3.262(a)(1)
5.472(d)(1) and (d)(2)	3.262(k)(1), (k)(2)
5.472(d)(3)	3.262(a)
5.472(d)(4)	3.262(k)(1)
5.472(d)(5)	3.262(k)(3)
5.472(d)(6)	3.262(k)(4)
5.472(d)(7)	3.262(k)(5)
5.472(e)	3.261(a)(20)
5.472(f)(1)	3.262(c)
5.472(f)(2)	3.262(r)
5.472(f)(3)	3.261(a)(12)
5.472(f)(4)	3.261(a)(13)
5.472(f)(5)	3.261(a)(31)
5.472(f)(6)	3.262(t), (t)(2)
5.472(f)(7)	3.261(a)(20)
5.472(f)(8)	3.261(a)(7)
5.472(f)(9)	3.262(a)(2)
5.472(f)(10)	3.261(a)(26)
5.472(f)(11)	3.261(a)(22)
5.472(f)(12)	3.262(e), (e)(1), (e)(2), (f), (g), (i)(2), (j)(1), (j)(2), (j)(3)
5.472(f)(13)	New
5.472(g)(1)	3.262(d), (f)
5.472(g)(2)	3.262(f)
5.472(g)(3)	3.262(k)(1)
5.472(h)	3.262(d)
5.473(a)	3.262(b)(2)
5.473(b)(1)	New
5.473(b)(2)	3.262(b)(2)
5.473(c)	3.252(e)
5.473(d)	3.261(a)(4)
5.474(a)	3.960(a)
5.474(b)	3.262(l), 3.262(l)(1), (l)(2), (l)(3)
5.474(c)	3.262(n), (p)

Proposed part 5 section or paragraph	Based in whole or in part on 38 CFR part 3 section or paragraph (or ''new'')
5.474(d)	3.262(k)(6)
5.475(a)	3.260(a), (f)
5.475(b)	3.260(f), 3.252(e)(4)
5.475(c)	3.252(d)
5.476	3.263
5.477(a)	3.660(a)(2)
5.477(b)	3.500, 3.501, 3.502, 3.503
5.478(a)	3.260(b)
5.478(b)	3.660(b)(1)
5.478(c)	3.960(d)

Readers who use this table to compare existing regulatory provisions with the proposed provisions, and who observe a substantive difference between them, should consult the text that appears later in this document for an explanation of significant changes in each regulation. Not every paragraph of every current part 3 section affected by these proposed regulations is accounted for in the table. In some instances, other portions of the part 3 sections that are contained in these proposed regulations will appear in subparts of part 5 that are being published separately for public comment. For example, a reader might find a reference to paragraph (a) of a part 3 section in the table, but no reference to paragraph (b) of that section because paragraph (b) will be addressed in a separate NPRM. The table also does not include material from the current sections that will be removed from part 3 and not carried forward to part 5. A listing of material VA proposes to remove from part 3 appears later in this document.

Background of Prior Pension Programs

''Old-law pension'' refers to the nonservice-connected disability and death pension programs that were available to claimants before July 1, 1960. These programs were superseded by the ''Veterans' Pension Act of 1959.'' Public Law 86–211, 73 Stat. 432. However, section 9(b) of that Act protected the right of people receiving pension under the ''old law'' programs to continue receiving pension under the laws in effect on June 30, 1960.

''Section 306'' pension refers to the nonservice-connected disability and death pension programs that were available to claimants on or after July 1, 1960, and through December 31, 1978. Sometimes also referred to as ''86–211 pension,'' or ''306 pension,'' Section 306 pension arose out of Public Law 86–211. VA has adopted the name ''Section 306'' to refer to these programs because it was section 306 of the ''Veterans' and Survivors' Pension Improvement Act of 1978,'' Public Law 95–588, 92 Stat. 2508, that grandfathered rates paid under both section 306 and old-law pension.

Sections 306(a)(1) and (b)(2) of Public Law 95–588 provide that any person entitled to receive VA pension under the prior pension laws as in effect on December 31, 1978, can elect to receive Improved pension instead. For any individual who is eligible to make an election but does not do so, sections 306(a)(2) and (b)(3) grandfather in the current rates paid by providing that:

> [Such] person * * * shall continue to receive pension at the monthly rate being paid to such person on December 31, 1978, subject to all provisions of law applicable to basic eligibility for and payment of pension under [such person's pension program], as in effect on December 31, 1978, [subject to income limits specified for that pension program].

Public Law 95–588, § 306(a)(2). A virtually identical grandfather clause is contained in section 306(b)(3).

Sections 306(a)(3) and (b)(4) go on to provide for automatic increases in the annual income limits and the spousal income exclusion by the same percentage as the automatic cost-of-living adjustments under the Improved pension program.

A claimant cannot establish new entitlement to either Section 306 or Old-Law pension; once a beneficiary loses entitlement under either of these programs, the only pension program for which VA may consider entitlement is Improved pension under Public Law 95–588.

Before 1998, VA required recipients of Section 306 or Old-Law pension to submit annual eligibility verification reports (EVRs) to VA under current 38 CFR 3.256. However, VA no longer requires annual EVRs from this group of beneficiaries. According to VA's Office of Policy, Planning, and Preparedness, as of January 2004, there were 179 veterans receiving Old-Law disability pension, 618 surviving spouses and/or children receiving Old-Law death pension, 13,523 veterans receiving Section 306 disability pension, and 52,832 surviving spouses and/or children receiving Section 306 death pension.

Overview of Proposed Regulation Changes

Several current regulations from which these proposed regulations are derived apply to more than one need-based program in effect before January 1, 1979. These programs include Old-Law pension, Section 306 pension, and parents' DIC, as well as regulations for establishing the dependency of parents. Because of the benefit-based structure of proposed part 5, we propose to divide these current part 3 regulations into separate part 5 regulations, each addressing a different type of benefit. This NPRM pertains to Old-Law and Section 306 pension and not to parents' DIC or establishing the dependency of parents. Future NPRMs will address these current part 3 regulations as they pertain to parents' DIC and establishing the dependency of parents.

Content of Proposed Regulations

Choosing Improved Pension Over Certain Other VA Pension Programs: Veterans and Survivors

5.460 Definitions of Certain VA Pension Programs

Proposed § 5.460 is based on current § 3.1(u), (v), and (x). The current regulation describes various types of VA pensions in terms of when the pensions were ''in effect.'' Paragraphs (a) and (b) of proposed § 5.460 amend current § 3.1(u) and (v) to describe the VA pensions in terms of the time periods during which those pensions were ''available to new claimants.'' We believe this is clearer because these pensions are still ''in effect'' in the limited sense that beneficiaries continue to receive them.

Proposed paragraph (c) defines ''Spanish-American War death pension'' instead of ''service pension,'' which is defined in § 3.1(x), because to our knowledge there are no surviving veterans of the Spanish-American War.

5.461 Electing Improved Pension Instead of Old-Law or Section 306 Pension

Proposed § 5.461 is based on current §§ 3.711 and 3.960(a). Proposed § 5.461 includes a parenthetical reference to the word ''choose'' immediately after the more technical term ''elect'' in the heading to proposed paragraph (a) and the first time that the word ''elect'' appears in the regulation text. The parenthetical reference provides a plain-language synonym for the technical term, ''elect.''

The first sentence of current § 3.711 states that individuals who are eligible to elect Improved pension may do so ''under the provisions of 38 U.S.C. 1521, 1541, or 1542 as in effect on January 1, 1979.'' We propose to remove this phrase. Instead, proposed § 5.461 simply refers to Improved pension. We believe that removing the phrase makes the proposed regulation clearer. We note that the regulations pertaining to Improved pension would immediately precede the regulations pertaining to

elections of Improved pension in new part 5.

Current § 3.711 provides that unless the provisions of current § 3.714 apply, an election of Improved pension is final when the payee or his or her fiduciary negotiates one check for this benefit. We propose to remove this reference to § 3.714 because we are proposing to remove § 3.714. The proposed removal of § 3.714 is described later in this NPRM. We propose to add three circumstances under which an election may be canceled. All of these circumstances are matters of longstanding VA policy, are reasonable, and are helpful to VA beneficiaries.

First, because the vast majority of VA beneficiaries now receive benefits by direct deposit and the current regulation that states when an election becomes final is based on negotiation of a check, proposed paragraph (b)(1) states that beneficiaries who receive benefits by direct deposit may cancel an election of Improved pension if the beneficiary informs VA of a desire to cancel the election before the financial institution receives the second direct deposit payment.

Second, proposed paragraph (b)(2) states that if VA later determines that the beneficiary was incompetent when he or she elected Improved pension, the election can be canceled if the beneficiary or his or her guardian cancels the election within one year after the date the election became effective.

Finally, proposed paragraph (b)(3) states that a beneficiary can cancel an election within one year after the effective date of the election if he or she elected Improved pension based on erroneous information that VA provided. However, VA must determine, based on the same evidence of record, that it provided the beneficiary with erroneous information. One example of this rule's application would be if VA mistakenly informed the beneficiary that he or she would be entitled to a higher rate upon election of Improved pension and later VA determines that this was not the case, based on the same evidence of record at the time VA mistakenly informed the beneficiary of his or her entitlement to a higher rate.

Proposed § 5.461(d) is based on § 3.960(a), which currently provides that beneficiaries who do not elect Improved pension will continue to receive section 306 or old-law pension at the rate payable on December 31, 1978, unless that rate must be reduced or discontinued as provided in § 3.960(b) and (c). Current paragraph § 3.960(a) is incomplete in implying that the reasons provided in paragraphs (b) and (c) are the only situations in which a Section 306 pension or Old Law pension rate might be reduced. Current § 3.551, for example, provides for reductions when certain beneficiaries are hospitalized at VA expense. Therefore, proposed § 5.461(d) states that in the absence of an election, the December 31, 1978, rate will continue ''unless that rate must be reduced or discontinued under § 5.470 or another regulation in this part.''

5.462 Right of Surviving Spouses Receiving Spanish-American War Death Pension to Elect Improved Death Pension

Proposed § 5.462 is derived from current § 3.712(a). Proposed § 5.462 states that the regulations governing finality of election under proposed § 5.461(b) also apply to surviving spouse beneficiaries of Spanish-American War death pension who elect Improved death pension. This is longstanding VA policy. Proposed § 5.461(d) does not apply to surviving spouses of Spanish-American War veterans because Spanish-American War death pension is not based on income or net worth but on the veteran's service only. The proposed regulation states that these surviving spouses who do not elect Improved pension will continue to receive Spanish-American War death pension.

We propose to remove the statutory references to 38 U.S.C. 1536 and 1541, and instead refer to Spanish-American War death pension and Improved death pension. We believe that removing these statutory references makes the regulation easier to understand.

5.463 Effective Dates of Improved Pension Elections

Proposed § 5.463 is derived from current § 3.713(a) and states that an election of Improved pension will be effective on the date that VA receives it.

5.464 Multiple Pension Awards Not Payable

Proposed § 5.464 is derived from § 3.700(a)(4) without any substantive changes.

Continuing Entitlement to Old-Law or Section 306 Pension: Veterans and Survivors

5.470 Reasons for Discontinuing or Reducing Section 306 or Old-Law Pension

Proposed § 5.470 is derived from current § 3.960(b) through (d). We propose to replace the current word ''terminate'' and all its iterations with the word ''discontinue'' and all its iterations. Throughout all of part 5, the Project proposes to use the word ''discontinue'' instead of ''terminate'' in reference to ending VA benefits because we believe the word ''terminate'' has an adversarial connotation. While one could argue that the word ''terminate'' better describes the finality of losing entitlement to prior pension than the word ''discontinue,'' we wish to remain consistent in our terminology to the extent possible. More significantly, we note that the word ''discontinuance'' in reference to ending a beneficiary's entitlement is statutory. *See* 38 U.S.C. 5112.

Proposed § 5.470(c), based on current § 3.960(c), states that VA will reduce pension based on the loss of a dependent if the dependent was established before January 1, 1979. The regulation need only cover dependents established before that date because section 306 and old-law pension rates are based on calendar year 1978 dependency and income. Pension rates under these programs do not increase when a dependent is established on or after January 1, 1979. Proposed § 5.470(c) clarifies that reductions due to the loss of a dependent are final and such reduced rates do not increase.

5.471 Annual Income Limits and Rates for Section 306 and Old-Law Pension

The proposed regulation, § 5.471, is derived from current § 3.28.

Proposed paragraph (a) informs readers that annual income limits as well as historical pension rates are available on VA's Web site, *http://www.VA.gov*.

Rather than referring to increasing annual income limits ''by reason of the provisions of 38 U.S.C. 5312,'' as current § 3.28 does, proposed § 5.471(b) refers instead to the cost-of-living increase in Social Security benefit amounts. We believe this reference is more familiar to readers and incorporates the provisions of 38 U.S.C. 5312. We note that current § 3.27 refers to the Social Security cost-of-living increase rather than to 38 U.S.C. 5312.

5.472 Evaluation of Income for Section 306 and Old-Law Pension

Current §§ 3.261 and 3.262 provide the regulatory framework VA uses to determine how to calculate income for purposes of section 306 pension, old-law pension, dependency of a parent, and parents' DIC. Because those sections deal with the evaluation of income in different contexts, they are lengthy and complex. As a result, they can be difficult to understand and use. We propose to divide the subject matter addressed by current §§ 3.261 and 3.262 into separate regulations pertaining to these three subjects—dependency of a

parent, parents' DIC, and section 306 and old-law pension. Because income determinations for section 306 and old-law pension are similar in many respects, we propose to continue to combine the regulations for these programs. Proposed § 5.472 deals only with evaluation of income for section 306 and old-law pension. Income regulations for dependency of a parent and parents' DIC will be addressed in other NPRMs.

Proposed § 5.472(b) states the basic rule that VA must count all payments of any kind from any source in determining income. Beginning with this basic rule permits simplification of the proposed regulation because the all-inclusive nature of the basic rule eliminates the need to catalog types of countable income. All income counts unless there is a specific exclusion. Therefore, we propose to remove the first sentence of current § 3.262(j)(2). A discussion of our proposed removal of current § 3.261 and additional removals from § 3.262 are later in this NPRM under ''Explanation of Additional Proposed Removals from Part 3.''

Proposed § 5.472(b)(3) clarifies that VA rounds down after subtracting deductible expenses from countable income.

Proposed § 5.472(b)(4) incorporates the introductory language of current § 3.260, but clarifies that although VA computes income for the year of receipt, VA does not discontinue benefits based on income that exceeds the income limit until the beginning of the following calendar year.

While VA counts all income except where there is specific authority to exclude it, VA permits deductions from countable income in some instances. That is, the amount of income ultimately counted is the difference between income and certain deductible expenses directly associated with that income. Proposed paragraph (c) lists permitted deductions from particular income sources. Deductions from all income sources for section 306 pension purposes are contained in a separate regulation, proposed § 5.474.

Proposed § 5.472(c)(1) continues a rule in current § 3.262(a)(2) that permits the deduction of expenses incident to the operation of businesses and professions from income from those sources. We propose to clarify that ''business'' includes the operation of a farm and transactions involving investment property. Because of this definitional change, it is only necessary to state in § 5.472(c)(1) that losses sustained in operating a business or profession may not be deducted from income from any other source. This is consistent with the rule in current § 3.262(a)(3) that states that ''[a] loss sustained in operating a business, profession, or farm or from investments may not be deducted from income derived from any other source.'' Note also that current § 3.262(a)(3) implies that investment income is counted and that current § 3.262(k)(5) provides, with respect to section 306 pension, that profit from the sale of nonbusiness property is not counted. With respect to investments, VA only counts income when the investment property is sold and does not constantly adjust income based on increases or decreases in the market value of investment property due to market fluctuations. Therefore, VA essentially already treats investment transactions as business transactions.

Proposed § 5.472(c)(2) continues a provision in current § 3.262(j)(4) that permits deduction of related medical, legal, or other expenses from sums recovered under disability, accident, or health insurance. Of course, the same expenses cannot be deducted twice. Therefore, we propose to state in § 5.472(c)(2) that if medical expenses are deducted under that paragraph, they cannot be deducted as unusual medical expenses under § 5.474.

Proposed § 5.472(d) provides the rules VA uses to determine whether income from property is the income of a pension beneficiary (or a veteran's spouse for Section 306 pension purposes). Property ownership is an important indicator of the right to income from that property, but it is not always controlling. In keeping with longstanding VA practice, we propose to state in paragraph (d)(3) that if a beneficiary transfers ownership of income-producing property to another person or legal entity, but retains the right to that income, the income will be counted.

Current § 3.262(k)(1) provides, in part, that ''if property is owned jointly each person will be considered as owning a proportionate share.'' The claimant's share of property held in partnership will be determined on the facts found.'' Current § 3.262(k)(2) provides, in part, that the claimant's share of ''[i]ncome received from real or personal property * * * will be determined in proportion to his right according to the rules of ownership.'' We propose to combine and simplify these provisions in proposed § 5.472(d)(4) by stating: ''[w]here a pension beneficiary owns property jointly with others, including partnership property, each person will be considered as receiving an equal share of the income from that property in the absence of evidence showing otherwise.'' (Pension beneficiaries may submit evidence showing that they receive a greater or lesser share of the income.) We believe this will be much easier for beneficiaries to understand.

Proposed paragraph (d)(5), based on applicable portions of current § 3.262(k)(3) and (4), provides an exclusion for an old-law pension beneficiary's net profit from the sale of a principal residence when that profit is used to purchase another principal residence within specified time constraints. Current § 3.262(k)(3), provides in part:

> In determining net profit from the sale of property owned prior to the date of entitlement, the value at the date of entitlement will be considered in relation to the selling price. Where payments are received in installments, payments will not be considered income until the claimant has received amounts equal to the value of the property at the date of entitlement.

Because, under the current regulation, the basis for calculating net profit on the sale of a residence is only the value at the date of entitlement if the pension beneficiary owned the property before the date he or she became entitled to pension, the basis for calculating the net profit on the sale of a residence acquired after the date of entitlement would be its cost. We propose to clarify that in the installment sale provision set out in proposed § 5.472(d)(5)(iii).

Proposed § 5.472(e) is an exception to our general guideline that we list only exclusions and not income that counts. Because there are many different VA benefits, most of which are excluded for prior pension purposes, we believe it would be simpler in this instance to list the VA benefits that count rather than those that don't.

Although VA insurance payments are excluded from income under proposed § 5.472(e) because they may be considered VA benefits, proposed paragraph (f)(7) specifically provides that payments under policies of Servicemembers' Group Life Insurance, United States Government Life Insurance, and National Service Life Insurance do not count as income in order to make sure that it is clear that these payments are not considered income for VA purposes.

Most of the income exclusions that apply to both Section 306 and Old-Law pension are listed in proposed § 5.472(f). In proposed paragraph (f)(3), we propose to change the description from ''six-months' death gratuity'' as it is in current § 3.261(a)(12), to ''death gratuity payments under 10 U.S.C. 1475 through 1480.'' The phrase ''six-months' death gratuity'' is obsolete. Although the gratuity consisted of six-months' pay when Congress originally authorized VA

to pay this benefit (*see* Public Law 66–99, 41 Stat. 367 (1919)), that is no longer the case. Over the years, these death gratuity payments have evolved into a fixed sum, rather than an amount equal to six-months' pay. *See* 10 U.S.C. 1478.

Current § 3.261(a)(7) states that VA will not count as income, ''Rental value of property owned and resided in by claimant.'' The intent of the regulation is to make it plain that VA will not impute a rental value to a pension beneficiary's own property and count that value as income. However, if a beneficiary resides in a duplex, for example, VA would count any rent that the beneficiary receives. We propose to clarify any potential confusion by stating in proposed § 5.472(f)(8) that the exclusion is for ''[t]he rental value of a beneficiary's use of his or her own real property, such as the rental value of the beneficiary's personal residence.''

Proposed § 5.472(f)(12) combines all of the various § 3.262 ten percent exclusions in one place. One of these 10-percent exclusions, found at current § 3.262(i)(2), is for certain payments received from the ''Bureau of Employees' Compensation.'' The Bureau of Employees' Compensation was abolished in 1974. *See* 20 CFR 1.5. Its functions are now carried out by the Office of Workers' Compensation Programs of the U.S. Department of Labor. *See* 20 CFR 1.6(b). This change would be reflected in proposed paragraph (f)(12)(iv).

In a future NPRM, we plan to propose a new regulation to be contained in proposed subpart L of proposed new part 5. The new regulation would list all income sources and assets that are statutorily excluded in determining entitlement to all need-based programs that VA administers. This separate regulation is the future regulation mentioned in proposed § 5.472(f)(13).

These broad exclusions that will be addressed in a future NPRM are therefore not specifically listed in proposed § 5.472. These include some of the income exclusions that currently appear in §§ 3.261 and 3.262. These are Agent Orange settlement payments, certain relocation payments, annuity payments elected under the Retired Serviceman's Family Protection Plan, restitution to individuals of Japanese ancestry, income received by American Indian beneficiaries from trust or restricted lands, payments under the Alaska Native Claims Settlement Act, payments from certain volunteer programs, Victims of Crime Act of 1984 payments, and monetary allowances under 38 U.S.C. chapter 18 for certain children of veterans who served in Vietnam and Korea.

5.473 Counting a Dependent's Income for Section 306 and Old-Law Pension

Proposed § 5.473 is derived from those portions of §§ 3.252, 3.261, and 3.262 that pertain to counting income of dependents. Other portions of current § 3.252 no longer apply to section 306 or old-law pension and we propose to remove them. These removals are discussed later in this NPRM under *''Explanation of Additional Proposed Removals from Part 3.''*

Proposed paragraphs (a) and (b) of proposed § 5.473 state that VA excludes the separate income of a veteran's child for both old-law and section 306 pension purposes. This is not a change and is implied in the current regulation, although not explicitly stated. However, because VA's Improved pension program counts children's income as a veteran's or surviving spouse's income in most cases, it is helpful to state explicitly that children's income doesn't count for purposes of calculating income for veterans who are receiving prior pension.

Current § 3.262(b)(2) provides that VA presumes that including a veteran's spouse's income would not cause hardship to the veteran unless there is evidence showing expenses ''beyond the usual family requirements.'' Proposed § 5.473(b)(2)(i)(B) provides two examples of such expenses'special training for a handicapped child and expenses for the prolonged illness of a family member. However, if the spouse's income is excluded because it is needed to pay for unusual medical expenses, those medical expenses cannot be used as deductible medical expenses. This is longstanding VA policy that we propose to include in the regulation.

5.474 Deductible Expenses for Section 306 Pension Only

Proposed § 5.474 is based on the portions of current § 3.262 that pertain to expenses that may be deducted from all countable income. However, these deductions apply only to section 306 pension and not to old-law pension.

Proposed § 5.474(a) states that deductible expenses paid after December 31, 1978, can only be used to continue entitlement to section 306 pension in order to make that fact more clear. They cannot be used to increase pension benefits because Public Law 95–588 provides that rates paid under the prior pension programs cannot increase. *See* current § 3.960(a).

Proposed § 5.474(b)(1)(i) describes a ''family member'' for Section 306 pension purposes. Currently, § 3.263 cross-references § 3.250 for the description of a family member, while paragraphs (l)(1) and (2) of § 3.262 use similar language to describe such relatives. We therefore propose to incorporate this description of a ''family member'' for Section 306 pension purposes as ''a relative of the beneficiary who is a member of the beneficiary's household whom the beneficiary has a moral or legal obligation to support. This includes family members who are physically absent from the household for a temporary purpose or for reasons beyond their control.''

In a future NPRM, we plan to propose a new regulation pertaining to Section 306 pension to be contained in proposed subpart L of proposed new part 5. This new regulation would provide a comprehensive explanation of what constitutes a ''medical expense'' for the purpose of all VA-administered need-based benefits. Therefore, we propose to remove the phrase currently found in § 3.262(l), ''[h]ealth, accident, sickness and hospitalization insurance premiums will be included as medical expenses * * *.'' Instead, proposed § 5.474(b)(1)(ii) refers the reader to the new regulation.

Proposed § 5.474(b)(6) is based on the last sentence of current § 3.262(l), which states that VA will estimate future medical expenses and then adjust them, if necessary, upon receipt of an amended estimate or at the end of the year when the beneficiary files an ''income questionnaire.'' The income questionnaire was the method of income reporting before the advent of Eligibility Verification Reports (EVRs) in 1985. However, recipients of Section 306 pension have not been required to complete annual EVRs since the end of calendar year 1997 because on October 6, 1998, VA amended § 3.256(b)(2) so that old-law and section 306 pension beneficiaries are not required to submit EVRs unless VA determines that doing so is necessary to preserve program integrity. 63 FR 53593 (Oct. 6, 1998). Therefore, we propose to remove the reference to the income questionnaire, and instead provide a cross-reference to the regulation that would replace current §§ 3.256 and 3.660(a), which would state that pension beneficiaries must inform VA if there is a change in income.

Proposed § 5.474(c)(1) defines ''final expenses'' as the amount an individual pays for a deceased individual's last illness and burial. We believe that having a definition makes the regulation clearer. We also propose to state that VA cannot allow the same expense as both a final expense and an unusual medical

expense in order to make this longstanding policy clearer to readers.

5.475 Gaining or Losing a Dependent for Section 306 and Old-Law Pension

Proposed § 5.475 differs from current § 3.260 because most of current § 3.260 no longer applies to pension awards. Paragraphs (a)(2) and (b)(3) of section 306, Public Law 95–588, provide that VA generally continues to pay the December 31, 1978, rate to beneficiaries of section 306 or old-law pension. A future NPRM will address § 3.260 as it applies to parents' DIC.

Paragraphs (a) and (b) of proposed § 5.475 explain the steps VA takes when a section 306 or old-law pension beneficiary gains or loses a dependent. These proposed paragraphs are based on current § 3.260(f), which pertains to rate changes for pension and parents' DIC. However, VA does not generally change section 306 and old-law pension rates unless the beneficiary loses a dependent who was established for VA purposes before January 1, 1979. In such cases, VA reduces, discontinues, or keeps rates the same but does not increase pension rates. (VA must also change pension rates when current § 3.551 pertaining to hospital adjustments applies. Another exception would be a hypothetical case in which VA computed 1978 annual income incorrectly and amended 1978 income to pay a different ''protected'' rate.)

Proposed § 5.475(a)(2) states that if a veteran beneficiary of section 306 pension gains a spouse, VA will not consider income that the spouse received or deductible expenses paid by or on behalf of the spouse before the date the person became the veteran's spouse for VA purposes. We believe this is fair to claimants and relatively easy to administer, while remaining consistent with statutory provisions that a spouse's income must be counted. We believe that a spouse's income cannot reasonably be assumed to be that of the veteran before the date the person becomes the veteran's spouse for VA purposes. The proposed regulation is also consistent with longstanding VA practice.

Proposed § 5.475(b)(1) clarifies that when a section 306 or old-law pension beneficiary loses his or her last dependent, the annual income limit is lowered. Proposed § 5.475(b)(2) clarifies that if a dependent was established before January 1, 1979, VA must recompute a new ''protected'' December 31, 1978, rate based on the changed dependency status and recomputed 1978 income. Proposed paragraph (b)(2)(i) also makes it clearer that VA will continue the December 31, 1978, rate if a recomputed rate based on a dependency change is higher than the previous rate. This could occur if a veteran receiving Section 306 pension lost a spouse who had income or if a surviving spouse pension beneficiary lost a child whose income was counted as the surviving spouse's by virtue of current § 3.252(e)(3).

Proposed § 5.475(c) is based on current § 3.252(d) and pertains to spousal estrangement for Section 306 pension purposes. The current regulation provides that the ''rates'' provided by 38 U.S.C. 1521(c) may be authorized to certain married veterans who do not live with or are estranged from their spouses. The reference to ''38 U.S.C. 1521(c)'' is actually to 38 U.S.C. 1521(c) as in effect on December 31, 1978 (when it was numbered 38 U.S.C. 521(c)), or more simply, the ''December 31, 1978, rate for a veteran with a spouse.'' However, it is not only the rates that apply to such married veterans, but also the annual income limits. The proposed regulation would so provide. Proposed § 5.475(c) also clarifies the longstanding VA policy that the spousal income is not included unless the annual income limit for a married veteran applies.

Current paragraphs (c), (d), and (e) of § 3.260, relating to proportional computations, are not included in proposed § 5.477 or elsewhere in these proposed subpart F regulations. We propose to remove these provisions from regulations governing old-law and section 306 pension because they pertain to proportional computations for original or resumed awards. Proportional computations no longer apply to section 306 or old-law pension claims because new claims are not allowed, nor can these benefits be resumed after they have been discontinued, under section 306 of Public Law 95–588. Paragraphs (c) and (d) of current § 3.260, as they apply to proportional computations for parents' DIC, will be addressed in a future NPRM.

5.476 Net Worth for Section 306 Pension Only

Current § 3.263 provides the regulatory authority for evaluating net worth in determining the dependency of a parent as well as entitlement to section 306 pension. Proposed § 5.476 applies only to section 306 pension for reasons previously outlined.

We propose to use the term ''net worth'' only and remove references to ''corpus of estate'' because we believe ''net worth'' to be the more commonly understood term. The terms ''net worth'' and ''corpus of estate'' are defined synonymously in 38 CFR 3.263(b) and 3.275(b) and used interchangeably. Sections 1522 and 1543 of title 38, United States Code, are both titled, ''Net worth limitation.'' However, the term ''net worth'' is not used in the text of the statutes. Instead, the statutes refer to the ''corpus of the estate'' of an affected individual. Although the term ''net worth'' is not used in the text of these statutes, there is no indication that there is any intended difference between the two terms. In VAOGCPREC 64–91, VA's General Counsel confirmed that the terms ''corpus of estate'' and ''net worth'' are used interchangeably ''[i]n the context of estate valuation for certain need-based veterans' benefits.'' In order to prevent any misconception that there is a difference between the two terms, we propose to use one term, ''net worth.''

Proposed § 5.476(a) includes current and longstanding VA policy concerning the evaluation of a ''reasonable lot area,'' as being that which is reflective of lot sizes in the area. This rule is necessarily broad because lot sizes vary from locale to locale. It might be reasonable in some parts of the country to retain significant acreage. In other parts of the country, the same acreage would constitute a sizeable asset and the test of ''reasonableness'' would dictate disposal for the beneficiary's maintenance.

Proposed § 5.476(c) specifies that the income VA must consider in a net worth determination is income as determined under § 5.472. We propose this specification in order to make it clear that the income VA considers in a net worth determination is the same as income considered for any Section 306 pension purpose. The law (38 U.S.C. 1503 as in effect December 31, 1978 (when it was numbered 38 U.S.C. 503)) defines ''annual income under this chapter,'' as all payments received except for certain kinds of payments specifically excluded or deducted. Therefore, we must conclude that the reference to income in the net worth statute (38 U.S.C. 1522 as in effect December 31, 1978 (when it was numbered 38 U.S.C. 522)) refers to the same definition of income because both provisions are in the same chapter.

At the same time, we propose to state that when VA considers a beneficiary's living expenses, VA cannot consider expenses excluded or deducted in determining income. This statement clarifies that the same expenses cannot be deducted twice. Because we are making this clarification concerning income and because we believe that the phrase ''all of the beneficiary's living expenses'' sufficiently encompasses

medical expenses, we do not believe it is necessary to specifically mention unusual medical expenses in proposed paragraph (c). Therefore, we propose to remove the reference to unusual medical expenses currently in § 3.263(d).

Proposed § 5.476 does not incorporate the following phrase currently found in § 3.263(d): ''whether the property can be readily converted into cash at no substantial sacrifice.'' VA has traditionally defined the phrase ''substantial sacrifice'' as meaning that benefits should not be discontinued for excessive net worth if the beneficiary cannot readily convert other assets into cash. Therefore, proposed paragraph (c)(1), provides for consideration of ''[t]he value of liquid assets and the current market value of other property the beneficiary can readily convert into cash.'' We believe this wording would be clearer to beneficiaries, as well as consistent with VA practice.

Finally, proposed § 5.476(d) includes a cross-reference to the listing of payment sources that, by statute, VA must exclude from consideration in determining entitlement to need-based benefits. As previously mentioned, we will propose a regulation in a separate NPRM that would list income sources and assets that are statutorily excluded from consideration for all of VA's need-based programs. Therefore, the following four such sources, currently listed in § 3.263(e) through (h), are not included in proposed § 5.476: ''Agent Orange settlement payments'; ''Restitution to individuals of Japanese ancestry'; ''Monetary allowance under 38 U.S.C. chapter 18 for certain individuals who are children of Vietnam veterans'; and ''Victims of Crime Act.''

5.477 Effective Dates for Section 306 and Old-Law Pension Reductions or Discontinuances

Proposed § 5.477(a) is based on the first sentence of current § 3.660(a)(2), which provides:

> Where reduction or discontinuance of a running award of [S]ection 306 pension or [O]ld-[L]aw pension is required because dependency of another person ceased due to marriage, annulment, divorce or death, or because of an increase in income, which increase could not reasonably have been anticipated based on the amount actually received from that source the year before, the reduction or discontinuance shall be made effective the end of the year in which the increase occurred.

Proposed § 5.477(a) clarifies the actual effective date that VA pays a reduced rate or discontinues benefits by stating, ''If required, VA will pay a reduced section 306 or old-law pension rate or discontinue benefits effective January 1 of the calendar year immediately following [certain events].'' Proposed paragraphs (a)(1) through (a)(3) then go on to specify those events. We believe that stating the effective date in this manner—focusing on the date that the new rate begins rather than on the date that the old rate ends—clarifies the effective-date provisions for reductions and discontinuances. We propose similar wording throughout the Project. VA intends no substantive change by this rewording.

Proposed § 5.477(b) provides that if a reduction or discontinuance is required for any reason other than the events specified in paragraph (a) or in § 5.478(a), VA will apply the general effective-date rules. These are currently found in §§ 3.500 through 3.503. A future NPRM will address §§ 3.500 through 3.503.

5.478 Time Limit To Establish Continuing Entitlement to Section 306 or Old-Law Pension

Proposed § 5.478(a) is based on current § 3.260(b), which provides that ''[w]here there is doubt as to the amount of the anticipated income,'' VA will make its decision concerning payment for a particular calendar year based on the best income information it has concerning income for that year. If it appears that income exceeds the annual income limit, VA will discontinue the benefit. Proposed § 5.478(a) makes the application of § 3.260(b) to prior pension clearer to readers.

However, proposed § 5.478(b), derived from portions of § 3.660(b)(1), provides that beneficiaries have until the end of the following year to provide evidence to show that income was actually below the limit and thereby establish continuing entitlement to pension. We propose to include an example as an aid to readers.

Proposed § 5.478(c), based on current § 3.960(d), clarifies further that if no income evidence is submitted or if the evidence submitted does not warrant continued benefits, the discontinuance of section 306 or old-law pension is final.

Explanation of Additional Proposed Removals From Part 3

Although all of part 3 would be removed and replaced by proposed part 5, we invite public comment concerning rules in current part 3 that we do not propose to transfer to proposed part 5, *i.e.*, that we simply propose to remove. Some of these have already been discussed in this NPRM, but others are discussed below.

We propose to remove § 3.26. Paragraphs (a) through (c) describe the annual income limits for old-law and section 306 pension. We believe this regulation no longer has value because the statutory provisions are obscure to most readers. More importantly, the cited statutes set forth the January 1, 1979, income limits only. We believe it is more useful to describe how and where to find the current income limits, which we have done in proposed § 5.471. Current § 3.26(d) is redundant of the final sentence of current § 3.28.

We propose to remove § 3.261. This regulation currently contains a table that lists income exclusions and deductions, and applicability of net worth, for VA's need-based benefits that existed before January 1, 1979: old-law pension, section 306 pension, and parents' DIC. The § 3.261 table also lists income exclusions and deductions, and applicability of net worth, for VA determinations concerning parents' dependency. Most of the entries in the table cross-reference § 3.262, where the inclusion or exclusion of a particular type of income is explained in greater detail. We believe that some readers may rely only on the information in the table and fail to refer to the specific provisions of § 3.262. Because it is a bedrock principle of regulatory construction that a specific provision will trump a more general one, we propose to remove all of the paragraphs in § 3.261 that cross-reference § 3.262.

Therefore, when a paragraph from the § 3.261 table has an associated cross-reference in the last column of the table, we have not included that entry in the derivation table at the beginning of this NPRM. For example, § 3.261(a)(6) is not included on the derivation table because it would be removed in favor of the more specific provision it cross references, § 3.262(c).

There are currently 13 paragraphs in § 3.261 that do not contain associated § 3.262 cross-references. These are paragraphs (a)(4), (7), (9), (10), (11), (12), (13), (20), (22), (23), (26), (27), and (31). Of these, paragraphs (a)(4), (7), (12), (13), (20), (22), (26), and (31) are included in the derivation table at the beginning of this NPRM as the source of certain proposed part 5 regulations.

The ''[a]nnuities'' entry in paragraph (a)(14) of § 3.261 does not contain a cross-reference to § 3.262. However, as previously discussed in this NPRM in the discussion of proposed § 5.472, this entry will be included in a future proposed regulation.

We propose to remove paragraphs (a)(9) and (27) of § 3.261 because these paragraphs list included income sources. Under proposed § 5.472, VA

counts all payments unless specifically excluded. For the same reason, we propose to remove the ''[r]efund'' entry in paragraph (a)(14). We propose to remove paragraph (a)(10), which excludes the ''[r]easonable value of allowances to person in service in addition to base pay'' for Section 306 child pension beneficiaries. We do not believe there are any remaining beneficiaries to whom this exclusion applies.

We propose to remove paragraph (a)(11) of § 3.261 because authority for mustering-out pay was repealed by Public Law 89–50, 79 Stat. 173.

We propose to remove paragraph (a)(23) of § 3.261, which excludes overtime pay for ''Government employees'' for old-law veteran pension beneficiaries. We do not believe there are any remaining beneficiaries to whom this exclusion applies.

Current § 3.261(a)(20) lists VA benefits. As previously described in the discussion of proposed § 5.472(e), the portions of § 3.261(a)(20) that pertain to section 306 and old-law pension would be described in proposed § 5.472(e) in terms of those VA benefits that count. We propose to remove the portion of current § 3.261(a)(20) that lists the subsistence allowance under Chapter 31 of 38 U.S.C. as a countable payment because we do not believe that any of the remaining veteran beneficiaries of old-law pension receive these vocational rehabilitation payments. We also propose to remove the portion of § 3.261(a)(20) that lists veterans' educational assistance under 38 U.S.C. chapter 34 because VA no longer pays this benefit.

We propose to remove the second sentence of § 3.262(j)(3), an income exclusion that applies only to old-law death pension beneficiaries, for payments equaling lump-sum amounts based on the death of a veteran. We believe that all such payments have already been received because the veteran must have died before July 1, 1960, in order for a beneficiary to be receiving old-law death pension.

Current § 3.262(e)(1) provides in part that:

> Where the retirement benefit is based on the claimant's own employment, payments will not be considered income until the amount of the claimant's personal contribution (as distinguished from amounts contributed by the employer) has been received. Thereafter the 10 percent exclusion will apply.

Similarly, current § 3.262(e)(2) provides in part that:

> Where a person was receiving or entitled to receive pension and retirement benefits based on his or her own employment on December 31, 1964, the retirement payments will not be considered income until the amount of the claimant['s] personal contribution (as distinguished from amounts contributed by the employer) has been received. Thereafter the 10 percent exclusion will apply.

We propose to remove these two provisions. It is extremely unlikely that an old-law pension beneficiary's contributions to retirement plans or a Section 306 pension beneficiary's contributions to retirement plans based on employment on December 31, 1964, were not recovered long ago.

We propose to remove references to the following effective dates in current § 3.262 for exclusion of particular income types: July 1, 1959 (paragraph (g)(2)); January 10, 1962 (paragraph (k)(4)(iii)); January 1, 1965 (paragraphs (e)(1) and (2), (j)(1), and (k)(5)); October 7, 1966 (paragraphs (i)(2), (j)(2), and (j)(4)); and January 1, 1971 (paragraphs (k)(1) and (k)(6)). Although current section 306 and old-law pension rates are based on 1978 income, it is highly unlikely that VA will process a retroactive adjustment to a prior pension award effective more than 30 years in the past; therefore, we believe these effective dates are no longer necessary.

We propose to remove current § 3.262(m), which concerns deducting the veteran's final expenses and just debts from death pension awards. Current § 3.262(p) specifies that VA allows final expenses as a deduction during the year of the veteran's last illness and burial or during the year the beneficiary paid the expenses. Because the last date that a surviving spouse or child could establish entitlement to Section 306 pension was December 31, 1978, these claims were made long ago. If a case should arise in which a surviving spouse or child claims to have paid final expenses or just debts many years previously which were claimed but remained unprocessed due to an error, the statute would govern the decision.

From paragraphs (n)(2) and (p) of § 3.262, we propose to remove the references to ''spouse'' on the same basis as our proposal to remove § 3.262(m). Spouses of veterans who die after December 31, 1978, may only be considered for Improved pension. This is true even if the veteran was in receipt of section 306 or old-law pension.

We propose to remove § 3.270. This regulation currently introduces specific section numbers for regulations that govern entitlement to Section 306 and Old-Law pension and parents' DIC, and for making dependent parent determinations. All of the regulations referenced in current § 3.270 are to be moved to various other regulations that are specific to the benefit indicated. Therefore, current § 3.270 would no longer be necessary.

We propose to remove several provisions that pertain to initial entitlement to certain pension programs. First, we propose to remove paragraphs (a)(1), (b)(1), and (b)(2) of current § 3.3. These paragraphs pertain to initial entitlement to Spanish-American War service pension for veterans, Indian war death pension, and Spanish-American War death pension, respectively. Although new claims for these pensions are theoretically possible, they are unlikely in the extreme. As of September 2003, there was one surviving child beneficiary of an Indian war veteran, and there were approximately 400 surviving spouse and child beneficiaries of Spanish-American War veterans. VA RCS 20–0221, September 2002. To our knowledge, no veterans of either war survive. Therefore, we believe removal of these provisions is warranted. In the unlikely event of a new claim, the applicable statute would control. For the same reason, we propose to remove § 3.16, which pertains to computing service for service pension.

Second, we propose to remove current paragraphs (a)(2) and (b)(3) of § 3.3, which pertain to initial entitlement to Section 306 pension. As previously outlined in this NPRM, new entitlement to Section 306 disability or death pension is not possible and has not been possible since January 1, 1979. We note that there are no regulations in current part 3 pertaining to initial entitlement to old-law pension. The governing statutes would control if VA discovers an old claim for Section 306 pension that has not been processed due to error or oversight.

We propose to remove § 3.314, which pertains to basic pension determinations. The provisions in this regulation are either obsolete or redundant of other regulatory provisions. Paragraph (a) pertains to establishing basic eligibility for service pension, which we propose to remove for the reasons stated above in relation to current § 3.3(a)(1) and (b)(2). Paragraph (b) describes when rating decisions are required for nonservice-connected disability pension, which we believe is a procedural matter that should not be included in new part 5. Paragraph (b)(1) is redundant of § 3.3(a)(2)(iii) and (b)(3)(ii). The first sentence of § 3.314(b)(2) is redundant of § 3.342(a). The second sentence of § 3.314(b)(2) pertains to new entitlement

to Section 306 pension, which we are removing for the reasons stated above in relation to current § 3.3(a)(2). Current § 3.314(b)(3) pertains to increased old-law or section 306 pension because of the need for aid and attendance or the housebound rate. This provision is obsolete because section 306 and old-law pension cannot increase; the veteran must have established the need for aid and attendance or eligibility for the housebound rate before January 1, 1979.

We propose to remove § 3.17, which pertains to computing wartime service for nonservice-connected disability and death pension purposes. Because new entitlement cannot be established to section 306 or old-law pension, this regulation no longer pertains to those programs. The regulation still pertains to the Improved pension program; however, it is redundant of current § 3.3(a)(3)(i) through (iv).

We propose to remove § 3.401(i), which is an effective-date provision for an award of increased pension to a veteran who attains the age of 78. With the enactment of Public Law 95–588, 92 Stat. 2497, Congress removed the ''age of 78 rule.'' This provision does not apply to the Improved pension program. Section 306 pension rates have been frozen since December 31, 1978. They may be reduced or discontinued under limited circumstances, but they cannot increase. In order for the ''age of 78 rule'' to apply to section 306 pension beneficiaries, the beneficiary must have attained age 78 before January 1, 1979. Current 38 U.S.C. contains no statutory authority for the ''age of 78 rule.''

Similarly, we propose to remove current §§ 3.400(j)(2) through (6) and 3.401(f). These are effective-date provisions for Spanish-American War service pension and the other prior pension programs. Because we are proposing to remove the regulations pertaining to new entitlement to Spanish-American War service pension, section 306 pension, and old-law pension, we propose to remove the applicable effective dates.

We propose to remove § 3.712(b) as obsolete. This is a special provision that applies to surviving spouses in receipt of Spanish-American War death pension who require aid and attendance. Current § 3.712(b) provides that these surviving spouses will receive either the Spanish-American War aid and attendance benefit of $149 monthly or the aid and attendance rate for section 306 death pension, whichever is greater. Current § 3.712(b) further provides that the section 306 death pension rate is based on current income. In the early years following the introduction of improved pension, it was occasionally the case that section 306 death pension would pay more than Spanish-American War death pension or improved death pension. However, with each passing year, this has become less and less likely as Improved pension maximum annual pension rates increase while section 306 pension rates remain frozen. Now, it is a virtual impossibility. In order for a surviving spouse with no dependents to be entitled to more than $149 per month under section 306 death pension, the surviving spouse's annual income would have to be less than $1,900 per year in 2004. If that were the case at this time, such a surviving spouse would almost certainly elect Improved death pension. (A surviving spouse eligible for aid and attendance who has no dependents and an annual income of $1,900 per year is entitled to $725 monthly in 2004 under the Improved pension program, unless he or she is in a nursing home and Medicaid is paying for care.) If a case arises in which a surviving spouse beneficiary of Spanish-American War death pension claimed that section 306 death pension should have been paid but was not paid due to error or oversight, the governing statute, 38 U.S.C. 1536(d)(2), would control.

We propose to remove § 3.713(b) as obsolete. Current paragraph (b) creates a special exception to the general effective date in paragraph (a) for beneficiaries who were entitled to receive either section 306 or old-law pension on December 31, 1978, and who elected to receive improved pension before October 1, 1979. (Section 3.713(b) does not apply to Spanish-American War death pension). If a pension beneficiary were to claim entitlement to an earlier effective date based on the filing of an election before October 1, 1979, which VA somehow did not recognize as such at the time, the claim would be processed under section 306(d) of Public Law 95–588, 73 Stat. 432, the governing statute.

We propose to remove § 3.252(e)(1) as obsolete. Current § 3.252(e)(1) provides that if a veteran's child is born after the veteran dies, the surviving spouse cannot claim the child as a dependent until the child is born. Because the last date a surviving spouse could establish eligibility to old-law pension was June 30, 1960, and the last date a surviving spouse could establish eligibility to section 306 pension was December 31, 1978, current § 3.252(e)(1) no longer applies to section 306 or old-law pension.

We propose to remove § 3.252(f), which contains specific provisions for computing a special reduced aid and attendance allowance under 38 U.S.C. 1521(d)(1) as in effect on December 31, 1978 (when it was numbered 38 U.S.C. 521(d)(1)). We believe there is no longer a need for § 3.252(f). Veterans are not entitled to the special reduced aid and attendance allowance unless they were in need of aid and attendance on or before December 31, 1978. VA publishes the income limits for continued entitlement to this allowance every year as the income limits increase. If there would be a case at some time to which § 3.252(f) would apply (due to error or oversight), the statute would control.

We propose to remove current § 3.257 as obsolete. This regulation states that if old-law or section 306 pension is not payable to a surviving spouse because his or her annual income exceeds the income limit, VA will make payments to children as if there were no surviving spouse. Because new entitlement to old-law or section 306 pension cannot be established, VA cannot establish new entitlement to either old-law or section 306 pension for a child if a surviving spouse's income exceeds the income limit for either of these pensions. Removal of this regulation would not affect current pension awards to children.

We propose to remove current § 3.714 as obsolete. Current § 3.714 implemented the Adoption and Child Welfare Act of 1980, Public Law 96–272 § 310(b), 94 Stat. 500, which provided that certain beneficiaries who had once been in receipt of prior pensions had the right to disaffirm an election of improved pension, thereby restoring their right to prior pension. The primary purpose of the law was to restore Medicaid eligibility to those who lost it because they were required to elect improved pension under the regulations that previously governed eligibility to receive public assistance. Under section 310(b), VA was required to obtain from every affected pension beneficiary an informed decision regarding whether he or she wish to continue to receive improved pension or disaffirm the earlier election. VA long ago complied with these notification provisions.

Current § 3.714 also provides for a special informed election process for those pension beneficiaries who reside in states in which Medicaid eligibility is based on public assistance. However, section 114(a) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Public Law 104–193, 110 Stat. 2105, provides that eligibility for Medicaid is no longer linked to the receipt of public assistance. In other words, there is no longer any state to which the first sentence of current § 3.714(b) applies.

Endnote Regarding Removals From Part 3

For the reasons shown in the preceding supplementary information, the amendments proposed in this document would, if adopted, result in removal of current §§ 3.16, 3.17, 3.26, 3.28, 3.252, 3.257, 3.261, 3.270, 3.314, 3.711, 3.712, 3.713, and 3.714, and removal of portions of §§ 3.1, 3.3, 3.260, 3.262, 3.263, 3.400, 3.401, 3.660, 3.700, and 3.960. This would be the case because those part 3 sections, or portions of sections, would be replaced by new part 5 sections or they would be removed entirely. Readers are invited to comment both on these part 5 removals and on the proposed new part 5 rules at this time.

NPRMs frequently include formal ''amendatory language'' listing the sections, or portions of sections, that would be removed if the proposed amendments are adopted. However, we have not included such ''amendatory language'' in this NPRM because of the nature of this Project. Because of the very large scope of the Project, we are publishing proposed amendments in several NPRMs. Then, after public comments in response to all of the NPRMs making up the Project have been reviewed and considered, VA will propose to remove all of part 3, concurrent with the implementation of part 5.

Paperwork Reduction Act

Although this document contains a provision constituting a collection of information in proposed 38 CFR 5.478(b), under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501–3521), no new or proposed revised collection of information is associated with this proposed rule. The information collection requirement for proposed §§ 5.474 and 5.478(b) are currently approved by the Office of Management and Budget (OMB) and have been assigned OMB control numbers 2900–0624 and 2900–0101.

Regulatory Flexibility Act

The Secretary hereby certifies that this proposed regulatory amendment will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. This proposed amendment would not affect any small entities. Only VA beneficiaries could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), this proposed amendment is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Executive Order 12866

This document has been reviewed by the Office of Management and Budget under Executive Order 12866.

Unfunded Mandates

The Unfunded Mandates Reform Act requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before developing any rule that may result in an expenditure by State, local, or tribal governments, in the aggregate, or by the private sector of $100 million or more in any given year. This proposed rule would have no such effect on State, local, or tribal governments, or the private sector.

Catalog of Federal Domestic Assistance Numbers

The Catalog of Federal Domestic Assistance program numbers for this proposal are 64.100–102, 64.104–110, 64.115, and 64.127.

List of Subjects in 38 CFR Part 5

Administrative practice and procedure, Claims, Disability benefits, Pensions, Veterans.

Approved: October 14, 2004.

Anthony J. Principi,

Secretary of Veterans Affairs.

For the reasons set forth in the preamble, VA proposes to amend 38 CFR chapter I as set forth below:

PART 5—COMPENSATION, PENSION, BURIAL, AND RELATED BENEFITS

Part 5, as proposed to be added at 69 FR 4832, January 30, 2004, is further amended by adding subpart F to read as follows:

Subpart F—Nonservice-Connected Disability Pensions and Death Pensions

Choosing Improved Pension Over Certain Other VA Pension Programs: Veterans and Survivors

Sec.

Continuing Entitlement to Old-Law or Section 306 Pension: Veterans and Survivors

Authority: 38 U.S.C. 501(a) and as noted in specific sections.

Subpart F—Nonservice-Connected Disability Pensions and Death Pensions

Choosing Improved Pension Over Certain Other VA Pension Programs: Veterans and Survivors

§ 5.460 Definitions of certain VA pension programs.

(a) *Section 306 pension* means the nonservice-connected disability and death pension programs available to new claimants during the period beginning on July 1, 1960, and ending on December 31, 1978.

(b) *Old-Law pension* means the nonservice-connected disability and death pension programs available to new claimants before July 1, 1960.

(c) *Spanish-American War death pension* means pension payable to a surviving spouse or child of a veteran who served in the Spanish-American War. Entitlement is based solely on the veteran's service in the Spanish-American war without regard to disability, income, or net worth.

(Authority 38 U.S.C. 501(a)).

§ 5.461 Electing improved pension instead of old-law or section 306 pension.

(a) *Right to elect (choose) Improved pension.* Unless this section states otherwise, a pension beneficiary who was entitled to receive old-law pension or section 306 pension on December 31, 1978, may instead elect (choose) to receive improved pension.

(b) *Finality of election.* Unless one of the following exceptions applies, an election of Improved pension is final when a beneficiary negotiates a check for a payment of Improved pension. Once the election is final, the beneficiary cannot receive old-law or section 306 pension. An election may be canceled according to the following exceptions:

(1) *The beneficiary receives benefits by direct deposit or electronic funds transfer (DD/EFT).* If the beneficiary receives a payment of improved pension benefits by direct deposit or electronic

funds transfer, the beneficiary must cancel the election of improved pension before the financial institution receives the second Improved pension payment. Once the financial institution receives a second payment, the election is final.

(2) *The beneficiary is incompetent.* If VA finds that a beneficiary was mentally incompetent when he or she elected Improved pension, the beneficiary (or guardian) may cancel that election. VA must receive the request to cancel the election within one year from the date the election became effective.

(3) *Beneficiary based election on erroneous VA information.* A beneficiary who elected improved pension based on erroneous information provided by VA may cancel the election within one year after the date the election became effective. For this paragraph (b)(3) to apply, VA must determine that it previously provided erroneous information and that determination must be based on the same evidence that VA used when it previously provided the erroneous information.

(c) *If a veteran's spouse is also a veteran eligible to elect Improved pension.* If a veteran who is eligible to elect Improved pension has a spouse who is also a veteran who is eligible to elect Improved pension, neither veteran may receive Improved pension unless both elect to receive it.

(d) *If a beneficiary does not elect Improved pension.* If a pension beneficiary who is eligible to elect Improved pension does not do so, VA will continue to pay that beneficiary old-law pension or section 306 pension at the monthly rate in effect on December 31, 1978, unless that rate must be reduced or discontinued under § 5.470 or another regulation in this part.

(Authority: Sec. 306(a) and (b), Pub. L. 95–588, 92 Stat. 2508)

§ 5.462 Right of surviving spouses receiving Spanish-American War death pension to elect improved death pension.

A surviving spouse who is receiving Spanish-American War death pension may elect to receive Improved death pension instead. Paragraph (b) of § 5.461, concerning finality of elections, applies to surviving spouses of Spanish-American War veterans. Once the election is final, the surviving spouse has no right to receive Spanish-American War death pension again. Surviving spouse beneficiaries of Spanish-American War death pension who do not elect Improved pension will continue to receive Spanish-American War death pension.

(Authority: 38 U.S.C. 1536).

§ 5.463 Effective dates of improved pension elections.

An election to receive improved pension will be effective the date VA receives the election.

(Authority: Sec. 306(d), Pub. L. 95–588, 92 Stat. 2508)

§ 5.464 Multiple pension awards not payable.

If a veteran is entitled to improved pension on the basis of his or her own service and is also entitled to pension under any other VA pension program based on another person's service, VA will pay only the greater benefit.

(Authority: 38 U.S.C. 1521(i)).

§§ 5.465 through 5.469 [Reserved]

Continuing Entitlement to Old-Law or Section 306 Pension: Veterans and Survivors

§ 5.470 Reasons for discontinuing or reducing section 306 or old-law pension.

(a) *Discontinuances.* Section 306 or old-law pension will be discontinued for any one of the following reasons:

(1) A veteran pension beneficiary ceases to be permanently and totally disabled.

(2) A surviving spouse pension beneficiary no longer meets the definition of ''surviving spouse'' as provided in § 3.50 of this chapter.

(3) A child pension beneficiary no longer meets the definition of ''child,'' as provided in § 3.57 of this chapter.

(4) A pension beneficiary's income exceeds the annual income limit.

(5) A section 306 pension beneficiary has a net worth of such value that it is reasonable that some part of it be consumed for the beneficiary's maintenance. Evaluation of net worth will be made under § 5.476, ''Net worth for section 306 pension only.''

(b) *Finality of discontinuance.* Discontinuance of section 306 or old-law pension for one of the reasons listed in paragraph (a) of this section means that a pension beneficiary is no longer entitled to receive section 306 or old-law pension benefits. Any new entitlement that may be established would be to improved pension.

(c) *Reduction and finality of reduction.* If a beneficiary of section 306 or old-law pension loses a dependent who was established before December 31, 1978, VA must reduce such pension by the additional amount payable based on the existence of the dependent. Such reductions are final and rates do not increase. VA must discontinue pension as provided in paragraph (a)(4) of this section if a veteran or surviving spouse no longer has any dependents and his or her annual income exceeds the annual income limit for a veteran or surviving spouse alone.

(Authority: Sec. 306, Pub. L. 95–588, 92 Stat. 2508)

§ 5.471 Annual income limits and rates for section 306 and old-law pension.

(a) *Where to find the annual income limits and pension rates.* When annual income limits are adjusted as provided in paragraph (b) of this section, VA will publish the new limits in the ''Notices'' section of the **Federal Register**. Current and historical annual income limits and historical pension rates for old-law and section 306 pension can be found on the Internet at *http://www.va.gov* or are available from any Veterans' Service Center.

(b) *When annual income limits are adjusted.* Whenever there is a cost-of-living increase in Social Security benefit amounts under the Federal Old-Age, Survivors, and Disability Insurance Benefits section of the Social Security Act (42 U.S.C. 415(i)), VA will increase the following by the same percentage effective the same date:

(1) The annual income limits applicable to continued receipt of section 306 and old-law pension.

(2) The dollar amount of a veteran's spouse's income that may be excluded in determining the income of a veteran for section 306 pension purposes.

(Authority: Sec. 306, Pub. L. 95–588, 92 Stat. 2508)

§ 5.472 Evaluation of income for section 306 and old-law pension.

(a) *Purpose and scope.* This section provides rules for determining how to count income for section 306 and old-law pension purposes. This section also applies to counting spousal income for section 306 pension purposes when spousal income is included as the veteran's income.

(b) *Countable income.* (1) *All payments included.* VA counts all payments of any kind from any source in determining the income of a pension beneficiary, except payments that are not counted under an exclusion provided in this section or § 5.473.

(2) *''Payments'' defined.* For purposes of this section, ''payments'' are cash and cash equivalents (such as goods and other negotiable instruments) and include the fair market value of personal services, goods, or room and board a beneficiary receives in lieu of other forms of payment.

(i) For section 306 pension purposes, VA counts as income retirement benefits

(pension or retirement payments) that have been waived.

(ii) For old-law pension purposes, ''payments'' do not include retirement benefits from the following sources that have been waived pursuant to Federal statutes:

(A) Civil Service Retirement and Disability Fund.

(B) Railroad Retirement Board.

(C) District of Columbia (paid to firemen, policemen, or public school teachers).

(D) Former United States Lighthouse Service.

(3) *Countable income is rounded down.* VA rounds countable income down to the nearest whole dollar. For section 306 pension, VA rounds down after subtracting any authorized deductible expenses specified in § 5.474.

(4) *Income considered for year of receipt.* VA computes income for the calendar year in which it is received and considers income for the full calendar year. However, when VA discontinues section 306 or old-law pension awards based on income that exceeds the limit, it does so effective January 1 of the following calendar year as provided in § 5.477.

(c) *Deductions from specific income sources.* (1) *Expenses of a business or profession.* Necessary business operating expenses such as the cost of goods sold and payments for rent, taxes, upkeep, repairs, and replacements are deductible from income from a business or profession. Depreciation is not a deductible expense. Losses sustained in operating a business or profession may not be deducted from income from any other source. For purposes of this section, ''business'' includes the operation of a farm and transactions involving investment property.

(2) *Expenses associated with disability, accident, or health insurance recoveries.* Medical, legal, or other expenses incident to the insured injury or illness are deductible from sums recovered under disability, accident, or health insurance. However, the same medical expenses cannot then be deducted as unusual medical expenses under § 5.474.

(3) *Salary deductions and employer contributions.* Income from a salary is not determined by ''take-home'' pay. The salary counted as income is the gross salary without any deductions. An employer's contributions to health and hospitalization plans are not included in gross salary.

(d) *Income-producing property and income from property sales.* (1) *Scope.* This paragraph (d) provides rules for determining whether income from income-producing property and property sales should be counted as a pension beneficiary's income. The provisions of this paragraph (d) apply to all property, real or personal, in which a pension beneficiary has an interest, whether acquired through purchase, bequest, or inheritance.

(2) *Proof of ownership.* In determining whether to count income from real or personal property or property sales, VA will consider the terms of the recorded deed or other evidence of title. In the absence of evidence showing otherwise, VA will accept the beneficiary's statement as proof of the terms of ownership.

(3) *Transfer of ownership with retention of income.* If a pension beneficiary transfers ownership of property to another person or legal entity, but retains the right to income, the income will be counted.

(4) *Income from jointly-owned property.* If a pension beneficiary owns property jointly with others, including partnership property, each person will be considered as receiving an equal share of the income from that property in the absence of evidence showing otherwise.

(5) *Property sales for old-law pension.* (i) Unless it is the beneficiary's principal residence, net profit from the sale of real or personal property counts as income for old-law pension.

(ii) In determining net profit from the sale of property owned prior to the date of entitlement, VA will compare the value of the property at the time entitlement began with the selling price.

(iii) If payments are received in installments, the entire amount of installment payments received (including principal and interest) will be excluded until the total of installments received is equal to the cost of the residence, or if paragraph (d)(5)(ii) of this section applies, equal to the value of the property on the date pension entitlement was established. The entire amount of any installment received thereafter will be counted as income.

(6) *Profit from sale of principal residence for old-law pension.* (i) Net profit realized from the sale of an old-law pension beneficiary's principal residence is not counted to the extent that it is applied to the purchase price of a subsequent principal residence for the beneficiary in either the calendar year of the sale or the following year.

(ii) This exclusion does not apply where the net profit is applied to the price of a home purchased earlier than the calendar year preceding the calendar year of the sale of the old residence.

(iii) To qualify for this exclusion, the application of the net profit from the sale of the old residence to the purchase of the replacement residence must be reported to VA within one year following the date it was so applied.

(7) *Profit from sale of non-business property for section 306 pension.* Profit realized from the disposition of real or personal property other than in the course of a business does not count for section 306 pension. However, amounts received in excess of the sales price, such as interest payments, count as income. If payments are received in installments, the entire amount of installment payments (including principal and interest) are excluded until the total amount received equals the sales price. The entire amount of any installment received thereafter counts as income.

(e) *VA benefits.* (1) *Old-law pension.* All VA benefits are excluded for old-law pension.

(2) *Section 306 pension.* Only the following VA benefits count as income for section 306 pension:

(i) Subsistence allowance (38 U.S.C. Ch. 31).

(ii) Special allowance under 38 U.S.C. 1312(a).

(iii) Accrued benefits, unless paid as a reimbursement.

(iv) World War I adjusted compensation.

(f) *Income exclusions for section 306 or old-law pension.* VA will not count payments from the sources listed in this paragraph (f) when calculating income for section 306 or old-law pension. Paragraph (g) of this section provides additional exclusions for section 306 pension.

(1) *Maintenance.* The value of maintenance furnished by a relative, friend, or a civic or governmental charitable organization, including money paid to an institution for the care of the beneficiary due to impaired health or advanced age. However, if the maintenance is paid to the beneficiary and excluded under this provision, VA cannot also deduct it as an unusual medical expense under § 5.474.

(2) *Survivor benefit annuity.* Annuities paid by the Department of Defense under the authority of section 653, Public Law 100–456, 102 Stat. 1991, to qualified surviving spouses of veterans who died before November 1, 1953.

(3) *Death gratuity.* Death gratuity payments under 10 U.S.C. 1475 through 1480.

(4) *State service bonuses.* Payments of a bonus or similar cash gratuity by any State based upon service in the Armed Forces.

(5) *Payment for civic obligations.* Payments received for performance of jury duty or other obligatory civic duties.

(6) *Fire loss reimbursement.* Proceeds from fire insurance.

(7) *Certain life insurance payments.* Payments under policies of Servicemembers' Group Life Insurance, United States Government Life Insurance, Veterans' Group Life Insurance, or National Service Life Insurance.

(8) *Rental value of beneficiary's property.* The rental value of a beneficiary's use of his or her own real property, such as the rental value of the beneficiary's personal residence.

(9) *Increased inventory value of a business.* The value of an increase of stock inventory of a business.

(10) *Commercial insurance dividends.* Dividends from commercial insurance.

(11) *Employer contributions for retired employees.* Contributions a public or private employer makes to either of the following:

(i) Public or private health or hospitalization plan for a retired employee.

(ii) Retired employee as reimbursement for premiums for supplementary medical insurance benefits under the Social Security program.

(12) *Income from retirement plans and similar plans and programs.* Ten percent of the amount of payments under public or private retirement, annuity, endowment, or similar plans. This includes, but is not limited to, payments under or for any of the following:

(i) Annuities or endowments paid under a Federal, State, municipal, or private business or industrial plan.

(ii) Old age and survivor's insurance and disability insurance under title II of the Social Security Act.

(iii) Retirement benefits received from the Railroad Retirement Board. However, if the beneficiary is a veteran receiving old-law pension, payments from this source do not count at all.

(iv) Payments for permanent and total disability or death received from the Office of Workers' Compensation Programs of the United States Department of Labor, the Social Security Administration, or the Railroad Retirement Board, or pursuant to any worker's compensation or employer's liability statute, including damages collected incident to a tort suit under an employer's liability law of the United States or a political subdivision of the United States. This 10-percent exclusion applies after the income from the specified payments is reduced by the deductions described in paragraph (c)(3) of this section.

(v) The proceeds of commercial annuity, endowment, or life insurance.

(vi) The proceeds of disability, accident, or health insurance. This 10-percent exclusion applies after the income from the specified payments is reduced by the deductions described in paragraph (c)(3) of this section.

(13) *Other payments.* Other payments listed in [regulation that will be published in a future Notice of Proposed Rulemaking].

(g) *Additional income exclusions for section 306 pension.* In addition to the payments listed in paragraph (f) of this section, VA will exclude payments from the following sources as income for section 306 pension:

(1) *Donations received.* Donations from public or private relief or welfare organizations, including benefits received under noncontributory programs such as Supplemental Security Income payments.

(2) *Social Security death payments.* Lump sum death payments under title II of the Social Security Act.

(3) *Money acquired from joint accounts because of death.* Money that a death pension beneficiary acquires because of the death of a co-owner of a joint account in a bank or similar institution.

(h) *Donations received for old-law pension.* If an old-law pension beneficiary receives additional donations from public or private relief organizations for members of his or her family, these additional allowances may not be divided per member of the family in determining the pension beneficiary's income. The entire payment is counted as income.

(Authority: Sec. 306, Pub. L. 95–588, 92 Stat. 2508)

§ 5.473 Counting a dependent's income for section 306 and old-law pension.

(a) *Veteran awards for old-law pension.* VA excludes the separate income of a veteran's spouse or child in computing income for veteran old-law pension beneficiaries.

(b) *Veteran awards for section 306 pension.* (1) *Child's income.* VA excludes the separate income of a veteran's child in computing income for veteran section 306 pension beneficiaries.

(2) *Spousal income.* (i) *VA presumptions concerning spousal income.* For section 306 pension purposes, if a veteran and his or her spouse live together, VA presumes—

(A) That the spouse's income is available to the veteran. The veteran may rebut this presumption by submitting evidence showing that all or part of the spouse's income is not available.

(B) That counting the spouse's income would not cause the veteran hardship. The veteran may rebut this presumption by submitting evidence showing that there are expenses beyond the usual family requirements. Examples of such expenses include special training for a handicapped child and expenses for the prolonged illness of a family member. However, if the spouse's income is excluded because it is needed to pay for unusual medical expenses, the same medical expenses cannot be deducted as unusual medical expenses under § 5.474(b).

(ii) *Spousal income exclusions.* Unless excluded under paragraph (b)(2)(i) of this section, the veteran's income includes his or her spouse's income for section 306 pension purposes. However, VA will exclude from the veteran's income the greater of the following two amounts:

(A) The amount of the spousal income exclusion specified in Public Law 95–588, section 306(a)(2)(B) (as increased by amounts published in the ''Notices'' section of the **Federal Register**).

(B) All of the spouse's earned income.

(c) *Surviving spouse awards for section 306 or old-law pension.* (1) *Veteran's child not in surviving spouse's custody.* For section 306 or old-law pension purposes, if a deceased veteran is survived by a spouse and a child, the annual income limits for a surviving spouse and child apply even if the child is not the surviving spouse's child and not in the surviving spouse's legal custody.

(2) *When a child's separate income is excluded.* (i) VA will not count a child's or children's separate income as part of the surviving spouse's income if it is paid to the child, regardless of who has legal custody of the child.

(ii) If the child's income is paid or given to the surviving spouse, VA will only count as much of the child's income as remains after deducting the child's living expenses.

(d) *Child awards.* (1) *Old-law pension.* Earned income of child beneficiaries counts as income for old-law pension.

(2) *Section 306 pension.* Earned income of child beneficiaries is excluded for section 306 pension.

(Authority: Sec. 306, Pub. L. 95–588, 92 Stat. 2508)

§ 5.474 Deductible expenses for section 306 pension only.

(a) *Scope.* This section applies to section 306 pension only. Because section 306 pension rates cannot increase, deductible expenses paid after

December 31, 1978, can only be deducted from a pension beneficiary's income to keep the income within the annual income limit and continue entitlement to section 306 pension.

(b) *Unusual medical expenses.* (1) *Application.* (i) *Family members.* For section 306 pension purposes, a family member is a relative of the beneficiary who is a member of the beneficiary's household whom the beneficiary has a moral or legal obligation to support. This includes relatives who are physically absent from the household for a temporary purpose or for reasons beyond their control.

(ii) *Unusual medical expenses.* For purposes of this section, ''unusual medical expenses'' means unreimbursed medical expenses above 5 percent of annual income. However, if annual income includes retirement plan income, VA will calculate the 5 percent before applying the 10 percent exclusion under § 5.472(f)(11). For medical expenses that VA will deduct, see [regulation that will be published in a future Notice of Proposed Rulemaking].

(2) *Veteran or surviving spouse awards.* VA will deduct amounts paid by a veteran or surviving spouse for the veteran's or surviving spouse's own unusual medical expenses and those of family members.

(3) *Child awards.* VA will deduct amounts paid by a child pension beneficiary for his or her own unusual medical expenses and those of the child's parent, brothers, and sisters.

(4) *When expenses are deducted.* VA will deduct unusual medical expenses from income for the calendar year in which they were paid regardless of when the expenses were incurred.

(5) *Proof of expenses.* VA will accept the pension beneficiary's statement as proof of the amount and nature of such medical expenses, the date of payment, and the identity of the creditor, unless circumstances create doubt as to the statement's credibility.

(6) *Estimates of expenses for future benefit periods.* VA will project anticipated medical expenses based on a clear and reasonable expectation that they will continue. *See* § 3.660(a) of this chapter (concerning the beneficiary's responsibility to inform VA concerning income changes).

(c) *Final expenses.* (1) *Definition.* Final expenses are amounts paid for the expenses of a deceased person's last illness and burial. The same expense cannot be deducted as both a final expense and an unusual medical expense under paragraph (a) of this section.

(2) *Final expenses paid by the veteran.* VA will deduct from a veteran's income the final expenses the veteran pays for his or her spouse or child.

(3) *Final expenses paid by a surviving spouse.* VA will deduct from a surviving spouse's income the final expenses the surviving spouse pays for the veteran's child.

(4) *Proof of expenses.* VA will accept as proof of expenses deductible under paragraph (c) of this section the pension beneficiary's statement as to the amount and nature of each expense, the date of payment, and identity of the creditor unless the circumstances create doubt as to the credibility of the statement.

(5) *When expenses are deducted.* Expenses deductible under paragraph (c) of this section are deductible for the year in which they were paid. However, if such expenses were paid during the year following the year the spouse, surviving spouse, or child died, the expenses may be deducted for the year the expenses were paid or the year of death, whichever is to the beneficiary's advantage.

(d) *Prepayment on real property mortgage after death of spouse.* (1) *Section 306 veteran pension beneficiaries only.* If a veteran who is receiving section 306 pension makes a pre-payment on a mortgage or similar type security instrument on real property after the death of his or her spouse, VA will deduct the amount of the pre-payment from the veteran's income. The real property must have been the principal residence of the veteran and spouse, and the mortgage or security instrument must have existed when the veteran's spouse died.

(2) *Time limit of pre-payment.* The pre-payment described in paragraph (d)(1) of this section must be made after the spouse's death but before the end of the year following the year of death. VA will deduct the amount of the pre-payment from the veteran's income for the year of death or the year after death, whichever is to the veteran's advantage.

(Authority: Sec. 306, Pub. L. 95–588, 92 Stat. 2508)

§ 5.475 Gaining or losing a dependent for section 306 and old-law pension.

(a) *Pension beneficiary gains a dependent.* (1) *Section 306 or old-law pension.* If a section 306 or old-law pension beneficiary gains a dependent, VA will determine if a higher annual income limit applies. A higher limit applies if the beneficiary previously had no dependents.

(2) *Veteran receiving section 306 pension gains a spouse who has income.* If a veteran beneficiary of section 306 pension gains a spouse who has countable income, VA will recompute the veteran's income for the year in which the person became the veteran's spouse. VA will then determine if the veteran is entitled to continued pension benefits or whether the recomputed income exceeds the annual income limit. VA makes the determination based on calendar-year income. However, VA will not count income that the spouse received or deduct any of the spouse's expenses paid before the date the person became the veteran's spouse for VA purposes.

(b) *Pension beneficiary loses dependent.* (1) *Loss of last dependent.* When section 306 or old-law pension beneficiaries lose their last dependent, their annual income limit is lowered. When this occurs, VA must determine if the beneficiary is still entitled to pension based on the lowered income limit and recalculated income for the calendar year that the dependent was lost.

(2) *Computation of new rate if a dependent established on or before December 31, 1978.* If a pension beneficiary loses a dependent and that dependent was established on or before December 31, 1978, VA will calculate a new pension rate. Because section 306 and old-law pension rates are based on 1978 income and number of dependents, VA calculates the new rate by removing the dependent and the dependent's 1978 income, if any, and using the remaining 1978 income to determine the new rate.

(i) If the recomputed rate is higher than the previous rate, VA will continue the previous rate.

(ii) If the rate payable to a surviving spouse with one child is less than the rate payable for a child alone, the surviving spouse will be paid the child's rate unless paragraph (b)(2)(i) of this section applies.

(c) *Section 306 pension and dependency of spouse.* For section 306 pension purposes, the December 31, 1978, rates for a veteran with a spouse and the annual income limit for a veteran with a spouse apply as long as the veteran and spouse live together or if not living together, are not estranged. If they are estranged, the married rates and the annual income limit for a veteran with a spouse apply if the veteran is reasonably contributing to the spouse's support. VA counts spousal income only if the annual income limit for a veteran with a spouse applies. VA bases its determination of ''reasonable'' contribution on all of the circumstances of the case, including a consideration of the veteran's income and net worth and the spouse's separate income and net

worth. VA automatically considers the requirement of ''reasonable'' contribution met without further review if the spouse is receiving an apportionment under § 3.451 of this chapter.

(Authority: Sec. 306, Pub. L. 95–588, 92 Stat. 2508)

§ 5.476 Net worth for section 306 pension only.

(a) *Definition.* For purposes of determining continuing entitlement to section 306 pension, net worth means the market value, minus mortgages or other encumbrances, of all real and personal property the beneficiary owns. VA excludes the beneficiary's dwelling (single-family unit), which also includes a reasonable lot area, and personal effects suitable to and consistent with the beneficiary's reasonable mode of life. VA will evaluate a ''reasonable lot area'' by considering the typical size of lots in the area. If the person lives on a farm, VA will exclude the value of a reasonable lot area, including the residence area, and consider the rest of the farm as part of net worth.

(b) *General.* VA only considers the net worth of the veteran, surviving spouse, or child beneficiary. In determining whether property belongs to a pension beneficiary, VA will consider the terms of the recorded deed or other evidence of title. In the absence of such evidence, VA will accept the beneficiary's statement as proof of the terms of ownership.

(c) *How VA evaluates net worth.* In determining whether some part of a beneficiary's net worth should be used for his or her maintenance, VA considers the beneficiary's income as determined under § 5.472, ''Evaluation of income for section 306 and old-law pension,'' along with all of the beneficiary's living expenses. However, in considering the beneficiary's living expenses, VA cannot consider expenses it excluded or deducted in determining income. In addition to these income and expense factors, VA will also consider the following factors:

(1) The value of liquid assets and the value of other property the beneficiary can readily convert into cash.

(2) The ability of the beneficiary to dispose of property if limited by community property laws.

(3) The number of family members (as described in § 5.474(b)(1)(i)) who depend on the beneficiary for support.

(4) The beneficiary's average life expectancy, and the potential rate of depletion of the beneficiary's net worth.

(d) *Statutory exclusions from net worth.* Resources excluded by statute will not be considered part of the beneficiary's net worth. For the list of resources excluded by statute, see [regulation that will be published in a future Notice of Proposed Rulemaking].

(Authority: Sec. 306, Pub. L. 95–588, 92 Stat. 2508)

§ 5.477 Effective dates for section 306 and old-law pension reductions or discontinuances.

(a) *Reductions or discontinuances based on certain events.* If required, VA will pay a reduced section 306 or old-law pension rate or discontinue benefits effective January 1 of the calendar year immediately following any of these events:

(1) *Marriage, annulment, divorce, or death.* A beneficiary loses a dependent due to marriage, annulment, divorce, or death.

(2) *Increased income.* The beneficiary receives increased income that could not reasonably have been anticipated based on the amount actually received from that source the previous year.

(3) *Increased net worth.* The beneficiary's net worth increases to the extent benefits must be discontinued (section 306 pension only).

(b) *General effective dates apply for other reasons.* VA will use the general effective dates in §§ 3.500 through 3.503 of this chapter for a discontinuance or reduction for any reason other than those stated in paragraph (a) of this section or in § 5.478(a).

(Authority: Sec. 306, Pub. L. 95–588, 92 Stat. 2508)

§ 5.478 Time limit to establish continuing entitlement to section 306 or old-law pension.

(a) *Anticipated income appears to exceed income limit.* If it appears that a section 306 or old-law pension beneficiary's income for a calendar year will be higher than the annual income limit, VA will discontinue pension benefits for that year effective January 1 of the following year, subject to paragraph (b) of this section.

(b) *Time limit for continuing entitlement.* If VA discontinues pension benefits as described in paragraph (a) of this section because of the beneficiary's anticipated income for a calendar year, the beneficiary can establish continuing entitlement by submitting evidence showing that income for the calendar year was below the annual income limit. The beneficiary must submit the evidence before the end of the calendar year that follows the year for which VA determined the income exceeded the limit. For example, if VA determines that a beneficiary's income for 2005 exceeds the income limit and discontinues pension benefits effective January 1, 2006, the beneficiary has up to and including December 31, 2006, to submit evidence such as deductible medical expenses or other information showing that 2005 income was within the 2005 income limit.

(c) *Finality of discontinuance.* If a beneficiary does not submit income evidence as described in paragraph (b) of this section or if such evidence does not warrant continued benefits, the discontinuance described in paragraph (a) of this section is final. This means that the beneficiary is no longer entitled to receive section 306 or old-law pension benefits. Any new entitlement that may be established would be to Improved pension.

(Authority: 38 U.S.C. 5110(h))

§§ 5.479 through 5.499 [Reserved]

[FR Doc. 04–28161 Filed 12–23–04; 8:45 am]

BILLING CODE 8320–01–P

Federal Register

Monday,
December 27, 2004

Part VII

Department of Transportation

Federal Aviation Administration

14 CFR Part 91
Pyrotechnic Signaling Device Requirements; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 91

[Docket No. FAA–2004–19947; Amendment No. 91–285]

RIN 2120–AI42

Pyrotechnic Signaling Device Requirements

AGENCY: Federal Aviation Administration, DOT.

ACTION: Direct final rule; request for comments.

SUMMARY: This direct final rule removes the requirement for a pyrotechnic signaling device required for aircraft operated for hire over water and beyond power-off gliding distance from shore for air carriers operating under part 121 unless it is part of a required life raft. All other operators will continue to be required to have onboard one pyrotechnic signaling device if they operate aircraft for hire over water and beyond power-off gliding distance from shore. The FAA amends the rule to remove the redundancy and regulatory burden for air carriers operating under part 121.

DATES: Effective February 7, 2005. The FAA must receive comments on this direct final rule by January 26, 2005.

ADDRESSES: You may send comments to Docket Number FAA–2004–19947 using any of the following methods:

- DOT Docket Web site: Go to *http://dms.dot.gov* and follow the instructions for sending your comments electronically.
- Government-wide rulemaking Web site: Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- Mail: Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–0001.
- Fax: 1–202–493–2251.
- 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.

Privacy Act: We will post all comments we receive, without change, to *http://dms.dot.gov,* including any personal information you provide. Using the search function of our docket Web site, anyone can find and read the comments received into any of our dockets. This will include the name of the individual sending the comment (or signing the comment for an association, business, labor union). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78) or you may visit *http://dms.dot.gov.*

Docket: To read background documents or comments received, go to *http://dms.dot.gov.* You may also go to Room PL–401 on the plaza of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Joe Keenan, Air Transportation Division (AFS–220), Flight Standards Service, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; Telephone No. (202) 267–9579.

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites anyone to take part in this rulemaking by sending written comments, data, or views. We also invite comments about the economic, environmental, energy, or federalism impacts that might result from adopting the proposals in this document. The most helpful comments reference a specific portion of the proposal, explain any recommended change, and include supporting data. We ask that you send us two copies of written comments.

We will file all comments received, as well as a report summarizing each substantive public contact with FAA personnel on this rulemaking, in the public docket. The docket is available for public inspection before and after the comment closing date. If you wish to review the docket in person, go to the address in the **ADDRESSES** section of this preamble between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also review the docket using the Internet at the web address in the **ADDRESSES** section.

Before this direct final rule becomes effective, we will consider all comments we receive by the closing date for comments. We may change this rule because of the comments we receive. For more information about direct final rule procedures, see the ''Direct Final Rule Procedures'' later in this document.

If you want the FAA to acknowledge receipt of your comments on this proposal, include with your comments a preaddressed, stamped postcard on which the docket number appears. We will stamp the date on the postcard and mail it to you.

Availability of Rulemaking Documents

You can get an electronic copy using the Internet by taking the following steps:

(1) Go to the search function of the Department of Transportation's electronic Docket Management System (DMS) Web page—*http://dms.dot.gov/search.*

(2) On the search page type in the last five digits of the Docket number of this notice (19947), click on ''search.''

(3) On the next page, which contains the Docket summary information for the Docket you selected, click on the document number for the item you wish to view.

You can also get an electronic copy using the Internet through the Office of Rulemaking's Web page at *http://www.faa.gov/avr/arm/index.cfm* or the Federal Register's Web page at *http://www.gpoaccess.gov/fr/index.html.*

You can also get a copy by filing a request to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267–9680. Make sure to identify the amendment number or docket number of this rulemaking.

Small Entity Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) requires the FAA to report inquiries from small entities about information on, and advice about, compliance with statutes and regulations within its jurisdiction. Therefore, any small entity that has a question about this document may contact their local FAA official, or the person listed under **FOR FURTHER INFORMATION CONTACT.** You can also find more information on SBREFA on the FAA's Web page at *http://www.faa.gov/avr/arm/sbrefa.cfm.*

Background

On February 25, 2004, the FAA published a ''Review of Existing Regulations'' proposal in the **Federal Register** (69 FR 8575; docket number FAA–2004–17168) seeking comments on regulations that it should amend, remove, or simplify. The FAA stated that the intent of this review was to ''identify regulations that impose undue regulatory burden, are no longer necessary, or overlay, repeat, or conflict with other Federal regulations.'' Further, the FAA stated that it would review comments and ''point out, where appropriate, how we will adjust our regulatory priorities.''

The FAA received comments from the National Air Carrier Association

(NACA), the Air Transport Association (ATA), and Southwest Airlines (SWA) that address § 91.205(b)(12), a regulation that has been an issue of both petitions for exemption and enforcement policy for some time. That issue is whether air carriers conducting operations under part 121 should be required to comply with § 91.205(b)(12). Specifically, paragraph (b)(12) requires aircraft that operate for hire, over water, and beyond power off gliding distance from shore to carry one pyrotechnic signaling device. The relevant parts of § 91.205 read as follows:

§ 91.205 Powered civil aircraft with standard category U.S. airworthiness certificates: Instrument and equipment requirements.

(a) *General.* Except as provided in paragraphs (c)(3) and (e) of this section, no person may operate a powered civil aircraft with a standard category U.S. airworthiness certificate in any operation described in paragraphs (b) through (f) of this section unless that aircraft contains the instruments and equipment specified in those paragraphs (or FAA-approved equivalents) for that type of operation, and those instruments and items of equipment are in operable condition.

(b) *Visual-flight rules (day).* For VFR flight during the day, the following instruments and equipment are required:

(1)–(11)* * *

(12) If the aircraft is operated for hire over water and beyond power-off gliding distance from shore, approved flotation gear readily available to each occupant and at least one pyrotechnic signaling device. As used in this section, ''shore'' means that area of the land adjacent to the water which is above the high water mark and excludes land areas which are intermittently under water.

(13)–(17) and (c) * * *

(d) *Instrument flight rules.* For IFR flight, the following instruments and equipment are required:

(1) Instruments and equipment specified in paragraph (b) of this section, and, for night flight, instruments and equipment specified in paragraph (c) of this section.

(2)–(9) and (e)–(h) * * *

SWA states that the FAA should rescind § 91.205(b)(12) for part 25 airplanes because mandating a flare gun be carried in the cockpit is an unnecessary and hazardous requirement that is without aviation safety justification. SWA asserts that the risk of a modern multi-engine turbo jet experiencing a total power loss on take-off and not being able to return to the departure airport for an emergency landing is extremely low. SWA states that even if an aircraft had to ditch in the ocean, departure radar control would easily pinpoint its location. SWA believes the minimal value that a flare gun would provide is far outweighed by the danger it imposes to the cockpit. SWA states that this device is hazardous because if it is triggered in flight it cannot be extinguished.

The ATA asserts that the rule requires operators that do not operate with life rafts and survival equipment as required by § 91.509 to carry pyrotechnic signaling devices. This association states that eliminating the rule's applicability to air carriers would eliminate the purchase of the devices and additional engineering, manufacture, approval, and installation of security boxes. The association also points out that the elimination would also save unnecessary incorporation into maintenance programs and special training of flight crews.

The NACA states that when this rule was written, pyrotechnic flares were the state-of-art signaling devices. This association states that since that time we have emergency locator transmitters (ELTs), enhanced ELTs, better communications, radar surveillance, and more practical and timely options.

Petitions for Exemption From § 91.205(b)(12)

The FAA has consistently denied petitions for exemption from § 91.205(b)(12), partly on the basis that a grant of exemption would be more appropriate to an entire class of operators and thus should be accomplished under rulemaking. In recent years, however, the FAA has received several petitions that present compelling arguments for relief. America West, in a petition dated June 17, 2004, presents a probability analysis, based on the FAA's model in developing Special Federal Aviation Regulation (SFAR) 88 for fuel systems, that finds the probability of an in-flight shut down is far less likely than ''extremely improbable'' or ''extremely remote,'' as defined by the FAA in Appendix B: ''SFAR 88—Mandatory Action Decision Criteria,'' Memo Number 2003–112–15, dated February 25, 2003.

SWA, in a petition dated June 18, 2004, also states that the requirement is unnecessary. The airline asserts that during take-off and landing the aircraft's position is closely monitored by air traffic control, and if an over water event were to occur, the location of the aircraft would be known and broadcast long before a flight crewmember could locate and activate a pyrotechnic signaling device. SWA therefore finds the requirement obsolete. SWA also asserts that the device is hazardous. It argues that if the device is accidentally activated in the cockpit, the results could be catastrophic. SWA points out that ensuring pyrotechnic devices are safely stowed for security reasons poses an additional expense for airlines for a questionable increase in public safety. In its petition, SWA asks for an exemption or policy of nonenforcement for itself and similarly situated operators from § 91.205(b)(12) for 2 years while the FAA considers rulemaking.

Related Requirements in Part 121

In addition to petitions, over the years, other carriers have requested interpretation of § 91.205(b)(12). Part of the confusion results from other regulations in part 121 that provide a redundancy in the requirement for pyrotechnic devices in that one device must be carried for each required raft onboard aircraft that operate in extended over water operations. For aircraft other than helicopters, ''extended over water operation'' is defined in § 1.1 of 14 CFR as an operation over water at a horizontal distance of more than 50 nautical miles from the nearest shoreline. The relevant parts of the 14 CFR 121.339 requirement are as follows:

§ 121.339 Emergency equipment for extended over-water operations.

(a) Except where the Administrator, by amending the operations specifications of the certificate holder, requires the carriage of all or any specific items of the equipment listed below for any overwater operation, or upon application of the certificate holder, the Administrator allows deviation for a particular extended overwater operation, no person may operate an airplane in extended overwater operations without having on the airplane the following equipment:

(1) * * *

(2) Enough life rafts (each equipped with an approved survivor locator light) of a rated capacity and buoyancy to accommodate the occupants of the airplane. Unless excess rafts of enough capacity are provided, the buoyancy and seating capacity beyond the rated capacity of the rafts must accommodate all occupants of the airplane in the event of a loss of one raft of the largest rated capacity.

(3) At least one pyrotechnic signaling device for each life raft.

(4) and (b)–(c) * * *

Thus, the question might be asked that if an aircraft is already required to have pyrotechnic signaling devices onboard for each required life raft, should it also be required to have one additional device onboard the aircraft?

The Amended Rule

Having considered the arguments of petitioners and commenters to FAA docket number 17168, the FAA has determined that as a reasonable and judicious action, the requirement for air carriers operating under part 121 to have the pyrotechnic signaling device required by § 91.205(b)(12) onboard

should be removed from the regulations. The FAA finds that commenters have presented sufficient grounds to convince the FAA that the requirement for the pyrotechnic signaling device required by § 91.205(b)(12) for operators conducting operations under part 121 poses an unnecessary burden on those operators to secure the signaling device.

The FAA also finds that petitioners and commenters have presented compelling arguments that other regulatory requirements, such as air traffic control, dispatch/flight following, and advanced communications, provide an equivalent, if not greater, level of safety as would be provided by a pyrotechnic signaling device located on the aircraft.

Section 91.205(b)(12) will continue in force for operators not conducting their operations under part 121, since these operators' safety redundancies, such as dispatch/flight following systems, do not exist to the same extent as for part 121 air carriers. In addition, this amendment does not affect in any way the regulatory requirements for section 121.339 that require a pyrotechnic signaling device for each life raft required to be carried onboard aircraft that conduct extended over water operations. The FAA also notes that these operations do not need an additional pyrotechnic signaling device onboard the aircraft beyond the one required for each life raft.

Direct Final Rule Procedure

Under 14 CFR 11.29, the FAA may issue a direct final rule if an NPRM would be unnecessary because the agency expects no adverse comments to the changed rule. The FAA anticipates that this regulation will not result in adverse or negative comment and therefore is issuing it as a direct final rule. The provisions in this final rule remove a requirement as it applies to air carriers conducting operations under part 121. The removal of the requirement will not affect the safety of these operations because of the redundancies built into the air traffic control and dispatch/flight following systems. As a result, the FAA has determined that this amendment is a minor relieving change that has no effect on public safety.

Unless a written adverse or negative comment, or a written notice of intent to submit an adverse or negative comment, is received within the comment period, the regulation will become effective on the date specified above. After the close of the comment period, the FAA will publish a document in the **Federal Register** indicating that no adverse or negative comments were received and confirming the date on which the final rule will become effective. If the FAA does receive, within the comment period, an adverse or negative comment, or written notice of intent to file such a comment, the FAA will publish in the **Federal Register** a document withdrawing the direct final rule. The FAA may then issue another direct final rule accommodating the comment or may issue a notice of proposed rulemaking with a new comment period.

Economic Assessment, Regulatory Flexibility Determination, Trade Impact Assessment, and Unfunded Mandates Assessment

Proposed changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 directs each Federal agency to propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (19 U.S.C. 2531–2533) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. In developing U.S. standards, this Trade Act also requires agencies to consider international standards and, where appropriate, use them as the basis of U.S. standards. Fourth, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more annually (adjusted for inflation).

However, for regulations with an expected minimal impact the above-specified analyses are not required. If it is determined that the expected impact is so minimal that the proposal does not warrant a full evaluation, a statement to that effect and the basis for it is included in the proposed regulation. Since this final rule is relieving and is expected to provide some cost savings to some part 121 operators, the FAA has determined that the rule will have minimal impact. The FAA requests comment with supporting justification regarding the FAA determination of minimal impact.

The FAA has determined this rule (1) has benefits that justify its costs, is not a ''significant regulatory action'' as defined in section 3(f) of Executive Order 12866 and is not a ''significant regulatory action'' as defined in section 3(f) of Executive Order 12866 and is not ''significant'' as defined in DOT's Regulatory Policies and Procedures; (2) will not have a significant economic impact on a substantial number of small entities; (3) will not reduce barriers to international trade; and (4) does not impose an unfunded mandate on state, local, or tribal governments, or on the private sector.

Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (RFA) establishes ''as a principle of regulatory issuance that agencies shall endeavor, consistent with the objective of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the business, organizations, and governmental jurisdictions subject to regulation.'' To achieve that principle, the RFA requires agencies to solicit and consider flexible regulatory proposals and to explain the rationale for their actions. The RFA covers a wide range of small entities, including small businesses, not-for-profit organizations and small governmental jurisdictions.

Agencies must perform a review to determine whether a proposed or final rule will have a significant economic impact on a substantial number of small entities. If the determination is that it will, the agency must prepare a regulatory flexibility analysis as described in the RFA.

However, if an agency determines that a proposed or final rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

This rule will not impose any cost on any small part 121 operator, but it will provide some minor cost savings to them. Therefore, the FAA certifies that this rule will not have a significant economic impact on a substantial number of small entities. The FAA requests comments regarding its certification.

International Trade Impact Assessment

The Trade Agreement Act of 1979 prohibits Federal agencies from engaging in any standards or related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic

objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and where appropriate, that they be the basis for U.S. standards. The FAA accordingly has assessed the potential effect of this rule to be minimal and has determined that this rule will have no impact on international trade.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (the Act) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of the Act requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of $100 million or more (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a ''significant regulatory action.'' The FAA currently uses an inflation-adjusted value of $120.7 million in lieu of $100 million.

This final rule does not contain such a mandate. The requirements of Title II of the Act, therefore, do not apply.

Executive Order 13132, Federalism

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

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that the FAA consider the impact of paperwork and other information collection burdens imposed on the public. We have determined that there are no requirements for information collection associated with this rule.

Environmental Analysis

FAA Order No. 1050.1D defines FAA actions that may be categorically excluded from preparation of a National Environmental Policy Act (NEPA) environmental assessment or environmental impact statement. In accordance with FAA Order No. 1050.1D, Appendix 4, paragraph 4(j), regulations, standards, and exemptions (excluding those that may cause a significant impact on the human environment if implemented) qualify for a categorical exclusion. The FAA has determined that this rule qualifies for a categorical exclusion because no significant impacts to the environment are expected to result from its implementation.

Energy Impact

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

List of Subjects in 14 CFR Part 91

Afghanistan, Agriculture, Air traffic control, Aircraft, Airmen, Airports, Aviation safety, Canada, Cuba, Ethiopia, Freight, Mexico, Noise control, Political candidates, Reporting and recordkeeping requirements, Yugoslavia.

The Amendment

■ For the reasons stated in the preamble, the Federal Aviation Administration amends part 91 of Title 14 of the Code of Federal Regulations as follows:

PART 91—GENERAL OPERATING AND FLIGHT RULES

■ 1. The authority citation for part 91 continues to read as follows:

Authority: 49 U.S.C. 106(g), 1155, 40103, 40113, 40120, 44101, 44111, 44701, 44709, 44711, 44712, 44715, 44716, 44717, 44722, 46306, 46315, 46316, 46504, 46506–46507, 47122, 47508, 47528–47531, articles 12 and 29 of the Convention on International Civil Aviation (61 Stat. 1180).

■ 2. Amend § 91.205 by revising paragraph (b)(12) to read as follows:

§ 91.205 Powered Civil Aircraft with standard category U.S. airworthiness certificates: Instrument and equipment requirements.

(b) * * *

(12) If the aircraft is operated for hire over water and beyond power-off gliding distance from shore, approved flotation gear readily available to each occupant and, unless the aircraft is operating under part 121 of this subchapter, at least one pyrotechnic signaling device. As used in this section, ''shore'' means that area of the land adjacent to the water which is above the high water mark and excludes land areas which are intermittently under water.

* * * * *

Issued in Washington, DC, on December 20, 2004.

Marion C. Blakey,

Administrator.

[FR Doc. 04–28230 Filed 12–23–04; 8:45 am]

BILLING CODE 4910–13–P

Federal Register

Monday,
December 27, 2004

Part VIII

The President

Federal Register
Vol. 69, No. 247
Monday, December 27, 2004

Presidential Documents

Title 3—

The President

Proclamation 7858 of December 21, 2004

To Take Certain Actions Under the African Growth and Opportunity Act

By the President of the United States of America

A Proclamation

1. In Proclamation 7561 of May 16, 2002, I designated the Republic of Cote d'Ivoire as a beneficiary sub-Saharan African country pursuant to section 506A(a)(1) of the Trade Act of 1974, as amended, (the ''1974 Act'') (19 U.S.C. 2466a(a)(1)), as added by section 111(a) of the African Growth and Opportunity Act (title I of Public Law 106–200) (AGOA)). I also provided that Cote d'Ivoire would be considered a lesser developed beneficiary sub-Saharan African country for purposes of section 112(b)(3)(B) of the AGOA (19 U.S.C. 3721(b)(3)(B)).

2. In Proclamation 7350 of October 2, 2000, President Clinton delegated to the United States Trade Representative (USTR) the authority to perform the function specified in section 113(b)(1)(B) of the AGOA (19 U.S.C. 3722(b)(1)(B)). In a **Federal Register** notice dated December 17, 2003, the USTR determined that Cote d'Ivoire had adopted an effective visa system and related procedures to prevent unlawful transshipment and the use of counterfeit documents and that Cote d'Ivoire had implemented and followed, or was making substantial progress toward implementing and following, certain customs procedures that assist the United States Customs Service in verifying the origin of the products.

3. Section 506A(a)(3) of the 1974 Act (19 U.S.C. 2466a(a)(3)) authorizes the President to terminate the designation of a country as a beneficiary sub-Saharan African country for purposes of section 506A if he determines that the country is not making continual progress in meeting the requirements described in section 506A(a)(1) of the 1974 Act, effective on January 1 of the year following the year in which such determination is made.

4. Pursuant to section 506A(a)(3) of the 1974 Act, I have determined that Cote d'Ivoire is not making continual progress in meeting the requirements described in section 506A(a)(1) of the 1974 Act. Accordingly, I have decided to terminate the designation of Cote d'Ivoire as a beneficiary sub-Saharan African country for purposes of section 506A of the 1974 Act, effective on January 1, 2005.

5. Section 604 of the 1974 Act (19 U.S.C. 2483) authorizes the President to embody in the Harmonized Tariff Schedule of the United States (HTS) the substance of the relevant provisions of that Act, and of other acts affecting import treatment, and actions thereunder, including the removal, modification, continuance, or imposition of any rate of duty or other import restriction.

NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, acting under the authority vested in me by the Constitution and the laws of the United States, including sections 506A and 604 of the 1974 Act and section 301 of title 3, United States Code, do proclaim that:

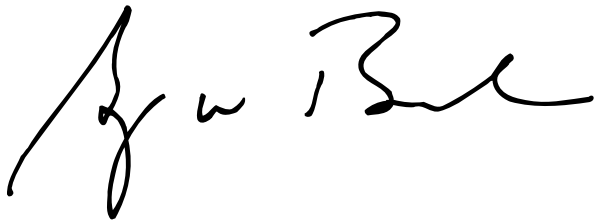
(1) The designation of Cote d'Ivoire as a beneficiary sub-Saharan African country for purposes of section 506A of the 1974 Act is terminated, effective on January 1, 2005.

(2) In order to reflect in the HTS that beginning January 1, 2005, Cote d'Ivoire shall no longer be designated as a beneficiary sub-Saharan African country, general note 16(a) to the HTS is modified by deleting ''Republic of Cote d'Ivoire'' from the list of beneficiary sub-Saharan African countries. Further, U.S. note 2(d) to subchapter XIX of chapter 98 is modified by removing ''Cote d'Ivoire'' from the list of lesser developed beneficiary sub-Saharan African countries, and U.S. note 7(a) to subchapter II and U.S. note 1 to subchapter XIX of chapter 98 of the HTS are modified by deleting ''Cote d'Ivoire'' from the list of beneficiary sub-Saharan African countries eligible for certain textile and apparel benefits.

(3) The modification to the HTS made by this proclamation shall be effective with respect to articles entered, or withdrawn from warehouse for consumption, on or after January 1, 2005.

(4) Any provisions of previous proclamations and executive orders that are inconsistent with this proclamation are superseded to the extent of such inconsistency.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-first day of December, in the year of our Lord two thousand four, and of the Independence of the United States of America the two hundred and twenty-ninth.



[FR Doc. 04–28403
Filed 12–23–04; 8:45 am]
Billing code 3195–01–P

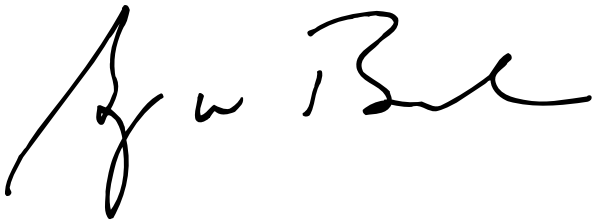
Presidential Documents

Executive Order 13367 of December 21, 2004

United States-Mexico Border Health Commission

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 1 of the International Organizations Immunities Act (22 U.S.C. 288) (the ''Act''), and having found that the United States participates in the United States-Mexico Border Health Commission (USMBHC) pursuant to the United-States Mexico Border Health Commission Act, Public Law 103–400 (22 U.S.C. 290n *et seq.*), I hereby designate the USMBHC as a public international organization for purposes of the International Organizations Immunities Act. I hereby extend to members and employees of the Mexican Section of the USMBHC the same privileges, exemptions, and immunities as are accorded under similar circumstances to officers and employees, respectively, of foreign governments with regard to the laws regulating entry into and departure from the United States as provided for in section 7(a) of the Act (22 U.S.C. 288d(a)). No other privileges, exemptions, or immunities of the Act are extended under this order.

This designation is not intended to abridge in any respect privileges, exemptions, or immunities that the USMBHC otherwise may have acquired or may acquire by law.



THE WHITE HOUSE,
December 21, 2004.

[FR Doc. 04–28404
Filed 12–23–04; 8:45 am]
Billing code 3195–01–P

Presidential Documents

Presidential Determination No. 2005–15 of December 21, 2004

Provision of Aviation Insurance Coverage for Commercial Air Carrier Service in Domestic and International Operations

Memorandum for the Secretary of Transportation

By the authority vested in me by 49 U.S.C. 44302, *et seq.*, I hereby:

1. determine that continuation of U.S.-flag commercial air service is necessary in the interest of air commerce, national security, and the foreign policy of the United States.

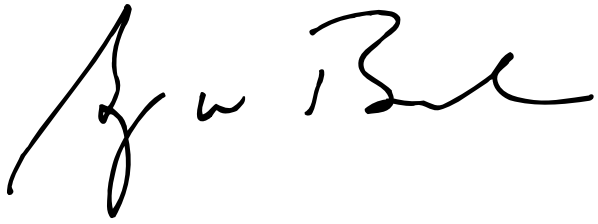
2. approve provision by the Secretary of Transportation of insurance or reinsurance to U.S.-flag air carriers against loss or damage arising out of any risk from the operation of an aircraft in the manner and to the extent provided in Chapter 443 of 49 U.S.C.:

(a) until August 31, 2005;

(b) after August 31, 2005, but no later than December 31, 2005, when he determines that such insurance or reinsurance cannot be obtained on reasonable terms and conditions from any company authorized to conduct an insurance business in a State of the United States; and

3. delegate to the Secretary of Transportation the authority, vested in me by 49 U.S.C. 44306(c), to extend this determination for additional periods beyond August 31, 2005, but no later than December 31, 2005, when he finds that the continued operation of aircraft to be insured or reinsured is necessary in the interest of air commerce or the national security, or to carry out the foreign policy of the United States Government.

You are directed to bring this determination immediately to the attention of all air carriers within the meaning of 49 U.S.C. 40102(2), and to arrange for its publication in the **Federal Register**.



THE WHITE HOUSE,
Washington, December 21, 2004.

[FR Doc. 04–28405
Filed 21–23–04; 8:45 am]
Billing code 4910–62–P

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Federal Register

Vol. 69, No. 247

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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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ENVIRONMENTAL PROTECTION AGENCY

Air pollutants, hazardous; national emission standards:
- Pulp and paper industry; published 11-2-04

Air quality implementation plans; approval and promulgation; various States:
- Iowa; published 11-3-04

Solid waste:
- Land disposal restrictions—
  - Chemical Waste Management, Chemical Services, LLC; site-specific treatment standard variance for selenium waste; published 11-19-04

FEDERAL COMMUNICATIONS COMMISSION

Common carrier services:
- Communications disruptions; reporting requirements; published 12-3-04

Digital television stations; table of assignments:
- Colorado; published 11-26-04

FEDERAL MARITIME COMMISSION

Ocean common carriers and marine terminal operators agreements; published 11-4-04

HOMELAND SECURITY DEPARTMENT

Coast Guard

Drawbridge operations:
- North Carolina; published 12-2-04
- Virginia; published 12-2-04

INTERIOR DEPARTMENT

National Park Service

Alaska National Park System units; amendments; published 12-2-04

SMALL BUSINESS ADMINISTRATION

Small business size standards:
- Small Business Innovation Research Program; small businesses owned and controlled by another business concern; published 12-3-04

Standards of conduct and employee restrictions and responsibilities; published 11-3-04

TRANSPORTATION DEPARTMENT

Federal Aviation Administration

Airworthiness directives:
- Airbus; published 11-26-04
- Boeing; published 11-29-04
- Empresa Brasileira de Aeronautica S.A. (EMBRAER); published 11-26-04
- Hamilton Sundstrand Power Systems; published 11-26-04
- McDonnell Douglas; published 11-26-04
- Rolls-Royce Corp.; published 11-26-04

TRANSPORTATION DEPARTMENT

Federal Highway Administration

Engineering and traffic operations:
- Uniform Traffic Control Devices Manual for streets and highways; 24-hour pharmacies; specific and general service signing; published 12-1-04

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Food and Drug Administration

Biological products:
- Bacteria vaccines and toxoids; efficacy review and implementation; published 1-5-04
  - Correction; published 1-8-04

TRANSPORTATION DEPARTMENT

Federal Aviation Administration

Airworthiness directives:
- Bombardier; published 12-20-04
- Saab; published 11-30-04

RULES GOING INTO EFFECT JANUARY 5, 2005

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National Oceanic and Atmospheric Administration

Fishery conservation and management:
- Atlantic highly migratory species—
  - Bigeye tuna, bluefin tuna, and swordfish; published 12-6-04

FEDERAL COMMUNICATIONS COMMISSION

Radio stations; table of assignments:
- Texas; published 11-8-04
- Various States; published 10-12-04

INTERIOR DEPARTMENT

Fish and Wildlife Service

Importation, exportation, and transportation of wildlife:
- Houston, TX; Louisville, KY; and Memphis, TN; designated port status; published 12-6-04

LABOR DEPARTMENT

Occupational Safety and Health Administration

Construction safety and health standards:
- Methylenedianiline standard for construction; correction; published 12-6-04

LIBRARY OF CONGRESS

Copyright Office, Library of Congress

Copyright office and procedures:
- Inspection and copying of records; published 12-6-04

TRANSPORTATION DEPARTMENT

Federal Aviation Administration

Airworthiness directives:
- Kelly Aerospace Power Systems; published 12-16-04
- Rolls-Royce Corp.; published 12-1-04

RULES GOING INTO EFFECT JANUARY 6, 2005

COMMERCE DEPARTMENT

Economic Analysis Bureau

Direct investment surveys:
- BE-10; U.S. direct investment abroad; benchmark survey; published 12-7-04

ENVIRONMENTAL PROTECTION AGENCY

Toxic substances:
- Preliminary assessment information reporting; addition of chemicals; published 12-7-04

FEDERAL COMMUNICATIONS COMMISSION

Radio stations; table of assignments:
- Alabama and Georgia; published 12-9-04
- Arizona; published 12-9-04
- Florida; published 12-9-04
- Washington; published 12-9-04

HOUSING AND URBAN DEVELOPMENT DEPARTMENT

Community development block grants:
- Metropolitan city definition and other conforming amendments; published 12-7-04

TRANSPORTATION DEPARTMENT

Federal Aviation Administration

Airworthiness directives:
- Bombardier; published 12-6-04

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AGRICULTURE DEPARTMENT

Agricultural Marketing Service

Oranges, grapefruit, tangerines, and tangelos grown in—
- Florida; published 12-8-04

AGRICULTURE DEPARTMENT

Food and Nutrition Service

Child nutrition programs:
- National School Lunch and School Breakfast Programs—
  - Nutrient analysis of school meals; weighted averages use requirement; waiver extended; published 12-8-04

AGRICULTURE DEPARTMENT

Farm Service Agency

Program regulations:
- Servicing delinquent community facility loans; published 12-8-04

AGRICULTURE DEPARTMENT

Rural Business-Cooperative Service

Program regulations:
- Servicing delinquent community facility loans; published 12-8-04

AGRICULTURE DEPARTMENT

Rural Housing Service

Program regulations:
- Servicing delinquent community facility loans; published 12-8-04

COMMENTS DUE NEXT WEEK

LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with "PLUS" (Public Laws Update Service) on 202–741–6043. This list is also available online at *http://www.archives.gov/federal_register/public_laws/public_laws.html*.

The text of laws is not published in the **Federal Register** but may be ordered in "slip law" (individual pamphlet) form from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202–512–1808). The text will also be made available on the Internet from GPO Access at *http://www.gpoaccess.gov/plaws/index.html*. Some laws may not yet be available.

H.R. 4012/P.L. 108–457

To amend the District of Columbia College Access Act of 1999 to reauthorize for 2 additional years the public school and private school tuition assistance programs established under the Act. (Dec. 17, 2004; 118 Stat. 3637)

S. 2845/P.L. 108–458

Intelligence Reform and Terrorism Prevention Act of 2004 (Dec. 17, 2004; 118 Stat. 3638)

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