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

DEPARTMENT OF AGRICULTURE

Rural Housing Service

7 CFR Part 1924

RIN 0575–AC60

Surety Requirements

AGENCY: Rural Housing Service, USDA.

ACTION: Direct final rule.

SUMMARY: The Rural Housing Service is amending its regulations to change the threshold for surety requirements guaranteeing payment and performance from a $100,000 contract amount to the maximum Rural Development Single Family Housing area lending limit. This limit will vary by locality. This will liberalize the requirement for surety and take into account the increased construction cost of single family homes in Rural Development's Single Family Housing Program. This will ease the burden on small contractors for whom obtaining surety is difficult and expensive, thereby reducing costs to our single family housing borrowers.

DATES: This rule is effective April 7, 2005, unless we receive written adverse comments or written notices of intent to submit adverse comments on or before March 8, 2005. If we receive such comments or notices, we will publish a timely document in the **Federal Register** withdrawing the direct final rule.

ADDRESSES: You may submit adverse comments or notice of intent to submit adverse comments to this rule by any of the following methods:

- Agency Web site: *http://rdinit.usda.gov/regs/.* Follow the instructions for submitting comments on the Web site.
- E-Mail: *comments@usda.gov.* Include the RIN number (0575–AC60) in the subject line of the message.
- Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.
- Mail: Submit written comments via the U.S. Postal Service to the Branch Chief, Regulations and Paperwork Management Branch, U.S. Department of Agriculture, STOP 0742, 1400 Independence Avenue, SW., Washington, DC 20250–0742.
- Hand Delivery/Courier: Submit written comments via Federal Express Mail or another mail courier service requiring a street address to the Branch Chief, Regulations and Paperwork Management Branch, U.S. Department of Agriculture, 300 7th Street, SW., 7th Floor, Suite 701, Washington, DC 20024.

All written comments will be available for public inspection during regular work hours at the 300 7th Street, SW., address listed above.

FOR FURTHER INFORMATION CONTACT: Michel Mitias, Technical Support Branch, Program Support Staff, Rural Housing Service, U.S. Department of Agriculture, STOP 0761, 1400 Independence Avenue, SW., Washington, DC 20250–0761; Telephone: (202) 720–9653; FAX (202) 690–4335; E-mail: *michel.mitias@usda.gov.*

SUPPLEMENTARY INFORMATION:

Classification

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

Civil Justice Reform

In accordance with this rule: (1) All State and local laws and regulations that are in conflict with this rule will be preempted, (2) no retroactive effect will be given to this rule, and (3) administrative proceedings in accordance with 7 CFR part 11 must be exhausted before bringing suit in court challenging action taken under this rule, unless those regulations specifically allow bringing suit at an earlier time.

Regulatory Flexibility Act

The Administrator of the Rural Housing Service has determined that this rule will not have a significant economic impact on a substantial number of small entities as defined in the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). New provisions included in this rule will not impact a substantial number of small entities to a greater extent than large entities. Therefore, a regulatory flexibility analysis was not performed.

Paperwork Reduction Act

There are no new reporting and recordkeeping requirements associated with this rule.

Unfunded Mandates Reform Act

This rule contains no Federal mandates (under the regulatory provisions of Title II of the Unfunded Mandates Reform Act of 1995) for State, local, and tribal governments or the private sector. Thus, this rule is not subject to the requirements of sections 202 and 205 of the Unfunded Mandates reform Act of 1995.

Environmental Impact Statement

This document has been reviewed in accordance with 7 CFR part 1940, subpart G, ''Environmental Program.'' RHS has determined that this action does not constitute a major Federal action significantly affecting the quality of the human environment, and, in accordance with the National Environmental Policy Act of 1969, Public Law 91–190, an Environmental Impact Statement is not required.

Programs Affected

The programs affected are listed in the Catalog of Federal Domestic Assistance under Number 10.410, Very Low to Moderate Income Housing Loans, and Number 10.415, Rural Rental Housing Loans. Rural Rental Housing Loans will be affected for those construction contracts above the applicable Rural Development area loan limit.

Intergovernmental Review

RHS conducts intergovernmental consultation in the manner delineated in RD Instruction 1940–J, ''Intergovernmental Review of Rural Development Programs and Activities,'' and in 7 CFR part 3015, subpart V. The Very Low to Moderate Income Housing Loans Program, Number 10.410, is not subject to the provisions of Executive Order 12372, which requires intergovernmental consultation with State and local officials. Rural Rental Housing Loans Program, Number 10.415, conducts intergovernmental reviews on a case-by-case basis. An intergovernmental review for this revision is not required or applicable.

Direct Final Rule

It is the policy of the Rural Housing Service (RHS) to publish rules determined to be non-controversial and unlikely to result in adverse comments as direct final rules. RHS policy for direct final rules was published on March 27, 2003, at 68 FR 14889. No adverse comments are anticipated on the changes in this rule. Adverse comments suggest that the rule should not be adopted or that a change should be made to the rule. Unless an adverse comment is received within 60 days from the date of publication, this rule will be effective 90 days from the date of publication. If RHS receives one or more written adverse comments within 60 days from the date of publication, a document withdrawing the direct final rule prior to its effective date will be published in the **Federal Register** stating that adverse comments were received.

Background

RHS administers the Direct Single Family Housing Loan and Grant program pursuant to 7 CFR part 3550, designed to assist very low and low-income households to obtain modest, decent, safe, and sanitary housing for use as permanent residences in rural areas. Direct loans may be used to buy, build, or improve the applicant's permanent residence. RHS regulations in 7 CFR part 1924, subpart A, contain requirements for construction which is funded with direct RHS loans, including direct single family housing loans. The regulation also applies to larger direct funded construction projects by other agencies in the Rural Development mission area. This regulation was originally promulgated on March 13, 1987 in 52 FR 41833. One of the requirements in this regulation is that for construction work performed by the contract method (where the borrower contracts with a builder for the construction), the builder must obtain a surety bond guaranteeing payment and performance in the amount of the contract when the contract exceeds $100,000. This amount has remained unchanged since 1987. In 1987, a single family house constructed and financed under the direct single family housing loan program would not exceed $100,000. Since 1987, construction costs for single family houses financed by RHS have dramatically increased so that now construction costs frequently exceed $100,000. The requirement that builders obtain surety bonds when the construction contract exceeds $100,000 has made it difficult for contractors to compete for direct single family housing projects financed by RHS. While the regulation contains internal exceptions for the $100,000 requirement, none of these exceptions satisfactorily resolves the cost burden for builders of direct single family housing.

The revision to 7 CFR 1924.6(a)(3)(i)(A) will facilitate the process of construction by raising the threshold when the contractor must acquire surety bonds. The purpose of this regulation is to remove the surety bond requirement for direct funded single family housing. The new threshold will be when the contract exceeds the applicable RHS area single family housing loan limit as established pursuant to 7 CFR 3550.63 and the limit for any particular area is available from any Rural Development office.

The provisions in 7 CFR 1924.6(a)(3)(i) that require payment and performance bonds when construction is under this threshold amount remain unchanged. RHS has determined that changing the threshold for payment and performance bonds provides for more flexibility, is locality based, borrowers are adequately protected, and housing costs are reduced.

List of Subjects in 7 CFR Part 1924

Agriculture, Construction management, Construction and repair, Energy conservation, Housing, Loan programs—Agriculture, Low and moderate income housing.

■ For the reasons set forth in the preamble, chapter XVIII, title 7, of the Code of Federal Regulations is amended as follows:

PART 1924—CONSTRUCTION AND REPAIR

■ 1. The authority citation for part 1924 continues to read as follows:

Authority: 5 U.S.C. 301; 7 U.S.C. 1989; 42 U.S.C. 1480.

Subpart A—Planning and Performing Construction and Other Development

■ 2. Section 1924.6 is amended by revising paragraph (a)(3)(i)(A) to read as follows:

§ 1924.6 Performing development work.

* * * * *

(a) * * *

(3) * * *

(i) * * *

(A) The contract exceeds the applicable Rural Development single Family Housing area loan limit as per 7 CFR 3550.63. (Loan limits are available at the local Rural Development field office.)

* * * * *

Dated: December 12, 2004.

Russell T. Davis,

Administrator, Rural Housing Service.

[FR Doc. 05–325 Filed 1–6–05; 8:45 am]

BILLING CODE 3410–XV–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 23

[Docket No. CE215, Special Condition 23–154–SC]

Special Conditions; The New Piper Aircraft, Inc.; PA–46–350P and PA–46–500TP; Protection of Systems for High Intensity Radiated Fields (HIRF)

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions; request for comments.

SUMMARY: These special conditions are issued to The New Piper Aircraft, Inc.; Vero Beach, Florida, for a type design change for the PA–46–350P and PA–46–500TP model airplanes. These airplanes will have novel and unusual design features when compared to the state of technology envisaged in the applicable airworthiness standards. These novel and unusual design features include the installation of electronic flight instrument system (EFIS) displays Model 700–00006–003 Entegra, manufactured by Avidyne Corporation, Inc., for which the applicable regulations do not contain adequate or appropriate airworthiness standards for the protection of these systems from the effects of high intensity radiated fields (HIRF). These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to the airworthiness standards applicable to these airplanes.

DATES: The effective date of these special conditions is December 23, 2004. Comments must be received on or before February 7, 2005.

ADDRESSES: Comments may be mailed in duplicate to: Federal Aviation Administration, Regional Counsel, ACE–7, Attention: Rules Docket Clerk, Docket No. CE215, Room 506, 901 Locust, Kansas City, Missouri 64106. All comments must be marked: Docket No. CE215. Comments may be inspected in the Rules Docket weekdays, except Federal holidays, between 7:30 a.m. and 4 p.m.

FOR FURTHER INFORMATION CONTACT: Wes Ryan, Aerospace Engineer, Standards Office (ACE–110), Small Airplane

Directorate, Aircraft Certification Service, Federal Aviation Administration, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone (816) 329–4127.

SUPPLEMENTARY INFORMATION: The FAA has determined that notice and opportunity for prior public comment hereon are impracticable because these procedures would significantly delay issuance of the design approval and thus delivery of the affected aircraft. In addition, the substance of these special conditions has been subject to the public comment process in several prior instances with no substantive comments received. The FAA, therefore, finds that good cause exists for making these special conditions effective upon issuance.

Comments Invited

Interested persons are invited to submit such written data, views, or arguments as they may desire. Communications should identify the regulatory docket or notice number and be submitted in duplicate to the address specified above. All communications received on or before the closing date for comments will be considered by the Administrator. The special conditions may be changed in light of the comments received. All comments received will be available in the Rules Docket for examination by interested persons, both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerning this rulemaking will be filed in the docket. Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must include a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. CE215.'' The postcard will be date stamped and returned to the commenter.

Background

The New Piper Aircraft, Inc., Vero Beach, Florida, has made application to revise the type design of the PA–46–350P and PA–46–500TP model airplanes. The models are currently approved under the type certification basis listed on Type Certificate Data Sheets (TCDS) A25SO. The proposed modification incorporates a novel or unusual design feature, such as digital avionics consisting of an EFIS that is vulnerable to HIRF external to the airplane.

Type Certification Basis

Under the provisions of 14 CFR part 21, § 21.101, The New Piper Aircraft, Inc., must show that affected airplane models, as changed, continue to meet the applicable provisions of the regulations identified on the appropriate TCDS. In addition, the type certification basis of the airplanes embodying this modification, which will include the additional certification basis for installation of the Avidyne Entegra EFIS, is:

PA–46–350P model aircraft: 14 CFR part 23 regulations §§ 23.301, 23.337, 23.341, 23.473, 23.561, 23.607, 23.611, as amended by Amdt. 23–48; §§ 23.305, 23.613, 23.773, 23.1525, 23.1549 as amended by Amdt. 23–45; §§ 23.777, 23.1191, 23.1337 as amended by Amdt. 23–51; §§ 23.867, 23.1303, 23.1307, 23.1309, 23.1311, 23.1321, 23.1323, 23.1329, 23.1351, 23.1353, 23.1359, 23.1361, 23.1365, 23.1431 as amended by Amdt. 23–49; § 23.1305 as amended by Amdt. 23–52; §§ 23.1322, 23.1331, 23.1357 as amended by Amdt. 23–43; §§ 23.1325, 23.1543, 23.1545, 23.1555, 23.1563, 23.1581, 23.1583, 23.1585 as amended by Amdt. 23–50; § 23.1523 as amended by Amdt. 23–34; § 23.1529 as amended by Amdt. 23–26; and the special conditions adopted by this rulemaking action.

PA–46–500TP model aircraft: 14 CFR part 23 regulations § 23.607 as amended by Amdt. 23–48; § 23.613 as amended by Amdt. 23–45; §§ 23.1351, 23.1365, 23.1431 as amended by Amdt. 23–49; §§ 23.1545, 23.1563 as amended by Amdt. 23–50; § 23.1523 as amended by Amdt. 23–34; and the special conditions adopted by this rulemaking action.

Discussion

If the Administrator finds that the applicable airworthiness standards do not contain adequate or appropriate safety standards because of novel or unusual design features of an airplane, special conditions are prescribed under the provisions of § 21.16.

Special conditions, as appropriate, as defined in § 11.19, are issued in accordance with § 11.38 after public notice and become part of the type certification basis in accordance with § 21.101.

Special conditions are initially applicable to the model for which they are issued. Should the applicant apply for a supplemental type certificate to modify any other model already included on the same type certificate to incorporate the same novel or unusual design feature, the special conditions would also apply to the other model under the provisions of § 21.101.

Novel or Unusual Design Features

The New Piper Aircraft, Inc., plans to incorporate certain novel and unusual design features into an airplane for which the airworthiness standards do not contain adequate or appropriate safety standards for protection from the effects of HIRF. These features include EFIS, which are susceptible to the HIRF environment, that were not envisaged by the existing regulations for this type of airplane.

Protection of Systems From High Intensity Radiated Fields (HIRF): Recent advances in technology have given rise to the application in aircraft designs of advanced electrical and electronic systems that perform functions required for continued safe flight and landing. Due to the use of sensitive solid-state advanced components in analog and digital electronics circuits, these advanced systems are readily responsive to the transient effects of induced electrical current and voltage caused by the HIRF. The HIRF can degrade electronic systems performance by damaging components or upsetting system functions.

Furthermore, the HIRF environment has undergone a transformation that was not foreseen when the current requirements were developed. Higher energy levels are radiated from transmitters that are used for radar, radio, and television. Also, the number of transmitters has increased significantly. There is also uncertainty concerning the effectiveness of airframe shielding for HIRF. Furthermore, coupling to cockpit-installed equipment through the cockpit window apertures is undefined.

The combined effect of the technological advances in airplane design and the changing environment has resulted in an increased level of vulnerability of electrical and electronic systems required for the continued safe flight and landing of the airplane. Effective measures against the effects of exposure to HIRF must be provided by the design and installation of these systems. The accepted maximum energy levels in which civilian airplane system installations must be capable of operating safely are based on surveys and analysis of existing radio frequency emitters. These special conditions require that the airplane be evaluated under these energy levels for the protection of the electronic system and its associated wiring harness. These external threat levels, which are lower than previous required values, are believed to represent the worst case to which an airplane would be exposed in the operating environment.

These special conditions require qualification of systems that perform critical functions, as installed in aircraft, to the defined HIRF environment in

paragraph 1 or, as an option to a fixed value using laboratory tests, in paragraph 2, as follows:

(1) The applicant may demonstrate that the operation and operational capability of the installed electrical and electronic systems that perform critical functions are not adversely affected when the aircraft is exposed to the HIRF environment defined below:

Frequency	Field strength (volts per meter)	
	Peak	Average
10 kHz–100 kHz	50	50
100 kHz–500 kHz	50	50
500 kHz–2 MHz	50	50
2 MHz–30 MHz	100	100
30 MHz–70 MHz	50	50
70 MHz–100 MHz	50	50
100 MHz–200 MHz ...	100	100
200 MHz–400 MHz ...	100	100
400 MHz–700 MHz ...	700	50
700 MHz–1 GHz	700	100
1 GHz–2 GHz	2000	200
2 GHz–4 GHz	3000	200
4 GHz–6 GHz	3000	200
6 GHz–8 GHz	1000	200
8 GHz–12 GHz	3000	300
12 GHz–18 GHz	2000	200
18 GHz–40 GHz	600	200

The field strengths are expressed in terms of peak root-mean-square (rms) values.

or, (2) The applicant may demonstrate by a system test and analysis that the electrical and electronic systems that perform critical functions can withstand a minimum threat of 100 volts per meter, electrical field strength, from 10 kHz to 18 GHz. When using this test to show compliance with the HIRF requirements, no credit is given for signal attenuation due to installation.

A preliminary hazard analysis must be performed by the applicant, for approval by the FAA, to identify either electrical or electronic systems that perform critical functions. The term ''critical'' means those functions whose failure would contribute to, or cause, a failure condition that would prevent the continued safe flight and landing of the airplane. The systems identified by the hazard analysis that perform critical functions are candidates for the application of HIRF requirements. A system may perform both critical and non-critical functions. Primary electronic flight display systems, and their associated components, perform critical functions such as attitude, altitude, and airspeed indication. The HIRF requirements apply only to critical functions.

Compliance with HIRF requirements may be demonstrated by tests, analysis, models, similarity with existing systems, or any combination of these. Service experience alone is not acceptable since normal flight operations may not include an exposure to the HIRF environment. Reliance on a system with similar design features for redundancy as a means of protection against the effects of external HIRF is generally insufficient since all elements of a redundant system are likely to be exposed to the fields concurrently.

Applicability

As discussed above, these special conditions are applicable to New Piper PA–46–350P and PA–46–500TP model airplanes.

Conclusion

This action affects only certain novel or unusual design features on one model of airplane. It is not a rule of general applicability and affects only the applicant who applied to the FAA for approval of these features on the airplane.

The substance of these special conditions has been subjected to the notice and comment period in several prior instances and has been derived without substantive change from those previously issued. It is unlikely that prior public comment would result in a significant change from the substance contained herein. For this reason, and because a delay would significantly affect the certification of the airplane, which is imminent, the FAA has determined that prior public notice and comment are unnecessary and impracticable, and good cause exists for adopting these special conditions upon issuance. The FAA is requesting comments to allow interested persons to submit views that may not have been submitted in response to the prior opportunities for comment described above.

List of Subjects in 14 CFR Part 23

Aircraft, Aviation safety, Signs and symbols.

Citation

■ The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 106(g), 40113 and 44701; 14 CFR 21.16 and 21.17; and 14 CFR 11.38 and 11.19.

The Special Conditions

■ Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the type certification basis for New Piper PA–46–350P and PA–46–500TP model airplanes modified by installation of the factory optional Avidyne Entegra EFIS system.

1. Protection of Electrical and Electronic Systems From High Intensity Radiated Fields (HIRF). Each system that performs critical functions must be designed and installed to ensure that the operations, and operational capabilities of these systems to perform critical functions, are not adversely affected when the airplane is exposed to high intensity radiated electromagnetic fields external to the airplane.

2. For the purpose of these special conditions, the following definition applies:

Critical Functions: Functions whose failure would contribute to, or cause, a failure condition that would prevent the continued safe flight and landing of the airplane.

Issued in Kansas City, Missouri on December 23, 2004.

David R. Showers,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–294 Filed 1–6–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2001–NM–74–AD; Amendment 39–13861; AD 2004–23–06]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 757–200, –200PF, –200CB, and –300 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; correction.

SUMMARY: This document corrects two typographical errors that appeared in airworthiness directive (AD) 2004–23–06 that was published in the **Federal Register** on November 16, 2004 (69 FR 67047). The errors resulted in an incorrect reference to an amendment number and an incorrect reference to a service bulletin. This AD applies to certain Boeing Model 757–200, –200PF, –200CB, and –300 series airplanes. This AD requires inspection for damage of the W2800 wire bundle insulation, wire conductor, the wire bundle clamp bracket, and the BACC10GU( ) clamp, and repair or replacement with new or serviceable parts, if necessary. This AD also requires installation of spacers between the clamp and the bracket.

DATES: Effective December 21, 2004.

FOR FURTHER INFORMATION CONTACT: Elias Natsiopoulos, Aerospace Engineer, Systems and Equipment Branch, ANM–130S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton,

Washington 98055–4056; telephone (425) 917–6478; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION: Airworthiness Directive AD 2004–23–06, amendment 39–13861 (69 FR 67047), applicable to certain Boeing Model 757–200, –200PF, –200CB, and –300 series airplanes, was published in the **Federal Register** on November 16, 2004. The AD requires inspection for damage of the W2800 wire bundle insulation, wire conductor, the wire bundle clamp bracket, and the BACC10GU( ) clamp, and repair or replacement with new or serviceable parts, if necessary. The AD also requires installation of spacers between the clamp and the bracket.

In ''PART 39—AIRWORTHINESS DIRECTIVES'' of the regulatory text of AD 2004–23–06, an incorrect citation of the amendment number appears. The reference should read, ''2004–23–06 Boeing: Amendment 39–13861.'' Additionally, as published, the applicability of the regulatory text of the AD specifies: ''Applicability: Model 757–200, –200PF, –200CB, as listed in Boeing Special Attention Service Bulletin 757–27–0089, Revision 1; and Model 757–300 series airplanes, as listed in Boeing Special Attention Service Bulletin 757–24–0090, Revision 1; both service bulletin revisions dated February 27, 2003; certificated in any category.'' The correct reference for Model 757–200, –200PF, –200CB airplanes is Boeing Special Attention Service Bulletin 757–24–0089, Revision 1, dated February 27, 2003. In all other places, the AD references the correct service bulletin number.

No other parts of the regulatory information have been changed; therefore, the final rule is not republished in the **Federal Register**.

The effective date of this AD remains December 21, 2004.

§ 39.13 [Corrected]

On page 67049, in the first column, reference to ''2004–23–06 Boeing: Amendment 39–2004–23–06. Docket 2001–NM–74–AD'' is corrected to read as follows:

* * * * *

2004–23–06 Boeing: Amendment 39–13861. Docket 2001–NM–74–AD.

* * * * *

■ On page 67049, in the first column, the ''Applicability'' paragraph of AD 2004–23–06 is corrected to read as follows:

* * * * *

Applicability: Model 757–200, –200PF, –200CB, as listed in Boeing Special Attention Service Bulletin 757–24–0089, Revision 1; and Model 757–300 series airplanes, as listed in Boeing Special Attention Service Bulletin 757–24–0090, Revision 1; both service bulletin revisions dated February 27, 2003; certificated in any category.

* * * * *

Issued in Renton, Washington, on December 27, 2004.

Kevin M. Mullin,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–285 Filed 1–6–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2004–19221; Directorate Identifier 2004–CE–28–AD; Amendment 39–13935; AD 2005–01–11]

RIN 2120–AA64

Airworthiness Directives; Pilatus Aircraft Ltd. Models PC–12 and PC–12/45 Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA adopts a new airworthiness directive (AD) for all Pilatus Aircraft Ltd. (Pilatus) Models PC–12 and PC–12/45 airplanes. This AD requires you to check the airplane logbook to determine whether any main landing gear (MLG) actuator (part number (P/N) 960.30.01.103) with serial numbers (SNs) 830E through 881E is installed. If any MLG actuator with one of these SNs is installed, you are required to replace the MLG actuator with a P/N 960.30.01.103 actuator that has a SN other than 830E through 881E. The pilot is allowed to do the logbook check. If the pilot can positively determine that no MLG actuator with one of these SNs is installed, then no further action is required. This AD results from mandatory continuing airworthiness information (MCAI) issued by the airworthiness authority for Switzerland. We are issuing this AD to prevent failure of the MLG actuator caused by an incorrect heat treating process, which could result in loss of hydraulic extension/retraction of the MLG. This failure could lead to loss of control during ground operations.

DATES: This AD becomes effective on February 22, 2005.

As of February 22, 2005, the Director of the Federal Register approved the incorporation by reference of certain publications listed in the regulation.

ADDRESSES: To get the service information identified in this AD, contact Pilatus Aircraft Ltd., Customer Liaison Manager, CH–6371 Stans, Switzerland; telephone: +41 41 619 6208; facsimile: +41 41 619 7311; e-mail: *SupportPC12@pilatus-aircraft.com* or from Pilatus Business Aircraft Ltd., Product Support Department, 11755 Airport Way, Broomfield, Colorado 80021; telephone: (303) 465–9099; facsimile: (303) 465–6040. To review this service information, go to the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html* or call (202) 741–6030.

To view the AD docket, go to the Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–001 or on the Internet at *http://dms.dot.gov.* The docket number is FAA–2004–19221.

FOR FURTHER INFORMATION CONTACT: Doug Rudolph, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4059; facsimile: (816) 329–4090.

SUPPLEMENTARY INFORMATION:

Discussion

What events have caused this AD? The Federal Office for Civil Aviation (FOCA), which is the airworthiness authority for Switzerland, recently notified FAA that an unsafe condition may exist on all Pilatus Aircraft Ltd. (Pilatus) Models PC–12 and PC–12/45 airplanes. The FOCA reports that some components of main landing gear (MLG) actuators (part number (P/N) 960.30.01.103 with serial numbers (SNs) 830E through 881E) were incorrectly heat treated during manufacture. Components in this condition can decrease the specified fatigue life of the actuators.

It is possible that these components could have been removed and then installed in other Pilatus Models PC–12 and PC–12/45 airplanes.

What is the potential impact if FAA took no action? Failure of the MLG actuator could result in loss of hydraulic extension/retraction of the MLG. This failure could lead to loss of control during ground operations.

Has FAA taken any action to this point? We issued a proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an AD that would apply to all Pilatus Aircraft Ltd. (Pilatus) Models PC–12 and

PC–12/45 airplanes. This proposal was published in the **Federal Register** as a notice of proposed rulemaking (NPRM) on November 1, 2004 (69 FR 63336). The NPRM proposed to require you to check the airplane logbook to determine whether any MLG actuator (P/N 960.30.01.103) with SNs 830E through 881E is installed. If any MLG actuator with one of these SNs is installed, the NPRM would require you to replace the MLG actuator with a P/N 960.30.01.103 actuator that has a SN other than 830E through 881E. The pilot would be allowed to do the logbook check. If the pilot can positively determine that no MLG actuator with one of these SNs is installed, no further action would be required.

Comments

Was the public invited to comment? We provided the public the opportunity to participate in developing this AD. The following presents the comment received on the proposal and FAA's response to the comment:

Comment Issue: Limit AD Serial Number Effectivity

What is the commenter's concern? The commenter states that it would be more appropriate to have the AD address only the serial number airplanes on which the parts were installed. Further, the commenter states that the AD should not apply to airplanes that Pilatus has not yet produced.

What is FAA's response to the concern? As FAA explained in the NPRM, there is a possibility that these parts might have been removed from the affected serial number aircraft and installed on other serial numbers not included in the FOCA AD or Pilatus service bulletin. Therefore, we are including all serial numbers in the effectivity of this AD. To relieve the burden, FAA has included in the AD a logbook check for the affected S/N main landing gear actuators.

The manufacturer should ensure that any MLG actuator P/N 960.30.01.103 with SNs 830E through 881E is not installed at the factory and include a statement of compliance with this FAA AD in the logbook of any new manufactured aircraft.

Also, the only assurance that FAA has that the suspect parts are not installed in the future on Pilatus Models PC–12 and PC–12/45 airplanes is through AD action.

We are not changing the final rule AD action based on these comments.

Conclusion

What is FAA's final determination on this issue? We have carefully reviewed the available data and determined that air safety and the public interest require adopting the AD as proposed except for the changes discussed above and minor editorial corrections. We have determined that these changes and minor corrections:

- Are consistent with the intent that was proposed in the NPRM for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM.

Docket Information

Where can I go to view the docket information? You may view the AD docket that contains information relating to this subject in person at the DMS Docket Offices between 9 a.m. and 5 p.m. (eastern standard time), Monday through Friday, except Federal holidays. The Docket Office (telephone 1–800–647–5227) is located on the plaza level of the Department of Transportation NASSIF Building at the street address stated in **ADDRESSES**. You may also view the AD docket on the Internet at *http://dms.dot.gov*.

Changes to 14 CFR Part 39—Effect on the AD

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

Costs of Compliance

How many airplanes does this AD impact? We estimate that this AD affects 260 airplanes in the U.S. registry.

What is the cost impact of this AD on owners/operators of the affected airplanes? We estimate the following costs to do the inspection:

Labor cost	Parts cost	Total cost per airplane	Total cost on U.S. operators
1 work hour × $65 per hour = $65	Not Applicable	$65	260 × $65 = $16,900.

We estimate the following costs to do any necessary replacement that would be required based on the results of this inspection. We have no way of determining the number of airplanes that may need this replacement:

Labor cost	Parts cost	Total cost per airplane
3 work hours × $65 per hour = $195 per MLG actuator	Not Applicable	$195.

Pilatus will provide replacement parts free of charge if any MLG actuator with a SN 830E through 881E is returned to Pilatus. If purchased, the cost of a new actuator is $14,000. The cost of an overhauled actuator is $5,000.

Authority for this Rulemaking

What authority does FAA have for issuing this rulemaking action? 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 AD.

Regulatory Findings

Will this AD impact various entities? We have determined that this AD will not have federalism implications under

Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

Will this AD involve a significant rule or regulatory action? For the reasons discussed above, I certify that this AD:

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

We prepared a summary of the costs to comply with this AD and placed it in the AD Docket. You may get a copy of this summary by sending a request to us at the address listed under **ADDRESSES**. Include ''Docket No. FAA–2004–19221; Directorate Identifier 2004–CE–28–AD'' in your request.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. FAA amends § 39.13 by adding a new AD to read as follows:

2005–01–11 Pilatus Aircraft Ltd.: Amendment 39–13935; Docket No. FAA–2004–19221; Directorate Identifier 2004–CE–28–AD.

When Does This AD Become Effective?

(a) This AD becomes effective on February 22, 2005.

What Other ADs Are Affected by This Action?

(b) None.

What Airplanes Are Affected by This AD?

(c) This AD affects Models PC–12 and PC–12/45 airplanes, all serial numbers, that are certificated in any category.

What Is the Unsafe Condition Presented in This AD?

(d) This AD is the result of mandatory continuing airworthiness information (MCAI) issued by the airworthiness authority for Switzerland. The actions specified in this AD are intended to prevent failure of the MLG actuator caused by an incorrect heat treating process, which could result in loss of hydraulic extension/retraction of the MLG. This failure could lead to loss of control during ground operations.

What Must I Do To Address This Problem?

(e) To address this problem, you must do the following:

Actions	Compliance	Procedures
(1) Check the airplane logbook to ensure that no main landing gear (MLG) actuator (part number (P/N) 960.30.01.103) with serial numbers (SN) 830E through 881E is installed.	Within 90 days after February 22, 2005 (the effective date of this AD), unless already done.	The owner/operator holding at least a private pilot certificate as authorized by section 43.7 of the Federal Aviation Regulations (14 CFR 43.7) may do this check.
(2) If you can positively determine that no MLG actuator (P/N 960.30.01.103) with SN 830E through 881E is installed, then no further action is required.	Not Applicable	Make an entry in the aircraft records showing compliance with paragraphs (e)(1) and (e)(2) of this AD per section 43.9 of the Federal Aviation Regulations (14 CFR 43.9).
(3) If you cannot positively determine that no MLG actuator (P/N 960.30.01.103) with SN 830E through 881E is installed, then inspect any MLG actuator (P/N 960.30.01.103) for SN 830E through 881E.	Within 90 days after February 22, 2005 (the effective date of this AD), unless already done.	Follow the Accomplishment Instructions—Aircraft section in Pilatus PC–12 Service Bulletin No. 32–017, dated August 3, 2004.
(4) If any MLG actuator (P/N 960.30.01.103) with SN 830E through 881E is found during the inspection required by paragraph (e)(3) of this AD, replace the MLG actuator with a P/N 960.30.01.103 actuator that has a SN other than 830E through 881E.	Before further flight after the inspection required by paragraph (e)(3) of this AD in which any actuator with SN 830E through 881E is found.	Follow the Accomplishment Instructions—Aircraft section in Pilatus PC–12 Service Bulletin No. 32–017, dated August 3, 2004.
(5) Do not install any MLG actuator (P/N 960.30.01.103) with SN 830E through 881E.	As of February 22, 2005 (the effective date of this AD).	Not Applicable.

May I Request an Alternative Method of Compliance?

(f) You may request a different method of compliance or a different compliance time for this AD by following the procedures in 14 CFR 39.19. Unless FAA authorizes otherwise, send your request to your principal inspector. The principal inspector may add comments and will send your request to the Manager, Standards Office, Small Airplane Directorate, FAA. For information on any already approved alternative methods of compliance, contact Doug Rudolph, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4059; facsimile: (816) 329–4090.

Is There Other Information That Relates to This Subject?

(g) Swiss AD Number HB 2004–330, dated August 18, 2004, also addresses the subject of this AD.

Does This AD Incorporate Any Material by Reference?

(h) You must do the actions required by this AD following the instructions in Pilatus PC–12 Service Bulletin No. 32–017, dated August 3, 2004. The Director of the Federal Register approved the incorporation by reference of this service bulletin in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. To get a copy of this service information, contact Pilatus Aircraft Ltd., Customer Liaison Manager, CH–6371 Stans, Switzerland; telephone: +41 41 619 6208; facsimile: +41 41 619 7311; e-mail: *SupportPC12@pilatus-aircraft.com* or from Pilatus Business Aircraft Ltd., Product Support Department, 11755 Airport Way, Broomfield, Colorado 80021; telephone: (303) 465–9099; facsimile: (303) 465–6040. To review copies of this service information, go to the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html* or call (202) 741–6030. To view the AD docket, go to the Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW.,

Nassif Building, Room PL–401, Washington, DC 20590–001 or on the Internet at *http://dms.dot.gov.* The docket number is FAA–2004–19221.

Issued in Kansas City, Missouri, on December 28, 2004.

David A. Downey,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–185 Filed 1–6–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2004–18597; Directorate Identifier 2004–CE–21–AD; Amendment 39–13934; AD 2005–01–10]

RIN 2120–AA64

Airworthiness Directives; The New Piper Aircraft, Inc. Models PA–23–235, PA–23–250, and PA–E23–250 Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA adopts a new airworthiness directive (AD) that supersedes Airworthiness Directive (AD) 74–06–01, which applies to certain The New Piper Aircraft, Inc. (Piper) Models PA–23–235, PA–23–250, and PA–E23–250 airplanes equipped with Garrett Aviation Services (Garrett) (formerly AiResearch) turbosuperchargers installed under supplemental type certificate (STC) SA852WE, SA909WE, or SA978WE; or installed under Piper Aircraft Drawing Number 32016. AD 74–06–01 currently requires you to replace turbosupercharger oil tanks, install fire shrouds, seal all openings in the fire shrouds, and add drainage provisions in the oil tank fairings for airplane serial numbers 27–1 through 27–2504; and add drainage provisions in the air scoops on serial numbers 27–2505 and higher. This AD requires you to replace the oil reservoir and related hoses with a fireproof oil tank and fire-shielded hoses. This AD results from a report of a fatal accident related to the breakdown of the turbocharger oil reservoir following a fire in the engine nacelle. We are issuing this AD to prevent turbosupercharger oil reservoirs with inadequate fire resistance from failing when exposed to flame or exhaust gases. This failure could lead to an in-flight fire within the nacelle area penetrating the firewall and subsequent failure of the wing spar.

DATES: This AD becomes effective on February 22, 2005.

As of February 22, 2005, the Director of the Federal Register approved the incorporation by reference of certain publications listed in the regulation.

ADDRESSES: You may get the service information identified in this AD from:

—*For any installation under supplemental type certificate (STC) SA852WE, SA909WE, or SA978WE:* The Nordam Group, Nacelle/Thrust Reverser Division, 6911 N. Whirlpool Drive, Tulsa, OK 74117; telephone: (918) 878–4000; facsimile: (918) 878–4808; and

—*For any installation under Piper Aircraft Drawing Number 32016:* The New Piper Aircraft, Inc., 2926 Piper Drive, Vero Beach, Florida, 32960; and The Nordam Group, Nacelle/Thrust Reverser Division, 6911 N. Whirlpool Drive, Tulsa, OK 74117; telephone: (918) 878–4000; facsimile: (918) 878–4808.

To review this service information, go to the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html* or call (202) 741–6030.

To view the AD docket, go to the Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–001 or on the Internet at *http://dms.dot.gov.* The docket number is FAA–2004–18597.

FOR FURTHER INFORMATION CONTACT: Roger Pesuit, Aerospace Engineer, FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, CA 90712–4137; telephone: (562) 627–5251; facsimile: (562) 627–5210.

SUPPLEMENTARY INFORMATION:

Discussion

What events have caused this AD? The need to minimize fire hazards in the engine compartment on The New Piper Aircraft, Inc. (Piper) Models PA–23–235, PA–23–250, and PA–E23–250 airplanes equipped with AiResearch turbosuperchargers installed under supplemental type certificate (STC) SA852WE, SA909WE, or SA978WE; or installed under Piper Aircraft Drawing 32016 caused FAA to issue AD 74–06–01, Amendment 39–1977. AD 74–06–01 currently requires the following on any Piper Models PA–23–235, PA–23–250, and PA–E23–250 airplanes equipped with AiResearch turbosuperchargers installed under STC SA852WE, SA909WE, or SA978WE; or installed under Piper Aircraft Drawing Number 32016:

—Replacing the existing turbosupercharger oil tanks;

—installing fire shrouds;

—sealing all openings in the fire shrouds;

—(for airplane serial numbers 27–1 through 27–2504) adding drainage provisions in the oil tank fairings; and

—(for airplane serial numbers 27–2505 and higher) adding drainage provisions in the air scoops.

What has happened since AD 74–06–01 to initiate this action? The FAA has received a report of a fatal accident related to the breakdown of the turbosupercharger oil reservoir. A Piper Model PA 23–250 airplane equipped with the STC turbocharger installation was involved in a fatal accident. The accident investigation revealed a breakdown of the turbosupercharger oil reservoir. Examination of the aircraft wreckage revealed evidence of an in-flight fire where the turbosupercharger oil reservoir was burned to include the rear firewall portion of the reservoir allowing fire to move aft, softening the wing spar.

What is the potential impact if FAA took no action? Failure of the turbosupercharger oil reservoir when exposed to flame or exhaust gases could lead to an in-flight fire and failure of the wing spar.

Has FAA taken any action to this point? We issued a proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an AD that would apply to certain Piper Models PA–23–235, PA–23–250, and PA–E23–250 airplanes equipped with Garrett Aviation Services (Garrett) (formerly AiResearch) turbosuperchargers installed under STC SA852WE, SA909WE, or SA978WE; or installed under Piper Aircraft Drawing Number 32016. This proposal was published in the **Federal Register** as a notice of proposed rulemaking (NPRM) on September 22, 2004 (69 FR 56733).

The NPRM proposed to supersede AD 74–06–01, which applies to certain Piper Models PA–23–235, PA–23–250, and PA–E23–250 airplanes equipped with Garrett Aviation Services (Garrett) (formerly AiResearch) turbosuperchargers installed under STC SA852WE, SA909WE, or SA978WE; or installed under Piper Aircraft Drawing Number 32016. AD 74–06–01 currently requires you to replace turbosupercharger oil tanks, install fire shrouds, seal all openings in the fire shrouds, and add drainage provisions in

the oil tank fairings for airplane serial numbers 27–1 through 27–2504; and the NPRM proposed to require you to add drainage provisions in the air scoops on serial numbers 27–2505 and higher.

Comments

Was the public invited to comment? We provided the public the opportunity to participate in developing this AD. The following presents the comment received on the proposal and FAA's response to the comment:

Comment Issue: Require Installation of FAA-Approved Parts Manufacturer Approval (PMA) Parts

What is the commenter's concern? The commenter recommends that FAA revise the AD to require installation of FAA-approved PMA parts. Further, the commenter writes that the proposed AD requires replacement of parts installed under an STC. The parts proposed to be installed have not been approved under 14 CFR 21.303(a). Therefore, the commenter states that the parts are not eligible for installation.

What is FAA's response to the concern? The FAA concurs that the AD should require the installation of PMA parts. However, incorporating the service bulletin, either standard parts or PMA parts are required. Therefore, we do not feel that a rewrite of the AD is necessary. Note that the first two sets of parts shipped omitted the PMA identification. The recipients of these were notified and arrangements made to exchange these parts for those having appropriate PMA identification. All subsequent shipments contain the required PMA identification.

We are not changing the final rule AD action based on these comments.

Conclusion

What is FAA's final determination on this issue? We have carefully reviewed the available data and determined that air safety and the public interest require adopting the AD as proposed except for the changes discussed above and minor editorial corrections. We have determined that these changes and minor corrections:

—Are consistent with the intent that was proposed in the NPRM for correcting the unsafe condition; and

—do not add any additional burden upon the public than was already proposed in the NPRM.

Docket Information

Where can I go to view the docket information? You may view the AD docket that contains information relating to this subject in person at the DMS Docket Offices between 9 a.m. and 5 p.m. (eastern standard time), Monday through Friday, except Federal holidays. The Docket Office (telephone 1–800–647–5227) is located on the plaza level of the Department of Transportation NASSIF Building at the street address stated in **ADDRESSES.** You may also view the AD docket on the Internet at *http://dms.dot.gov.*

Changes to 14 CFR Part 39—Effect on the AD

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

Costs of Compliance

How many airplanes does this AD impact? We estimate that this AD affects 250 airplanes in the U.S. registry.

What is the cost impact of this AD on owners/operators of the affected airplanes? We estimate the following costs to do the modification:

Labor cost	Parts cost	Total cost per airplane	Total cost on U.S. operators
14 workhours × $65 per hour = $910	$2,500	$3,410	$852,500

Authority for This Rulemaking

What authority does FAA have for issuing this rulemaking action? 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 AD.

Regulatory Findings

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

Will this AD involve a significant rule or regulatory action? For the reasons discussed above, I certify that this AD:

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

We prepared a summary of the costs to comply with this AD and placed it in the AD Docket. You may get a copy of this summary by sending a request to us at the address listed under **ADDRESSES.** Include ''Docket No. FAA–2004–18597; Directorate Identifier 2004–CE–21–AD'' in your request.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing Airworthiness Directive (AD) 74–06–01, Amendment 39–1977, and by adding a new AD to read as follows:

2005–01–10 The New Piper Aircraft, Inc.: Amendment 39–13934; Docket No. FAA–2004–18597; Directorate Identifier 2004–CE–21–AD.

When Does This AD Become Effective?

(a) This AD becomes effective on February 22, 2005.

What Other ADs Are Affected by This Action?

(b) This AD supersedes AD 74–06–01.

What Airplanes Are Affected by This AD?

(c) This AD affects Models PA–23–235, PA–23–250, and PA–E23–250 airplanes, all serial numbers, that are

(1) certificated in any category; and

(2) equipped with Garrett Aviation Services (Garrett) (formerly AiResearch) turbosuperchargers installed under supplemental type certificate (STC) SA852WE, SA909WE, or SA978WE; or installed under The New Piper, Inc. (Piper) Aircraft Drawing Number 32016.

Note: Piper manufactured the majority of affected airplanes with the turbocharger system. The turbocharger system installed under Piper Aircraft Drawing Number 32016 (STC SA909WE) was a factory option on the Piper Model PA–23–250 or PA–E23–250 with serial numbers 27–2505 through 27–3943.

What is the Unsafe Condition Presented in This AD?

(d) This AD is the result of a report of a fatal accident related to the breakdown of the turbocharger oil reservoir following a fire in the engine nacelle. The actions specified in this AD are intended to prevent turbosupercharger oil reservoirs with inadequate fire resistance from failing when exposed to flame or exhaust gases. This failure could lead to an in-flight fire within the nacelle area penetrating the firewall and subsequent failure of the wing spar.

What Must I do to Address This Problem?

(e) To address this problem, you must do the following:

Actions	Compliance	Procedures
(1) *For any turbosupercharger installation under supplemental type certificate (STC) SA852WE, SA909WE, or SA978WE:*	Within the next 100 hours time-in-service (TIS) after February 22, 2005 (the effective date of this AD), unless already done.	Follow the procedures in Garrett Aviation Service Bulletin No. 1002143, Revision A, dated June 18, 2004. (i) Replace any oil reservoir (part number (P/N) 286–P23–028–81 or 286–P23–028–111, or FAA-approved equivalent P/N) with a fireproof oil tank (P/N 10ND79200–1 or 10ND79200–3, or FAA-approved equivalent P/N); and (ii) Replace the installed oil reservoir hoses with fire-shielded hoses.
(2) *For any turbosupercharger installation under Piper Aircraft Drawing Number 32016:*	Within the next 100 hours TIS after February 22, 2005 (the effective date of this AD), unless already done.	Follow the procedures in The New Piper Aircraft, Inc. Vendor Service Publication No. 166, dated August 20, 2004 and the procedures in Garrett Aviation Service Bulletin No. 1002143, Revision A, dated June 18, 2004. (i) Replace any oil reservoir (P/N 286–P23–028–81 or 286–P23–028–111, or FAA-approved equivalent P/N) with a fireproof oil tank (P/N 10ND79200–1 or 10ND79200–3, or FAA-approved equivalent P/N); and (ii) Replace the installed oil reservoir hoses with fire-shielded hoses.
(3) *For any turbosupercharger installation under STC SA852WE, SA909WE, or SA978WE; or Piper Aircraft Drawing Number 32016:* Do not install any oil reservoir (P/N 286–P23–028–81 or 286–P23–028–111, or FAA-approved equivalent P/N). Do not install any oil reservoir hose that is not fire-shielded.	As of February 22, 2005 (the effective date of this AD).	Not Applicable.

May I Request an Alternative Method of Compliance?

(f) You may request a different method of compliance or a different compliance time for this AD by following the procedures in 14 CFR 39.19. Unless FAA authorizes otherwise, send your request to your principal inspector. The principal inspector may add comments and will send your request to the Manager, Los Angeles Aircraft Certification Office (ACO), FAA. For information on any already approved alternative methods of compliance, contact Roger Pesuit, Aerospace Engineer, FAA, Los Angeles ACO, 3960 Paramount Boulevard, Lakewood, CA 90712–4137; telephone: (562) 627–5251; facsimile: (562) 627–5210.

Does This AD Incorporate Any Material by Reference?

(g) You must do the actions required by this AD following the instructions in The New Piper Aircraft, Inc. Vendor Service Publication No. 166, dated August 20, 2004, and the procedures in Garrett Aviation Service Bulletin No. 1002143, Revision A, dated June 18, 2004. The Director of the Federal Register approved the incorporation by reference of these service bulletins in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. To get a copy of this service information, contact: (for any installation under STC SA852WE, SA909WE, or SA978WE) The Nordam Group Nacelle/Thrust Reverser Systems Division, 6911 N. Whirlpool Drive, Tulsa, OK 74117 telephone: (918) 878–4000; facsimile: (918) 878–4808; and (for any installation under Piper Aircraft Drawing Number 32016) The New Piper Aircraft, Inc., 2926 Piper Drive, Vero Beach, Florida, 32960; and The Nordam Group Nacelle/Thrust Reverser Systems Division 6911 N. Whirlpool Drive, Tulsa, OK 74117 telephone: (918) 878–4000; facsimile: (918) 878–4808. To review copies of this service information, go to the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, go to: *http://www.archives.gov/ federal_register/ code_of_federal_ regulations/ ibr_locations.html* or call (202) 741–6030. To view the AD docket, go to the Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–001 or on the Internet at *http://*

dms.dot.gov. The docket number is FAA–2004–18597.

Issued in Kansas City, Missouri, on December 28, 2004.

David A. Downey,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–184 Filed 1–6–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2004–19560; Directorate Identifier 2004–NM–121–AD; Amendment 39–13930; AD 2005–01–06]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A310 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for all Airbus Model A310 series airplanes. This AD requires modifying the wire routing of electrical harness 636VB in the right-hand wing. This AD is prompted by the manufacturer's analysis for compliance with Special Federal Aviation Regulation No. 88, which has shown that wiring 2M of the 115V anti-collision white strobe lights and wiring 2S of the fuel quantity indication system (FQIS) should be rerouted into separate conduits. We are issuing this AD to prevent chafing damage to wiring 2M and 2S, which could result in a short circuit and consequently introduce an electrical current into the wiring of the FQIS and create an ignition source in the fuel tank.

DATES: This AD becomes effective February 11, 2005.

The incorporation by reference of a certain publication listed in the AD is approved by the Director of the Federal Register as of February 11, 2005.

ADDRESSES: For service information identified in this AD, contact Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France. You can examine this information at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

You can examine the contents of this AD docket on the Internet at *http://dms.dot.gov*, or in person at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW., room PL–401, on the plaza level of the Nassif Building, Washington, DC. This docket number is FAA–2004–19560; the directorate identifier for this docket is 2004–NM–121–AD.

FOR FURTHER INFORMATION CONTACT: Tim Backman, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2797; fax (425) 227–1149.

Examining the Docket

The AD docket contains the proposed AD, comments, and any final disposition. You can examine the AD docket on the Internet at *http://dms.dot.gov*, or in person at the Docket Management Facility office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Management Facility office (telephone (800) 647–5227) is located on the plaza level of the Nassif Building at the DOT street address stated in the **ADDRESSES** section.

SUPPLEMENTARY INFORMATION: The FAA proposed to amend 14 CFR part 39 with an AD for all Airbus Model A310 series airplanes. That action, published in the **Federal Register** on November 9, 2004 (69 FR 64871), proposed to require modifying the wire routing of electrical harness 636VB in the right-hand wing.

Comments

We provided the public the opportunity to participate in the development of this AD. No comments have been submitted on the proposed AD or on the determination of the cost to the public.

Conclusion

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

Costs of Compliance

This AD will affect about 51 airplanes of U.S. registry. The required actions will take about 34 work hours per airplane, at an average labor rate of $65 per work hour. Required parts will cost about $356 per airplane. Based on these figures, the estimated cost of the AD for U.S. operators is $130,866 or $2,566 per airplane.

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

For the reasons discussed above, I certify that this AD:

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

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

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

We prepared a regulatory evaluation of the estimated costs to comply with this AD. See the **ADDRESSES** section for a location to examine the regulatory evaluation.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the FAA amends 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 (AD):

2005–01–06 Airbus: Amendment 39–13930. Docket No. FAA–2004–19560; Directorate Identifier 2004–NM–121–AD.

Effective Date

(a) This AD becomes effective February 11, 2005.

Affected ADs

(b) None.

Applicability

(c) This AD applies to all Airbus Model A310–203, –204, –221, –222, –304, –322, –324, and –325 series airplanes, certificated in any category.

Unsafe Condition

(d) This AD was prompted by the manufacturer's analysis for compliance with Special Federal Aviation Regulation No. 88, which has shown that wiring 2M of the 115V anti-collision white strobe lights and wiring 2S of the fuel quantity indication system (FQIS) should be rerouted into separate conduits. We are issuing this AD to prevent chafing damage to wiring 2M and 2S, which could result in a short circuit and consequently introduce an electrical current into the wiring of the FQIS and create an ignition source in the fuel tank.

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.

Modification

(f) Within 72 months after the effective date of this AD, modify the routing of electrical harness 636VB in the right-hand wing by accomplishing all of the actions in the Accomplishment Instructions of Airbus Service Bulletin A310–28–2140, Revision 04, dated March 31, 2004.

Credit for Previously Accomplished Service Bulletins

(g) Modification of the routing of electrical harness 636VB accomplished before the effective date of this AD in accordance with Airbus Service Bulletin A310–28–2140, Revision 02, dated May 24, 2002; or Revision 03, dated November 21, 2002; is acceptable for compliance with the requirements of paragraph (f) of this AD.

Alternative Methods of Compliance (AMOCs)

(h) The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

Related Information

(i) French airworthiness directive F–2004–005, dated January 7, 2004, also addresses the subject of this AD.

Material Incorporated by Reference

(j) You must use Airbus Service Bulletin A310–28–2140, Revision 04, dated March 31, 2004, to perform the actions that are required by this AD, unless the AD specifies otherwise. The Director of the Federal Register approves the incorporation by reference of this document in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. For copies of the service information, contact Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France. For information on the availability of this material at the National Archives and Records Administration (NARA), call (202) 741–6030, or go to *http://www.archives.gov/federal_ register/code_of _federal_regulations/ibr_locations.html.*

You may view the AD docket at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW, room PL–401, Nassif Building, Washington, DC.

Issued in Renton, Washington, on December 27, 2004.

Kevin M. Mullin,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–163 Filed 1–6–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2004–18729; Directorate Identifier 2004–NM–24–AD; Amendment 39–13931; AD 2005–01–07]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 747–100 and –200B Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Boeing Model 747–100 and –200B series airplanes. This AD requires installing bonding clips and bonding jumpers from the housing of each fuel pump to airplane structure outside the fuel tanks. This AD is prompted by the results of fuel system reviews conducted by the manufacturer. We are issuing this AD to ensure adequate electrical bonding between the housing of each fuel pump and airplane structure outside the fuel tanks. Inadequate electrical bonding, in the event of a lightning strike or pump electrical fault, could cause electrical arcing and ignition of fuel vapor in the wing fuel tank, which could result in a fuel tank explosion.

DATES: This AD becomes effective February 11, 2005.

The incorporation by reference of a certain publication listed in the AD is approved by the Director of the Federal Register as of February 11, 2005.

ADDRESSES: For service information identified in this AD, contact Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207.

You can examine this information at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

You can examine the contents of this AD docket on the Internet at *http://dms.dot.gov,* or at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW., room PL–401, on the plaza level of the Nassif Building, Washington, DC.

FOR FURTHER INFORMATION CONTACT:

Technical information: Dan Kinney, Aerospace Engineer, Propulsion Branch, ANM–140S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 917–6499; fax (425) 917–6590.

Plain language information: Marcia Walters, *marcia.walters@faa.gov.*

Examining the Docket

The AD docket contains the proposed AD, comments, and any final disposition. You can examine the AD docket on the Internet at *http://dms.dot.gov,* or in person at the Docket Management Facility office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Management Facility office (telephone (800) 647–5227) is located on the plaza level of the Nassif Building at the DOT street address stated in the **ADDRESSES** section.

SUPPLEMENTARY INFORMATION: The FAA proposed to amend 14 CFR part 39 with an AD for certain Boeing Model 747–100 and –200B series airplanes. That action, published in the **Federal Register** on August 6, 2004 (69 FR 47814), proposed to require installing bonding clips and bonding jumpers from the housing of each fuel pump to airplane structure outside the fuel tanks.

Comments

We provided the public the opportunity to participate in the development of this AD. We have considered the comments submitted on the proposed AD.

Request To Revise Bonding Resistance Values

The commenters state that there is a discrepancy in Boeing Alert Service Bulletin 747–28A2033, Revision 1, dated December 18, 2003. The discrepancy is the different maximum allowable resistance values for the boost pumps and the override jettison pumps. The resistance value for the boost pumps is 0.0004 ohm. The resistance value for the jettison pumps is 0.0002 ohm. One of the commenters notes that the same bonding jumper is used for each type of pump. We infer that the commenter requests that either of the resistance values be changed so the values are the same for the boost and override jettison pumps. The other commenter requests revising the proposed AD, or contacting the manufacturer so the service bulletin can be revised to correct the discrepancy.

The FAA does not agree that there is an error in the resistance values stated in Boeing Alert Service Bulletin 747–28A2033, Revision 1. The resistance values stated in the service bulletin are correct, and are based upon possible fault current magnitudes, which are different for the two pump types. This AD has not been changed regarding this issue.

Conclusion

We have carefully reviewed the available data, including the comments that have been submitted, and determined that air safety and the public interest require adopting the AD as proposed.

Costs of Compliance

This AD affects about 158 airplanes worldwide. The following table provides the estimated costs for U.S. operators to comply with this AD.

ESTIMATED COSTS

Action	Work hours	Average labor rate per hour	Parts	Cost per airplane	Number of U.S.-registered airplanes	Fleet cost
Installation of Bonding Clips/Jumpers	8	$65	$0	$520	23	$11,960

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. 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.

This rulemaking is promulgated under the authority described in subtitle VII, part A, subpart III, section 44701, ''General requirements.'' Under that section, the FAA is charged 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 AD.

Regulatory Findings

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

For the reasons discussed above, I certify that this AD:

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

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

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

We prepared a regulatory evaluation of the estimated costs to comply with this AD. See the **ADDRESSES** section for a location to examine the regulatory evaluation.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the FAA amends 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 (AD):

2005–01–07 Boeing: Amendment 39–13931. Docket No. FAA–2004–18729; Directorate Identifier 2004–NM–24–AD.

Effective Date

(a) This AD becomes effective February 11, 2005.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Boeing Model 747–100 and –200B series airplanes having line numbers 1 through 167 inclusive, certificated in any category.

Unsafe Condition

(d) This AD was prompted by the results of fuel system reviews conducted by the manufacturer. We are issuing this AD to ensure adequate electrical bonding between the housing of each fuel pump and airplane structure outside the fuel tanks. Inadequate electrical bonding, in the event of a lightning strike or pump electrical fault, could cause electrical arcing and ignition of fuel vapor in the wing fuel tank, which could result in a fuel tank explosion.

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.

Installation of Bonding Clips and Bonding Jumpers

(f) Within 60 months after the effective date of this AD, install bonding clips and bonding jumpers from the housing of each fuel pump to airplane structure located outside the fuel tanks by doing all of the actions in part 1 of the Accomplishment Instructions of Boeing Alert Service Bulletin 747–28A2033, Revision 1, dated December 18, 2003.

Actions Done in Accordance With Previous Issue of Service Bulletin

(g) Installations done before the effective date of this AD in accordance with Boeing Service Bulletin 747–28–2033, dated December 15, 1971, are acceptable for compliance with the requirements of this AD.

Alternative Methods of Compliance (AMOCs)

(h) The Manager, Seattle Aircraft Certification Office, FAA, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

Material Incorporated by Reference

(i) You must use Boeing Alert Service Bulletin 747–28A2033, Revision 1, dated December 18, 2003, to perform the actions that are required by this AD, unless the AD specifies otherwise. The Director of the Federal Register approves the incorporation by reference of this document in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. For copies of the service information, contact Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207.

For information on the availability of this material at the National Archives and Records Administration (NARA), call (202) 741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.* You may view the AD docket at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW., Room PL–401, Nassif Building, Washington, DC.

Issued in Renton, Washington, on December 27, 2004.

Kevin M. Mullin,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–162 Filed 1–6–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2004–19527; Directorate Identifier 2004–NM–71–AD; Amendment 39–13932; AD 2005–01–08]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A310 Series Airplanes; and Model A300 B4–600, B4–600R, and F4–600R Series Airplanes, and Model C4 605R Variant F Airplanes (Collectively Called A300–600)

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Airbus Model A310 series airplanes; and Model A300 B4–600, B4–600R, and F4–600R series airplanes, and Model C4 605R Variant F airplanes (collectively called A300–600). This AD requires relocating contactor 9DG located at rack (relay box) 107VU and adding protective sleeves to the two wire (cable) looms near the door hinge of rack 107VU. This AD is prompted by reports that interference was noticed during production between the wire looms located near the door hinge of rack 107VU and the terminals of contactor 9DG. We are issuing this AD to prevent possible short circuits in the wire looms supplying the fuel pump systems and the pitot probe heating system, which could lead to a possible loss of function of flight-critical systems and reduced controllability of the airplane.

DATES: This AD becomes effective February 11, 2005.

The incorporation by reference of certain publications listed in the AD is approved by the Director of the Federal Register as of February 11, 2005.

ADDRESSES: For service information identified in this AD, contact Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France. You can examine this information at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

You can examine the contents of this AD docket on the Internet at *http://dms.dot.gov,* or in person at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street, SW., room PL–401, on the plaza level of the Nassif Building, Washington, DC. This docket number is FAA–2004–19527; the directorate identifier for this docket is 2004–NM–71–AD.

FOR FURTHER INFORMATION CONTACT: Tim Backman, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2797; fax (425) 227–1149.

Examining the Docket

The AD docket contains the proposed AD, comments, and any final disposition. You can examine the AD docket on the Internet at *http://dms.dot.gov,* or in person at the Docket Management Facility office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Management Facility office (telephone (800) 647–5227) is located on the plaza level of the Nassif Building at the DOT street address stated in the **ADDRESSES** section.

SUPPLEMENTARY INFORMATION: The FAA proposed to amend 14 CFR part 39 with an AD for certain Airbus Model A310 series airplanes; and Model A300 B4–600, B4–600R, and F4–600R series airplanes, and Model C4 605R Variant F airplanes (collectively called A300–600). That action, published in the **Federal Register** on November 4, 2004 (69 FR 64260), proposed to require relocating contactor 9DG located at rack (relay box) 107VU and adding protective sleeves to the two wire (cable) looms near the door hinge of rack 107VU.

Comments

We provided the public the opportunity to participate in the development of this AD. No comments have been submitted on the proposed AD or on the determination of the cost to the public.

Conclusion

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

Costs of Compliance

This AD affects about 167 airplanes of U.S. registry. The required actions will take about 3 work hours per airplane, at an average labor rate of $65 per work hour. Required parts will cost about $290 per airplane. Based on these figures, the estimated cost of the AD for U.S. operators is $80,995, or $485 per airplane.

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 AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that this AD:

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

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

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

We prepared a regulatory evaluation of the estimated costs to comply with this AD. See the **ADDRESSES** section for a location to examine the regulatory evaluation.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the FAA amends 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 (AD):

2005–01–08 Airbus: Amendment 39–13932. Docket No. FAA–2004–19527; Directorate Identifier 2004–NM–71–AD.

Effective Date

(a) This AD becomes effective February 11, 2005.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Airbus Model A310 series airplanes, as listed in Airbus Service Bulletin A310–24–2087, Revision 01, dated December 18, 2003; and Model A300 B4–600, B4–600R, and F4–600R series airplanes, and Model C4 605R Variant F airplanes (collectively called A300–600), as listed in Airbus Service Bulletin A300–24–6081, Revision 01, dated December 18, 2003; certificated in any category.

Unsafe Condition

(d) This AD was prompted by reports that interference was noticed during production between two wire (cable) looms located near the door hinge of rack (relay box) 107VU and the terminals of contactor 9DG located at rack 107VU. We are issuing this AD to prevent possible short circuits in the wire looms supplying the fuel pump systems and the pitot probe heating system, which could lead to a possible loss of function of flight-critical systems and reduced controllability of 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.

Relocation of Contactor and Addition of Protective Sleeves

(f) Within 12 months after the effective date of this AD, relocate contactor 9DG located at rack 107VU and add protective sleeves to the two wire looms located at the door hinge of rack 107VU, by doing all actions in accordance with the Accomplishment Instructions of Airbus Service Bulletin A310–24–2087, Revision 01 (for Model A310 series airplanes); or Service Bulletin A300–24–6081, Revision 01 (for Model A300–600 series airplanes); both dated December 18, 2003; as applicable.

Actions Accomplished per Previous Issue of Service Bulletins

(g) Actions accomplished before the effective date of this AD in accordance with Airbus Service Bulletin A310–24–2087; or Airbus Service Bulletin A300–24–6081; both dated June 7, 2002; are considered acceptable for compliance with the corresponding actions specified in paragraph (f) of this AD.

Alternative Methods of Compliance (AMOCs)

(h) The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

Related Information

(i) French airworthiness directive F–2003–412, dated November 12, 2003, also addresses the subject of this AD.

Material Incorporated by Reference

(j) You must use the service information that is specified in Table 1 of this AD to perform the actions that are required by this AD, unless the AD specifies otherwise. The Director of the Federal Register approves the incorporation by reference of those documents in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. For copies of the service information, contact Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France. For information on the availability of this material at the National Archives and Records Administration (NARA), call (202) 741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html*. You may view the AD docket at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street, SW., Room PL–401, Nassif Building, Washington, DC.

TABLE 1.—MATERIAL INCORPORATED BY REFERENCE

Service bulletin	Revision level	Date
Airbus Service Bulletin A300–24–6081	01	December 18, 2003.
Airbus Service Bulletin A310–24–2087	01	December 18, 2003.

Issued in Renton, Washington, on December 27, 2004.

Kevin M. Mullin,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–161 Filed 1–6–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2004–18601; Directorate Identifier 2004–NM–34–AD; Amendment 39–13933; AD 2005–01–09]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 747–100, –200B, –200F, –200C, –100B, –300, –100B SUD, –400, –400D, –400F, and 747SR Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Boeing Model 747 series airplanes. This AD requires a one-time inspection for discrepancies of the frame web and inner chords on the forward edge frame of the number 5 main entry door cutout, and related corrective action. This AD is prompted by a report of cracking of the frame web and inner chords on the forward edge frame of the number 5 main entry door. We are issuing this AD to find and fix discrepancies of the frame web and inner chords, which could result in cracking, subsequent severing of the frame, and consequent rapid depressurization of the airplane.

DATES: This AD becomes effective February 11, 2005.

The incorporation by reference of certain publications listed in the AD is approved by the Director of the Federal Register as of February 11, 2005.

ADDRESSES: For service information identified in this AD, contact Boeing Commercial Airplanes, PO Box 3707, Seattle, Washington 98124–2207. You can examine this information at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

You can examine the contents of this AD docket on the Internet at *http://dms.dot.gov*, or at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW., room PL–401, on the plaza level of the Nassif Building, Washington, DC.

FOR FURTHER INFORMATION CONTACT:

Technical information: Ivan Li, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 917–6437; fax (425) 917–6590.

Plain language information: Marcia Walters, *marcia.walters@faa.gov.*

SUPPLEMENTARY INFORMATION: The FAA proposed to amend 14 CFR Part 39 with an AD for certain Boeing Model 747 series airplanes. That action, published in the **Federal Register** on July 15, 2004 (69 FR 42365), proposed to require a one-time inspection for discrepancies of the frame web and inner chords on the forward edge frame of the number 5 main entry door cutout, and related corrective action.

Examining the Docket

The AD docket contains the proposed AD, comments, and any final disposition. You can examine the AD docket on the Internet at *http://dms.dot.gov*, or in person at the Docket Management Facility office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Management Facility office (telephone (800) 647–5227) is located on the plaza level of the Nassif Building at the DOT street address stated in the **ADDRESSES** section.

Comment

We provided the public the opportunity to participate in the development of this AD. We have considered the single comment that has been submitted on the proposed AD.

Request To Change Paragraph (g)

The commenter (the manufacturer) asks that paragraph (g) of the proposed AD be changed to read ''For those airplanes on which the repetitive inspections required by AD 2001–16–02, amendment 39–12370, have been done as of the effective date of this AD, no further action is required.'' The commenter states that the inspection required by AD 2001–16–02 (referenced as a related AD in the proposed AD) is a surface eddy current inspection and is more intensive than the detailed inspection specified in the proposed AD. The commenter notes that the repetitive inspections in AD 2001–16–02 adequately detect any cracking prior to loss of residual strength of the chord. The commenter adds that a nick or gouge does not affect the crack growth rate, so the safety concern in the proposed AD is addressed by the repetitive inspections.

We agree with the commenter. The repetitive inspections for cracking required by AD 2001–16–02 are more extensive than the one-time inspection required by this AD, and must be repeated at intervals not to exceed 3,000 flight cycles. Initiating those inspections will find cracking before it reaches critical length; therefore, the one-time inspection required by this AD is not necessary if the repetitive inspections are currently being done. For airplanes that are at or near the 10,000-flight-cycle threshold, and have not been inspected per AD 2001–16–02, the purpose of this AD is to close the gap between the compliance time for the initial inspection required by AD 2001–16–02 (before the accumulation of 16,000 total flight cycles) and the one-time inspection required by this AD. The AD requires that operators inspect the airplane at or before 10,000 total flight cycles, or within the specified grace period. Therefore, paragraph (g) of this AD has been changed to specify that operators currently accomplishing the repetitive inspections required by AD 2001–16–02 are not required to accomplish the one-time inspection required by this AD.

Conclusion

We have carefully reviewed the available data, including the comment that has been submitted, and determined that air safety and the public interest require adopting the AD with the change described previously. We have determined that this change will neither increase the economic burden on any operator nor increase the scope of the AD.

Costs of Compliance

There are about 1,055 airplanes worldwide of the affected design, this AD affects about 220 airplanes of U.S. registry. The inspection takes about 2 work hours per airplane, at an average labor rate of $65 per work hour. Based on these figures, the estimated cost of the inspection required by this AD for U.S. operators is $28,600, or $130 per airplane.

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. 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.

This rulemaking is promulgated 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 AD.

Regulatory Findings

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

For the reasons discussed above, I certify that this AD:

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

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

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

We prepared a regulatory evaluation of the estimated costs to comply with this AD. See the **ADDRESSES** section for a location to examine the regulatory evaluation.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the FAA amends 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 (AD):

2005–01–09 Boeing: Amendment 39–13933. Docket No. FAA–2004–18601; Directorate Identifier 2004–NM–34–AD.

Effective Date

(a) This AD becomes effective February 11, 2005.

Affected ADs

(b) Accomplishing this AD will not terminate the repetitive inspections required by AD 2001–16–02, amendment 39–12370.

Applicability

(c) This AD applies to Boeing Model 747–100, –200B, –200F, –200C, –100B, –300, –100B SUD, –400, –400D, –400F, and 747SR series airplanes; line numbers 1 through 1333 inclusive; certificated in any category.

Unsafe Condition

(d) This AD was prompted by a report of cracking of the frame web and inner cords on the forward edge frame of the number 5 main entry door. We are issuing this AD to find and fix discrepancies of the frame web and inner cords, which could result in cracking, subsequent severing of the frame, and consequent rapid depressurization of 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.

One-Time Inspection

(f) For airplanes on which the repetitive inspections required by AD 2001–16–02 have not been accomplished as of the effective date of this AD: Do a one-time detailed inspection for discrepancies (nicks, scratches, and/or gouges) of the frame web and inner cords (forward and aft) of the forward edge frame of the number 5 main entry door cutout, by doing all the applicable actions specified in the Accomplishment Instructions of Boeing Alert Service Bulletin 747–53A2494, dated September 18, 2003. Do the inspection at the latest of the times specified in paragraphs (f)(1), (f)(2), and (f)(3) of this AD.

(1) Before the accumulation of 10,000 total flight cycles.

(2) Within 1,500 flight cycles after the effective date of this AD.

(3) Within 24 months after the effective date of this AD.

(g) For airplanes on which the repetitive inspections required by AD 2001–16–02 have been accomplished as of the effective date of this AD: No further action is required by this AD.

Note 1: For the purposes of this AD, a detailed inspection is: ''An intensive visual examination of a specific structural area, system, installation, or assembly to detect damage, failure, or irregularity. Available lighting is normally supplemented with a direct source of good lighting at intensity deemed appropriate by the inspector. Inspection aids such as mirror, magnifying lenses, etc., may be used. Surface cleaning and elaborate access procedures may be required.''

Related Corrective Action

(h) If any discrepancy is found during the inspection required by paragraph (f) of this AD: Before further flight, do all the related corrective actions specified in the Accomplishment Instructions of Boeing Alert Service Bulletin 747–53A2494, dated September 18, 2003. Where the service bulletin specifies contacting the manufacturer for disposition of certain repair conditions, repair before further flight per a method approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA; or per data meeting the type certification basis of the airplane approved by a Boeing Company Designated Engineering Representative who has been authorized by the Manager, Seattle ACO, to make such findings. For a repair method to be approved, the approval must specifically refer to this AD.

Alternative Methods of Compliance (AMOCs)

(i)(1) The Manager, Seattle ACO, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

(2) An AMOC that provides an acceptable level of safety may be used for any repair required by this AD, if it is approved by a Boeing Company Designated Engineering Representative who has been authorized by the Manager, Seattle ACO, to make those findings. For a repair method to be approved, the approval must specifically refer to this AD.

Material Incorporated by Reference

(j) You must use Boeing Alert Service Bulletin 747–53A2494, dated September 18, 2003, to perform the actions that are required by this AD, unless the AD specifies otherwise. The Director of the Federal Register approves the incorporation by reference of this document in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. For copies of the service information, contact Boeing Commercial Airplanes, PO Box 3707, Seattle, Washington 98124–2207. For information on the availability of this material at the National Archives and Records Administration (NARA), call (202) 741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html*. You may view the AD docket at the Docket Management Facility, Department of Transportation, 400 Seventh Street SW., room PL–401, Nassif Building, Washington, DC.

Issued in Renton, Washington, on December 27, 2004.

Kevin M. Mullin,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–160 Filed 1–6–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2004–19575; Airspace Docket No. 04–ACE–65]

Modification of Class E Airspace; Lexington, MO

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Direct final rule; confirmation of effective date.

SUMMARY: This document confirms the effective date of the direct final rule which revises Class E airspace at Lexington, MO.

EFFECTIVE DATE: 0901 UTC, March 17, 2005.

FOR FURTHER INFORMATION CONTACT: Brenda Mumper, Air Traffic Division, Airspace Branch, ACE–520A, DOT Regional Headquarters Building, Federal Aviation Administration, 901 Locust, Kansas City, MO 64106; telephone: (816) 329–2524.

SUPPLEMENTARY INFORMATION: The FAA published this direct final rule with a request for comments in the **Federal Register** on November 16, 2004 (69 FR 67052). The FAA uses the direct final rulemaking procedure for a non-controversial rule where the FAA believes that there will be no adverse public comment. This direct final rule advised the public that no adverse comments were anticipated, and that unless a written adverse comment, or a written notice of intent to submit such an adverse comment, were received within the comment period, the regulation would become effective on March 17, 2005. No adverse comments were received, and thus this notice confirms that this direct final rule will become effective on that date.

Issued in Kansas City, MO on December 27, 2004.

Donna R. McCord,

Acting Area Director, Western Flight Services Operations.

[FR Doc. 05–371 Filed 1–6–05; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2004–19334; Airspace Docket No. 04–ACE–63]

Modification of Class E Airspace; Sedalia, MO

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Direct final rule; confirmation of effective date.

SUMMARY: This document confirms the effective date of the direct final rule which revises Class E airspace at Sedalia, MO.

EFFECTIVE DATE: 0901 UTC, January 20, 2005.

FOR FURTHER INFORMATION CONTACT: Brenda Mumper, Air Traffic Division, Airspace Branch, ACE–520A, DOT Regional Headquarters Building, Federal Aviation Administration, 901 Locust, Kansas City, MO 64106; telephone: (816) 329–2524.

SUPPLEMENTARY INFORMATION: The FAA published this direct final rule with a request for comments in the **Federal Register** on October 29, 2004 (69 FR 63056) and the **Federal Register** subsequently published a correction on November 29, 2004 (69 FR 69448). The FAA uses the direct final rulemaking procedure for a non-controversial rule where the FAA believes that there will be no adverse public comment. This direct final rule advised the public that no adverse comments were anticipated, and that unless a written adverse comment, or a written notice of intent to submit such an adverse comment, were received within the comment period, the regulation would become effective on January 20, 2005. No adverse comments were received, and thus this notice confirms that this direct final rule will become effective on that date.

Issued in Kansas City, MO on December 23, 2004.

Rosalyn R. Ward,

Acting Area Director, Western Flight Services Operations.

[FR Doc. 05–369 Filed 1–6–05; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2004–19576; Airspace Docket No. 04–ACE–66]

Modification of Class E Airspace; Boone, IA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Direct final rule; confirmation of effective date.

SUMMARY: This document confirms the effective date of the direct final rule which revises Class E airspace at Boone, IA.

EFFECTIVE DATE: 0901 UTC, March 17, 2005.

FOR FURTHER INFORMATION CONTACT: Brenda Mumper, Air Traffic Division, Airspace Branch, ACE–520A, DOT Regional Headquarters Building, Federal Aviation Administration, 901 Locust, Kansas City, MO 64106; telephone: (816) 329–2524.

SUPPLEMENTARY INFORMATION: The FAA published this direct final rule with a request for comments in the **Federal Register** on November 19, 2004 (69 FR 67638). The FAA uses the direct final rulemaking procedure for a non-controversial rule where the FAA believes that there will be no adverse public comment. This direct final rule advised the public that no adverse comments were anticipated, and that unless a written adverse comment, or a written notice of intent to submit such an adverse comment, were received within the comment period, the regulation would become effective on March 17, 2005. No adverse comments were received, and thus this notice confirms that this direct final rule will become effective on that date.

Dated: Issued in Kansas City, MO on December 27, 2004.

Donna R. McCord,

Acting Area Director, Western Flight Services Operations.

[FR Doc. 05–370 Filed 1–6–05; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2004–19504; Airspace Docket No. 04–ACE–64]

Establishment of Class E2 Airspace; Wichita Colonel James Jabara Airport, KS

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This rule establishes a Class E surface area at Wichita Colonel James Jabara Airport, KS. The effect of this rule is to provide appropriate controlled Class E airspace for aircraft executing instrument approach procedures to Colonel James Jabara Airport and to segregate aircraft using instrument approach procedures in instrument conditions from aircraft operating in visual conditions.

EFFECTIVE DATE: 0901 UTC, March 17, 2005.

FOR FURTHER INFORMATION CONTACT: Brenda Mumper, Air Traffic Division, Airspace Branch, ACE–520A, DOT Regional Headquarters Building, Federal Aviation Administration, 901 Locust, Kansas City, MO 64106; telephone: (816) 329–2524.

SUPPLEMENTARY INFORMATION:

History

On Wednesday, November 10, 2004, the FAA proposed to amend 14 CFR part 71 to establish a Class E surface area at Wichita Colonel James Jabara Airport, KS (69 FR 65107). The proposal was to establish a Class E surface area at Wichita Colonel James Jabara Airport, KS. Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No comments objecting to the proposal were received.

The Rule

This amendment to part 71 of the Federal Aviation Regulations (14 CFR part 71) establishes Class E airspace designated as a surface area for an airport at Wichita Colonel James Jabara Airport, KS. Controlled airspace extending upward from the surface of the earth is needed to contain aircraft executing instrument approach procedures. Weather observations will be provided by an Automated Surface Observing System (ASOS) and communications will be direct with Wichita Approach Control. The area will be depicted on appropriate aeronautical charts.

Class E airspace areas designated as surface areas are published in Paragraph 6002 of FAA Order 7400.9M, Airspace Designations and Reporting Points, dated August 30, 2004, and effective September 16, 2004, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be published subsequently in the Order.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this 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 rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

This rulemaking is promulgated under the authority described in subtitle VII, part A, subpart I, section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority since it contains aircraft executing instrument approach procedures to Colonel James Jabara Airport.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (Air).

Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 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 Federal Aviation Administration Order 7400.9M, dated August 30, 2004, and effective September 16, 2004, is amended as follows:

Paragraph 6002 Class E airspace designated as surface areas.

* * * * *

ACE KS E2 Wichita Colonel James Jabara Airport, KS

Wichita, Colonel James Jabara Airport, KS, (Lat. 37°44′ 51″ N., long. 97°13′ 16″ W.)

Within a 4-mile radius of Colonel James Jabara Airport, excluding that airspace within the Wichita Mid-Continent Airport, KS Class C airspace area and the Wichita, McConnell AFB, KS Class D airspace area.

* * * * *

Issued in Kansas City, MO, on December 23, 2004.

Rosalyn R. Ward,

Acting Area Director, Western Flight Services Operations.

[FR Doc. 05–372 Filed 1–6–05; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[CGD08–04–032]

RIN 1625–AA09

Drawbridge Operation Regulation; Boeuf River, Mason, LA

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is removing the existing drawbridge operation regulation for the draw of the SR 4 bridge across the Boeuf River, mile 32.3, near Mason, Louisiana. The existing bridge has been removed from service and a replacement bridge has been constructed on the same alignment. Since the movable span of the bridge has been removed, the regulation controlling the opening and closing of the bridge is no longer necessary.

DATES: This rule is effective January 7, 2005.

ADDRESSES: Documents referred to in this rule are available for inspection or copying at the office of the Eighth Coast Guard District, Bridge Administration Branch, 500 Poydras Street, New Orleans, Louisiana 70130–3310, between 7 a.m. and 3 p.m., Monday

through Friday, except Federal holidays. The telephone number is (504) 589–2965. The Eighth District Bridge Administration Branch maintains the public docket for this rulemaking.

FOR FURTHER INFORMATION CONTACT: David Frank, Bridge Administration Branch, at (504) 589–2965.

SUPPLEMENTARY INFORMATION:

Good Cause for not Publishing an NPRM

We did not publish a notice of proposed rulemaking (NPRM) for this regulation. Under 5 U.S.C. 553(b)(B), the Coast Guard finds good cause exists for not publishing an NPRM. Public comment is not necessary since the bridge that the regulation governed is out of service and is being completely removed. The bridge no longer affects navigation through the area.

Good Cause for Making Rule Effective in Less Than 30 Days

Under 5 U.S.C. 553(d)(3), the Coast Guard finds good cause exists for making this rule effective in less than 30 days after publication in the **Federal Register**. There is no need to delay the implementation of this rule because the bridge it governs is already out of service and is being removed.

Background and Purpose

The existing swing span bridge across the Boeuf River, mile 32.3, which had previously serviced the area is in the process of being removed and no longer affects navigation. The regulation governing the operation of the bridge is found in 33 CFR 117.431. The purpose of this rule is to remove 33 CFR 117.431 from the Code of Federal Regulations since it governs a bridge that is no longer in service and is being removed. This final rule removes the regulation regarding the SR 4 bridge.

Regulatory Evaluation

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

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

This rule removes the special regulation for a bridge that is already out of service and is being removed.

Small Entities

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this temporary rule will not have a significant economic impact on a substantial number of small entities.

This rule will have no impact on any small entities because the regulation being removed applies to a bridge that has already been taken out of service and is being removed.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 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 (1–888–734–3247).

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 it does not have implications for federalism.

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

require a Statement of Energy Effects under Executive Order 13211.

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.

Environment

We have analyzed this rule under Commandant Instruction M16475.lD, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this temporary rule is categorically excluded, under figure 2–1, paragraph (32)(e), of the Instruction, from further environmental documentation. This final rule only involves removal of the drawbridge operation regulation for a drawbridge that has been removed from service. It will not have any impact on the environment.

List of Subjects in 33 CFR Part 117

Bridges.

Regulations

■ For the reasons set out in the preamble, the Coast Guard amends 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

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

Authority: 33 U.S.C. 499; Department of Homeland Security Delegation No. 0170.1; 33 CFR 1.05–1(g); section 117.255 also issued under the authority of Pub. L. 102–587, 106 Stat. 5039.

§ 117.431 [Removed]

■ 2. Section 117.431 is removed.

Dated: December 29, 2004.

Kevin L. Marshall,

Captain, U.S. Coast Guard, Commander, 8th Coast Guard Dist., Acting.

[FR Doc. 05–380 Filed 1–6–05; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[COTP Jacksonville 04–134]

RIN 1625–AA00

Safety Zone; Indian River, Cocoa Village Mardi Gras, Cocoa, FL

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary fixed safety zone on the Indian River at Lee Wenner Park, Cocoa, FL. This safety zone is for the Cocoa Village Mardi Gras firework display and is needed to protect participants, vendors, and spectators from the hazards associated with the launching of fireworks. Entry into this safety zone is prohibited unless authorized by the Captain of the Port.

DATES: This rule is effective from 11:30 p.m. on February 26, 2005, until 12:30 a.m. on February 27, 2005.

ADDRESSES: Documents mentioned in this preamble as being available in the docket, are part of docket [COTP Jacksonville 04–134] and are available for inspection and copying at Coast Guard Marine Safety Office Jacksonville, 7820 Arlington Expressway, Suite 400, Jacksonville, Florida, 32211, between 8 a.m. and 4 p.m., Monday through Friday, except Federal Holidays.

FOR FURTHER INFORMATION CONTACT: Lieutenant Junior Grade Carol M. Swinson at Coast Guard Marine Safety Office, Jacksonville, FL, tel: (904) 232–2640, ext. 155.

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), the Coast Guard finds that good cause exists for not publishing a NPRM. Publishing a NPRM, which would incorporate a comment period before a final rule could be issued, and delaying the rule's effective date is contrary to public safety because immediate action is necessary to protect the public and waters of the United States.

The Coast Guard will issue a broadcast notice to mariners and may place Coast Guard vessels in the vicinity of this zone to advise mariners of the restriction.

Background and Purpose

This rule is needed to protect spectator craft in the vicinity of the fireworks presentation from the hazards associated with the transport, storage, and launching of fireworks. Anchoring, mooring, or transiting within this zone is prohibited, unless authorized by the Captain of the Port, Jacksonville, FL. The temporary safety zone encompasses all waters within a 700-foot radius of the fireworks platform at Lee Wenner Park during the storage, preparation, transport, and launching of fireworks. During the fireworks show, the platform will be located at approximate position 28°21.03′ N, 080°43.13′ W.

Regulatory Evaluation

This regulation is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential cost and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has exempted it from review under the order. It is not significant under the regulatory policies and procedures of the Department of Homeland Security (DHS) because these regulations will only be in effect for a short period of time, and the impacts on routine navigation are expected to be minimal.

Small Entities

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

The Coast Guard certifies under section 5 U.S.C. 605(b) that this rule will not have a significant economic impact upon a substantial number of small entities because the regulation will only be enforced for approximately one hour and the impact on routine navigation is expected to be minimal because traffic may transit safely around the zone and traffic may enter upon permission of the Captain of the Port or his representative.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we offer to assist small entities in understanding the rule so that they can better evaluate its effects on them and participate in the rulemaking process. If the rule will affect your small business, organization, or government jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed under **FOR FURTHER INFORMATION CONTACT** for assistance in understanding this rule.

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 and annually 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 (1–888–734–3247).

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 it does not have implications for federalism.

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Environment

We have analyzed this rule under Commandant Instruction M16475.lD, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA)(42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction, from further environmental documentation. Under figure 2–1, paragraph (34)(g), of the Instruction, an ''Environmental Analysis Check List'' and a ''Categorical Exclusion Determination'' are not required for this rule.

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 substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have 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.

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 165, as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 33 U.S.C. 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. A new temporary § 165.T07–134 is added to read as follows:

165.T07–134 Safety Zone Cocoa Village Mardi Gras, Cocoa, FL

(a) *Regulated area.* The Coast Guard is establishing a temporary safety zone on the Indian River, Cocoa, FL. The safety zone includes all waters within in a 700-foot radius of the fireworks platform located at position 28°21.03′ N, 080°43.13′ W located at Lee Wenner Park.

(b) *Regulations.* In accordance with the general regulations in § 165.23 of this part, anchoring, mooring or transiting in this zone is prohibited unless authorized by the Coast Guard Captain of the Port Jacksonville, Florida.

(c) *Dates.* This rule is effective from 11:30 p.m., February 26, 2005, until 12:30 a.m. on February 27, 2005.

Dated: November 16 2004.

David. L. Lersch,

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

[FR Doc. 05–293 Filed 1–6–05; 8:45 am]

BILLING CODE 4910–15–P

POSTAL SERVICE

39 CFR Part 111

Signature Confirmation Service: Elimination of Signature Waiver Option

AGENCY: Postal Service.

ACTION: Final rule.

SUMMARY: This rule changes the Domestic Mail Manual (DMM) to eliminate the signature waiver option for Signature Confirmation service under DMM S919.1.10. The Postal Service is making this change because

the signature waiver option is no longer necessary.

EFFECTIVE DATE: February 1, 2005.

FOR FURTHER INFORMATION CONTACT: Donald Lagasse, 202–268–7269, *Donald.T.Lagasse@usps.gov.*

SUPPLEMENTARY INFORMATION: In a proposed rule published in the **Federal Register** on September 2, 2004 (69 FR 53665), the Postal Service proposed an amendment to *Domestic Mail Manual* (DMM) standards eliminating the signature waiver option for Signature Confirmation service. The Postal Service adopts the proposal as described below.

Signature Confirmation service provides Postal Service customers with information about the date and time a mailpiece was delivered and, if delivery was attempted but not successful, the date and time of the delivery attempt. A delivery record, including the recipient's signature, is maintained by the Postal Service and is available to the customer via fax, e-mail, or mail, upon request. No acceptance record is kept at the office of mailing.

Signature Confirmation service currently includes a signature waiver option that allows the sender to waive the signature requirement and accept the Postal Service delivery employee's signature, date, and time of delivery as proof of delivery. If a mailer selects the signature waiver option, the mailer is provided only with the date and time of delivery in the delivery record. The signature waiver option is not available when Signature Confirmation service is combined with other special services.

Signature waiver was requested initially by Delivery Confirmation service mailers who agreed to participate in testing the Signature Confirmation service but did not want to inconvenience their customers by requiring them to sign for their items. Now that Signature Confirmation service is fully implemented and widely recognized, the signature waiver feature is no longer necessary.

Summary of Comments

The Postal Service did not receive any comments in response to this proposal. Therefore, the Postal Service will eliminate the signature waiver option for Signature Confirmation service as of February 1, 2005. Customers who do not need to obtain a signature but wish to know the date and time that their mailpiece was delivered can do so using Delivery Confirmation service.

List of Subjects in 39 CFR Part 111

Administrative practice and procedure, Postal Service.

PART 111—[AMENDED]

■ 1. The authority citation for 39 CFR part 111 continues to read as follows:

Authority: 5 U.S.C. 552(a); 39 U.S.C. 101, 401, 403, 404, 414, 416, 3001–3011, 3201–3219, 3403–3406, 3621, 3626, 5001.

■ 2. Amend the following sections of the Domestic Mail Manual (DMM) as set forth below:

S SPECIAL SERVICES

* * * * *

S900 Special Postal Services

* * * * *

S910 Security and Accountability

* * * * *

S919 Signature Confirmation

1.0 BASIC INFORMATION

* * * * *

[Delete 1.10, Signature Waiver, in its entirety.]

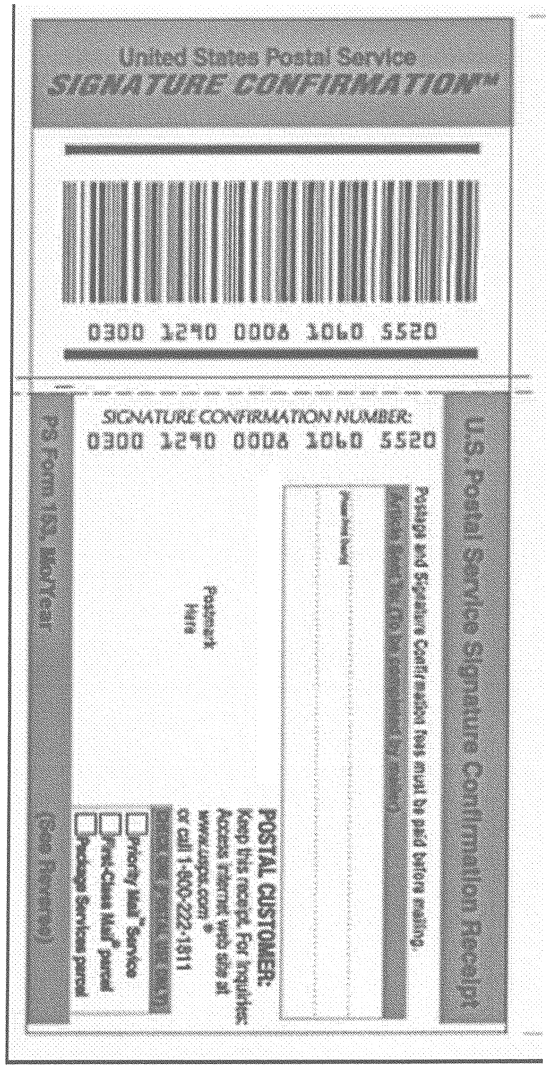
* * * * *

2.0 LABELS

* * * * *

Exhibit 2.1a Form 153

BILLING CODE 7710–12–P



BILLING CODE 7710–12–P

An appropriate amendment to 39 CFR part 111 will be published to reflect these changes.

Neva Watson,

Attorney, Legislative.

[FR Doc. 05–135 Filed 1–6–05; 8:45 am]

BILLING CODE 7710–12–C

POSTAL SERVICE

39 CFR Part 501

Authorization to Manufacture and Distribute Postage Meters

AGENCY: Postal Service.

ACTION: Final rule.

SUMMARY: Under 39 CFR 501.1, only manufacturers and distributors authorized by the Postal Service,(tm) may manufacture and/or distribute postage meters in the United States. This final rule provides that the Postal Service may revoke or suspend, wholly or in part, authorization to distribute postage meters if the authorized entity or its agent makes or distributes false or misleading statements about actions or proposed actions of the Postal Service regarding the postage meter program. In addition, minor editorial changes were made to correct references to sections of part 501 that were in error.

DATES: This rule is effective January 7, 2005.

FOR FURTHER INFORMATION CONTACT: Wayne Wilkerson, Manager of Postage Technology Management, at 703–292–3691 or by fax at 703–292–4073.

SUPPLEMENTARY INFORMATION: The Postal Service published a proposed rule in the **Federal Register** on November 20, 2003, to amend 39 CFR part 501, Authorization to Manufacture and Distribute Postage Meters. Comments on the proposed rule were due on or before December 20, 2003. We received no comments objecting to the proposed rule or requesting any changes. Therefore, the rule is adopted as final without any changes. The editorial changes to correct references to sections of part 501 necessitated by the redesignation of certain sections are as follows: In section 501.2(c), the reference to section 501.21 is corrected to 501.22. In section 501.4, the reference to section 501.23 is corrected to 501.24. In section 501.6(d), the reference to section 501.20(c) is corrected to section 501.6(c). In section 501.23(i), reference to section 501.26 is corrected to section 501.27. In section 501.24(b), the reference to section 501.26 is corrected to section 501.27 and the reference to section 501.25 is corrected to section 501.26. In section 501.27(e), the reference to section 501.23 is corrected to section 501.24. In section 501.30(a), the reference to section 501.22(b) is corrected to section 501.23(b).

List of Subjects in 39 CFR Part 501

Administrative practice and procedure, Postal Service.

For the reasons set out in this document, the Postal Service is amending 39 CFR part 501 as follows:

PART 501—AUTHORIZATION TO MANUFACTURE AND DISTRIBUTE POSTAGE METERS

■ 1. The authority citation for part 501 continues to read as follows:

Authority: 5 U.S.C. 552(a); 39 U.S.C. 101, 401, 403, 404, 410, 2601, 2605; Inspector General Act of 1978, as amended (Pub. L. 95–452, as amended); 5 U.S.C. App. 3.

■ 2. Revise current § 501.13 title to read ''Reporting and Communications'' and add new paragraph (e) to read as follows:

§ 501.13 Reporting and Communications.

* * * * *

(e) Authorized postage meter manufacturers and distributors, and their agents and employees, must not intentionally misrepresent to customers of the Postal Service decisions, actions, or proposed actions of the Postal Service respecting its regulation of postage meters in the United States. The Postal Service reserves the right to suspend and/or revoke the authorization to manufacture and/or distribute postage meters throughout the United States or in any part thereof under § 501.5 when the manufacturer, distributor, or agent or employee of either fails to comply with this requirement.

Neva Watson,

Attorney, Legislative.

[FR Doc. 05–279 Filed 1–6–05; 8:45 am]

BILLING CODE 7710–12–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP–2004–0042; FRL–7691–4]

Spinosad; Pesticide Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes a tolerance for residues of spinosad in or on grain, cereal, group 15 at 1.5 ppm; grain as aspirated fractions at 200 ppm; rice hulls at 4 ppm; meat of cattle, goats, hogs, horse and sheep at 1.5 ppm; fat of cattle, goats, hogs, horse and sheep at 33 ppm; meat byproducts of cattle, goats, hogs, horse and sheep at 8 ppm; milk at 6 ppm; milk fat at 75 ppm; fat of poultry at 0.5 ppm; meat byproducts of poultry at 0.03 ppm; eggs at 0.05 ppm. EPA is also deleting certain spinosad tolerances that are no longer needed as a result of this action. Dow AgroScience requested this tolerance under the Federal Food, Drug, and Cosmetic Act (FFDCA), as amended by the Food Quality Protection Act of 1996 (FQPA).

DATES: This regulation is effective January 7, 2005. Objections and requests for hearings must be received on or before March 8, 2005.

ADDRESSES: To submit a written objection or hearing request follow the detailed instructions as provided in Unit VI. of the **SUPPLEMENTARY INFORMATION.** EPA has established a docket for this action under Docket identification (ID) number OPP–2004–0042. All documents in the docket are listed in the EDOCKET index at *http://www.epa.gov/edocket.* Although listed in the index, some information is not publicly available, i.e., 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 EDOCKET or in hard copy at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1801 S. Bell St., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: George LaRocca, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW.,Washington, DC 20460–0001; telephone number: (703) 308–8587; e-mail address: *larocca.george@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

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

- Crop production (NAICS 111), e.g., agricultural workers; greenhouse, nursery, and floriculture workers; farmers.
- Animal production (NAICS 112), e.g., cattle ranchers and farmers, dairy cattle farmers, livestock farmers.
- Food manufacturing (NAICS 311), e.g., agricultural workers; farmers; greenhouse, nursery, and floriculture workers; ranchers; pesticide applicators.
- Pesticide manufacturing (NAICS 32532), e.g., agricultural workers; commercial applicators; farmers; greenhouse, nursery, and floriculture workers; residential users.

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

B. How Can I Access Electronic Copies of this Document and Other Related Information?

In addition to using EDOCKET (*http://www.epa.gov/edocket/*), you may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr/*. A frequently updated electronic version of 40 CFR part 180 is available at E-CFR Beta Site Two at *http://www.gpoaccess.gov/ecfr/*. To access the OPPTS Harmonized Guidelines referenced in this document, go directly to the guidelines at *http://www.epa.gpo/opptsfrs/home/guidelin.htm/*.

II. Background and Statutory Findings

In the **Federal Register** of June 23, 2004 (69 FR 35024) (FRL–7358–3), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition PP 3F6754 by Dow AgroSciences LLC, 9330 Zionsville Road, Indianapolis, IN 46268. The petition requested that 40 CFR 180.495 be amended by establishing a tolerance for residues of the insecticide spinosad, in or on the raw agricultural commodity stored grain (wheat, barley, corn, oats, rice, and sorghum milo) at 1 ppm , soybean, sunflower, peanut, and cotton seed at 1 part per million (ppm); and birdseed at 3 ppm. That notice included a summary of the petition prepared by DowAgroScience LLC, the registrant.

Based on EPA's review, the petition described in Unit II. was revised by the petitioner (Dow AgroSciences) to propose tolerances for residues of spinosad for cereal grains group at 1.5 ppm; grain as aspirated fractions at 200 ppm; rice hulls at 4 ppm; meat of cattle, goats, hogs, horse and sheep at 1.5 ppm; fat of cattle, goats, hogs, horse and sheep at 33 ppm; meat byproducts of cattle, goats, hogs, horse and sheep at 8 ppm; milk at 6 ppm; milk fat at 75 ppm; fat

of poultry at 0.5 ppm; meat byproducts of poultry at 0.03 ppm; eggs at 0.05 ppm. Residue data on stored seed (soybean, sunflower, cottonseed) and peanuts were not submitted, and thus not considered under this petition. The Agency does not establish tolerances for birdseed commodities.

EPA is also revising or deleting existing tolerances for spinosad that are superceded or no longer needed, correcting administrative errors in existing tolerances, and updating tolerance terminology as follows:

1. Tolerances for residues of spinosad in or on barley, grain; buckwheat, grain; corn, grain; corn, pop; corn pop, grain; grain, aspirated fractions; millet, pearl, grain; millet, proso, grain; oat grain; rye, grain; sorghum, grain; stored grains (barley, corn, oats, rice, sorghum/milo, and wheat); teosinte, grain; wheat bran; wheat, flour; wheat, grain; wheat midlings; wheat shorts are being revised or replaced as appropriate to reflect the new commodity terms and tolerance levels specified in Unit II.

2. Time-limited tolerances established for residues of spinosad in or on beet, sugar, tops at 10 ppm in connection with Section 18 exemption granted by EPA has expired and is being deleted. In a prior action, EPA established a spinosad tolerance for vegetables, leaves of root and tuber, group 2, which covers beet, sugar, tops. Time limited tolerances established for residues of spinosad in/or on coffee beans at 0.02 ppm in connection with an experimental use permit granted by EPA has expired and is being deleted.

3. Administrative errors in existing tolerances for corn, stover; sorghum, grain stover and wheat straw are being corrected as follows: The existing tolerances for these commodities are repeated more than once in the table in paragraph (a) under § 180.495 and are being deleted.

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

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

III. Aggregate Risk Assessment and Determination of Safety

Consistent with section 408(b)(2)(D) of FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure, consistent with section 408(b)(2) of FFDCA, for a tolerance for residues of spinosad on the commodities listed in Unit II. EPA's assessment of exposures and risks associated with establishing the tolerance follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children. The nature of the toxic effects caused by spinosad as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies reviewed are discussed in the **Federal Register** of September 27, 2002 (67 FR 60923) (FRL–7199–5).

B. Toxicological Endpoints

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

Three other types of safety or uncertainty factors may be used: ''Traditional uncertainty factors;'' the ''special FQPA safety factor;'' and the ''default FQPA safety factor.'' By the term ''traditional uncertainty factor,'' EPA is referring to those additional uncertainty factors used prior to FQPA passage to account for database deficiencies. These traditional uncertainty factors have been incorporated by the FQPA into the additional safety factor for the protection of infants and children. The term ''special FQPA safety factor'' refers to those safety factors that are deemed necessary for the protection of infants and children primarily as a result of the FQPA. The ''default FQPA safety factor'' is the additional 10X safety factor that is mandated by the statute unless it is decided that there are reliable data to choose a different additional factor (potentially a traditional uncertainty factor or a special FQPA safety factor).

For dietary risk assessment (other than cancer) the Agency uses the UF to calculate an acute or chronic reference dose (acute RfD or chronic RfD) where the RfD is equal to the NOAEL divided by an UF of 100 to account for interspecies and intraspecies differences and any traditional uncertainty factors deemed appropriate (RfD = NOAEL/UF). Where a special FQPA safety factor or the default FQPA safety factor is used, this additional factor is applied to the RfD by dividing the RfD by such additional factor. The acute or chronic Population Adjusted Dose (aPAD or cPAD) is a modification of the RfD to accommodate this type of safety factor.

For non-dietary risk assessments (other than cancer) the UF is used to determine the LOC. For example, when 100 is the appropriate UF (10X to account for interspecies differences and 10X for intraspecies differences) the LOC is 100. To estimate risk, a ratio of the NOAEL to exposures (margin of exposure (MOE) = NOAEL/exposure) is calculated and compared to the LOC.

The linear default risk methodology (Q*) is the primary method currently used by the Agency to quantify carcinogenic risk. The Q* approach assumes that any amount of exposure will lead to some degree of cancer risk. A Q* is calculated and used to estimate risk which represents a probability of occurrence of additional cancer cases (e.g., risk). An example of how such a probability risk is expressed would be to describe the risk as one in one hundred thousand (1×10^{-5}), one in a million (1×10^{-6}), or one in ten million (1×10^{-7}).

Under certain specific circumstances, MOE calculations will be used for the carcinogenic risk assessment. In this non-linear approach, a ''point of departure'' is identified below which carcinogenic effects are not expected. The point of departure is typically a NOAEL based on an endpoint related to cancer effects though it may be a different value derived from the dose response curve. To estimate risk, a ratio of the point of departure to exposure (MOE_{cancer} = point of departure/exposures) is calculated.

A summary of the toxicological endpoints for spinosad used for human risk assessment is discussed in Unit III.B. of the final rule published in the **Federal Register** of September 27, 2002 (67 FR 60923) (FRL–7199–5).

C. Exposure Assessment

1. *Dietary exposure from food and feed uses*. Tolerances have been established (40 CFR 180.495) for the residues of spinosad, in or on a variety of raw agricultural commodities. Risk assessments were conducted by EPA to assess dietary exposures from spinosad in food as follows:

i. *Acute exposure*. Acute dietary risk assessments are performed for a food-use pesticide, if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a one-day or single exposure. An endpoint was not identified for acute dietary exposure and risk assessment because no effects were observed in oral toxicity studies including developmental toxicity studies in rats or rabbits that could be attributable to a single dose (exposure). Therefore, an acute dietary exposure assessment was not performed.

ii. *Chronic exposure*. In conducting the chronic dietary risk assessment EPA used the Dietary Exposure Evaluation Model software with the Food Commodity Intake Database (DEEM-FCID™), which incorporates food consumption data as reported by respondents in the USDA 1994–1996 and 1998 Nationwide Continuing Surveys of Food Intake by Individuals (CSFII), and accumulated exposure to the chemical for each commodity. The following assumptions were made for the chronic exposure assessments: A chronic dietary exposure assessment (using tolerance-level residues, DEEM default processing factors, and percent crop treated (CT) information including 10% CT for all proposed commodities) was conducted for the general U.S. population and various population subgroups. The estimated chronic dietary exposures for the U.S. population and all population subgroups, as represented by percent of the chronic Population Adjusted Dose (cPAD), is below EPA's level of concern (< 100% cPAD). The estimated exposure for the U.S. population is 21% of the cPAD. The estimated exposure for the most highly exposed subpopulation, children 1-2 years, is 62% of the cPAD.

iii. *Cancer*. Spinosad has been classified as not likely to be carcinogenic in humans based on the results of a carcinogenicity study in mice and the combined chronic toxicity and carcinogenicity study in rats. Therefore, a quantitative cancer risk assessment was not performed.

iv. *Anticipated residue and percent crop treated (PCT) information*. Section 408(b)(2)(E) of FFDCA authorizes EPA to use available data and information on the anticipated residue levels of pesticide residues in food and the actual levels of pesticide chemicals that have been measured in food. If EPA relies on such information, EPA must require that data be provided 5 years after the tolerance is established, modified, or left in effect, demonstrating that the levels in food are not above the levels anticipated. Following the initial data submission, EPA is authorized to require similar data on a time frame it deems appropriate. As required by section 408(b)(2)(E) of FFDCA, EPA will issue a data call-in for information relating to anticipated residues to be submitted no later than 5 years from the date of issuance of this tolerance.

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

The Agency used PCT information as follows:

The chronic analysis assumed tolerance level residues for all crop, poultry, and egg commodities, and anticipated residues for ruminant and milk commodities. Percent crop treated for several crop commodities were reduced from 100% based on data submitted to EPA. The Agency used PCT information as follows:

Almond—5%;
Apple—28%;
Apricot —5%;
Avocado—5%;
Bean, snap—9%;
Bean/pea, dry—1%;
Broccoli—62%;
Cabbage—32%;
Cauliflower—54%;
Celery—78%;
Cherry—4%;
Collards—24%;
Cotton—3%;
Eggplant—14%;
Grapefruit—1%;
Grape, wine—1%;
Kale—32%;
Lemon—11%;
Lettuce, head—59%;
Lettuce, other—42%;
Mustard greens—17%;
Orange—6%;
Potato—1%;
Peach—4%;
Peanut—1%;
Pepper—45%;
Pistachio—1%;
Prune/plum—5%;
Spinach—32%;
Squash—1%;
Tangerine—6%;
Tomato, fresh—30%;
Tomato, processed—2%;
Turnip, greens—6%;
Watermelon—1%

Furthermore, an estimated 10% seed treatment for cereal grains was used.

The Agency believes that the three conditions listed in Unit III.C. have been met. With respect to Condition 1, PCT estimates for existing uses are derived from Federal and private market survey data, which are reliable and have a valid basis. EPA uses a weighted average PCT for chronic dietary exposure estimates. This weighted average PCT figure is derived by averaging State-level data for a period of up to 10 years, and weighting for the more robust and recent data. A weighted average of the PCT reasonably represents a person's dietary exposure over a lifetime, and is unlikely to underestimate exposure to an individual because of the fact that pesticide use patterns (both regionally and nationally) tend to change continuously over time, such that an individual is unlikely to be exposed to more than the average PCT over a lifetime. With respect to the projected PCT for the proposed used, the 10% projection is based upon a maximum percent seed supply treated with chlorphyrifos-methyl of 8% for wheat and 5% for barley and oats. Since spinosad is likely to be used in place of chlorphyrifos-methyl, historically the

most widely used insecticide for control of insects pests on stored grain this assessment assumes that the percent of seed treatment would approximate the maximum percent of the seed supply treated with chlorphyrifos-methyl. As to Conditions 2 and 3, regional consumption information and consumption information for significant subpopulations is taken into account through EPA's computer-based model for evaluating the exposure of significant subpopulations including several regional groups. Use of this consumption information in EPA's risk assessment process ensures that EPA's exposure estimate does not understate exposure for any significant subpopulation group and allows the Agency to be reasonably certain that no regional population is exposed to residue levels higher than those estimated by the Agency. Other than the data available through national food consumption surveys, EPA does not have available information on the regional consumption of food to which spinosid may be applied in a particular area.

2. *Dietary exposure from drinking water*. The Agency lacks sufficient monitoring exposure data to complete a comprehensive dietary exposure analysis and risk assessment for spinosad in drinking water. Because the Agency does not have comprehensive monitoring data, drinking water concentration estimates are made by reliance on simulation or modeling taking into account data on the physical characteristics of spinosad.

The Agency uses the FQPA Index Reservoir Screening Tool (FIRST) or the Pesticide Root Zone Model/Exposure Analysis Modeling System (PRZM/EXAMS), to produce estimates of pesticide concentrations in an index reservoir. The SCI-GROW model is used to predict pesticide concentrations in shallow ground water. For a screening-level assessment for surface water EPA will use FIRST (a tier 1 model) before using PRZM/EXAMS (a tier 2 model). The FIRST model is a subset of the PRZM/EXAMS model that uses a specific high-end runoff scenario for pesticides. Both FIRST and PRZM/EXAMS incorporate an index reservoir environment, and both models include a percent crop area factor as an adjustment to account for the maximum percent crop coverage within a watershed or drainage basin.

None of these models include consideration of the impact processing (mixing, dilution, or treatment) of raw water for distribution as drinking water would likely have on the removal of pesticides from the source water. The primary use of these models by the Agency at this stage is to provide a screen for sorting out pesticides for which it is unlikely that drinking water concentrations would exceed human health levels of concern.

Since the models used are considered to be screening tools in the risk assessment process, the Agency does not use estimated environmental concentrations (EECs), which are the model estimates of a pesticide's concentration in water. EECs derived from these models are used to quantify drinking water exposure and risk as a %RfD or %PAD. Instead drinking water levels of comparison (DWLOCs) are calculated and used as a point of comparison against the model estimates of a pesticide's concentration in water. DWLOCs are theoretical upper limits on a pesticide's concentration in drinking water in light of total aggregate exposure to a pesticide in food, and from residential uses. Since DWLOCs address total aggregate exposure to spinosad they are further discussed in the aggregate risk sections in Unit III.E.

Based on the FIRST and SCI-GROW models, the EECs of spinosad for chronic exposures are estimated to be 2.3 ppb for surface water and 0.037 ppb for ground water.

The EECs for spinosad are based on application of the insecticide to turf at a maximum of four applications at a rate of 0.41 pound active per acre per application.

3. *From non-dietary exposure*. The term ''residential exposure'' is used in this document to refer to non-occupational, non-dietary exposure (e.g., for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets). A summary of the residential uses for spinosad is discussed in Unit III.C. of the final rule published in the **Federal Register** of September 27, 2002 (67 FR 60923) (FRL–7199–5).

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

EPA does not have, at this time, available data to determine whether spinosad has a common mechanism of toxicity with other substances. Unlike other pesticides for which EPA has followed a cumulative risk approach based on a common mechanism of toxicity, EPA has not made a common mechanism of toxicity finding as to spinosad and any other substances and spinosad does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has not assumed that spinosad has a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see the policy statements released by EPA's OPP concerning common mechanism determinations and procedures for cumulating effects from substances found to have a common mechanism on EPA's web site at *http://www.epa.gov/pesticides/cumulative/*.

D. Safety Factor for Infants and Children

1. *In general*. Section 408 of FFDCA provides that EPA shall apply an additional tenfold margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the data base on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. Margins of safety are incorporated into EPA risk assessments either directly through use of a MOE analysis or through using uncertainty (safety) factors in calculating a dose level that poses no appreciable risk to humans. In applying this provision, EPA either retains the default value of 10X when reliable data do not support the choice of a different factor, or, if reliable data are available, EPA uses a different additional safety factor value based on the use of traditional uncertainty factors and/or special FQPA safety factors, as appropriate.

2. *Prenatal and postnatal sensitivity*. There is no indication of increased susceptibility of rat and rabbit fetuses to in utero and/or postnatal exposure.

3. *Conclusion*. There is a complete toxicity data base for spinosad and exposure data are complete or are estimated based on data that reasonably accounts for potential exposures. EPA determined that the 10X SF to protect infants and children should be removed. The FQPA factor is removed because:

i. The toxicological data base for spinosad is complete for FQPA assessment.

ii. There is no evidence of increased susceptibility of rat or rabbit fetuses following *in utero* exposure in the developmental studies with spinosad,

and there is no evidence of increased susceptibility of young rats in the reproduction study with spinosad.

iii. There are no residual uncertainties identified in the exposure databases; the dietary food exposure assessment (chronic only; no acute endpoint was identified) is refined using Anticipated Residues calculated from field trial data and available percent crop treated (%CT) information.

iv. EPA has indicated that the dietary drinking water exposure is based on conservative modeling estimates.

v. EPA Residential SOPs were used to assess post-application exposure to children as well as incidental oral exposure of toddlers, so these assessments do not underestimate the exposure and risks posed by spinosad.

E. Aggregate Risks and Determination of Safety

To estimate total aggregate exposure to a pesticide from food, drinking water, and residential uses, the Agency calculates DWLOCs which are used as a point of comparison against EECs. DWLOC values are not regulatory standards for drinking water. DWLOCs are theoretical upper limits on a pesticide's concentration in drinking water in light of total aggregate exposure to a pesticide in food and residential uses. In calculating a DWLOC, the Agency determines how much of the acceptable exposure (i.e., the PAD) is available for exposure through drinking water [e.g., allowable chronic water exposure (mg/kg/day) = cPAD - (average food + residential exposure). This allowable exposure through drinking water is used to calculate a DWLOC.

A DWLOC will vary depending on the toxic endpoint, drinking water consumption, and body weights. Default body weights and consumption values as used by the EPA's Office of Water are used to calculate DWLOCs: 2 liter (L)/70 kg (adult male), 2L/60 kg (adult female), and 1L/10 kg (child). Default body weights and drinking water consumption values vary on an individual basis. This variation will be taken into account in more refined screening-level and quantitative drinking water exposure assessments. Different populations will have different DWLOCs. Generally, a DWLOC is calculated for each type of risk assessment used: Acute, short-term, intermediate-term, chronic, and cancer.

When EECs for surface water and ground water are less than the calculated DWLOCs, OPP concludes with reasonable certainty that exposures to the pesticide in drinking water (when considered along with other sources of exposure for which OPP has reliable data) would not result in unacceptable levels of aggregate human health risk at this time. Because OPP considers the aggregate risk resulting from multiple exposure pathways associated with a pesticide's uses, levels of comparison in drinking water may vary as those uses change. If new uses are added in the future, OPP will reassess the potential impacts of residues of the pesticide in drinking water as a part of the aggregate risk assessment process.

1. *Acute risk*. Acute aggregate risk consists of the combined dietary exposures from food and drinking water sources. The total exposure is compared to the acute RfD. An acute RfD was not identified since no effects were observed in oral toxicity studies that could be attributable to a single dose. Therefore, the Agency concludes that there is a reasonable certainty of no harm from acute aggregate exposure to spinosad.

2. *Chronic risk*. Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that exposure to spinosad from food will utilize 21% of the cPAD for the U.S. population, 22% of the cPAD for all infants, and 62 % of the cPAD for children 1-2 years old. Based on the use pattern, chronic residential exposure to residues of spinosad is not expected. In addition, there is potential for chronic dietary exposure to spinosad in drinking water. After calculating DWLOCs and comparing them to the EECs for surface and ground water, EPA does not expect the aggregate exposure to exceed 100% of the cPAD, as shown in the Table below:

AGGREGATE RISK ASSESSMENT FOR CHRONIC (NON-CANCER) EXPOSURE TO SPINOSAD

Population Subgroup	cPAD mg/kg/day	% cPAD (Food)	Surface Water EEC (ppb)	Ground Water EEC (ppb)	Chronic DWLOC (ppb)
U.S. Population	0.027	36	2.3	0.037	600
All infants < 1 year	0.027	36	2.3	0.037	170
Children 1 - 2 years old	0.027	82	2.3	0.037	50
Children 3 - 5 years old	0.027	79	2.3	0.037	60

3. *Short-term risk*. Short-term aggregate exposure takes into account residential exposure plus chronic exposure to food and water (considered to be a background exposure level).

A summary of the short-term risk for spinosad is discussed in Unit III.E. of the final rule published in the **Federal Register** of September 27, 2002 (67 FR 60923) (FRL–7199–5).

4. *Aggregate cancer risk for U.S. population*. Spinosad has been classified as ''not likely to be carcinogenic in humans'' based on the results of a carcinogenicity study in mice and the combined chronic toxicity and carcinogenicity study in rats. Therefore, spinosad is not expected to pose a cancer risk to humans.

5. *Determination of safety*. Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general population, and to infants and children from aggregate exposure to spinosad residues.

IV. Other Considerations

A. Analytical Enforcement Methodology

Adequate enforcement methodology using high pressure liquid chromatography with ultraviolet detector (HPLC/UV) is available to enforce the tolerances in plants. Adequate livestock methods are available for tolerance enforcement. Method RES 94094 (GRM 95.03) is an HPLC/UV method suitable for determination of spinosad residues in ruminant commodities. Method GRM 95.03 has undergone successful independent laboratory validation (ILV) and EPA laboratory validation, and has been forwarded to FDA for inclusion in PAM Volume II. Method GRM 95.15 is another HPLC/UV method suitable for determination of spinosad residues in poultry commodities. This method has

been forwarded to FDA for inclusion in PAM Volume II. Method RES 95114, an immunoassay method for determination of spinosad residues in ruminant commodities, underwent a successful ILV and EPA laboratory validation. It has been submitted to FDA for inclusion in PAM Volume II. The methods may be requested from: Paul Golden, US EPA/OPP/BEAD/ACB, Environmental Science Center, 701 Mapes Road, Fort Meade, MD 20755–5350; telephone number: (410) 305–2960; FAX (410) 305–3091; e-mail address: *RAM Mailbox*.

B. International Residue Limits

No Codex, Canadian, or Mexican maximum residue limits (MRLs) have been established for residues of spinosad on the raw agricultural commodity cereal grains.

C. Public Comments

One comment was received in response to the notice of filing. In that comment, a B. Sachau objected to the proposed tolerances because of the amounts of pesticides already consumed and carried by the American population. She further indicated that testing conducted on animals have absolutely no validity and cruel to the test animals.

The Agency understands the commenter's concerns and recognizes that some individuals believe that pesticides should be banned completely. However, under the existing legal framework provided by section 408 of the Federal Food, Drug and Cosmetic Act (FFDCA) EPA is authorized to establish pesticide tolerances or exemptions where persons seeking such tolerances or exemptions have demonstrated that the pesticide meets the safety standard imposed by that statute.

The Agency disagrees with the commenter's claims regarding animal testing. Since humans and animals have complex organ systems and mechanisms for the distribution of chemicals in the body, as well as processes for eliminating toxic substances from their systems, EPA relies on laboratory animals such as rats and mice to mimic the complexity of human and higher-order animal physiological responses when exposed to a pesticide. EPA is committed, however, to reducing the use of animals whenever possible. EPA-required studies include animals only when the requirements of sound toxicological science make the use of an animal absolutely necessary. The Agency's goal is to be able to predict the potential of pesticides to cause harmful effects to humans and wildlife by using fewer laboratory animals as models and have been accepting data from alternative (to animals) test methods for several years. As progress is made on finding or developing non-animal test models that reliably predict the potential for harm to humans or the environment, EPA expects that it will need fewer animal studies to make safety determinations.

Finally, because the commenter has not provided the Agency with a specific rationale (including supporting information) as to why the Agency's action is inconsistent with the legal standards in section 408 of FFDCA, EPA can not provide any more detailed response to the commenter's disagreement with the Agency's decision.

V. Conclusion

Therefore, the tolerances are established for residues of spinosad, in or on the raw agricultural commodity grain, cereal, group 15 at 1.5 ppm; grain as aspirated fractions at 200 ppm; rice hulls at 4 ppm; meat of cattle, goats, hogs, horse and sheep at 1.5 ppm; fat of cattle, goats, hogs, horse and sheep at 33 ppm; meat byproducts of cattle, goats, hogs, horse and sheep at 8 ppm; milk at 6 ppm; milk fat at 75 ppm; fat of poultry at 0.5 ppm; meat byproducts of poultry at 0.03 ppm; eggs at 0.05 ppm.

VI. Objections and Hearing Requests

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

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

You must file your objection or request a hearing on this regulation in accordance with the instructions provided in this unit and in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number OPP–2004–0042 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk on or before March 8, 2005.

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

Mail your written request to: Office of the Hearing Clerk (1900L), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001. You may also deliver your request to the Office of the Hearing Clerk in Suite 350, 1099 14th St., NW., Washington, DC 20005. The Office of the Hearing Clerk is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Office of the Hearing Clerk is (202) 564–6255.

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

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

Ave., NW., Washington, DC 20460–0001.

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

3. *Copies for the Docket*. In addition to filing an objection or hearing request with the Hearing Clerk as described in Unit VI.A., you should also send a copy of your request to the PIRIB for its inclusion in the official record that is described in **ADDRESSES**. Mail your copies, identified by docket ID number OPP–2004–0042, to: Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001. In person or by courier, bring a copy to the location of the PIRIB described in **ADDRESSES**. You may also send an electronic copy of your request via e-mail to: *opp-docket@epa.gov*. Please use an ASCII file format and avoid the use of special characters and any form of encryption. Copies of electronic objections and hearing requests will also be accepted on disks in WordPerfect 6.1/8.0 or ASCII file format. Do not include any CBI in your electronic copy. You may also submit an electronic copy of your request at many Federal Depository Libraries.

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

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

VII. Statutory and Executive Order Reviews

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

VIII. Congressional Review Act

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

List of Subjects in 40 CFR Part 180

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

Dated: December 20, 2004.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

■ Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

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

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

■ 2. Section 180.495 is amended by revising the table in paragraph (a) and by removing from the table in paragraph (b) the entry ''Beet, sugar, tops'' to read as follows:

§ 180.495 Spinosad; tolerances for residues.

(a) * * *

Commodity	Parts per million	Expiration/Revocation Date
Acerola	1.5	None
Almond, hulls	2.0	None
Amaranth, grain, grain	1.0	None
Animal feed, nongrass, group, 18	0.02	None
Apple pomace	0.5	None
Artichoke, globe	0.3	None
Asparagus	0.2	None
Atemoya	0.3	None
Avocado	0.3	None
Beet, sugar, molasses	0.75	None
Biriba	0.3	None
Brassica, head and stem, subgroup 5A	2.0	None
Bushberry subgroup 13B	0.250	None
Cranberry subgroup 13A	0.7	None
Canistel	0.3	None
Cattle, fat	33	None
Cattle, meat	1.5	None
Cattle, meat byproducts	8	None
Cherimoya	0.3	None
Citrus, oil	3.0	None
Citrus, dried pulp	0.5	None
Coriander, leaves	8.0	None
Corn, forage	1.0	None
Corn, hay	1.0	None
Corn, stover	1.0	None
Corn, straw	1.0	None
Corn, sweet, kernel plus cob with husks removed	0.02	None
Cotton gin byproducts	1.5	None
Cotton, undelinted seed	0.02	None
Cranberry	0.01	None
Custard apple	0.3	None
Egg	0.05	None
Feijoa	.05	None
Fig	0.10	None
Fruit, citrus group	0.3	None
Fruit, pome, group 11	0.20	None
Fruit, stone, group 12	0.20	None
Goat, fat	33	None
Goat, meat byproducts	8	None
Goat, meat	1.5	None
Grain, aspirated fractions	200	None
Grain, cereal, group 15	1.5	None
Grape	0.50	None
Grape, raisin	0.70	None
Grass, forage, fodder and hay, group 17	0.02	None
Guava	0.3	None
Herb, dried, subgroup	22	None
Herb, fresh, subgroup	3.0	None
Hog, fat	33	None
Hog, meat byproducts	8.0	None
Hog, meat	1.5	None
Horse, fat	33	None
Horse, meat byproducts	8.0	None
Horse, meat	1.5	None
Ilama	0.3	None
Jaboticaba	0.3	None
Juneberry	0.25	None
Leafy vegetables (except Brassica vegetables group)	8.0	None
Legume vegetables, edible podded (Crop Subgroup 6A)	0.30	None
Legume vegetables, dried shell pea and bean (Crop Subgroup 6C)	0.02	None
Legume vegetables, succulent shelled pea and bean (Crop Subgroup 6B)	0.02	None
Lingonberry	0.250	None
Longan	0.3	None
Lychee	0.3	None
Mango	0.3	None

Commodity	Parts per million	Expiration/Revocation Date
Milk	6.0	None
Milk, fat	75	None
Nut, tree, group 14	0.02	None
Okra	0.40	None
Papaya	0.3	None
Passionfruit	0.3	None
Peanut	0.02	None
Pistachio	0.020	None
Poultry, fat	0.5	None
Poultry, meat byproducts	0.03	None
Poultry, meat	0.02	None
Pulasan	0.3	None
Rambutan	0.3	None
Rice, hulls	4.0	None
Salal	0.250	None
Sapodilla	0.3	None
Sapote, black	0.3	None
Sapote, mamey	0.3	None
Sapote, white	0.3	None
Sheep, fat	33	None
Sheep, meat byproducts	8.0	None
Sheep, meat	1.5	None
Sorghum, forage	1.0	None
Sorghum, forage, hay	1.0	None
Sorghum, grain, stover	1.0	None
Sorghum, straw	1.0	None
Soursop	0.3	None
Soybean	0.02	None
Spanish lime	0.3	None
Star apple	0.3	None
Starfruit	0.3	None
Strawberry	1.0	None
Sugar apple	0.3	None
Ti, leaves	10.0	None
Vegetable, brassica, leafy, group 5	10.0	None
Vegetable, cucurbit (cucumber, melon, squashes), group 9	0.3	None
Vegetable, foliage of legume, group 7	8.0	None
Vegetable, fruiting, group 8	0.4	None
Vegetable, leaves of root and tuber, group 2	10.0	None
Vegetable, root and tuber, group 1	0.10	None
Watercress	8.0	None
Wax jambu	0.3	None
Wheat, forage	1.0	None
Wheat, hay	1.0	None
Wheat, straw	1.0	None

[FR Doc. 05–88 Filed 1–6–05; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP–2005–0001; FRL–7694–5]

Peanuts, Tree Nuts, Milk, Soybeans, Eggs, Fish, Crustacea, and Wheat; Exemption from the Requirement of a Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes an exemption from the requirement of a tolerance for residues of peanuts, tree nuts, milk, soybeans, eggs, fish, crustacea, and/or wheat when used as inert or active ingredients in pesticide products, for certain use patterns, under the Federal Food, Drug, and Cosmetic Act, as amended by the Food Quality Protection Act of 1996. The Agency is acting on its own initiative.

DATES: This regulation is effective on January 7, 2005.

ADDRESSES: To submit a written objection or hearing request follow the detailed instructions as provided in Unit IV. of the SUPPLEMENTARY INFORMATION. EPA has established a docket for this action under Docket identification (ID) number OPP–2005–0001. All documents in the docket are listed in the EDOCKET index at *http://www.epa.gov/edocket*. Although listed in the index, some information is not publicly available, i.e., 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 EDOCKET or in hard copy at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1801 South Bell St., Arlington, VA., Monday through Friday, excluding legal holidays. The Docket telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Kathryn Boyle, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–6304; fax number: (703) 305–0599; e-mail address: *boyle.kathryn@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

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

- Industry (NAICS code 111), e.g., Crop production
- Industry (NAICS code 32532), e.g., Pesticide manufacturing.

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

B. How Can I Access Electronic Copies of this Document and Other Related Information?

In addition to using EDOCKET *(http://www.epa.gov/edocket/)*, you may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr/*. A frequently updated electronic version of 40 CFR part 180 is available at E-CFR Beta Site Two at *http://www.gpoaccess.gov/ecfr/*.

II. What is the Agency's Authority for Taking this Action?

This final rule is issued under section 408 of FFDCA, 21 U.S.C. 346a, as amended by the Food Quality Protection Act of 1996 (FQPA) (Public Law 104–170). Section 408(e) of FFDCA authorizes EPA to establish, modify, or revoke tolerances, or exemptions from the requirement of a tolerance for residues of pesticide chemicals in or on raw agricultural commodities and processed foods.

III. Background and Statutory Findings

In the **Federal Register** of July 21, 2004 (69 FR 43548) (FRL–7365–5), EPA issued a proposed rule under section 408 (e) of the FFDCA, 21 U.S.C. 346a, as amended by the FQPA (Public Law 104–170). The Agency proposed to establish in 40 CFR 180.1071 an exemption from the requirement for tolerance for peanuts, tree nuts, milk (including caseins), soybeans, eggs, fish, crustacea, and/or wheat when used according to the use patterns specified by the Agency as being unlikely to result in residues of an allergen-containing material mixed-in with other (different) food commodities as a result of a pesticide application.

One comment was received from a private citizen opposing the establishment of this exemption, particularly the animal feed-through use, but the commentor gave no reason for opposing the exemption other than a general objection to pesticides. The Agency recognizes that some individuals believe that pesticides should be banned completely. However, under the existing legal framework provided by section 408(e) of FFDCA, EPA can establish or modify pesticide tolerances or exemptions by demonstrating that the pesticide meets the safety standard imposed by that statute. The commentor has not provided the Agency with a specific rationale or additional information pertaining to the legal standards in FFDCA Section 408 for opposing the establishment of a tolerance exemption for residues of peanuts, tree nuts, milk, soybeans, eggs, fish, crustacea, and/or wheat. In the absence of any additional information of a factual nature, the Agency can not respond further to the commentor's disagreement with the Agency's decision.

A late comment was received from the Monterey Chemical Company requesting that the use patterns specified in the proposed rule be changed to include the use on bearing citrus. The requester indicated their belief that because of the washing and waxing of the harvested crop that it would be ''unlikely that any residue of casein would remain on the harvested crop.'' The Agency has considered the commentor's request, but believes that additional information is needed. The casein is being intentionally used as a sticking agent, that is, the casein is formulated to stick to the surface of the developing citrus fruit. The Agency simply does not know if the casein would be degraded in the environment by sunlight or by microflora, or if the casein would still be present on the surface of the fruit after washing. If the Agency were in possession of data (for example, casein-specific enzyme-linked immunosorbent assays (ELISA) wipe tests performed on citrus fruits as harvested, and as washed and waxed with detection levels of less than 10 ppm), then its ability to make a determination would increase.

While not as a result of a public comment, the Agency is also formally including the term putrescent eggs within the definition of eggs, even though putrescent eggs would not be considered as a food commodity. It is a long-standing practice of the Pesticides Program to accept the use of the term putrescent eggs as being included under the descriptor egg solids (whole). In fact, putrescent whole egg solids are a minimum risk active ingredient per 40 CFR 152.25(f)(1).

Based on the reasons set forth in the preamble to the proposed rule, and considering the comments received by the Agency in response to the proposed rule, EPA is establishing a tolerance exemption for residues of peanuts, tree nuts, milk (including casein), soybeans, eggs (including putrescent egg solids), fish, crustacea, and/or wheat when used according to the use patterns as specified by the Agency as being unlikely to result in residues of an allergen-containing material mixed-in with other (different) food commodities as a result of a pesticide application.

IV. Objections and Hearing Requests

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

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

You must file your objection or request a hearing on this regulation in accordance with the instructions provided in this unit and in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number OPP–2005–0001 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk on or before March 8, 2005.

1. *Filing the request.* Your objection must specify the specific provisions in the regulation that you object to, and the

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

Mail your written request to: Office of the Hearing Clerk (1900L), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001. You may also deliver your request to the Office of the Hearing Clerk in Suite 350, 1099 14th St., NW., Washington, DC 20005. The Office of the Hearing Clerk is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Office of the Hearing Clerk is (202) 564–6255.

2. *Copies for the Docket*. In addition to filing an objection or hearing request with the Hearing Clerk as described in Unit XI.A., you should also send a copy of your request to the PIRIB for its inclusion in the official record that is described in **ADDRESSES**. Mail your copies, identified by docket ID number OPP–2005–0001, to: Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001. In person or by courier, bring a copy to the location of the PIRIB described in **ADDRESSES**. You may also send an electronic copy of your request via e-mail to: *opp-docket@epa.gov*. Please use an ASCII file format and avoid the use of special characters and any form of encryption. Copies of electronic objections and hearing requests will also be accepted on disks in WordPerfect 6.1/8.0 or ASCII file format. Do not include any CBI in your electronic copy. You may also submit an electronic copy of your request at many Federal Depository Libraries.

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

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

V. Statutory and Executive Order Reviews

This final rule establishes an exemption from the tolerance requirement under section 408(e) of the FFDCA. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this rule has been exempted from review under Executive Order 12866 due to its lack of significance, this rule is not subject to Executive Order 13211, *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, or impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4). Nor does it require any special considerations under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994); or OMB review or any Agency action under Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note).

This final rule establishes new tolerance exemptions in 40 CFR 180.1071. Establishing a new tolerance exemption permits expanded use of pesticide products and thus has a positive economic impact. Under section 605(b) of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), the Agency hereby certifies that the proposed action to establish a new tolerance exemption for allergen-containing materials will not have significant negative economic impact on a substantial number of small entities.

In addition, the Agency has determined that this action will not have a substantial direct effect on States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999). Executive Order 13132 requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' This final rule directly regulates growers, food processors, food handlers and food retailers, not States. This action does not alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of the FFDCA. For these same reasons, the Agency has determined that this rule does not have any ''tribal implications'' as described in Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 6, 2000). Executive Order 13175, requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' ''Policies that have tribal implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and the Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.'' This rule will not have substantial direct effects on tribal governments, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this rule.

VI. Congressional Review Act

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

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practices and procedures, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: December 29, 2004.

Betty Shackleford,

Acting Director, Registration Division, Office of Pesticide Programs.

■ Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

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

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

■ 2. Section 180.1071 is revised to read as follows:

§ 180.1071 Peanuts, Tree Nuts, Milk, Soybeans, Eggs, Fish, Crustacea, and Wheat; exemption from the requirement of a tolerance.

(a) *General.* Residues resulting from the following uses of the food commodity forms of peanuts, tree nuts, milk, soybeans, eggs (including putrescent eggs), fish, crustacea, and wheat are exempted from the requirement of a tolerance in or on all food commodities under FFDCA section 408 (when used as either an inert or an active ingredient in a pesticide formulation), if such use is in accordance with good agricultural practices:

(1) Use in pesticide products intended to treat seeds.

(2) Use in nursery and greenhouse operations, as defined in 40 CFR 170.3, which includes seeding, potting and transplanting activities.

(3) Pre-plant and at-transplant applications.

(4) Incorporation into seedling and planting beds.

(5) Applications to cuttings and bare roots.

(6) Applications to the field that occur after the harvested crop has been removed.

(7) Soil-directed applications around and adjacent to all plants.

(8) Applications to rangelands, which is land, mostly grasslands, whose plants can provide food (i.e., forage) for grazing or browsing animals.

(9) Use in chemigation and irrigation systems (via flood, drip, or furrow application with no overhead spray applications).

(10) Application as part of a dry fertilizer on which an active ingredient is impregnated.

(11) Aerial and ground applications that occur when no above-ground harvestable food commodities are present (usually pre-bloom).

(12) Application as part of an animal feed-through product.

(13) Applications as gel and solid (non-liquid/non-spray) crack and crevice treatments that place the gel or bait directly into or on top of the cracks and crevices via a mechanism such as a syringe.

(14) Applications to the same crop from which the food commodity is derived, whether the plant fraction(s) intended for harvest are present or not, e.g., applications of peanut meal when applied to peanut plants.

(b) *Specific chemical substances.* Residues resulting from the use of the following substances as either an inert or an active ingredient in a pesticide formulation are exempted from the requirement of a tolerance under FFDCA section 408, if such use is in accordance with good agricultural practices and such use is included in paragraph (a):

Chemical Substance	CAS No.
Caseins	9000–71–9
Caseins, ammonium complexes	9005–42–9
Caseins, hydrolyzates	65072–00–6
Caseins, potassium complexes	68131–54–4
Caseins, sodium complexes	9005–46–3

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[FR Doc. 05–344 Filed 1–6–05; 8:45 am]

BILLING CODE 6560–50–S

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 15

[ET Docket No. 04–37 and ET Docket No. 03–104; FCC 04–245]

Broadband Power Line Systems

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document adopts new requirements and measurement guidelines for a new type of carrier current system that provides access to broadband services using electric utility companies' power lines. This new technology offers the potential for the establishment of a significant new medium for extending broadband access to American homes and businesses. Given that power lines reach virtually every residence and business in every community and geographic area in this country, Access BPL service could be made available nearly everywhere. This new broadband delivery medium could also serve to introduce additional competition to existing cable, DSL, and other broadband services. We believe these actions will promote the development of BPL systems by removing regulatory uncertainties for BPL operators and equipment manufacturers while ensuring that licensed radio services are protected from harmful interference.

DATES: Effective February 7, 2005, except for §§ 15.615(a) through (e) which contain information collection requirements that are not effective until approved by the Office of Management and Budget. The FCC will publish a document in the **Federal Register** announcing the effective date for those sections.

Final Paperwork Reduction Act of 1995 Analysis

This document contains modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public to comment on the information collection requirements contained in this R&O as required by the Paperwork Reduction Act of 1995, Public Law 104–13. Public and agency comments are due March 8, 2005.

ADDRESSES: Comments on the information collection requirements should be addressed to the Office of the Secretary, Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554. In addition to filing comments with the Secretary, a

copy should be submitted to Leslie Smith, Federal Communications Commission, Room 1–C804, 445 12th Street, SW., Washington, DC 20554, or via Internet to *Leslie.Smith@fcc.gov,* and to Kristy L. LaLonde, OMB Desk Officer, 10234 NEOB, 725 17th Street, NW., Washington, DC 20503 or via the Internet to *Kristy_L._LaLonde@omb.eop.gov* or via fax at (202) 395–5167.

FOR FURTHER INFORMATION CONTACT: Anh Wride, Office of Engineering and Technology, (202) 418–20577, e-mail: *Anh.Wride@fcc.gov,* TTY (202) 418–2989.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Report and Order,* ET Docket No. 04–37 and ET Docket No. 03–104, FCC 04–245, adopted October 14, 2004, and released October 28, 2004. The full text of this document is available for inspection and copying during normal business hours in the FCC Reference Center (Room CY–A257), 445 12th Street, SW., Washington, DC 20554. The complete text of this document also may be purchased from the Commission's copy contractor, Qualex International, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. The full text may also be downloaded at: *www.fcc.gov.* Alternate formats are available to persons with disabilities by contacting Brian Millin at (202) 418–7426 or TTY (202) 418–7365.

Congressional Review Act

The Commission will send a copy of this Report & Order, in a report to be sent to Congress and the General Accounting Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

Summary of Report and Order

1. In the Report and Order, the Commission adopted new rules for Access Broadband over Power Line (Access BPL) systems, a new type of carrier current technology that provides access to high speed broadband services using electric utility companies' power lines. This new technology offers the potential for the establishment of a significant new medium for extending broadband access to American homes and businesses. Given that power lines reach virtually every residence and business in every community and geographic area in this country, Access BPL service could be made available nearly everywhere. This new broadband delivery medium could also serve to introduce additional competition to existing cable, DSL, and other broadband services. In addition, the National Telecommunications and Information Administration (NTIA) has undertaken a significant effort to both study Access BPL technology, including its operating characteristics and interference potential, and to make specific recommendations to the Commission for policies to encourage its implementation and to manage its interference potential. Our staff has worked closely with NTIA on this matter and the policy decisions and rules we adopted reflect that cooperation and embody many of NTIA's recommendations.

2. Along with NTIA, we recognize the concerns of authorized radio service users in both the private and government sectors for the need to ensure that radio frequency (RF) energy from BPL signals on power lines does not cause harmful interference to licensed radio services. The record and our investigations indicate that BPL network systems can generally be configured and managed to minimize and/or eliminate this harmful interference potential. Our goals in developing the rules for Access BPL are to provide a framework that will both facilitate the rapid introduction and development of BPL systems and protect licensed radio services from harmful interference. Specifically, we adopted: new operational requirements for Access BPL to promote avoidance and resolution of harmful interference; new administrative requirements to aid in identifying Access BPL installations; and specific measurement guidelines and certification requirements to ensure accurate and repeatable evaluations of emissions from Access BPL and all other carrier current systems. We believe these actions will promote the development of BPL systems by removing regulatory uncertainties for BPL operators and equipment manufacturers while ensuring that licensed radio services are protected from harmful interference.

Part 15—Existing Rules

3. Carrier current systems use alternating current (AC) electric power lines to carry communications by coupling very low power RF signals onto the AC electric wiring. Traditionally, these systems have included amplitude modulated (AM) radio systems on school campuses and devices intended for the home, such as intercom systems and remote controls for electrical appliances and lamps. Carrier current systems operate on an unlicensed basis under part 15 of the Commission's rules. As a general condition of operation, part 15 devices may not cause harmful interference to authorized radio services and must accept any interference that they receive.

4. The part 15 rules for carrier current systems currently specify radiated and conducted emission limits for devices operating below 30 MHz and above 30 MHz. Carrier current systems operating from 9 kHz to 30 MHz are subject to radiated emission limits on emissions from any part of the wiring or power network connected to the RF power source. For carrier current systems that contain their fundamental emission within the standard AM broadcast band of 535 to 1705 kHz and are intended to be received using standard AM broadcast receivers, there is no limit on conducted emissions. All other carrier current systems operating below 30 MHz are subject to a conducted emission limit only within the AM broadcast band. Carrier current devices operating above 30 MHz must meet the radiated emission limits of § 15.109(a), (b) or (g) for digital devices, which are further divided into two types. Class A equipment includes devices marketed for use in a commercial, industrial or business environment, excluding devices which are marketed for use by the general public or are intended to be used in the home. Class B equipment includes devices marketed for use in a residential environment, notwithstanding use in commercial, business and industrial environments. The rules require Access BPL systems to comply with the limits for Class A or B devices depending on whether they are marketed for use in a commercial, industrial or business environment on the one hand or for use by the general public or in the home on the other. Under this Class A/Class B regime, Access BPL systems that operate on medium voltage lines external to residential environments are considered Class A devices. Carrier current devices that do not operate on frequencies below 30 MHz are subject to the general conducted emission limits below 30 MHz. The existing part 15 rules also address power line carrier systems, which are low-speed carrier current systems operating between 10 kHz and 490 kHz, used by an electric public utility entity for protective relaying, telemetry, etc., for general supervision of the power system. Because of their specialized use and operating frequency range, power line carrier systems are not subject to specific emission limits as are general carrier current systems.

5. The Commission believes that the widespread introduction of Access BPL service would further our goals for broadband service consistent with the challenges indicated. This new

technology offers the potential to give rise to a major new medium for broadband service delivery. Services provided on Access BPL could offer high speed Internet and data communications that compete with, complement, or extend the broadband services provided on existing media. Given the ubiquitous nature of the electric power network, Access BPL could conceivably also offer these services to virtually every element of the broadband market, including residential, institutional, and commercial users. In addition, it is possible that Access BPL could provide a means to expedite the availability of broadband Internet service to consumers and business in rural and other underserved areas. We also find that encouraging the deployment of the technology in the United States will support globalization of products and services, promote continued U.S. leadership in broadband technology, and bring important benefits to the American public.

6. The Commission understand the significant concerns of licensed radio service users about the potential for Access BPL services to cause harmful interference to their operations. It is our intention to ensure that Access BPL operations do not become a source of harmful interference to licensed radio services. Based on extensive research, analyses, and practical experience, the Commission also continues to believe that the interference concerns of licensed radio users can be adequately addressed and that Access BPL systems will be able to operate successfully on an unlicensed, non-harmful interference basis under the part 15 model. In this regard, we find that the harmful interference potential from Access BPL systems operating in compliance with the existing part 15 emission limits for carrier current systems is low in connection with the additional rules we adopted. From the information provided by our field tests, the tests conducted by NTIA, theoretical predictions by NTIA and ARRL, and experience of the several tests of Access BPL systems, we observe that the potential for any harmful interference is limited to areas within a short distance of the power lines used by this technology. As emphasized by NTIA's Phase 1 study and comments, interference can be rapidly eliminated through various means should it occur. We pointed out to the individual amateurs commenting in this proceeding that the definition of ''harmful interference'' as used in § 15.5 of the rules is set forth in § 2.1 of the rules. We disagree with ARRL's position that there is no reason to act now in this proceeding and that we should delay our decision on rules for Access BPL to provide more time to develop rules to prevent this technology from causing harmful interference. As indicated, the broadband service capabilities of Access BPL systems offer important opportunities for establishing a new medium for broadband access and for introducing new competition in the broadband market. We believe that it is important to set forth rules that will promote this service now, rather than delay. In addition, the record provided in response to the *Inquiry* and the *NPRM*, including the extensive studies conducted by NTIA, is more than sufficient to assure us that the rules we adopted will adequately protect licensed services from harmful interference. While some cases of harmful interference may be possible from Access BPL emissions at levels up to the part 15 limits, we agree with NTIA that the benefits of Access BPL service warrant acceptance of a small and manageable degree of interference risk.

7. As stated in the *NPRM*, we believe that, on balance, the benefits of Access BPL for bringing broadband services to the public are sufficiently important and significant so as to outweigh the limited potential for increased harmful interference that may arise. Moreover, the Commission continue to believe that cases where interference may occur or where its possible occurrence would impact critical services can be addressed through additional regulatory measures. These additional measures will generally require Access BPL operators to reduce emissions or avoid operation on certain frequencies in order to protect licensed services, to use equipment that can alter its operation by changing operating frequencies to eliminate interference, to make available information that will assist the public in identifying locations where Access BPL operations are present, and to provide notice to radio users before commencing local BPL operations. In this way, the new rules provide effective means for preventing any interference and will ensure that any instances of interference that may occur can be quickly identified and resolved. We emphasize that Access BPL systems will continue be treated as unlicensed part 15 devices and as such will be subject to the conditions that they not cause harmful interference and that they cease operation if they do cause such interference, as required by our rules. As discussed in paragraph 50, of the Report and Order, except for a few specific frequencies that are reserved for international aeronautical safety operations, we do not believe that excluding BPL operations from frequencies used by any specific service, such as the low VHF TV bands, is necessary or appropriate. Rather, we believe requiring BPL equipment to have the capability to avoid any locally used frequency is the most effective approach to ensuring that harmful interference to licensed operations is avoided.

8. The Commission is amending its part 15 rules with changes intended to facilitate the deployment of Access BPL technology while protecting licensed users of the spectrum. Specifically, we are: defining Access BPL for purposes of our rules; maintaining the existing part 15 emission limits for carrier current systems for Access BPL; requiring that Access BPL devices employ adaptive interference mitigation techniques; requiring that Access BPL system operators provide information on the areas where their systems are installed and other technical parameters in a central data base that would be accessible by the public; and adopting specific measurement guidelines for both Access BPL and other carrier current systems to ensure that measurements are made in a consistent manner and provide for repeatable results in determining compliance with our rules.

Definition of Access BPL

9. The Commission adopted a modified version of the proposed definition of Access BPL that includes changes as suggested by the commenting parties. In this regard, we agree that the definition of Access BPL should not include the low-speed power line carrier systems used by electric utilities as defined in our rules. Transmissions on these systems have very short duty cycles that pose very low interference potential as opposed to the constant operation that characterizes Access BPL. We also agree that the definition for Access BPL should limit the low frequency cut-off to above 1.705 MHz, which is the upper frequency for the AM broadcast band. We agree that the definition for Access BPL should not include power lines located within a customer's premises or within a utility's own premises. These lines generally carry low voltage power, are not under the ownership or integral control of the power service operator, are isolated from the medium voltage lines by a distribution transformer such that a bypass device must be used to reach them with BPL signals, and pose lower potential as sources of interference because their emissions are attenuated

by the structure in which they are located. We also see no need to limit ownership or control of BPL operations to electric utility operators. We believe that an independent BPL provider can take the same steps and precautions as an electric utility operator in working with its equipment vendor, the power system, and licensed radio users to ensure that an Access BPL system does not cause harmful interference and to resolve any interference. We also see no need to specifically mention aerial or underground lines in the definition. Furthermore, we note that the record in this proceeding only addresses Access BPL systems operating over medium voltage and low voltage lines. Because the high voltage lines are located physically higher, can carry very high voltages, and have different configurations as well as characteristics with respect to potential harmful interference, we are excluding them from the definition for Access BPL at this time. Access BPL systems intended for high voltage lines can however operate under the requirements for experimental licensing in part 5 of the Commission rules.

10. We therefore are amending § 15.3 of the rules to include the following definition for Access BPL:

Access Broadband Over Power Line (Access BPL). A carrier current system installed and operated on an electric utility service as an unintentional radiator that sends radio frequency energy on frequencies between 1.705 MHz and 80 MHz over medium voltage lines or low voltage lines to provide broadband communications and is located on the supply side of the utility service's points of interconnection with customer premises. Access BPL does not include power line carrier systems as defined in § 15.3(t) of this part or In-House BPL systems as defined in § 15.3(gg) of this part.

11. While we are not generally addressing rules for In-House BPL systems, except for measurement procedures, we do find it useful and appropriate to set forth a definition of such systems in the rules. As NTIA and Southern point out, specifying a definition of In-House BPL systems will fully define all forms of BPL and help to clarify the differences between Access BPL and In-House systems. We find that the definition of In-House BPL suggested by NTIA properly identifies these systems. Accordingly, we adopted the following definition for In-House BPL:

In-House Broadband Over Power Line (In-House BPL). A carrier current system, operating as an unintentional radiator, that sends radio frequency energy to provide broadband communications on frequencies between 1.705 MHz and 80 MHz over low-voltage electric power lines that are not owned, operated or controlled by an electric service provider. The electric power lines may be aerial (overhead), underground, or inside walls, floors or ceilings of user premises. In-House BPL devices may establish closed networks within a user's premises or provide connections to Access BPL (as defined in § 15.3(ff) of this part) networks, or both.

We also encourage industry efforts to develop standards for In-House BPL systems and devices that are complementary to and compatible with Access BPL operations.

12. *Access BPL Systems Above 80 MHz.* We agree with Corridor that Access BPL systems operating in higher regions of the spectrum, such as the Corridor Access BPL system at 5.8 GHz, should not be subject to the rules adopted herein for Access BPL systems operating in the HF and low VHF spectrum. We find that the record in this proceeding does not provide sufficient information regarding Access BPL operating in spectrum above 80 MHz, hence a decision regarding this type of Access BPL technology cannot be effectively rendered at the present time; however, Access BPL systems not covered in the above definition are subject to existing applicable part 15 rules for carrier current systems. However, we will monitor the development of Access BPL systems that operate on frequencies above 80 MHz and may consider additional requirements for Access BPL systems operating above 80 MHz in a future rulemaking if appropriate.

Emission Limits

13. *General Emission Limits.* The Commission continues to believe that it is appropriate to apply the existing part 15 radiated emission limits to Access BPL systems. We are not persuaded by the arguments of ARRL and others representing licensed spectrum users that the current emission limits are insufficient to limit the general interference potential of these systems. The 0 dBμV/m limit suggested by the ARRL is typically below the noise floor in the HF and low VHF bands and would be unnecessarily and prohibitively restrictive for Access BPL operators. Along with NTIA, we conclude that the current emission limits will restrict Access BPL systems to very low emitted power levels in comparison to the signals of licensed radio operations. The effect of these limits will be to constrain the harmful interference potential of these systems to relatively short distances from the power lines that they occupy. In fact, in most cases the level of emissions from Access BPL systems will be at or close to the noise floor at distances beyond a hundred meters of an installed power line. We recognize that some radio operations in the bands being used for Access BPL, such as those of Amateur radio licensees, may occur at distances sufficiently close to power lines as to make harmful interference a possibility. We believe that those situations can be addressed through interference avoidance techniques by the Access BPL provider such as frequency band selection, notching, or judicious device placement; the rules we are specifying facilitate such solutions. We do not see evidence that BPL operation will significantly contribute RF energy to generally raise the background noise level. In addition, because power lines inherently can radiate significant noise emissions as noted by NTIA and ARRL, good engineering practice is to locate sensitive receiver antennas as far as practicable from power lines. This practice will also help prevent interference from Access BPL emissions. In fact, as stated by NTIA, power line noise emissions at frequencies up to 800 MHz may actually be reduced as Access BPL systems are deployed. Furthermore, we see no need to impose a strict band-pass filtering on Access BPL, and we deny Echelon's request in this regard.

14. Although we agree with ARRL that Access BPL on overhead lines is not a traditional point-source emitter, we do not believe that Access BPL devices will cause the power lines to act as countless miles of transmission lines all radiating RF energy along their full length. First, the part 15 emission limits for carrier current systems have proven very effective at controlling interference from such systems. Also, for the reasons indicated by PPL Telcom, we believe that the design and configuration of Access BPL systems will be inconsistent with the development of cumulative emissions effects for nearby receivers. Moreover, the NTIA Phase 1 Study and our own field measurements of Access BPL installations indicate that these systems are not efficient radiators, nor are their emissions cumulative such that they permeate areas in which they are located. Rather, we find that emissions from Access BPL systems tend to dissipate after a short distance from a coupler along a line, and then remain relatively the same for some distance. Along the line there also may be multiple points where emissions may be relatively higher but within the part 15 limits. However, because the signal level decreases significantly with distance perpendicular from the line, the potential for interference also decays

rapidly with distance from the line. To ensure that the effects of the power line as a radiator are taken into consideration when testing for compliance with our part 15 rules, the measurement procedures we adopted for Access BPL systems, as discussed in the Report and Order, specify that emission measurements are to be made at several specific distances from the Access BPL equipment source, and that measurements are to be taken parallel to the power line to find the maximum emissions from the BPL system.

15. Notwithstanding our decision on emission limits, we do recognize that Access BPL systems present concerns for licensed users in the HF and low VHF bands, given the propagation characteristics of RF signals in the range of frequencies being used for these systems, the diversity of users of these frequencies, and the fact that Access BPL devices will be installed at many locations in an area. While we conclude, that the likelihood that interference from Access BPL operations will occur is low at the signal levels allowed under the current part 15 emission limits, such interference could occur in limited situations despite the intentions of BPL operators. Moreover, even if interference were to occur to amateur operations at the distances indicated by the ARRL, as recommended by NTIA, there are additional interference mitigation techniques that we are requiring of BPL providers to address such interference potential. We believe that such steps should be taken, particularly in those cases where the occurrence of interference would affect critical services or where interference could be anticipated to occur.

16. We find no need to subject Access BPL equipment to a conducted emission limit that would apply for compliance measurement purposes before the equipment is shipped and installed. We note that Access BPL manufacturers already test their equipment for the proper power levels in a laboratory as part of their manufacturing procedures, and in any case, the radiated emissions from a representative model of equipment would be measured *in-situ* at three sites as part of the equipment authorization process. We therefore find that requiring conducted emission tests in the laboratory would be a redundant and unnecessary procedure.

17. The Class A limits are appropriate because Access BPL devices are not marketed to the general public and operate on the medium voltage power lines as commercial facilities. Those portions of Access BPL systems that operate above 30 MHz on the low-voltage power lines from the distribution transformer to a residence and all in-house wiring connected to a BPL device are subject to Class B radiated emission limits. The Class B limits are appropriate for these operations because they are located within residential environments and are marketed for use by the general public. Although Access BPL systems are required to comply with the less stringent Class A limits, operators will nonetheless have a strong incentive to exercise the utmost caution in installing and operating their systems to avoid harmful interference and ensure uninterrupted service to their customers, given that there is significant investment in the deployment of the service. We do not find that a 10 dB increase in the allowable emissions levels is warranted or desirable for systems that can reduce emissions by 40 dB in selected bands, as suggested by Satius. We believe that it is important that Access BPL systems comply with the emission limits across their entire operating range in order to minimize the potential for interference in all bands, not just those where interference may be more likely at a particular location.

18. *Other Protection Measures.* We agree with NTIA and the parties representing public safety agencies that critical Federal Government and other services specified by NTIA and public safety warrant additional protection. These services, including national defense, maritime distress and safety, aeronautical navigation and communications, emergency response, radioastronomy, and others provide important safety and research services whose functions would be afforded additional protection against possible interference from Access BPL operations. We agree with and adopted NTIA's approach for addressing additional protection to critical Federal Government and other radio operations. The excluded frequency bands amount only to a total of 1731 kHz, or 2% of the spectrum within the 1.7–80 MHz band. The exclusion zones are relatively few, on only the 2173.5 to 2190.5 kHz global maritime distress signaling band with prohibited distances of 1 km from coast station facilities, and 73.0–74.6 MHz band used by the ten Very Long Baseline Array facilities of radio astronomy observatories with prohibited distances of 29 km and 11 km for Access BPL systems using overhead medium voltage power lines and other Access BPL implementations, respectively. We agree with NTIA that the potential for interference from Access BPL to the critical services in exclusion zones is somewhat greater for transmissions carried on overhead medium voltage lines than other Access BPL implementations, *i.e.,* transmissions carried on underground lines or low voltage lines. In this regard, emissions from underground power lines are generally attenuated by the earth materials in which they are buried, while emissions from low voltage lines are generally lower because such lines are generally used only for short feeder links from a transformer to a customer service location and these lines are more closely spaced with an accompanying neutral line—and in fact are often twisted together with the neutral line. The close spacing—together with the shorter length—reduces radiated RF emissions relative to those from overhead medium voltage lines. In addition, the requirement to contact and work with the Federal Government in the 53 consultation areas is not generally expected to result in major impact on Access BPL operators' flexibility to use specific frequency bands. We therefore find that avoiding operation on the frequencies excluded under these restrictions and requirements will not be burdensome for Access BPL operators and manufacturers in order to protect distress and safety communications. Indeed, several manufacturers and Access BPL operators have indicated that they are capable of, and already do, notch out certain frequency bands. We disagree with Ameren, PLCA, and Southern that the mandatory consultation provisions imposed on Access BPL operators impose burdens on Access BPL operators not borne by other unlicensed broadband operators without countervailing benefits. For example, in part 76, we require that cable operators conduct measurements annually to ensure that signal leakage does not create interference risks. Moreover, the distributive nature and other technical characteristics of Access BPL pose somewhat higher potential for interference than point-source wireless broadband systems that warrant additional protective measures. In addition, the consultation actions will benefit Access BPL operators by leading them to select frequencies at the beginning of their service so as to avoid interference to critical services that might have to be corrected later. Accordingly, we adopted NTIA's list of consultation areas, excluded bands, and exclusion zones to which Access BPL equipment must adhere. For all other radio communication operations not addressed in these special provisions, radio operators have the opportunity to inform local BPL operators of the

pertinent details of their operations and BPL operators have the opportunity to apply that information as appropriate to prevent interference.

19. With regard to the consultation areas, we will require Access BPL operators to provide notification to the parties listed as Federal Government contact points, as designated in the rules, for the area in which their systems will operate at least 30 days prior to initiation of service. The notification shall include: the name of the Access BPL provider; the frequencies of the Access BPL operation; the postal zip codes served by the Access BPL operation; the manufacturer of and type of Access BPL equipment being deployed (*i.e.*, FCC ID); point of contact information (both telephone and e-mail address); and the proposed or actual date of initiation of Access BPL operation. We will also require that systems located in consultation areas that were in operation prior to the effective date of these rules provide this notice to the appropriate contact point within 45 days of that date. NTIA has indicated that it plans to arrange to have information made available to BPL operators on Federal Government operations. We expect parties to consult in good faith to ensure that no harmful interference is caused to licensed operations and that any constraints on BPL deployments are minimized to those necessary to avoid harmful interference.

20. As indicated in the *NPRM,* we believe that the risk of harmful interference to State and local public safety services, *i.e.*, EMS, fire, law enforcement, and emergency management agencies from Access BPL operations is essentially low. In general, we believe that a properly designed and operated Access BPL system will pose little interference hazard to services such as aeronautical, maritime and public safety that are designed to operate with relatively high signal-to-noise ratios. In analyzing the potential for harmful interference to public safety systems, we took into account the fact that low-level part 15 signals from Access BPL devices attenuate rapidly as the distance from the power line increases; and that most public safety systems are designed so that mobile and portable units receive a signal level significantly above the noise floor. From an interference analysis standpoint, this latter characteristic distinguishes public safety systems from amateur radio stations using high-sensitivity receivers to receive signals from transmitters often thousands of miles away. However, it is foreseeable that under certain rare circumstances a public safety unit could: (a) Operate in close proximity to a power line carrying Access BPL transmissions at a location where field strength is near the part 15 limit; (b) be tuned to a frequency radiated by an Access BPL device; and (c) be receiving a weak signal from a distant, or obstructed, public safety base station. In general, potential harmful interference under these conditions would be limited to public safety units operating on systems using low-band VHF channels (25–50 MHz). We therefore conclude that the interference protections set forth will be adequate to foreclose harmful interference to public safety systems except perhaps under such unusual circumstances.

21. However, we also conclude that public safety systems merit additional protection because of the often critical and/or safety-of-life nature of the communications they provide. Given the importance and nature of public safety communications, we believe it is necessary to require Access BPL systems to notify the public safety agencies in their local areas, *i.e.*, State and local police, fire, emergency medical, any special emergency coordinators, call box operators, and other entities that are eligible for public safety licenses under § 90.20 of the rules. This advance notification will provide public safety operators with an opportunity to assess whether there are portions of its geographic area of responsibility about which it should make special arrangements with the Access BPL operator in order to avoid interference. Consistent with our decision on notifications for Federal Government consultation areas, we will require that this notification be provided to local public safety agencies at least 30 days prior to a system's initial operation, the activation of any major extensions of the system, or any changes in its operating characteristics, *i.e.*, transmitting frequencies. The notification shall include: (1) The name of the Access BPL provider, (2) the frequencies of the Access BPL operation, (3) the postal zip codes served by the Access BPL operation, (4) the manufacturer of and type of Access BPL equipment being deployed (*i.e.*, FCC ID), (5) point of contact information (both telephone and e-mail address), and (6) the proposed or actual date of initiation of Access BPL operation. We will also require that systems in operation prior to the effective date of these rules provide this notice to local public safety agencies within 45 days of that date.

22. We do not see a need to establish Access BPL-free zones around airports, military bases, hospitals, police stations and fire stations, as requested by NAC/Amherst. To the extent that these services warrant special protection, they will be afforded protection through the excluded bands, exclusion zones and consultation areas specified by NTIA. We similarly do not find that amateur radio frequencies warrant the special protection afforded frequencies reserved for international aeronautical and maritime safety operations. We note that in many instances amateur frequencies are used for routine communications and hobby activities. While we recognize that amateurs may on occasion assist in providing emergency communications, we believe that the general part 15 provisions and the specific provisions being adopted for Access BPL operations are sufficient to protect these amateur operations.

Interference Mitigation

23. We continue to believe that it is important that Access BPL systems include capabilities that allow them to modify their operations to mitigate or avoid instances of harmful interference that may arise. These capabilities will allow Access BPL system operators to resolve interference found to occur at specific locations or in specific areas of their plant in an expeditious manner and without disrupting service to their broadband service subscribers. We agree with NTIA that Access BPL operators would have strong incentives to voluntarily implement such equipment and operating practices. We also agree with NTIA that, notwithstanding these incentives, it is necessary that we adopt requirements for interference mitigation capabilities to ensure that any interference can be resolved quickly without the need to address the tension that might arise over the possible disruption of service to BPL subscribers if mitigation capabilities were not available. The concerns of those commenting parties who argue that the mitigation requirements would not be sufficient to protect their operations from interference by BPL operations are misplaced. That protection will be provided by: (1) The emissions limits for Access BPL systems; (2) the provisions for consultation areas, excluded bands, and exclusion zones; and (3) the requirement that Access BPL systems not cause interference, as set forth above. The mitigation requirements are intended to ensure that Access BPL systems are designed with features that support interference mitigation, both during initial installation, if sensitive local communications systems are identified in advance, and after installation, when the newly required operational

capabilities will allow Access BPL system operators to expeditiously resolve any instances of interference that may occur, without the need to cease operations and thereby disrupt the broadband data services they provide to their subscribers.

24. Accordingly, we have adopted requirements that Access BPL systems incorporate capabilities to modify their systems' operations and performance to mitigate or avoid potential harmful interference to radio services and to deactivate specific units found to actually cause harmful interference that cannot be remedied through modification of their operations as proposed, but with certain modifications. Our approach in specifying these requirements is to provide Access BPL equipment manufacturers and operators with flexibility to design and implement a broad range of products and system designs to meet particular service and operational needs while ensuring that systems have the capabilities to make operational changes to avoid any interference that may arise. The specific provisions of the mitigation requirements and the comments that concern them are addressed below. We also see no basis for subjecting Access BPL systems to requirements for addressing interference complaints that are different and more stringent than our procedures for addressing interference from other types of unlicensed devices. In this regard, we will continue to subject Access BPL systems to the procedures of § 15.5(c) of the rules. Under this rule, parties who believe they are experiencing interference from an unlicensed device are first expected to bring the matter to the attention of the operator of the unlicensed device. If that action does not resolve the interference, the party may then seek intervention by the Commission.

25. To be more specific, in the event a BPL interference complaint is filed by a licensee with the Commission, the Commission will contact the complainant and/or the BPL provider to determine if they have first attempted to resolve the interference complaint among themselves. If they have not made such an attempt, the complaint will be forwarded to the BPL provider for action and the complainant notified that they will be contacted by the BPL provider concerning their interference complaint. The Commission may periodically monitor the resolution process to ensure that the parties are working in good faith and making appropriate progress in resolving the interference complaint. If the parties have attempted to address the complaint but the matter remains unresolved, the Commission, through its Enforcement Bureau with assistance from the Office of Engineering and Technology will review the complaint and take appropriate action. In general, the Commission will contact the BPL operator and request information on what steps they have taken to address the licensee's complaint. If these actions are deemed insufficient to resolve the interference complaint, the Commission will instruct the BPL operator to take immediate remedial actions, such as ''notching'' or avoiding specific frequencies, or ceasing operations. In specific instances, the Commission may undertake field testing and measurements to address interference complaints and determine the most appropriate remedial action.

26. *Frequency Avoidance.* We conclude that the most appropriate approach regarding mitigation techniques that involve altering system operation is to require that Access BPL systems incorporate the capability to avoid the use of specific frequency bands. The ability to alter a system's operation to notch-out transmissions from specific frequencies where interference is occurring is a necessary feature for resolving interference without disrupting service to BPL subscribers. While other mitigation capabilities, such as adaptive or commanded power control, are desirable system features that can serve to reduce interference potential, they generally would provide a much lower degree of benefit in eliminating interference than frequency avoidance. Limiting the requirement for operational modification capabilities to frequency avoidance is also consistent with our intent to minimize the impact of these requirements on manufacturers and system operators so as preserve their flexibility to design products and systems that will best meet the needs of Access BPL subscribers.

27. In considering specifications for the notching requirement, we find that the most important consideration is to ensure that the notch provides enough filtering to effectively reduce the potential for interference. Our experience in examining the field performance of various Access BPL operations indicates that at frequencies below 30 MHz, a notching capability that provides at least a 20 dB reduction of Access BPL emissions below the current applicable part 15 emission limits is adequate to resolve interference occurrences that might result to mobile reception from such operations. In this regard, we will generally assume that a 20 dB notch is sufficient to resolve any harmful interference that might occur to mobile operations, given the low signal levels allowed under the part 15 emission limits and the fact that a mobile transceiver can readily be re-positioned to provide some separation from the Access BPL operation. The interference potential from emissions at this low level would be limited to a very short range from an Access BPL device or a power line on which Access BPL transmissions are carried. We also believe that notching at this level with some distance separation will generally avoid interference to fixed operations, including those that use more sensitive receivers. Above 30 MHz we believe that a notching capability of at least 10 dB is sufficient to provide the same level of protection, given the more stringent part 15 emission limits that apply to Access BPL transmissions above 30 MHz and the increased attenuation of emissions that occurs from propagation losses as the frequency of operation increases. With regard to NAS/CORF's requests for protection of radioastronomy, we note that special protections are provided for radioastronomy in the exclusion zones and consultation requirements for Access BPL.

28. We do not believe it is necessary to specify the bandwidth over which the notching capability must function. Rather, we will adopt the more general requirement that Access BPL systems must be capable of avoiding transmissions in any frequency band or bands in order to eliminate any instances of interference with the operations of licensed radio services. We therefore are amending our rules to require that Access BPL devices have the capability to reduce emissions by at least 20 dB below the part 15 emission limits in frequency bands below 30 MHz and 10 dB below those limits in frequency bands 30 MHz and above. We believe that these provisions adequately set forth the structure of the required capabilities for modifying the operation of an Access BPL system. We are not specifying requirements for use of the frequency avoidance capabilities. Rather, we believe that system operators should have the discretion to use this capability or any other alternative available to them as they might deem appropriate to resolve specific situations involving interference that they may encounter in the course of their operations.

29. We do not find any justification for a requirement that Access BPL operators notch the frequencies of any or all of those services that use frequencies in the HF and low VHF

bands. We believe that the emission limits, consultation areas, excluded bands, exclusion zones, and the requirement that Access BPL systems not cause interference, are generally sufficient to control the interference potential of these systems. The required notching capability will enable a system operator to address any specific instances of interference that might otherwise arise. We also decline to adopt a rule requiring transmission of identification codes. As NTIA states, such codes could increase the potential for interference from Access BPL operations. We also do not believe that it would be practicable for ARINC or any other operator to identify an Access BPL system as the source of interference and contact its operator on a real time basis to resolve the interference. As NTIA indicates in its letter of September 24, 2004, no practical method has been identified for Access BPL systems to transmit an identifying code. We believe that the Access BPL notification requirements will provide sufficient information to locate and mitigate interference.

30. *Shut Down Requirement.* We continue to believe that Access BPL equipment and systems should have the capability to deactivate individual system components. This feature will allow systems to deactivate limited portions of their plant so that localized interference problems can be addressed without affecting service to all of their subscribers. As a secondary benefit, the shut-down feature will allow system operators to rapidly diagnose whether their operations are causing reported interference. We are also requiring that the shut-down feature in individual devices be remote-controllable from the central system operations facility or other appropriate location. This will allow rapid response to resolve interference in any emergency or other urgent situation that might arise. We also agree with Progress Energy the required shut-down capability should be manually controlled. Moreover, we have no record on which to base a decision on the conditions under which an automated capability would be activated. We also recognize that, depending on how it would be triggered, an automated shut-down capability could unnecessarily have detrimental effects on a power utility service's operations in addition to disrupting broadband service to its Access BPL customers.

31. It is not our intention that a service shut-down be the first step in a system operator's response to a valid interference complaint. As suggested by several of the commenting parties, we would anticipate that shut-down would be a last resort when all other efforts to satisfactorily reduce interference have failed. We disagree with Ameren that the shut-down requirement will add unnecessary costs and complexity to Access BPL equipment. As NTIA and our own field testing indicate, most Access BPL systems and equipment already include the capability to shut down specific components of their operation. Accordingly, we are requiring that Access BPL systems incorporate features that will allow the deactivation of individual components on a remote-controlled basis, to be implemented. We reiterate, however, that the Commission, through a duly authorized representative, is the sole authority that may direct an Access BPL operator to cease operating any of its devices to eliminate interference.

Access BPL Notification and Database Requirements

32. We believe that the Access BPL notification and database requirements proposed in the *NPRM* are appropriate and sufficient to ensure that any potential interference to licensed services from BPL operations can be adequately identified and quickly addressed. The primary intent of our notification and database requirements is to ensure that licensed users of the spectrum have a publicly accessible and centralized source of information on BPL operations to determine whether there may be Access BPL operations on particular frequencies within their local area so that any incident of harmful interference can be resolved should it occur. The information contained in the notification database need only be sufficient to determine whether there may be a BPL operation in the local area, the nature of the BPL operations, whether the BPL system is operating on frequencies that could potentially be a source of harmful interference to the licensed user and to identify an appropriate contact person who can work directly with the complainant to resolve the harmful interference if it is determined to be caused by the local BPL operations. Additional or more detailed relevant information needed by a radio operator could be requested via the contact person indicated in the data base, as appropriate.

33. We therefore are adopting rules that will require the BPL industry to establish within July 6, 2005, a centralized publicly accessible Access BPL notification database. We note that two organizations have indicated their willingness to perform this task and that the issue of ''independence'' of the database manager has been raised by some of the commenting parties. The responsibilities and duties of the database manager are to maintain complete, accurate and timely records of FCC-mandated information. We are not requiring, as some parties have suggested, that the database manager be involved in, monitor, or manage the interference resolution process. The party responsible for avoiding interference is clearly the Access BPL operator and his responsibilities are clearly set forth in the existing procedures under § 15.5(c) of the Commission rules. We therefore do not find that the database manager need be an ''independent'' third-party with no relationship to the BPL or utility industry and are not adopting such a requirement.

34. With regard to the information to be included in the database, we adopted rules that will require the Access BPL operator to provide the BPL industry designated database manager with the following information 30 days prior to initiation of any operation or service: (1) The name of the Access BPL provider; (2) the frequencies of the Access BPL operation; (3) the postal zip codes served by the specific Access BPL operation; (4) the manufacturer and type of Access BPL equipment being deployed (*i.e.*, FCC ID); (5) point of contact information (both telephone and e-mail address) for interference inquiries and resolution; and (6) the proposed/or actual date of Access BPL operation. The database manager shall be required to enter this information into the publicly accessible database within 3 business days of receipt. This will allow some period of time for the database manager and BPL provider to address any questions with regard to information submitted and to ensure that information entered into the database is correct. We believe that the above information provides sufficient specificity for identifying potential interference while at the same time avoiding valid concerns that sensitive information on critical infrastructure not be revealed.

35. We believe that using zip codes, as suggested by Southern, would sufficiently identify the area of Access BPL deployment without revealing specific sensitive information and would facilitate a more organized approach to identification and resolution of harmful interference. We note that zip codes are easily understood and can be identified by both licensees and BPL operators. With regard to those parties that request more comprehensive information, we do not find that benefits of providing such information in the database would

outweigh the substantial cost of collecting and reporting this additional information. We note, for example, that NTIA's proposals to require information on modulation types, number of carriers, range of transmission duty cycle, minimum and maximum carrier spacing, symbol rates per carrier, etc., would provide little additional guidance on whether interference were being caused in a particular instance as compared to the more simple requirement of identifying BPL operating frequencies. In addition, we are requiring that BPL equipment must be certified and therefore more detailed technical information will be available through our equipment authorization files for those parties desiring such information. We also are not requiring Access BPL operators to have multi-lingual contact persons. We believe that requiring both telephone and e-mail contact information is sufficient to address interference inquiries. We are also not requiring that telephone contact positions be staffed 24 hours per day and seven days a week. We believe that our emission requirements and other mitigation rules will ensure that interference is generally avoided. We believe that telephone contact staffing during normal business hours is sufficient and also note that e-mail would generally allow interference reports to be filed at any time.

36. We expect the Access BPL operators and licensees to cooperate in good faith to identify and resolve instances of harmful interference. We require the notification database for Access BPL operators to notify the operation of its devices and systems to facilitate the speedy resolution of interference. Speedy resolution of interference will not result if the database information on Access BPL deployments is abused and the BPL operators are deluged with frivolous interference complaints. We expect the Access BPL operators to take every complaint of interference seriously and to diagnose the possible cause of interference quickly. At the same time, we expect the complainant to have first taken reasonable steps to confirm that interference rather than a receiver system malfunction is occurring and, to the extent practicable, to determine that the interference source is located outside the complainant's premises. We expect both parties to cooperate to determine a mutually acceptable schedule to diagnose and resolve the interference complaint, recognizing that the Access BPL operator may have to prioritize any complaints of interference that it receives (*e.g.*, from a public safety agency). With regard to public safety operations, however, we will require that the BPL operator respond to complaints of harmful interference from public safety users within 24 hours; the BPL provider shall be required to immediately cease the operations causing the public safety complaint if it fails to respond to such complaint within 24 hours. Any complaints of interference that are not resolved in accordance with the mutually agreed schedule may be filed with the Commission along with the particulars of the interference case. Upon receipt of the interference complaint, the Commission will investigate the complaint and take action against the Access BPL operator if it is found to be causing harmful interference. If, on the other hand the Commission uses its resources to investigate an interference complaint that is found to be frivolous, the Commission will impose appropriate sanctions for abuse of its administrative process.

Measurement Guidelines

Access BPL Systems

37. We find the extensive measurement and modeling efforts presented in the NTIA Phase 1 Study and the Technical Appendix to NTIA's comments to be highly useful in our efforts to develop appropriate measurement procedures for Access BPL. The scientific engineering in those submissions clarifies the interference potential of Access BPL on radio reception and the recommended techniques for measurement of Access BPL emissions provide us with a well thought-out plan on which to base our decisions on measurement issues. Our decision, takes into account NTIA's research and adopts a modified version of its recommendations.

38. We find that our proposed measurement procedure for testing Access BPL systems including the presence and testing of all of their electronic components to be reasonable as each component is part of the Access system of that installation. We do not agree with Southern that the testing should be limited to three representative signal injection points. Southern believes that the highest levels of emissions on overhead systems are found at the signal injection point, and it states that the biggest variable affecting emissions is impedance mismatch between the signal injection system and the power system at the point of injection, which could be a coupler or a repeater. We agree with Southern that each injection point affects the radiated emissions. However, Southern's suggestion of selecting only representative signal injection points precludes the presence of other components, *e.g.*, booster, concentrator, extractor, etc. if they should be together at an installation to make up the complete Access BPL system. Our requirement for a typical installation takes into account the topology of the power lines and of all Access BPL devices at that installation, thus choosing only representative injection points, as Southern recommends, does not cover the installation as a whole. Accordingly, we will keep our proposed *in-situ* requirements for including and testing all components of an Access BPL system. We also find that our measurement procedure for testing Access BPL systems *in-situ* at three typical underground locations along a number of radials consistent with testing other part 15 carrier current devices. The selection of three typical underground installations is a streamlined procedure, compared to testing each and every installation, as recommended by some parties; therefore we do not agree with Main.Net that only one underground location should be tested. We discuss below the issues with respect to measuring radiated emissions from Access BPL systems on overhead power lines.

39. *Measurement Distance.* Despite the stated aversion of NTIA and ARRL to distance extrapolation, we recognize that at many *in-situ* test locations, it may not be possible or practicable to measure at the proposed fixed distances of 10 and 3 meters. If a 10-meter distance places the measurement antenna on a roadway, safety may dictate increasing the distance to, *e.g.*, 14 meters in order to position the testers out of harm's way. Hence, we expect that distance extrapolation will be necessary for *in-situ* testing. We note that NTIA's latest computer modeling results show that the variation of field strength with distance is consistent with the existing part 15 distance extrapolation when used with the slant range distance to the power line as was proposed in Appendix C of the *NPRM.* We also note that although the ARRL and ARINC recommend the use of a 20 dB per decade extrapolation factor rather than the existing 40 dB per decade in part 15 for frequencies below 30 MHz, Ameren states that it has determined the characteristics of the fields near the line support the case for assuming a 40 dB per decade decay rate of the field away from the line and recommends the use of the existing 40 dB per decade extrapolation factor. Given the lack of conclusive

experimental data pending large scale Access BPL deployments, we will continue the use of the existing part 15 distance extrapolation factors in our rules, but with the slant range rather than horizontal distance. If new information becomes available that alternative emission limit/distance standards or extrapolation factors would be more appropriate, we will revisit this issue at another time.

40. *Receive Antenna Height and Correction Factor.* NTIA expresses a possible need for ''adjustments'' to measured data due to three factors: (1) Effect of antenna height, (2) effect of distance (extrapolation methods), and (3) effect of using an H-field sensing antenna to predict E-fields in the near-field region. However, NTIA initially provided a specific recommendation regarding only one of these issues—correction for the effect of antenna height. Our modeling suggests that there is a linkage between these factors. We believe that all three areas must be considered together in order to develop appropriate measurement procedures. Furthermore, NTIA's recommendation for a 5 dB correction factor is based on a constant measurement antenna height of 1 meter. On the other hand, for frequencies above 30 MHz, our current measurement guidelines require varying the receive antenna height from 1 to 4 meters, hence higher peaks at a higher antenna height would be found with our test procedure, obviating the need for a height correction factor at those frequencies. However, we recognize that NTIA's method of keeping the antenna height constant and applying a height correction factor is aimed at simplifying the measurement procedure; hence, this might be an alternative testing procedure that BPL providers may actually prefer. The Commission's rules have historically allowed the use of alternative methods for compliance measurements, based on good engineering practices. In deference to NTIA's extensive work culminating in the NTIA recommendations in this proceeding, we will adopt NTIA's recommendations for antenna height and correction factor as an alternative method within the measurement guidelines of Appendix C of the Report and Order. We note however that the methods are mutually exclusive, *i.e.*, the BPL tester must choose either the NTIA alternative method or the FCC method, and cannot mix and match the two.

41. *Type of Antenna Used for Testing.* Given NTIA's concurrence with the use of a magnetic loop antenna for emission measurements below 30 MHz and electric field sensing antennas above 30 MHz, we are adopting our proposal to use these antenna types in Access BPL emission measurements. This decision is consistent with the use of such antennas for testing other types of part 15 devices.

42. *Effects of Power Lines on the Radiated Emissions of a BPL Device.* We are concerned that NTIA's recommendation for performing field strength measurements all along a 1200-meter section of the connected power line wiring would be difficult and burdensome for Access BPL system operation. In this regard, we note that such a process could be time-consuming and would require many individual measurements, when power wiring may be many miles long, and the interval between measurements may have to be a small fraction of a wavelength in order to ensure that the true peak is captured. It is clear from the modeling results presented by NTIA that the maximum emission from the system often occurs further down-line from the coupler than the one-wavelength maximum distance proposed in Appendix C of the *NPRM.* However, it is also clear from the NTIA data that the true maximum is not significantly larger than the maximum that would be found over the limited search space that we proposed. We understand the concerns of Ameren, Southern, and other BPL providers regarding an overly large number of necessary measurements, which could increase the costs of compliance testing. We therefore believe that the approach in our proposed measurement guidelines strikes an appropriate balance in avoiding a potentially very large number of measurements by allowing the use of the mid-band frequency in determining measurement distances down-line for a given frequency band of operation. We also note that, at each of the five specified down-line points, measurements must be made at all operating frequencies of the Access BPL device, in order to find the peaks.

43. We concur with NTIA's recommendation that measurements be made sequentially with the Access BPL devices operating at all frequencies at which they are capable. This is consistent with existing part 15 requirements, and with our proposed measurement guidelines. It is important that radiated emissions be measured at all operating frequencies to find the peaks. We also concur with NTIA's recommendation that measurements be made using the maximum possible BPL device output power and operational duty factor. We disagree with Progress Energy that emission measurements should be performed with the Access BPL equipment power levels set for normal operations at that site, and not at the maximum levels. Testing at the BPL maximum output power and operational duty factor is necessary to ensure identification of the maximum field strength that the device is capable of generating. The measurement report and operating instructions must clearly state the maximum output power and duty factor settings necessary to certify that the installed device will comply with our limits. However, because the same device might be used on either overhead or underground power lines having different radiating properties, we are not requiring that the device be modified to prevent operation at higher power levels and duty cycle settings. Furthermore, Access BPL devices must comply with our limits upon power-up following a fault condition, or during a start-up operation after a shut-off procedure, by the use of a non-volatile memory, or some other method, to immediately restore previous settings with programmed notches and excluded bands. This is necessary to avoid the situation where programmed protection schemes, such as excluded bands and notches, have to be restored manually, thus leaving protected licensed services vulnerable during the time delay caused by a manual re-programming procedure.

44. Based on the foregoing, we believe that our proposed measurement guidelines that require selection of fractional wavelengths based on mid-band frequency for down-line measurements strike an appropriate balance between the need to ensure compliance with the rules and practical considerations of the burden and degree of measurement difficulty placed on system operators, and that our requirements for testing at maximum output power and operational duty factor and requirement for clear identification of maximum compliant operating levels will ensure that devices comply under all conditions. Accordingly, we are adopting the measurement guidelines in Appendix C of the *NPRM,* modified to incorporate some of NTIA's recommendations, as discussed in the Report and Order.

45. *Selection of Representative Installations.* Although we concur with NTIA that the selection of typical Access BPL installations for *in-situ* measurements must be made in a careful manner, taking into account the various configurations of the power lines to select a typical, representative installation, we will not require specific criteria for site selection process, because this may limit the number of test sites which may actually be more typical in a specific provider's service area than those recommended by NTIA.

We find that our proposed guidelines for three typical overhead installations and three typical underground installations are reasonable to cover a number of test sites in deployment. We also find that by requiring Access BPL devices to be certified by the equipment manufacturer, the concerns of Progress Energy regarding Access BPL installation sites with multiple vendors' equipment no longer exist because the responsibility for site selection to test for equipment certification purposes rests with the Access BPL manufacturer and not with the utility. We are however recommending that the utility operator verify that each representative Access BPL site complies following the installation of a separately certified Access BPL equipment. In such cases, the selection of the test site should be based on the characteristics of the installation and not on vendor's equipment types. Additionally, we concur with Southern and UPLC that NTIA's recommendation in the NTIA Phase 1 Study of requiring a representative power line of 600 meters devoid of discontinuities is impractical, because of the difficulty of finding such a line. Accordingly, in the absence of more specific input, we will not require the selection of such a specific type of power line.

46. *Other requirements.* We find that NTIA's recommendations regarding the various reporting requirements for the test report are satisfied by our adoption of the certification procedure for Access BPL equipment authorization. Information regarding the test conditions, spectrum distribution and other relevant technical specifications will be required in the certification report for the equipment, which will be accessible through our equipment authorization database. We further find that NTIA's recommendation to embody requirements such as measurement distance, measurement bandwidth, etc. directly into the rules and not merely as guidelines, would not be consistent with our current practice of including measurement specifications in a separate guideline.

In-House Carrier Current Systems

47. We note that although CISPR is continuing to work on addressing emission issues that will apply to In-House BPL, no final recommendation has been adopted. We also note that most commenters in this proceeding address Access BPL, and not In-House BPL, issues. Measurements along the service wire leading to the house have been proposed because this wire can be one of the conduits for radiation coming from In-House BPL devices. We are sympathetic to HomePlug's concerns, however. To address HomePlug's concerns, we will allow measurements to be made at three different points along the wire, where the highest radiated emissions are found; these points would not need to be associated with specific wavelengths of the device's operating frequencies, if the installation under test does not include a service wire with a sufficient length for the required measurements. Moreover, testing is required on only one side of the service wire because radiation is nearly symmetrical on either side of the wire. The test report must provide documentation explaining the test configuration. As for the required clear space along the service wire, the guidelines do allow the test to be performed at 3 meters with a distance extrapolation factor when a 10-meter clearance is not available, hence we would expect that most residence configurations would not pose any clearance problem. Accordingly, we partially grant HomePlug's request and hereby adopt the guidelines for In-House BPL and all other in-house types of carrier current systems in Appendix C of this Report and Order.

Equipment Authorization

48. Upon careful consideration of the record, we find that Access BPL systems are not typical unintentional radiators, and that emission measurements for such systems *in-situ* are critical in determining their interference potential. We are persuaded by NTIA that the newness of the Access BPL measurement procedures warrants review of measurement reports. We therefore conclude that the Certification procedure is appropriate for this new technology to allow us to maintain oversight until additional operational experience is obtained from its wide deployment. While we appreciate NTIA's concerns for assigning responsibility with respect to Access BPL compliance, we do not find that the operator, rather than the Access BPL equipment manufacturer, should bear the burden of the certification requirement. Since a system operator does not control the manufacture of the equipment, it will not be in a position to control production to ensure that each unit marketed conforms to the unit tested for compliance. We believe that the legal and business relationship between the system operator and the BPL manufacturer will be sufficient to ensure that Access BPL equipment installed on a power line be in compliance with our rules. We do, however, strongly recommend that operators perform initial installation and subsequent periodic testing on their systems in order to ensure that the systems maintain compliance with our emission limits.

49. Based on the foregoing, we are subjecting Access BPL to the certification procedure to be carried out by the equipment manufacturer. We are also clarifying that we are retaining the verification procedure for all carrier current systems other than Access BPL, because the verification procedure has been adequate to ensure that other types of carrier current systems comply with the part 15 rules.

50. We also specify that Access BPL certification will be initially performed by the Commission. In General Docket No. 98–68, we established the requirements for Telecommunication Certification Bodies (TCBs) that are allowed to approve equipment in the same manner as the Commission. In that proceeding, we stated that while we intended to use TCBs to certify a broad range of equipment, we found that certain functions should continue to be performed by the Commission. The functions included certifying new or unique equipment for which the rules or requirements do not exist or for which the application of the rules is not clear. Because Access BPL is a new technology and many questions about the application of the rules may arise, we believe that TCBs should not be permitted to certify Access BPL systems or approve permissive changes to Access BPL systems until the Chief of the Office of Engineering and Technology acting under the existing delegated authority announces that TCBs may certify Access BPL systems.

Miscellaneous

51. *Transition Period and Grandfathering of Existing Access BPL Equipment.* We note that the major differences between the existing part 15 rules for carrier current systems and the newly adopted rules in subpart G for Access BPL are (1) the type of equipment authorization procedure—Verification for existing carrier current systems, Certification for Access BPL systems; (2) the requirement for interference mitigation techniques and avoidance of excluded bands and exclusion zones for Access BPL systems; and (3) the requirement for an Access BPL database concurrent with consultation with licensed spectrum users. Insofar as existing deployed Access BPL systems can satisfy (2) and (3) by working with licensed spectrum users to avoid co-channel operations, and by being listed in the Access BPL database, the requirements of (1) can be satisfied by having compliance test data

available for inspection during the transition period. We clarify that after the transition period, all Access BPL devices that are manufactured, imported, marketed or installed shall comply with the requirements specified in subpart G of part 15, including certification of the equipment.

52. We believe that it would be an undue burden on those operators who have deployed Access BPL systems to require their systems to come into compliance with the rules adopted herein, as long as the deployed equipment does not cause harmful interference and the operator takes the necessary steps to eliminate occurrences of harmful interference. We agree with Progress Energy that once a system has been installed and is operating within the limits and requirements in place when it was installed, the system should be allowed to remain in operation. We will, of course, require that all Access BPL systems and equipment comply with the non-interference rule of part 15, that is, there is not transition period for compliance with the emission limits, which we are not changing. We find that Access BPL equipment should be allowed a transition period for compliance with new rules, in the manner that we typically provide for other part 15 devices. This will minimize economic hardships on manufacturers by allowing them, during the transition period, to continue producing and selling existing equipment while modifying their products to meet the new requirements. If an Access BPL device does not cause harmful interference, it can continue to operate until its natural replacement, unless the equipment is subsequently modified, at which time it must be brought into compliance with the new rules. We believe that a transition time frame of 18 months is adequate as this represents the typical high tech equipment life cycle. Accordingly, we are adopting a cut-off date of 18 months from the date of publication of this Report and Order. All Access BPL devices that are manufactured, imported, marketed or installed July 7, 2006 shall comply with the requirements specified in subpart G of this part, including certification of the equipment. Access BPL equipment manufactured, imported, marketed and installed prior to this date shall comply with the requirements that were in effect immediately prior to the effective date of this Report and Order.

53. *Separate Rule Part for Access BPL Systems.* NTIA and IEEE 802.18 advocate the creation of a new, dedicated rule part or a separate subpart of part 15 for Access BPL systems, because many of the adopted rules will be unique to Access BPL. We find that the complete separation of the rules for Access BPL equipment from part 15 inadvisable due to possible confusion and repetition of requirements in two places, as Access BPL equipment must comply with the general requirements for unlicensed devices of subparts A–C of the existing part 15 rules. We do, however, find that requirements specific to Access BPL equipment warrant the creation of a separate subpart of part 15. Accordingly, we are adding subpart G to part 15 of our rules which will contain unique requirements for Access BPL equipment, with cross reference to other applicable subparts.

54. *Motions and Requests.* We have received several motions and requests for additional extensions of time and for reiteration of proposals to take into account information added to the record since the *NPRM.* We are generally considering the substance of these motions and requests as filed comments, and denying the specific procedural remedies requested, as they offer no new information or arguments sufficient to justify procedural delays, nor do they raise issues beyond those already explicitly or implicitly included in the record and capable of full consideration in this Order.

Final Regulatory Flexibility Analysis

55. As required by the Regulatory Flexibility Act (''RFA''),[1] an Initial Regulatory Flexibility Analysis (''IRFA'') was incorporated in the *Notice of Proposed Rule Making* (''NPRM'') in this proceeding, ET Docket Nos. 04–37 & 03–104. The Commission sought written public comment on the proposals in the NPRM, including comment on the IRFA. This Final Regulatory Flexibility Analysis (''FRFA'') conforms to the RFA.[2]

A. Need for, and Objectives of, the Report and Order

56. By this action, the Commission amends part 15 of the rules for radio frequency (RF) devices regarding Access Broadband over Power Line (Access BPL), a new type of carrier current system that operates on an unlicensed basis under part 15. Access BPL systems use existing electrical power lines as a transmission medium to provide high-speed communications capabilities by coupling RF energy onto the power line. Given that power lines reach virtually every residence and business in every community and geographic area in this country, Access BPL service could be made available nearly everywhere. This new broadband delivery medium could also serve to introduce additional competition to existing cable, DSL, and other broadband services. At the same time, we recognize the concerns of authorized radio services in both the private and government sectors for the need to ensure that RF energy from BPL signals on power lines does not cause harmful interference to licensed radio services. Our goals in developing the rules for Access BPL therefore are to provide a framework that will both facilitate the rapid introduction and development of BPL systems and protect licensed radio services from harmful interference. Specifically, we adopted in the Report and Order: (1) New operational requirements for Access BPL to promote avoidance and resolution of harmful interference, (2) new administrative requirements to aid in identifying Access BPL installations; and (3) specific measurement guidelines and certification requirements to allow accurate and repeatable evaluations of emissions from Access BPL and all other carrier current systems. These actions will further the development of BPL systems by removing regulatory uncertainties for BPL operators and equipment manufacturers and facilitate the continued deployment of these new broadband networks while ensuring that licensed radio services are protected from harmful interference. The record and our investigations indicate that BPL network systems can generally be configured and managed to minimize and/or eliminate this interference potential.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

57. No comments were filed in response to the IRFA.

C. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

58. 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.[3] The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' [4] In addition, the term

[1] *See* 5 U.S.C. 603. The RFA, *see* 5 U.S.C. 601–612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. 104–121, Title II, 110 Stat. 857 (1996).

[2] *See* 5 U.S.C. 604.

[3] 5 U.S.C. 604(a)(3).

[4] 5 U.S.C. 601(6).

''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act.[5] 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).[6]

59. The rules adopted in the Report and Order pertain to manufacturers of unlicensed communications devices. The appropriate small business size standard is that which the SBA has established for radio and television broadcasting and wireless communications equipment manufacturing. This category encompasses entities that primarily manufacture radio, television, and wireless communications equipment.[7] Under this standard, firms are considered small if they have 750 or fewer employees.[8] Census Bureau data for 1997 indicate that, for that year, there were a total of 1,215 establishments [9] in this category.[10] Of those, there were 1,150 that had employment under 500, and an additional 37 that had employment of 500 to 999. The percentage of wireless equipment manufacturers in this category is approximately 61.35%,[11] so the Commission estimates that the number of wireless equipment manufacturers with employment under 500 was actually closer to 706, with an additional 23 establishments having employment of between 500 and 999. Given the above, the Commission estimates that the great majority of wireless communications equipment manufacturers are small businesses.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

60. Although a large number of part 15 radio frequency devices are already required to be authorized under the Commission's Certification, Declaration of Conformity, or Verification procedures as a prerequisite to marketing and importation, the adopted rules add a slight amount of new testing and reporting requirements, to ensure protection of licensed spectrum users from harmful interference. These requirements include the proposed technical requirement for adaptive interference mitigation capabilities and the proposed notification of Access BPL systems in a database similar to the one required for existing Power Line Carrier systems. The major differences between the existing part 15 rules for carrier current systems and the newly adopted rules in subpart G for Access BPL are (1) the type of equipment authorization procedure,—Verification for existing carrier current systems, Certification for Access BPL systems; (2) the requirement for interference mitigation techniques and avoidance of excluded bands and exclusion zones for Access BPL systems; and (3) the requirement for an Access BPL database concurrent with consultation with licensed spectrum users. Because Access BPL systems operate in the High Frequency (HF) and in the low Very High Frequency (VHF) of the spectrum, they must co-exist with numerous private and governmental authorized radio services. As such, they present concerns for these licensed users, given the propagation characteristics of radio frequency signals in these ranges of frequencies, the diversity of users of these frequencies, and the fact that Access BPL devices will be installed at many locations in an area, primarily over unshielded power lines. However, the record and our own investigations indicate that BPL network systems can generally be configured and managed to minimize and/or eliminate this interference potential, through the use of consultation with licensed services and identification of installed Access BPL equipment in a database, as well as the adoption of precise measurement procedures. The adopted certification procedure for Access BPL systems will therefore help provide a more detailed record of their characteristics toward this objective.

61. Although the adopted rules do somewhat increase the reporting and recordkeeping requirements for Access BPL systems, the benefit of ensuring protection to critical systems operated by law enforcement groups, government users and emergency operations outweighs this small cost that will permit the growth of Access BPL in the shared spectrum.

E. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

62. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four 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 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.

63. In the Report and Order, we maintained the existing part 15 emission limits, which are applicable to all part 15 devices, including BPL. We have adopted new measurement guidelines for BPL and existing carrier current systems, to assist manufacturers and testing entities to follow clearer and more precise measurement procedures in the testing of BPL and carrier current systems (CCS), which will help in eliminating confusion and repetitive and costly compliance testing. Although we changed the equipment authorization procedure from Verification to Certification for Access BPL systems, this is because Access BPL systems operate in a different environment than other unlicensed part 15 devices and to avoid overburdening the information that would otherwise be required to be submitted into the Access BPL database. We have adopted a simple Access BPL database format for the notification of Access BPL systems, rather than a complex one with all-inclusive and more comprehensive information. We have narrowed down the list of absolutely necessary licensed entities that Access BPL providers must consult with prior to operating in their bands, as well as the list of exclusion zones and excluded frequency bands in which Access BPL are prohibited from operating. We have provided a generous time frame for a transition period, thus allowing existing systems to continue to operate, as long as they do not cause harmful interference to other authorized radio services. Finally, the rules will

[5] 5 U.S.C. 601(3) (incorporating by reference the definition of ''small-business concern'' in the Small Business Act, 15 U.S.C. 632). Pursuant to 5 U.S.C. 601(3), the statutory definition of a small business applies ''unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register.**''

[6] 15 U.S.C. 632.

[7] NAICS code 334220.

[8] *Id.*

[9] The number of ''establishments'' is a less helpful indicator of small business prevalence in this context than would be the number of ''firms'' or ''companies,'' because the latter take into account the concept of common ownership or control. Any single physical location for any entity is an establishment, even though that location may be owned by a different establishment. Thus, the numbers given may reflect inflated numbers of businesses in this category, including the numbers of small businesses. In this category, the Census breaks-out data for firms or companies only to give the total number of such entities for 1997, which was 1,089.

[10] U.S. Census Bureau, 1997 Economic Census, Industry Series: Manufacturing, ''Industry Statistics by Employment Size,'' Table 4, NAICS code 334220 (issued August 1999).

[11] *Id.* Table 5, ''Industry Statistics by Industry and Primary Product Class Specialization: 1997.''

apply equally to large and small entities. Therefore, there is no inequitable impact on small entities.

64. We believe that the rules adopted are equitable, balancing the critical needs of licensed radio users for protection against harmful interference, with facilitating the development of Access BPL by removing regulatory uncertainties. For the reasons stated we find that the rule changes contained in this Report and Order will not present a significant economic burden to small entities.

Report to Congress

65. The Commission will send a copy of the Report and Order, including this FRFA, in a report to Congress pursuant to the Congressional Review Act.[12] In addition, the Commission will send a copy of the Report and Order, including the FRFA, to the Chief Counsel for Advocacy of the SBA.[13]

Ordering Clauses

66. Pursuant to the authority contained in Sections 4(i), 301, 302, 303(e), 303(f), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 301, 302, 303(e), 303(f), and 303(r), part 15 of the Commission's Rules *are amended,* as specified in Appendix B in the Report and Order, effective 30 days after **Federal Register** publication, except for §§ 15.615(a) through (e) which contains information collection requirements that are not effective until approved by the Office of Management and Budget. The FCC will publish a document in the **Federal Register** announcing the effective date for those sections.

67. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 15

Communications equipment, Radio.

Federal Communications Commission.

William F. Caton,

Deputy Secretary.

Rule Changes

■ For the reasons set forth in the preamble, the Federal Communications Commission amends 47 CFR part 15 as follows:

PART 15—RADIO FREQUENCY DEVICES

■ 1. The authority citation for part 15 continues to read as follows:

Authority: 47 U.S.C. 154, 302, 303, 304, 307 and 544A.

■ 2. Section 15.3 is amended by adding paragraphs (ff) and (gg) to read as follows:

§ 15.3 Definitions.

* * * * *

(ff) *Access Broadband over Power Line (Access BPL).* A carrier current system installed and operated on an electric utility service as an unintentional radiator that sends radio frequency energy on frequencies between 1.705 MHz and 80 MHz over medium voltage lines or over low voltage lines to provide broadband communications and is located on the supply side of the utility service's points of interconnection with customer premises. Access BPL does not include power line carrier systems as defined in § 15.3(t) or In-House BPL as defined in § 15.3(gg).

(gg) *In-House Broadband over Power Line (In-House BPL).* A carrier current system, operating as an unintentional radiator, that sends radio frequency energy by conduction over electric power lines that are not owned, operated or controlled by an electric service provider. The electric power lines may be aerial (overhead), underground, or inside the walls, floors or ceilings of user premises. In-House BPL devices may establish closed networks within a user's premises or provide connections to Access BPL networks, or both.

■ 3. Section 15.15 is amended by revising paragraph (b) to read as follows:

§ 15.15 General technical requirements.

* * * * *

(b) Except as follows, an intentional or unintentional radiator must be constructed such that the adjustments of any control that is readily accessible by or intended to be accessible to the user will not cause operation of the device in violation of the regulations. Access BPL equipment shall comply with the applicable standards at the control adjustment that is employed. The measurement report used in support of an application for Certification and the user instructions for Access BPL equipment shall clearly specify the user- or installer-control settings that are required for conformance with these regulations.

* * * * *

■ 4. Section 15.31 is amended by revising paragraph (f)(5), to read as follows:

§ 15.31 Measurement standards.

* * * * *

(f) * * *

(5) Measurements shall be performed at a sufficient number of radials around the equipment under test to determine the radial at which the field strength values of the radiated emissions are maximized. The maximum field strength at the frequency being measured shall be reported in the equipment authorization report. This paragraph shall not apply to Access BPL equipment on overhead medium voltage lines. In lieu thereof, the measurement guidelines established by the Commission for Access BPL shall be followed.

* * * * *

■ 5. Section 15.37 is amended by adding paragraph (m) to read as follows:

§ 15.37 Transition provisions for compliance with the rules.

* * * * *

(m) All Access BPL devices that are manufactured, imported, marketed or installed on or after July 7, 2006, shall comply with the requirements specified in subpart G of this part, including certification of the equipment.

■ 6. Section 15.101 is amended by revising the table in paragraph (a) to read as follows:

§ 15.101 Equipment authorization of unintentional radiators.

(a) * * *

Type of device	Equipment authorization required
TV broadcast receiver	Verification.
FM broadcast receiver	Verification.
CB receiver	Declaration of Conformity or Certification.
Superregenerative receiver	Declaration of Conformity or Certification.

[12] *See* 5 U.S.C. 801(a)(1)(A).

[13] *See* 5 U.S.C. 604(b).

Type of device	Equipment authorization required
Scanning receiver	Certification.
Radar detector	Certification.
All other receivers subject to part 15	Declaration of Conformity or Certification.
TV interface device	Declaration of Conformity or Certification.
Cable system terminal device	Declaration of Conformity.
Stand-alone cable input selector switch	Verification.
Class B personal computers and peripherals	Declaration of Conformity or Certification.[1]
CPU boards and internal power supplies used with Class B personal computers	Declaration of Conformity or Certification.[1]
Class B personal computers assembled using authorized CPU boards or power supplies	Declaration of Conformity.
Class B external switching power supplies	Verification.
Other Class B digital devices & peripherals	Verification.
Class A digital devices, peripherals & external switching power supplies	Verification.
Access Broadband over Power Line (Access BPL)	Certification.
All other devices	Verification.

* * * * *

■ 7. Part 15 is amended by adding a new Subpart G, to read as follows:

Subpart G—Access Broadband Over Power Line (Access BPL)

Sec.
15.601 Scope.
15.603 Definitions.
15.605 Cross reference.
15.607 Equipment authorization of Access BPL equipment.
15.609 Marketing of Access BPL equipment.
15.611 General technical requirements.
15.613 Measurement procedures.
15.615 General administrative requirements.

§ 15.601 Scope.

This subpart sets out the regulations for Access Broadband over Power Line (Access BPL) devices operating in the 1.705–80 MHz band over medium or low voltage lines.

§ 15.603 Definitions.

(a) *Excluded Band:* A band of frequencies within which Access BPL operations are not permitted.

(b) *Exclusion Zone:* A geographical area within which Access BPL operations are not permitted in certain frequency bands.

(c) *Consultation.* The process of communication between an entity operating Access BPL and a licensed public safety or other designated point of contact for the purpose of avoiding potential harmful interference.

(d) *Consultation area:* A designated geographical area within which consultation with public safety users or other designated point of contact is required before an Access BPL may be operated at designated frequencies.

(e) *Low Voltage power line.* A power line carrying low voltage, *e.g.*, 240/120 volts from a distribution transformer to a customer's premises.

(f) *Medium Voltage power line.* A power line carrying between 1,000 to 40,000 volts from a power substation to neighborhoods. Medium voltage lines may be overhead or underground, depending on the power grid network topology.

(g) *Access BPL Database.* A database operated by an industry-sponsored entity, recognized by the Federal Communications Commission and the National Telecommunications and Information Administration (NTIA), containing information regarding existing and planned Access BPL systems, as required in § 15.615(a) of this chapter.

§ 15.605 Cross reference.

(a) The provisions of subparts A and B of this part apply to Access BPL devices, except where specifically noted. The provisions of subparts C through F of this part do not apply to Access BPL devices except where specifically noted.

(b) The requirements of this subpart apply only to the radio circuitry that is used to provide carrier current operation for the Access BPL device. Other aspects of the operation of an Access BPL device may be subject to requirements contained elsewhere in this chapter. In particular, an Access BPL device that includes digital circuitry that is not used solely to enable the operation of the radio frequency circuitry used to provide carrier current operation also is subject to the requirements for unintentional radiators in subpart B of this part.

§ 15.607 Equipment authorization of Access BPL equipment.

Access BPL equipment shall be subject to Certification as specified in § 15.101.

§ 15.609 Marketing of Access BPL equipment.

The marketing of Access BPL equipment must be directed solely to parties eligible to operate the equipment. Eligible parties consist of AC power line public utilities, Access BPL service providers and associates of Access BPL service providers. The responsible party, as defined in § 2.909 of this chapter, is responsible for ensuring that the equipment is marketed only to eligible parties. Marketing of the equipment in any other manner may be considered grounds for revocation of the grant of certification issued for the equipment.

§ 15.611 General technical requirements.

(a) *Conducted emission limits.* Access BPL is not subject to the conducted emission limits of § 15.107.

(b) *Radiated emission limits.* (1) *Medium voltage power lines.* (i) Access BPL systems that operate in the frequency range of 1.705 kHz to 30 MHz over medium voltage power lines shall comply with the radiated emission limits for intentional radiators provided in § 15.209.

(ii) Access BPL systems that operate in the frequency range above 30 MHz over medium voltage power lines shall comply with the radiated emission limits provided in § 15.109(b).

(2) *Low voltage power lines.* Access BPL systems that operate over low-voltage power lines, including those that operate over low-voltage lines that are connected to the in-building wiring, shall comply with the radiated emission limits provided in § 15.109(a) and (e).

(c) *Interference Mitigation and Avoidance.* (1) Access BPL systems shall incorporate adaptive interference mitigation techniques to remotely reduce power and adjust operating frequencies, in order to avoid site-specific, local use of the same spectrum by licensed services. These techniques may include adaptive or ''notch'' filtering, or complete avoidance of frequencies, or bands of frequencies, locally used by licensed radio operations.

(i) For frequencies below 30 MHz, when a notch filter is used to avoid interference to a specific frequency band, the Access BPL system shall be

capable of attenuating emissions within that band to a level at least 20 dB below the applicable part 15 limits.

(ii) For frequencies above 30 MHz, when a notch filter is used to avoid interference to a specific frequency band, the Access BPL system shall be capable of attenuating emissions within that band to a level at least 10 dB below the applicable part 15 limits.

(2) Access BPL systems shall comply with applicable radiated emission limits upon power-up following a fault condition, or during a start-up operation after a shut-off procedure, by the use of a non-volatile memory, or some other method, to immediately restore previous settings with programmed notches and excluded bands, to avoid time delay caused by the need for manual re-programming during which protected services may be vulnerable.

(3) Access BPL systems shall incorporate a remote-controllable shut-down feature to deactivate, from a central location, any unit found to cause harmful interference, if other interference mitigation techniques do not resolve the interference problem.

§ 15.613 Measurement procedures.

Compliance measurements for Access BPL shall be made in accordance with the Guidelines for Access BPL systems specified by the Commission.

§ 15.615 General administrative requirements.

(a) *Access BPL Database.* Entities operating Access BPL systems shall supply to an industry-recognized entity, information on all existing Access BPL systems and all proposed Access BPL systems for inclusion into a publicly available data base, within 30 days prior to initiation of service. Such information shall include the following:

(1) The name of the Access BPL provider.

(2) The frequencies of the Access BPL operation.

(3) The postal zip codes served by the specific Access BPL operation.

(4) The manufacturer and type of Access BPL equipment and its associated FCC ID number, or, in the case of Access BPL equipment that has been subject to verification, the Trade Name and Model Number, as specified on the equipment label.

(5) The contact information, including both phone number and e-mail address of a person at, or associated with, the BPL operator's company, to facilitate the resolution of any interference complaint.

(6) The proposed/or actual date of Access BPL operation.

(b) The Access BPL database manager shall enter this information into the publicly accessible database within three (3) business days of receipt.

(c) No notification to the Commission is required.

(d) A licensed spectrum user experiencing harmful interference that is suspected to be caused by an Access BPL system shall inform the local BPL operator's contact person designated in the Access BPL database. The investigation of the reported interference and the resolution of confirmed harmful interference from the Access BPL system shall be successfully completed by the BPL operator within a reasonable time period according to a mutually acceptable schedule, after the receipt of an interference complaint, in order to avoid protracted disruptions to licensed services. The Access BPL operator shall respond to complaints of harmful interference from public safety users within 24 hours. With regard to public safety complaints, the BPL provider shall be required to immediately cease the operations causing such complaint if it fails to respond within 24 hours.

(e) *Consultation with public safety users.* An entity operating an Access BPL system shall notify and consult with the public safety users in the area where it plans to deploy Access BPL, at least 30 days prior to initiation of any operation or service. This entity shall design or implement the Access BPL system such that it does not cause harmful interference in those frequencies or bands used by the public safety agencies in the area served by the Access BPL system. The notification shall include, at a minimum, the information in paragraph (a) of this section.

(f) *Federal government spectrum users and other radio service users.* An entity operating an Access BPL system shall ensure that, within its Access BPL deployment area, its system does not operate on any frequencies designated as excluded bands or on identified frequencies within any designated exclusion zones.

(1) *Excluded Bands.* To protect Aeronautical (land) stations and aircraft receivers, Access BPL operations using overhead medium voltage power lines are prohibited in the frequency bands listed in Table 1. Specifically, such BPL systems shall not place carrier frequencies in these bands.

TABLE 1.—EXCLUDED FREQUENCY BANDS

Frequency band
2,850–3,025 kHz
3,400–3,500 kHz
4,650–4,700 kHz
5,450–5,680 kHz
6,525–6,685 kHz
8,815–8,965 kHz
10,005–10,100 kHz
11,275–11,400 kHz
13,260–13,360 kHz
17,900–17,970 kHz
21,924–22,000 kHz
74.8–75.2 MHz

(2) *Exclusion zones.* Exclusion zones encompass the operation of any Access BPL system within 1 km of the boundary of coast station facilities at the coordinates listed in Tables 2 and 2.1. Exclusion zones also encompass the operation of Access BPL systems using overhead medium voltage power lines within 29 km of the coordinates for the ten Very Long Baseline Array facilities listed in Allocation US311. Exclusion zones further encompass the operation of Access BPL systems using overhead low voltage power lines or underground power lines within 11 km of the coordinates for the ten Very Long Baseline Array facilities listed in Allocation US311. Within the exclusion zones for coast stations, Access BPL systems shall not use carrier frequencies within the band of 2173.5–2190.5 kHz. Within the exclusion zone for Very Long Baseline Array radio astronomy observatories, Access BPL systems shall not use carrier frequencies within the 73.0–74.6 MHz band.

(i) *Existing coast station facilities.* Access BPL systems shall not operate in the frequency band 2,173.5–2,190.5 kHz, within 1 kilometer (km) of the boundary of coast station facilities at the coordinates listed in Tables 2 and 2.1. BPL operators planning to deploy Access BPL devices at these frequencies in areas within these exclusion zones as defined above shall consult with the appropriate point of contact for these coast stations to ensure harmful interference is prevented at these facilities.

Point of contact: Commandant (CG 622), U.S. Coast Guard, 2100 2nd Street, SW., Washington, DC 20593–0001, Telephone: (202) 267–2860, e-mail: *cgcomms@comdt.uscg.mil.*

TABLE 2.—EXCLUSION ZONES FOR U.S. COAST GUARD COAST STATIONS

Locale	Latitude	Longitude
Group Guam	13°35′23″ N	144°50′24″ E
GANTSEC	18°18′00″ N	65°46′59″ W
Puerto Rico	18°28′11″ N	66°07′47″ W
Honolulu	21°18′21″ N	157°53′23″ W
Group Key West	24°33′35″ N	81°47′59″ W
Trumbo Point CG Base	24°33′58″ N	81°47′57″ W
Miami	25°37′28″ N	80°23′07″ W
Everglades Park	25°50′10″ N	81°23′13″ W
Group Saint Petersburg (Everglades)	25°51′00″ N	81°23′24″ W
Station Ft. Lauderdale	26°05′21″ N	80°06′40″ W
Station Ft. Myers Beach	26°27′34″ N	81°57′15″ W
Group Miami (Ft. Pierce)	27°27′36″ N	80°18′36″ W
Station Ft. Pierce	27°27′50″ N	80°18′27″ W
Group Corpus Christi	27°42′01″ N	97°16′11″ W
Group Corpus Christi	27°42′06″ N	97°16′45″ W
ESD Saint Petersburg	27°45′21″ N	82°37′32″ W
Group Saint Petersburg	27°46′11″ N	82°37′47″ W
Station Port O'Connor	28°26′03″ N	96°25′39″ W
S. Padre Island	28°26′22″ N	97°09′56″ W
Freeport	28°55′59″ N	95°16′59″ W
Group Galveston (Freeport)	28°56′24″ N	95°17′59″ W
Station YANKEETOWN	29°01′51″ N	82°43′39″ W
Station Ponce De Leon Inlet	29°03′50″ N	81°55′01″ W
Group New Orleans (Grand Isle)	29°15′53″ N	89°57′26″ W
Galveston	29°19′59″ N	94°46′18″ W
Kapalan	29°20′04″ N	94°47′17″ W
Sabine	29°43′42″ N	93°52′14″ W
New Orleans	30°01′17″ N	90°07′24″ W
Panama City	30°10′01″ N	85°45′04″ W
Group Mobile (Panama City)	30°10′12″ N	85°45′36″ W
ANT Jacksonville Beach	30°17′16″ N	81°24′10″ W
Pensacola	30°20′24″ N	87°18′17″ W
Group Mayport	30°23′10″ N	81°26′01″ W
Group Mayport	30°23′24″ N	81°25′48″ W
Ft. Morgan	30°39′07″ N	88°03′12″ W
Tybee Lighthouse	32°01′15″ N	80°50′39″ W
Point Loma Lighthouse	32°39′56″ N	117°14′34″ W
Point Loma	32°40′07″ N	117°14′14″ W
Activities San Diego	32°43′59″ N	117°11′13″ W
Group Charleston (Sullivan's Island)	32°45′00″ N	79°49′47″ W
Sullivan's Island Lights	32°45′02″ N	79°50′03″ W
Group Charleston	32°46′25″ N	79°56′37″ W
Group San Diego	32°52′48″ N	118°26′23″ W
San Pedro	33°45′00″ N	118°15′58″ W
Group Fort Macon	33°53′24″ N	78°01′48″ W
Point Mugu	33°59′32″ N	119°07′18″ W
Group LA/Long Beach	34°07′11″ N	119°06′35″ W
Channel Island	34°09′17″ N	119°13′11″ W
Station Oxnard Channel Island	34°09′43″ N	119°13′19″ W
Group Ft. Macon	34°41′48″ N	76°40′59″ W
Group Cape Hatteras	35°13′59″ N	75°31′59″ W
Group Cape Hatteras	35°15′35″ N	75°31′48″ W
Morro Bay (Cambria)	35°31′21″ N	121°03′31″ W
San Clemente Island	32°50′24″ N	118°23′15″ W
Point Pinos	36°38′12″ N	121°56′06″ W
CAMSLANT	36°43′47″ N	76°01′11″ W
Group Hampton Roads	36°53′01″ N	76°21′10″ W
Point Montara	37°31′23″ N	122°30′47″ W
Point Montara Lighthouse	37°32′09″ N	122°31′08″ W
Group San Francisco	37°32′23″ N	122°31′11″ W
Group San Francisco	37°48′34″ N	122°21′55″ W
Point Bonita	37°49′00″ N	122°31′41″ W
Group Eastern Shores	37°55′47″ N	75°22′47″ W
Group Eastern Shore	37°55′50″ N	75°22′58″ W
CAMSPAC	38°06′00″ N	122°55′48″ W
Point Arena Lighthouse	38°57′18″ N	124°44′28″ W
Point Arena	38°57′36″ N	123°44′23″ W
Group Atlantic City	39°20′59″ N	74°27′42″ W
Activities New York	40°36′06″ N	74°03′36″ W
Activities New York	40°37′11″ N	74°04′11″ W
ESD Moriches Hut	40°47′19″ N	72°44′53″ W
Group Moriches	40°47′23″ N	72°45′00″ W

TABLE 2.—EXCLUSION ZONES FOR U.S. COAST GUARD COAST STATIONS—Continued

Locale	Latitude	Longitude
Group Humboldt Bay	40°58′41″ N	124°06′31″ W
Group Humboldt Bay	40°58′47″ N	124°06′35″ W
Trinidad Head	41°03′15″ N	124°09′02″ W
Group Long Island Sound	41°16′12″ N	72°54′00″ W
Station New Haven	41°16′12″ N	72°54′06″ W
Station Brant Point	41°17′21″ N	70°05′31″ W
Group Woods Hole	41°17′23″ N	70°04′47″ W
Station Castle Hill	41°27′46″ N	71°21′42″ W
Group Woods Hole	41°17′29″ N	70°401′07″ W
Boston Area	41°40′12″ N	70°31′48″ W
Station Provincetown	42°01′48″ N	70°12′42″ W
Eastern Point	42°36′24″ N	70°39′26″ W
Cape Blanco	42°50′16″ N	124°33′52″ W
Group North Bend	43°24′16″ N	124°13′22″ W
Group North Bend	43°24′35″ N	124°14′23″ W
Cape Elizabeth	43°33′28″ N	70°12′00″ W
Group South Portland	43°38′24″ N	70°15′00″ W
Group South Portland	43°38′45″ N	70°14′51″ W
Group SW Harbor	44°16′19″ N	68°18′27″ W
Group Southwest Harbor	44°16′48″ N	68°18′36″ W
Fort Stevens, Oregon	46°09′14″ N	123°53′07″ W
Group Astoria	46°09′29″ N	123°31′48″ W
Group Astoria	46°09′35″ N	123°53′24″ W
La Push	47°49′00″ N	124°37′59″ W
Station Quillayute River	47°54′49″ N	124°38′01″ W
Port Angeles	48°07′59″ N	123°25′59″ W
Group Port Angeles	48°08′24″ N	123°24′35″ W
Juneau (Sitka)	57°05′24″ N	135°15′35″ W
Kodiak	57°40′47″ N	152°28′47″ W
Valdez (Cape Hinchinbrook)	60°26′23″ N	146°25′48″ W

Note: Systems of coordinates comply with NAD 83.

TABLE 2.1.—EXCLUSION ZONES FOR MARITIME PUBLIC COAST STATIONS

[Points of Contact Are Identified in the Commission's License Database]

Licensee name	Location	Latitude	Longitude
Shipcom LLC	Marina Del Ray, CA	33°56′21″ N	118°27′14″ W
Globe Wireless	Rio Vista, CA	38°11′55″ N	121°48′34″ W
Avalon Communications Corp	St. Thomas, VI	18°21′19″ N	64°56′48″ W
Globe Wireless	Bishopville, MD	38°24′10″ N	75°12′59″ W
Shipcom LLC	Mobile, AL	30°40′07″ N	88°10′23″ W
Shipcom LLC	Coden, AL	30°22′35″ N	88°12′20″ W
Globe Wireless	Pearl River, LA	30°22′13″ N	89°47′26″ W
Globe Wireless	Kahalelani, HI	21°10′33″ N	157°10′39″ W
Globe Wireless	Palo Alto, CA	37°26′44″ N	122°06′48″ W
Globe Wireless	Agana, GU	13°29′22″ N	144°49′39″ E

Note: Systems of coordinates comply with NAD 83.

(ii) *New or relocated Coast stations.* In the unlikely event that a new or relocated coast station is established for the 2.173.5–2.190.5 kHz band at a coordinate not specified in Table 2 or 2.1, Access BPL operations in that frequency band shall also be excluded within 1 km of the new coast station facility;

(iii) *Very Long Baseline Array (VLBA) radio astronomy observatories.* Access BPL systems using overhead medium voltage power lines shall not operate in the frequency band 73.0–74.6 MHz, within 29 km of the coordinates of the ten (10) Very Long Baseline Array facilities listed in 47 CFR 2.106, Note US311. Access BPL systems using overhead low voltage power lines or underground power lines shall not operate in the 73.0–74.6 MHz band within 11 km of those coordinates.

(3) *Consultation areas.* Access BPL operators shall provide notification to the appropriate point of contact specified below regarding Access BPL operations at any frequencies of potential concern in the following consultation areas, at least 30 days prior to initiation of any operation or service. The notification shall include, at a minimum, the information in paragraph (a) of this section. We expect parties to consult in good faith to ensure that no harmful interference is caused to licensed operations and that any constraints on BPL deployments are minimized to those necessary to avoid harmful interference.

(i) For frequencies in the 1.7–30 MHz frequency range, the areas within 4 km of facilities located at the following coordinates:

(A) The Commission's protected field offices listed in 47 CFR 0.121, the point-of-contact for which is specified in that section;

(B) The aeronautical stations listed in Tables 3a and 3b;

(C) The land stations listed in Tables 4 and 5;

(ii) For frequencies in the 1.7–38.25 MHz frequency range, the areas within 4 km of facilities located at the coordinates specified for radio astronomy facilities in 47 CFR 2.106, Note US 311.

(iii) For frequencies in the 1.7–80 MHz frequency range, the area within 1 km of the Table Mountain Radio Receiving Zone, the coordinates and point of contact for which are specified in 47 CFR 21.113(b).

(iv) For frequencies in the 1.7–30 MHz frequency range, the areas within 37 km of radar receiver facilities located at the coordinates specified in Table 6.

Point of contact: U.S. Coast Guard HQ, Division of Spectrum Management CG–622, 2100 Second St., SW., Rm. 6611, Washington, DC 20593, Tel: (202) 267–6036, Fax: (202) 267–4106, e-mail: *jtaboada@comdt.uscg.mil.*

TABLE 3a.—CONSULTATION AREA COORDINATES FOR AERONAUTICAL (OR) STATIONS (1.7–30 MHZ)

Command name	Location	Latitude	Longitude
Washington	Arlington, VA	38°51′07″ N	77°02′15″ W
Cape Cod	Cape Cod, MA	41°42′00″ N	70°30′00″ W
Atlantic City	Atlantic City, NJ	39°20′59″ N	74°27′42″ W
Elizabeth City	Elizabeth City, NC	36°15′53″ N	76°10′32″ W
Savannah	Savannah, GA	32°01′30″ N	81°08′30″ W
Miami	Opa Locka, FL	25°54′22″ N	80°16′01″ W
Clearwater	Clearwater, FL	27°54′27″ N	82°41′ 29″ W
Borinquen	Aguadilla, PR	18°18′36″ N	67°04′ 48″ W
New Orleans	New Orleans, LA	29°49′31″ N	90°02′ 06″ W
Traverse City	Traverse City, MI	44°44′24″ N	85°34′54″ W
San Diego	San Diego, CA	32°43′33″ N	117°10′ 15″ W
Sacramento	McCllelan AFB, CA	38°40′06″ N	121°24′04″ W
Astoria	Warrenton, OR	46°25′18″ N	123°47′ 46″ W
North Bend	North Bend, OR	43°24′39″ N	124°14′35″ W
Barbers Point	Kapolei, HI	21°18′01″ N	158°04′15″ W
Kodiak	Kodiak, AK	57°44′19″ N	152°30′18″ W
Houston	Houston, TX	29°45′00″ N	95°22′00″ W
Detroit	Mt. Clemens, MI	42°36′05″ N	82°50′12″ W
San Francisco	San Francisco, CA	37°37′58″ N	122°23′20″ W
Los Angeles	Los Angeles, CA	33°56′36″ N	118°23′48″ W
Humboldt Bay	McKinleyville, CA	40°58′39″ N	124°06′45″ W
Port Angeles	Port Angeles, WA	48°08′25″ N	123°24′48″ W
Sitka	Sitka, AK	57°05′50″ N	135°21′58″ W

Note: Systems of coordinates conform to NAD 83.

Point of contact: ARINC, 2551 Riva Road, Annapolis, MD 21401, Tel: 1–800–633–6882, Fax: (410) 266–2329, e-mail: *arincmkt@arinc.com, http://www.arinc.com.*

TABLE 3b.—CONSULTATION AREA COORDINATES FOR AERONAUTICAL RECEIVE STATIONS (1.7–30 MHZ)

Locale	Latitude	Longitude
Southampton, NY	40°55′15″ N	72°23′41″ W
Molokai, HI	21°12′23″ N	157°12′30″ W
Oahu, HI	21°22′27″ N	158°05′56″ W
Half Moon Bay, CA	37°39′00″ N	122°41′00″ W
Pt. Reyes, CA	38°06′00″ N	122°56′00″ W
Barrow, AK	71°17′24″ N	156°48′12″ W
Guam	13°25′00″ N	144°44′57″ E (**note:** Eastern N Hemisphere)
NY Comm Center, NY	40°46′48″ N	73°05″46″ W
Cedar Rapids, IA	42°02′05.0″ N	91°38′37.6″ W
Beaumont, CA	33°54′27.1″ N	116°59′49.1″ W
Fairfield, TX	31°47′02.6″ N	96°47′03.0″ W
Houston, TX	29°36′35.8″ N	95°16′54.8″ W
Miami, FL	25°49′05″ N	80°18′28″ W

Note: Systems of coordinates conform to NAD 83.

Point of contact: U.S. Coast Guard HQ, Division of Spectrum Management CG–622, 2100 Second St., SW., Rm. 6611, Washington, DC 20593, Tel: (202) 267–6036, Fax: (202) 267–4106, e-mail: *jtaboada@comdt.uscg.mil.*

TABLE 4.—CONSULTATION AREA COORDINATES FOR LAND STATIONS, SET 1 (1.7–30 MHZ)

Command name	Location	Latitude	Longitude
COMMSTA Boston	Maspee, MA	41°24′00″ N	70°18′57″ W

TABLE 4.—CONSULTATION AREA COORDINATES FOR LAND STATIONS, SET 1 (1.7–30 MHz)—Continued

Command name	Location	Latitude	Longitude
Camslant	Chesapeake, VA	36°33′59″ N	76°15′23″ W
COMMSTA Miami	Miami, FL	25°36′58″ N	80°23′04″ W
COMMSTA New Orleans	Belle Chasse, IA	29°52′40″ N	89°54′46″ W
Camspac	Pt. Reyes Sta, CA	38°06′00″ N	122°55′48″ W
COMMSTA Honolulu	Wahiawa, HI	21°31′08″ N	157°59′28″ W
COMMSTA Kodiak	Kodiak, AK	57°04′26′ N	152°28′20″ W
Guam	Finegayan, GU	13°53′08″ N	144°50′20″ E

Note: Systems of coordinates conform to NAD 83.

Point of contact: COTHEN Technical Support Center, COTHEN Program Manager, Tel: (800) 829–6336.

TABLE 5.—CONSULTATION AREA COORDINATES FOR LAND STATIONS, SET 2 (1.7–30 MHz)

Site name	Latitude	Longitude
Albuquerque, NM	35°05′02″ N	105°34′23″ W
Arecibo, PR	18°17′26″ N	66°22′33″ W
Atlanta, GA	32°33″06 N	84°23′35″ W
Beaufort, SC	34°34′22″ N	76°09′48″ W
Cape Charles, VA	37°05′37″ N	75°58′06″ W
Cedar Rapids, IA	42°00′09″ N	91°17′39″ W
Denver, CO	39°15′45″ N	103°34′23″ W
Fort Myers, FL	81°31′20″ N	26°20′01″ W
Kansas City, MO	38°22′10″ N	93°21′48″ W
Las Vegas, NV	36°21′15″ N	114°17′33″ W
Lovelock, NV	40°03′07″ N	118°18′56″ W
Memphis, TN	34°21′57″ N	90°02′43″ W
Miami, FL	25°46′20″ N	80°28′48″ W
Morehead City, NC	34°34′50″ N	78°13′59″ W
Oklahoma City, OK	34°30′52″ N	97°30′52″ W
Orlando, FL	28°31′30″ N	80°48′58″ W
Reno, NV	38°31′12″ N	119°14′37″ W
Sarasota, FL	27°12′41″ N	81°31′20″ W
Wilmington, NC	34°29′24″ N	78°04′31″ W

Note: Systems of coordinates conform to NAD 83.

Point Of Contact: ROTHR Deputy Program Manager, (540) 653–3624.

TABLE 6.—CONSULTATION AREA COORDINATES FOR RADAR RECEIVER STATIONS (1.7–30 MHz)

Latitude/Longitude
18°01′ N/66°30′ W
28°05′ N/98°43′ W
36°34′ N/76°18′ W

Note: Systems of coordinates conform to NAD 83.

[FR Doc. 05–246 Filed 1–6–05; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary of Transportation

49 CFR Part 15

RIN 2105–AD33

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

49 CFR Part 1520

[Docket No. TSA–2003–15569; Amendment No. 1520–2]

RIN 1652–AA08

Protection of Sensitive Security Information; Technical Amendment

AGENCY: Office of the Secretary of Transportation (OST), Department of Transportation, and Transportation Security Administration (TSA), Department of Homeland Security.

ACTION: Technical amendment.

SUMMARY: OST and TSA are revising their regulations governing the protection of sensitive security information (SSI) to remove an unintended limitation on parties that have a need to know such information. Specifically, this rule removes the limiting words ''aviation or maritime'' from 49 CFR 15.11 and 49 CFR 1520.11 in order to clearly permit the sharing of vulnerability assessments and other documents properly designated as SSI with covered persons who meet the need to know requirements regardless of mode of transportation.

DATES: Effective January 7, 2005.

FOR FURTHER INFORMATION CONTACT: *For questions on 49 CFR part 15:* Astrid Lopez-Goldberg, Senior Attorney, Office of the Chief Counsel, Research and Special Programs Administration, Department of Transportation, Washington, DC 20590; e-mail: *Astrid.Lopez-Goldberg@rspa.dot.gov,* telephone: (202) 366–4400.

For questions on 49 CFR part 1520: David Graceson, Acting Director, Aviation Operations Litigation Support & Special Activities Staff, TSA–7, Transportation Security Administration, 601 South 12th Street, Arlington, VA 22202–4220; e-mail: *David.Graceson@dhs.gov,* telephone: (571) 227–2277.

SUPPLEMENTARY INFORMATION:

Availability of Final Rule

You can get an electronic copy using the Internet by—

(1) Searching the Department of Transportation's electronic Docket Management System (DMS) Web page (*http://dms.dot.gov/search*). Use Docket No. TSA–2003–15569;

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

(3) Visiting TSA's Law and Policy Web page at *http://www.tsa.dot.gov/public/index.jsp.*

In addition, copies are available by writing or calling the individuals in the **FOR FURTHER INFORMATION CONTACT** section. Make sure to identify the docket number of this rulemaking.

Background

On May 18, 2004, TSA and OST published an interim final rule (IFR) on the protection of sensitive security information (SSI) in the **Federal Register** (69 FR 28066). The preamble to that rule provided a full description of the statutory and regulatory background for the SSI program. As explained there, the original SSI program provided for the protection of SSI involved in aviation programs. However, the Aviation and Transportation Security Act (ATSA) (Pub. L. 107–71), enacted two months after the terrorist attacks of September 11, 2001, amended the statutory authority underlying the aviation SSI program to mandate coverage of appropriate security information in all modes of transportation. By deleting ''air'' as a limiting word before ''transportation,'' in ATSA, Congress enlarged its specific direction to issue protective regulations to encompass all modes of transportation.

While the general focus of TSA's 2002 regulation to implement ATSA remained on aviation programs, TSA's regulation also provided for the protection of vulnerability assessments and certain other SSI (including information concerning threats against transportation) regardless of mode of transportation.[1] Later in 2002, in the Homeland Security Act (Pub. L. 107–296) that created the Department of Homeland Security (DHS), Congress: (1) transferred TSA's authority to issue SSI regulations to DHS, and (2) directed the Secretary of Transportation to also prescribe SSI regulations. Also in 2002, the Maritime Transportation Security Act (Pub. L. 107–295), which established a new framework for maritime security, became law and called for the preparation of many security-related documents that would need SSI protection.

The May 2004 IFR consisted of virtually identical TSA and OST rules to implement Congressional direction that both agencies issue SSI regulations. The IFR expanded the 2002 regulatory framework governing information generally related to aviation security to also cover information related to security in maritime transportation. This expansion was the main theme of the IFR. However, the IFR also continued the TSA 2002 regulation's coverage for vulnerability assessments and, with some changes, certain other SSI for all modes. For example, the TSA 2002 regulation coverage of ''Information concerning threats against transportation'' was not limited by mode of transportation. The May 2004 IFR continued that coverage for ''Threat information'' regardless of the mode of transportation.

Technical Amendment

SSI rules limit the disclosure of vulnerability assessments and other SSI to persons with a ''need to know.'' The TSA 2002 regulation contained no modal-specific limits in its need-to-know provision (49 CFR 1520.5(b)(2002)). However, consistent with the May 2004 IFR's focus on adding provisions for the maritime industry to existing, mostly aviation-related, provisions, the IFR added a restriction of ''aviation or maritime'' at several locations in the need-to-know section. (Under the regulation, Federal employees and persons acting in the performance of a contract with or grant from DHS or DOT are not subject to this restriction.) This led to unintended situations. For example, transportation entities in land modes that transport hazardous materials are required by 49 CFR subpart I to perform vulnerability assessments (see 49 CFR 172.802—assessment of possible transportation security risks for shipments of the hazardous materials listed in § 172.800 and appropriate measures to address the assessed risks), but the SSI regulation literally provides that, unless they were acting in the performance of a contract with or grant from DHS or DOT, they may share these assessments only with entities in the aviation or maritime industries, because the language of the regulation defines only these entities as having a ''need to know.''

More than one commenter to the docket on the May 2004 IFR brought this issue to our attention. In light of the well-justified concern about the vulnerability of all transportation modes to terrorist activities, and the crucial need to share information to ''connect the dots'' to forestall future attacks, DOT and DHS believe that this is a technical problem that must be fixed. By removing the limiting words ''aviation or maritime'' from 49 CFR 15.11 and 1520.11, we correct this mistake and restore the original intent of this aspect of the SSI rule—to share vulnerability assessments and threat information with entities in all transportation modes that need the information to help forestall future attacks.

TSA and OST received many useful, constructive comments on the May 2004 IFR. We plan to publish in the **Federal Register** a rulemaking document responding to comments related to subjects other than this need to know issue.

Regulatory Analyses and Notices

Good Cause for Immediate Adoption

TSA and OST are issuing this technical amendment without prior notice and opportunity for comment pursuant to the authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision allows an agency to issue a regulatory action without notice and opportunity for comment when the agency for good cause finds that notice and comment procedures are ''impracticable, unnecessary or contrary to the public interest.''

As noted previously, it is essential to fix this problem in the SSI regulation immediately, lest the unintended restriction in the regulation inhibit the exchange of vital security-related information. In addition, the technical amendment will relieve a restriction on regulated parties. For these reasons, TSA and OST have determined that prior notice and an opportunity for comment would be impracticable, unnecessary, and contrary to the public interest. This same rationale provides good cause to make the technical amendment effective immediately upon publication.

[1] 67 FR 8351, Feb. 22, 2002. The TSA SSI regulation is codified at 49 CFR part 1520.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires consideration of the impact of paperwork and other information collection burdens imposed on the public. TSA and OST have determined that there are no new information collection requirements associated with this technical amendment.

As protection provided by the Paperwork Reduction Act, as amended, 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 Office of Management and Budget (OMB) control number.

Executive Order 12886 and DOT Regulatory Policies and Procedures

Executive Order 12866 (58 FR 51735, October 4, 1993), provides for making determinations whether a regulatory action is ''significant'' and therefore subject to Office of Management and Budget (OMB) review and to the requirements of the Executive Order. This is a nonsignificant regulatory action under Executive Order 12866. The technical amendment will not add any requirements or burdens on any party. It simply relieves a restriction that would prevent transportation entities from sharing certain information with those who need to know, regardless of mode. This will enhance security by allowing TSA and OST to share vital security information with regulated parties. For the same reasons, this regulatory action is nonsignificant under the Department of Transportation's Regulatory Policies and Procedures.

Regulatory Flexibility Act Assessment

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), an agency is required to prepare and make available a regulatory flexibility analysis that describes the effect of the regulatory action on small entities (*i.e.*, small businesses, small organizations, and small governmental jurisdictions). Because good cause exists for issuing this regulation as a final technical amendment, no regulatory flexibility analysis is required. However, because this technical amendment will not impose any costs on any entities, including small entities, we have determined and certify that this regulatory action does not have a significant economic impact on a substantial number of small entities.

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 and security, are not considered unnecessary obstacles. The Act also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. We have assessed the potential effect of this regulatory action and determined that it will have no effect on any trade-sensitive activity and will not constitute a barrier to international trade.

Unfunded Mandates Reform Act Assessment

The Unfunded Mandates Reform Act of 1995 is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of the Act requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in a $100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a ''significant regulatory action.''

This regulatory action does not contain such a mandate. The requirements of Title II of the Act, therefore, do not apply and a statement has not been prepared under the Act.

Executive Order 13132 (Federalism)

This regulatory action has been analyzed under the principles and criteria of Executive Order 13132, Federalism. We have determined that it would not have a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, this regulatory action does not have federalism implications.

Environmental Analysis

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

Energy Impact

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

Small Entity Inquiries

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 requires an agency to comply with small entity requests for information and advice about compliance with statutes and regulations within the agency's jurisdiction. Any small entity that has a question regarding this document may contact the individuals listed in **FOR FURTHER INFORMATION CONTACT** for information. You can get further information regarding SBREFA on the Small Business Administration's Web page at *http://www.sba.gov/advo/laws/law_lib.html.*

List of Subjects

49 CFR Part 15

Air carriers, Aircraft, Airports, Maritime carriers, Reporting and recordkeeping requirements, Security measures, Vessels, Vulnerability assessments.

49 CFR Part 1520

Air carriers, Aircraft, Airports, Maritime carriers, Reporting and recordkeeping requirements, Security measures, Vessels, Vulnerability assessments.

Department of Transportation

Office of the Secretary of Transportation

■ For the reasons stated in the preamble, the Department of Transportation amends title 49, Code of Federal Regulations, by amending part 15 as follows:

PART 15—PROTECTION OF SENSITIVE SECURITY INFORMATION

■ 1. The authority citation for part 15 continues to read as follows:

Authority: 49 U.S.C. 40119.

§ 15.11 [Amended]

■ 2. In § 15.11(a), remove the words ''aviation or maritime'' wherever those words appear.

Issued in Washington, DC, on January 4, 2005.

Norman Y. Mineta,

Secretary of Transportation.

Department of Homeland Security

Transportation Security Administration

49 CFR Chapter XII

■ For the reasons stated in the preamble, the Transportation Security Administration amends chapter XII of title 49, Code of Federal Regulations, by amending part 1520 as follows:

PART 1520—PROTECTION OF SENSITIVE SECURITY INFORMATION

■ 1. The authority citation for part 1520 continues to read as follows:

Authority: 46 U.S.C. 70102–70106, 70117; 49 U.S.C. 114, 40113, 44901–44907, 44913–44914, 44916–44918, 44935–44936, 44942, 46105.

§ 1520.11 [Amended]

■ 2. In § 1520.11(a), remove the words ''aviation or maritime'' wherever those words appear.

Issued in Arlington, Virginia, on January 4, 2005.

David M. Stone,

Assistant Secretary of Homeland Security (Transportation Security Administration).

[FR Doc. 05–366 Filed 1–6–05; 8:45 am]

BILLING CODE 4910–62–P

Proposed Rules

Federal Register
Vol. 70, No. 5
Friday, January 7, 2005

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 ENERGY

10 CFR Parts 709 and 710

[Docket No. CN–03–RM–01]

RIN 1992–AA33

Counterintelligence Evaluation Regulations

AGENCY: Office of Counterintelligence, Department of Energy.

ACTION: Supplemental notice of proposed rulemaking and opportunity for public comment.

SUMMARY: The Department of Energy (DOE or Department) publishes a supplemental notice of proposed rulemaking to establish new counterintelligence evaluation regulations, including revised regulations governing the use of polygraph examinations. This proposed rule substitutes for DOE's April 14, 2003, preliminary proposal to retain the existing Polygraph Examination Regulations without significant change. The statutory purpose of the regulations, as stated by section 3152 of the National Defense Authorization Act of Fiscal Year 2002, is ''* * * to minimize the potential for release or disclosure of classified data, materials, or information.'' The main features of today's supplemental proposal are: Significant reductions in the number of individuals now subject to mandatory counterintelligence evaluations including polygraph screening; initiation of random counterintelligence evaluations including polygraph screening to deter unauthorized releases or disclosures; strict prohibitions on the use of polygraph examination results as the sole basis for adverse actions against employees; and a program description showing how polygraph examinations are used as one of a broad array of tools to deal with counterintelligence risks.

DATES: Written comments (10 copies) are due March 8, 2005. You may present oral views, data, and arguments at the public hearing which will be held in Washington, DC on March 2, 2005 at 10 a.m. If you would like to speak at this hearing, contact Andi Kasarsky at (202) 586–3012. Each oral presentation is limited to 10 minutes. The hearing will last as long as there are persons requesting an opportunity to speak.

ADDRESSES: You may choose to address written comments or notification of intent to speak at the public hearing to U.S. Department of Energy, Office of Counterintelligence (CN–1), Docket No. CN–03–RM–01, 1000 Independence Avenue. SW., Washington, DC 20585. Alternatively, you may e-mail your comments or your notification to: *poly@cn.doe.gov.* You may review or copy the public comments DOE has received in Docket No. CN–03–RM–01, the public hearing transcript, and any other docket material DOE makes available at the DOE Freedom of Information Reading Room, Room 1E–190, 1000 Independence Avenue, SW., Washington, DC 20585. This notice of proposed rulemaking and supporting documentation are available on DOE's Internet home page at the following address: *http://www.so.doe.gov.* The public hearing for this rulemaking will be held at the following address: U.S. Department of Energy, room 1E–245, 1000 Independence Avenue, SW., Washington, DC. For more information concerning public participation in this rulemaking, see Section VI of this supplemental notice of proposed rulemaking.

FOR FURTHER INFORMATION CONTACT: Douglas Hinckley, U.S. Department of Energy, Office of Counterintelligence, CN–1, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586–5901; or Robert Newton, U.S. Department of Energy, Office of General Counsel, GC–53, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586–6980. For information concerning the public hearing, requests to speak at the hearing, submissions of written comments or public file information contact: Andi Kasarsky at (202) 586–3012.

SUPPLEMENTARY INFORMATION:

I. Introduction

Under section 3152(a) of the National Defense Authorization Act for Fiscal Year 2002 (NDAA for FY 2002), DOE is obligated to prescribe regulations for a new counterintelligence polygraph program the stated purpose of which is ''* * * to minimize the potential for release or disclosure of classified data, materials, or information'' (42 U.S.C. 7383h–1(a).) Section 3152(b) requires DOE to ''* * * take into account the results of the Polygraph Review,'' which is defined by section 3152 (e) to mean ''* * * the review of the Committee to Review the Scientific Evidence on the Polygraph of the National Academy of Sciences'' (42 U.S.C. 7383h–1(b), (e)).

Upon promulgation of final regulations under section 3152, and ''effective 30 days after the Secretary submits to the congressional defense committees the Secretary's certification that the final rule * * * has been fully implemented, * * *'' section 3154 of the National Defense Authorization Act for Fiscal Year 2000 (NDAA for FY 2000) (42 U.S.C. 7383h), would be repealed by operation of law. (42 U.S.C. 7383h–1(c).) The repeal of section 3154 would eliminate the existing authority which underlies DOE's current counterintelligence polygraph regulations, which are codified at 10 CFR part 709, but would not preclude the retention of some or all of those regulations through this rulemaking pursuant to the later-enacted section 3152 of the NDAA for FY 2002.

In Part II of this **SUPPLEMENTARY INFORMATION,** DOE reviews background information useful in understanding the existing statutory and regulatory provisions applicable to DOE's current counterintelligence polygraph examination program. In Part III of this **SUPPLEMENTARY INFORMATION,** DOE discusses the basis for today's supplemental proposed regulations, including DOE's evaluation of the NAS Polygraph Review which is entitled ''The Polygraph and Lie Detection.'' In Part IV of this **SUPPLEMENTARY INFORMATION,** DOE provides an overview of today's supplemental proposed regulations with specific references to critical provisions that should be highlighted for the information of potential commenters.

DOE invites interested members of the public to provide their views on the issues in this rulemaking by filing written comments or by attending the public hearing scheduled in this notice. With an open mind, DOE intends carefully to evaluate the public comments received in response to this notice of proposed rulemaking and to respond in a notice of final rulemaking.

II. Background

For more than 50 years, DOE, like its predecessor the Atomic Energy Commission, has had to balance two sets of considerations. On the one hand, we must attract the best minds that we can to do cutting edge scientific work at the heart of DOE's national security mission, and we must allow sufficient dissemination of that work to allow it to be put to the various uses that our national security demands. On the other hand, we must take all reasonable steps to prevent our enemies from gaining access to the work we are doing, lest that work end up being used to the detriment rather than the advancement of our national security. There are no easy answers to the dilemma of how best to reconcile these competing considerations.

The question of whether and to what extent DOE should use the polygraph as a tool for screening individuals for access to our most sensitive information is the latest manifestation of this perennial struggle. This particular chapter begins in 1988, when Congress enacted the Employee Polygraph Protection Act of 1988. That legislation generally restricted employers from using polygraphs to screen potential employees. Congress, however, included three exceptions that are relevant. First, Congress decided that it would not apply any of the legislation's prohibitions to the United States or other governmental employers with respect to their own employees. Second, Congress specifically allowed the Federal government to administer polygraphs to Department of Defense contractors and contractor employees, and Department of Energy contractors and contractor employees in connection with the Department's atomic energy defense activities. And finally, Congress specifically provided that the Federal Government could administer polygraphs to contractors and contractor employees of the intelligence agencies and any other contractor or contractor employee whose duties involve access to top secret information or information that has been designated as within a special access program.

In February 1998, President Clinton issued Presidential Decision Directive-61. In that classified directive, entitled U.S. Department of Energy Counterintelligence Program, the Department was ordered to enhance its protections against the loss or compromise of highly sensitive information associated with certain defense-related programs by considering a variety of improvements to its counterintelligence program. One of these was the use of polygraph examinations to screen individuals with access to this information.

In order to carry out this directive, after initially proceeding through an internal order governing only federal employees, on August 18, 1999 (64 FR 45062), the Department proposed a rule, entitled ''Polygraph Examination Regulation,'' that would govern the use of the polygraph as a screening tool. It proposed that employees at DOE facilities, contractor employees as well as Federal employees, with access to certain classified information and materials, as well as applicants for such positions, be subject to a counterintelligence polygraph before they received initial access to the information and materials and at five-year intervals thereafter.

In the NDAA for FY 2000, Congress directed that the Department administer a counterintelligence polygraph to all Department employees, consultants, and contractor employees in ''high risk programs'' prior to their being given access to the program. Congress specified that these programs were the ''Special Access Programs'' and ''Personnel Security and Assurance Programs.''

On January 18, 2000, the Department finalized essentially the rule it had proposed, which included individuals with access to these programs and others in the screening requirement. Thereafter, on October 30, 2000, Congress enacted the NDAA of FY 2001, which added DOE employees, consultants, and contractor employees in programs that use ''Sensitive Compartmented Information'' and all others already covered by the Department's prior rule to those to whom the polygraph screening mandate applied.

More recently, in the NDAA for FY 2002 (Public Law 107–107), enacted on December 28, 2001, Congress required the Secretary of Energy to carry out, under regulations, a new counterintelligence polygraph program for the Department. Congress directed that the purpose of the new program should be to minimize the potential for release or disclosure of classified data, materials, or information. Congress further directed that the Secretary, in prescribing the regulation for the new program, take into account the results of a not-yet-concluded study being done by the National Academy of Sciences. That study was being conducted pursuant to a contract DOE had entered into with the National Academy of Sciences in November 2000, in which the Department requested the Academy to conduct a review of the existing research on the validity and reliability of polygraph examinations, particularly as used for personnel security screening. Congress directed the Department to propose a new rule regarding polygraphs no later than six months after publication of the NAS study.

The NAS study, entitled The Polygraph and Lie Detection, was published in October 2002 (hereinafter referred to as ''NAS Report'' or ''NAS Study''). The Department published a Notice of Proposed Rulemaking on April 14, 2003 (68 FR 17886). In that Notice, the Department indicated its then-current intent to continue the current polygraph program under a new rule. As the Secretary of Energy said upon release of that proposed rule, he ''concluded that it was appropriate at the present time to'' retain the current system ''in light of the current national security environment, the ongoing military operations in Iraq, and the war on Terrorism.'' At the same time, the Secretary recognized that in the longer term some changes might be appropriate. Therefore, the Department explicitly asked for public comment during a period which ended on June 13, 2003. The Secretary also personally wrote all laboratory directors inviting their comments and views on the proposed rule.

DOE received comments that were mostly critical of the proposal to retain the existing regulations. The comments especially took issue with DOE's proposal, despite the NAS Report, to continue with mandatory employee screening in the absence of an event or other good cause to administer a polygraph examination. Some of the comments recommended random screening as an alternative to mandatory screening. Others complained about the adequacy of the regulatory protections in 10 CFR part 709 against adverse personnel-related action as a result of exclusive reliance on adverse polygraph examination results. Some of the management comments of the DOE weapons laboratories expressed concern about the effect of the counterintelligence polygraph program on employee morale and recruitment. DOE's response to the major issues presented in these critical comments is reflected in parts II and III of this **SUPPLEMENTARY INFORMATION**. DOE invites those who filed comments in response to the April 14, 2003, preliminary notice of proposed rulemaking to reconsider their views in light of the substantial changes to 10 CFR part 709 that DOE has proposed in this notice.

Following the close of the comment period and consideration of public

comments, the Secretary then directed the Deputy Secretary of Energy to conduct a review of the current policy and its implementation history to date, the NAS Report, and the public and internal comments resulting from the Notice of Proposed Rulemaking, and to make recommendations based on his review. The Deputy Secretary worked closely with the Administrator of the National Nuclear Security Administration and the three directors of the nuclear weapons labs. He has discussed the issues with counterintelligence professionals, polygraph experts, and, as part of that review, he has also had access to classified summaries prepared by other Federal agencies regarding their use of polygraph as a screening tool for highly sensitive national security positions.

III. Basis for Supplemental Proposed Rule

The NAS report makes very clear how little we actually know—in a scientific sense—about the theory and practice of polygraphs, either in support of or against the use of polygraphs in a variety of contexts. DOE found many of the NAS's concerns about the ''validity'' of polygraph testing to be well taken. Some employees feel quite strongly that the polygraph is a dangerous tool that either has or will deprive us of the kind of talent that is needed to support our important national security programs. And, yet, DOE proposes to conclude that the utility of polygraphs is strong enough to merit their use in certain situations, for certain classes of individuals, and with certain protections that minimize legitimate concerns expressed by the NAS, employees of the Department and its contractors, and other observers.

DOE is therefore proposing substantial changes to how we use the polygraph in the context of the Department's counterintelligence program. In preparing today's proposal, DOE carefully weighed considerations of fairness to employees with national security objectives. DOE weighed the critical need to protect important classes of national security information against the reality that such information's value is realized in some situations only when shared among talented individuals, without which our national security would suffer. DOE weighed the possibility that individuals who might otherwise be critically important to our national security might not be able to contribute to our security if they choose another type of employment because they object to taking a polygraph exam. DOE weighed the possibility that a polygraph exam that is sensitive enough to raise the likelihood of ''catching'' someone who means to do harm to the United States is also sensitive enough to raise the risk that many ''innocent'' employees will have their lives and employment disrupted by an examination that is either inconclusive or wrongly indicates deception, thereby also potentially depriving the government of their services. Throughout, DOE has been guided by the NAS Report, a study of considerable rigor and integrity both in the sense of what it tells us about what we know and don't know about scientific evidence relating to the polygraph, and in its willingness to make clear the limitations under which the study was conducted.

Perhaps the most difficult issue involves the use of a polygraph as a screening tool, either as a pre-employment test, or as is the case with DOE, as a tool for determining access to certain types of information, programs, or materials. The NAS report points out that the generic nature of the questions asked in the traditional counterintelligence scope exam poses concerns for validity, concerns that are present to a lesser degree when a polygraph exam is focused on a specific set of facts or circumstances. Thus, the NAS report stated, ''we conclude that in populations of examinees such as those represented in the polygraph research literature, untrained in countermeasures, specific-incident polygraph tests can discriminate lying from truth telling at rates well above chance, though well below perfection.'' By contrast, ''polygraph accuracy for screening purposes is almost certainly lower than what can be achieved by specific-incident polygraph tests in the field.''

Adding to the difficulty for public policy makers is the NAS' conclusion that ''virtually all the available scientific evidence on polygraph test validity comes from studies of specific-event investigations'' rather than studies of polygraphs used as a screening tool, and the ''general quality of the evidence for judging polygraph validity is relatively low.'' However, several agencies within the U.S. intelligence community have utilized the counterintelligence scope polygraph for many years as part of both their hiring process and periodic security evaluations of on-board personnel. Those examinations have proved to be very valuable.

Federal agencies deploying the counterintelligence scope polygraph as a screening tool for initial hiring or initial access have detected applicants for classified positions within those agencies who were directed by foreign governments or entities to seek employment with the agencies in order to gain successful penetrations within the various U.S. Government components.

U.S. agencies have also benefited from the utilization of the polygraph screen as part of periodic security evaluations and re-investigations of federal employees and contractor personnel. Such examinations have resulted in multiple admissions in several different areas:

- Knowingly providing classified information to members of foreign intelligence services.
- Involvement in various stages of recruitment efforts by foreign intelligence services.
- Prior unreported contacts with known foreign intelligence officers.
- Efforts by employees to make clandestine contact with foreign diplomatic establishments or foreign intelligence officers.
- Serious contemplation of, or plans to commit, acts of espionage.
- Knowingly providing classified information to foreign nationals and uncleared U.S. persons.

As a result of admissions and subsequent investigations, federal agencies have disrupted on going clandestine relationships between employees/contractors and foreign intelligence officers, and stopped others in their beginning phases, or even before the clandestine relationships began.

If this were the end of the inquiry, it would be a relatively straightforward matter. The probability would be that use of the polygraph screen as one tool for counterintelligence would have a value that demanded its use in the context of access to information the protection of which is critical to our national security, even taking into account questions of employee morale and the resources necessary to sustain such a program. The value of its use in specific-incident investigations would be presumably greater still.

However, that cannot be the end of the inquiry. As the NAS Report makes clear, there are two fundamental issues that must still be confronted: problems associated with examination results that produce ''false positives'' (*i.e.*, where an ''innocent'' person's exam is either inconclusive, or wrongly indicates deception or a significant response meriting further investigation); or ''false negatives'' (*i.e.*, where a ''guilty'' person is judged to have ''passed'' an exam such that no follow up investigation is required). ''False positives'' pose a serious dilemma. They clearly affect the morale of those for whom such a result is reached, and at a certain number can plausibly be expected to affect the

morale of a sizeable portion of the workforce. They risk interrupting the careers of valuable contributors to our nation's defense, if only to fully investigate and clear someone who has not ''passed'' a polygraph. Both ways, therefore, they pose a very serious risk of depriving the United States of the vital services of individuals who may not be easily replaced. They also risk wasting valuable resources, particularly valuable security and counterintelligence resources that could more usefully be deployed in other ways. For all these reasons, therefore, false positives are a serious issue not only as a matter of individual justice but as a matter of the security of the United States.

What this means, in turn, is that the ratio of ''true positives'' to ''false positives'' is a very important consideration in evaluating the polygraph's utility as a screening tool. Unfortunately, we do not really know what that ratio actually is. It largely depends on the accuracy of the polygraph used in this way, as to which, as the NAS Study explains, for the reasons noted above, we do not have enough hard information to make anything more than an educated guess.

Nonetheless, the NAS's conclusion on this point is stark: ''Polygraph testing yields an unacceptable choice * * * Its accuracy in distinguishing actual or potential security violators from innocent test takers is insufficient to justify reliance on its use in employee security screening in federal agencies.''

The NAS analysis underlying this conclusion is very complex and varies somewhat depending on the ''sensitivity threshold'' at which the polygraph is set. There is no need to detail it fully here. However, the bottom line is that DOE found these concerns to be compelling, requiring a satisfactory response in order to continue the use of the polygraph as a counterintelligence tool for screening decisions.

The core of DOE's response is twofold. First, DOE believes that considerations brought out by the NAS Study strongly counsel in favor of ensuring that the types of information that require a screening polygraph in order to obtain access to them are the most critical to our national security, so that we are only incurring the costs that the screening polygraph will inevitably entail in order to protect our most vital information. That has led DOE to propose substantially lowering the number of persons that would be subject to mandatory polygraph screening.

Even in such cases, however, DOE still believes that the costs of allowing bottom-line decisions to be made based solely on a ''positive'' that stands a substantial chance of being a ''false positive'' are unacceptably high. DOE cannot afford them because they risk undermining the very national security goals we hope to attain. The NAS paragraph quoted above actually only goes to the use of the polygraph results as the sole basis for decisionmaking. It does not address the polygraph's use as an investigative lead, to be used in conjunction with other traditional investigative tools. So used, the polygraph seems to be far less problematic because DOE should be able to use these other tools to distinguish the false positives from the true positives. The NAS Report acknowledges that this approach can ameliorate the problems it identifies, noting that ''We believe that any agency that uses polygraphs as part of a screening process should, in light of the inherent fallibility of the polygraph instrument, use the polygraph results only in conjunction with other information, and only as a trigger for further testing and investigation.''

To put the point most simply: DOE knows of no investigative lead that is perfect. Most will identify a substantial number of instances of misconduct or ''false positives'' that do not check out. For example, anonymous tips are the bread and butter of investigations. If an anonymous tipster reports wrongdoing on someone's part that indicates danger to the national security, the report may be true. But it is also possible that the tipster misunderstood something and leapt to an unwarranted conclusion. And it is also possible that the tipster made up or distorted the report in order to slander the subject out of malice, envy, or because of some other grievance or motivation. Anonymity provides a cloak to the tipster that may result in the government's obtaining some true information it otherwise might not get, but it also lowers the costs to the tipster of lying.

Nevertheless, we do not rule out the use of anonymous tips to screen individuals for access to information, or for all kinds of other purposes. Rather, we accept them, but we investigate them. What we do not do, however, is assume they are true and treat them as the sole basis for decisionmaking.

Similarly, techniques in addition to the polygraph are utilized by U.S. Government agencies to determine whether to grant security clearances and determine access to classified information. Those techniques include, among others, national agency checks; credit and criminal checks; and interviews with co-workers. Any of those techniques, standing alone, could produce inaccurate information which, taken on its face without further verification, could lead to adverse consequences to the prospective or current employee. While no individual technique is perfect and without some potential for error, no one has suggested that we should abandon their use, or that we hire people and entrust them with national defense information with no prior checks or reviews whatsoever.

In DOE's view, it is not unreasonable to place the same kind of limited credence in a polygraph result that we place in many other kinds of information that we receive in the course of evaluating whether an individual should be given access to extremely sensitive information. Therefore, DOE believes it should continue to use the polygraph as one tool to assist in making that determination, but that it should not use it as the only tool. That, in turn, leads us to propose retaining the policy in the present rule against taking any ''adverse personnel action'' solely based on the test results of polygraph examinations. Moreover, we are proposing to retain the present policy that no adverse decision on ''access'' to certain information or programs will be made solely on the basis of such test results.

The bottom line is we intend that a polygraph screen operate as a ''trigger'' that may often be useful for subsequent evaluation, but standing alone, to be treated as having no conclusive evidentiary value. In every case of an adverse personnel action, it is DOE policy that such an action or decision is based on other information as well.

There remains the problem of ''false negatives,'' where a polygraph indicates ''no deception'' but the individual is actually being deceptive. The NAS report quite correctly highlights this as also a very real concern. DOE's review of this question persuades it that it is a certainty that any screening polygraph will produce a number of false negatives. These could in theory be significantly diminished by raising the sensitivity threshold of polygraph exams, but that almost certainly raises the numbers of false positives in a population like DOE's where virtually everyone is an honest patriot. Moreover, even this approach will not solve the problem, as we may still end up with a substantial number of false negatives.

Rather, what we must keep in mind is that every ''clearance'' procedure has the problem of ''false negatives.'' It is just as dangerous to simply assume that a successfully completed background check means that we ''know'' the person is loyal to the United States. All that we ''know'' is that we have not found any

evidence of disloyalty. The same should hold for thinking about what it means to ''pass'' a polygraph exam. We actually do not ''know'' that the person is not being deceptive. We simply have not found anything indicating that he or she is. The real life public policy challenge is that we have to make a judgment about how far we go, how many resources we expend, in the search for perfection when it comes to counterintelligence. Quite obviously, considering the many tens of thousands of Americans who have access to information or programs the protection of which is absolutely critical, we are forced to make a probabilistic judgment on how far is enough. The right way to think about this is ''defense in depth.'' One tool alone will not suffice. But many tools, among them the polygraph and other well-known tools, working together can reduce the risk to the greatest extent practical.

IV. Overview of Proposed Regulations

DOE is proposing that the new program, like the current program, be driven by access needs and apply equally to Federal and contractor employees. We will make no distinctions between political appointees or career service professionals. The function or information to which access is sought will be determinative.

DOE is proposing (at proposed section 709.3(a)) to retain a mandatory CI evaluation program including polygraph screening principally for individuals with ''regular and routine access'' to the most sensitive information. (The term ''regular and routine access'' is defined at proposed section 709.2.) The proposed rule, like the current regulation, would provide for a mandatory counterintelligence (CI) evaluation (hereafter referred to as CI evaluation), including a CI-scope polygraph examination prior to initial access being granted, as well as periodic CI evaluations at intervals not to exceed five years.

Overall, DOE's proposal would narrow the range of information, access to which will trigger mandatory screening as compared to the potential scope of the program under the current legislation. The approach in today's proposal would have the effect of reducing the number of individuals subject to mandatory screening from in excess of potentially 20,000 under the current legislation to approximately 4,500 under this new program.

In addition, DOE is proposing that some elements of the mandatory screening population remain essentially the same as under the current regulation. For example: all counterintelligence employees; all employees in the Headquarters Office of Intelligence and at the Field Intelligence Elements; and all employees in DOE Special Access Programs (and non-DOE Special Access Programs if a requirement of the program sponsor) will be included in the mandatory screening program. These employees would continue to be subject to mandatory screening because they have routine access to highly sensitive information, such as foreign intelligence information and other extremely close-hold and compartmented information.

DOE has searched for a test to identify the types of information that on balance would overcome the very real concerns about the validity of the polygraph screen. Most would agree that the polygraph should be reserved for only those programs or information, the protection of which is the most critical. As it happens, we have a well understood test of how to define the damage disclosure of certain information would present: the current classification levels of Confidential, Secret, and Top Secret. There are additional categories that are also important, but it seems that the definition of Top Secret is a better way to capture the information most precious to us: ''information, the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security''.

Thus, DOE is proposing including in the mandatory screening program those employees with ''regular and routine access'' to all DOE-originated ''Top Secret'' information, including Top Secret ''Restricted Data'' and Top Secret ''National Security Information.'' (The terms in quotation marks are defined at proposed section 709.2.) Top Secret Restricted Data is a clearly distinguishable criterion that identifies the weapons community's most sensitive information assets. Other non-weapons-related Top Secret information, categorized as Top Secret National Security Information, although not dealing with nuclear weapons, includes our most sensitive national security information. This category would not include everyone with a ''Q'' or a Top Secret clearance, nor would it include all weapons scientists; it would include only those employees who require continuing, routine access to Top Secret RD or other DOE-originated Top Secret information. This is a fairly small population.

The proposed rule also would include authority for certain managers, with input from the Office of Counterintelligence and subject to the approval by the Secretary, to include additional individuals within their offices or programs in the mandatory screening program. This authority would allow designation of individuals within the Office of the Secretary, the National Nuclear Security Administration, the Office of Security, the Office of Emergency Operations, the Office of Independent Oversight and Performance Assurance, and the Human Reliability Program (HRP) under 10 CFR part 712. (See proposed section 709.3(a)(6) and (f).) The criteria for conducting a risk assessment are set forth at section 709.3(e). Those criteria are: access on a non-regular and non-routine basis to top secret restricted data or top secret national security information or the nature and extent of access to other classified information; unescorted or unrestricted access to significant quantities or forms of special nuclear materials; and any other factors concerning the employee's responsibilities that are relevant to determining risk of unauthorized disclosure of classified information or materials.

DOE is proposing not to designate for mandatory CI evaluations screening all individuals in the HRP. The NDAA for FY 2000 originally mandated that everyone in this program be subject to a screening polygraph, and the NDAA for FY 2001 retained that mandate.

The NDAA for FY 2002, however, directs that the focus of DOE's polygraph program be the protection of classified data, materials or information. The HRP applies to individuals primarily not by reason of their access to classified information but because of their responsibilities for nuclear materials. Many, if not most, of the HRP individuals do not have routine access to the most sensitive classified information.

DOE envisions, as one element of the new program, that employees designated for mandatory screening under the new regulation would be allowed to retain access to classified information or materials pending scheduling of their first CI evaluation.

We now turn to an entirely new proposed element of the overall program—the random screening program. We have identified a universe of employees whose level and frequency of access, while not requiring mandatory screening, nevertheless warrants some additional measure of deterrence against damaging disclosures. (See proposed section 709.3(b).)

In reviewing the public policy dimensions of the polygraph, one is

struck by the ''either-or'' aspect of the debate: either you are subject to a polygraph, or you are not. This strikes DOE as too simplistic. The types of information we are concerned with do not easily fall into categories where either we fully deploy every tool we have to defend against disclosure or we do nothing. The classification regime itself acknowledges that there is a continuum, and that these determinations are based on less science and more judgment than is often admitted. Nonetheless, the problem of targeting is perhaps unique to DOE facilities, and especially our three weapons labs, in a way not present elsewhere in our national security complex. Nowhere else in America can someone—in one location—find not only our most sensitive nuclear weapons secrets, but secrets addressing other weapons of mass destruction, and special nuclear material.

There are many ways to deter and detect such targeting, and the security and counterintelligence functions at DOE command the full attention of DOE's leadership, substantial resources, large and highly trained protective forces, and security and access controls that are too numerous to list here. Nonetheless, we will do everything we can to strengthen our ability to detect and deter activities inimical to our interests. Thus, as a policy matter, unless there are very compelling countervailing considerations, we should pursue even modest additions to the arsenal of tools we deploy to deter dissemination of this information to our enemies given the potentially grave consequences of failure.

It is noteworthy that the NAS report, while questioning the validity of polygraph screens and their value in ''detection,'' also stated that ''polygraph screening may be useful for achieving such objectives as deterring security violations, increasing the frequency of admissions of such violations, [and] deterring employment applications from potentially poor security risks.''

As the NAS report notes, ''the value, or utility, of polygraph testing does not lie only in its validity for detecting deception. It may have a deterrent value * * *'' And, as the NAS report also notes, ''predictable polygraph testing (*e.g.*, fixed-interval testing of people in specific job classifications) probably has less deterrent value than random testing.'' This leads DOE to conclude that it is appropriate in some instances to include some form of screening beyond that routinely required to obtain and maintain access to classified information or materials that makes some use of the deterrent value of the polygraph. The random screening program is intended to meet this need and to supplement the mandatory screening program. Under the random screening portion of the program, CI evaluations would not be a condition of initial entry nor would individuals with access to the information at issue be subject to mandatory polygraphs at specific intervals. However, they would be subject to random selection for CI evaluations at any time, at any frequency. In essence, even though it is possible that an individual may never actually be selected through the random process, the individual could be subject to a (random) CI evaluation at any time, even if the individual recently completed one.

While the overall goal is one of deterrence, an associated benefit is that the random program serves to reduce the number of individuals in the mandatory program, allowing us to focus our resources more wisely. Thus, it will be DOE's policy to fashion a random CI evaluation program including polygraph that achieves the objectives of deterrence with the minimum reasonable percentage or number of individuals to which it applies. Since we estimate the total number of individuals who would be eligible for the random CI evaluations including polygraph to be small, the use of a minimum percentage means the total number of random polygraphs in any given year would be a much lower number. Proposed section 709.3(b) lists individuals whose occasional access to classified information or materials would merit screening. Again, the population associated with routine access to such information will not encompass the entire population of ''Q'' cleared individuals.

In addition, due to the interconnectedness of DOE sites and cyber networks and the volume of sensitive unclassified information, we are already taking steps to apply additional security controls (clearance requirements, segregation of duties, two-person rules, etc.) to system administrators of unclassified systems.

In addition to the mandatory and random screening programs, DOE is proposing a provision for conducting ''specific-incident'' polygraph examinations in response to specific facts or circumstances with potential counterintelligence implications with a defined foreign nexus. (See proposed section 709.3(c).) That recommendation also grows out of the NAS Report, which noted that this kind of use of the polygraph is the one for which the existing scientific literature provides the strongest support. The proposed rule also would provide for employee-requested polygraph examinations in the context of a specific incident. (See proposed section 709.3(c).)

The proposed rule would not retain the provision in the existing regulations concerning the use of polygraph examinations for the Accelerated Access Authorization Program (AAAP). Since AAAP is related exclusively to expedited interim access authorizations rather than to DOE's Counterintelligence Evaluation Program, it should not be covered by part 709. Nevertheless, DOE did undertake a review of the use of polygraph examinations as part of the AAAP, in light of the NAS report, to determine if it was unduly reliant on such examinations in granting interim access authorizations. DOE's review found that there are sufficient checks and balances in place that the continued use of polygraph examinations, together with the other components of the AAAP, is appropriate. Likewise, the proposed rule deletes the general provision in the existing regulations regarding employee requested polygraphs.

As the discussion above makes clear, the Department is strongly committed to maximizing protections against potential errors and adverse consequences and safeguarding the privacy of the employees who are subject to CI evaluations. Therefore the proposed rule would retain and enhance the protections already contained in the current regulation. The provisions we would retain include: written notification by DOE and written consent from the employee are required before a polygraph examination can be administered; a prohibition against recording a refusal to submit to a polygraph examination in an employee's personnel file; audio and video recordings of polygraph examination sessions would be made to protect both the employee and the polygrapher; all polygraph examination records and reports would be maintained in a system of records established under the Privacy Act; and strict qualification standards and standards of conduct for polygraphers would be established and enforced. Neither the polygrapher nor the Office of Counterintelligence would have the authority to make a decision to grant or deny access to information covered by part 709. That decision would be made by the Program Manager or the Secretary. The polygraph examination would be limited to topics concerning the individual's involvement in espionage, sabotage, terrorism, unauthorized disclosure of classified information, unauthorized foreign

contacts, and deliberate damage to or malicious misuse of a U.S. government information or defense system. The examiner would not be permitted to ask ''lifestyle'' questions, *e.g.*, drugs, crimes, and falsification of application.

Perhaps the most important aspect of these safeguards is how we address the problem of ''false positives.'' Assuming we adhere to the difficult policy choice that the continued use of polygraphs as both a screening tool and for resolving specific incidents is appropriate, we believe that it is absolutely necessary to ensure that we minimize to the greatest extent possible any morale effects of the polygraph, and do everything we can to prevent ''false positives'' from producing an unfair result to an employee.

Limiting the population of those subject to mandatory screening polygraphs is the most important step we can take to limit these kinds of problems. In addition, however, we are proposing a few improvements to the current rule. First, we would clarify that the sole purpose for which we use the polygraph as a screening tool is to assist us in making determinations about whether an individual may be given access to specific categories of highly sensitive information. Otherwise, DOE does not use it to make employment decisions at all, except to the extent that access to this information may be a critical element of someone's job.

The proposed rule also would make clear that it is DOE's policy not to base a denial of access solely on the results of a polygraph exam. (See proposed section 709.25(a).) This would be consistent with the NAS report's recommendation: ''We believe that any agency that uses polygraphs as part of a screening process should, in light of the inherent fallibility of the polygraph instrument, use the polygraph results only in conjunction with other information, and only as a trigger for further testing and investigation.''

The proposed rule also would improve the process for making decisions to grant, continue, or deny access to these high-risk programs by providing for a counterintelligence evaluation review board, including senior DOE officials, that may be convened by the Director of the Office of Counterintelligence to consider the results of counterintelligence evaluations that are not dispositive and to solicit the individual recommendations of the board members. The board could include the appropriate weapons laboratory director if the access determination involves a laboratory employee.

Because the policy choices discussed above lead to the conclusion that the polygraph should be just one tool of many, the proposed rule would make clear that polygraphs are just one element to be used in counterintelligence evaluations. The current rule refers to review of personnel security files and personal interviews in conjunction with the polygraph. The proposed rule would broaden this reference to provide that DOE may when appropriate employ other techniques, such as review of financial and credit information, net worth analyses, analyses of foreign travel and foreign contacts and connections, and other relevant information. Any such review by OCI will be conducted in accordance with Executive Order 12333, the DOE ''Procedures for Intelligence Activities,'' and other relevant laws, guidelines and authorities as may be applicable with respect to such matters.

In addition to a wider array of tools, better tools are needed to increase the reliability and validity of screening processes. The NAS report called for basic and applied scientific research into improved security screening techniques, and suggested that such an effort could be devoted in part to developing knowledge to put the polygraph technique on a firmer scientific foundation, which could strengthen its acceptance as a tool for detecting and deterring security threats. We have also identified a need for basic research into improved screening technologies, including but not limited to psychological and behavioral assessment techniques. It may be, as the NAS report suggests, that this research is best conducted under the auspices of an organization other than an agency that invests considerable resources in a counterintelligence polygraph program. DOE stands ready to lead or assist in such research.

V. Regulatory Review

A. National Environmental Policy Act

The proposed rule would retain the existing procedures for counterintelligence evaluations to include polygraph examinations and therefore will have no impact on the environment. DOE has determined that this rule is covered under the Categorical Exclusion in DOE's National Environmental Policy Act regulations in paragraph A.5 of appendix A to subpart D, 10 CFR part 1021, which applies to rulemakings amending an existing regulation that does not change the environmental effect of the regulations being amended. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601–612, requires preparation of an initial regulatory flexibility analysis for every rule that must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. This rulemaking will not directly regulate small businesses or small governmental entities. It will apply principally to individuals who are employees of, or applicants for employment by, some of DOE's prime contractors, which are large businesses. There may be some affected small businesses that are subcontractors, but the rule will not impose unallowable costs. Accordingly, DOE certifies that the proposed rule, if promulgated, will not have a significant economic impact on a substantial number of small entities.

C. Paperwork Reduction Act

DOE has determined that this proposed rule does not contain any new or amended record keeping, reporting or application requirements, or any other type of information collection requirements that require the approval of the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq*. The OMB has defined the term ''information'' to exclude certifications, consents, and acknowledgments that entail only minimal burden (5 CFR 1320.3(h)(1)).

D. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1531 *et seq.*, requires a Federal agency to perform a detailed assessment of the costs and benefits of any rule imposing a Federal mandate with costs to state, local, or tribal governments, or to the private sector of $100 million or more. The proposed rule does not impose a Federal mandate requiring preparation of an assessment under the Unfunded Mandates Reform Act of 1995.

E. Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act of 1999, (Public Law 105–277), requires Federal agencies to issue a Family Policymaking Assessment for any proposed rule that may affect family well being. This proposed rule will not have any impact on the autonomy or

integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

F. Executive Order 12866

In accordance with Executive Order 12866, the rule has been determined to be significant and has been reviewed by the Office of Management and Budget.

G. Executive Order 12988

Section 3(a) of Executive Order 12988, 61 FR 4729 (February 7, 1996) imposes on executive agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard, and promote simplification and burden reduction. Section 3(b) of Executive Order 12988 specifically requires that executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this proposed rule meets the relevant standards of Executive Order 12988.

H. Executive Order 13084

Under Executive Order 13084, 63 FR 27655 (May 19, 1998), DOE may not issue a discretionary rule that significantly or uniquely affects Indian tribal governments and imposes substantial direct compliance costs. This proposed rulemaking would not have such effects. Accordingly, Executive Order 13084 does not apply to this rulemaking.

I. Executive Order 13132

Executive Order 13132, 64 FR 43255 (August 10, 1999), requires agencies to develop an accountable process to ensure meaningful and timely input by state and local officials in the development of regulatory policies that have ''federalism implications.'' Policies that have federalism implications are defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations (65 FR 13735). DOE has examined this proposed rule and determined that it 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. No further action is required by the Executive Order.

J. Executive Review Under Order 13211

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy, Supply, Distribution, or Use), 66 FR 28355 (May 22, 2001) requires preparation and submission to OMB of a Statement of Energy Effects for significant regulatory action under Executive Order 12866 that are likely to have a significant adverse effect on the supply, distribution, or use of energy. This rulemaking, although significant, will not have such an effect. Consequently, DOE has concluded that there is no need for a Statement of Energy Effects.

K. Treasury and General Government Appropriations Act, 1999

The Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516, note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issues by OMB. OMB's guidelines were published at 67 FR 8452 (February 22, 2001), and DOE's guidelines were published at 67 FR 62446 (October 7, 2002). DOE has reviewed this notice of proposed rulemaking under the OMB and DOE guidelines, and has concluded that it is consistent with applicable policies in those guidelines.

VI. Opportunity for Public Comment

A. Written Comments

Interested members of the public are invited to participate in this proceeding by submitting data, views, or comments on this proposed rule. Ten copies of written comments should be submitted to the address indicated in the **ADDRESSES** section of this notice of proposed rulemaking. Comments should be identified on the outside of the envelope and on the comments themselves with the designation ''Counterintelligence Evaluation Regulation, Docket No. CN–03–RM–01.'' If anyone wishing to provide written comments is unable to provide ten copies, alternative arrangements can be made in advance with the DOE. All comments received on or before the date specified at the beginning of this notice, and other relevant information before final action is taken on the proposed rule, will be considered.

All submitted comments will be available for public inspection as part of the administrative record on file for this rulemaking in the DOE Freedom of Information Reading Room at the address indicated in the **ADDRESSES** section of this notice of proposed rulemaking. Pursuant to the provisions of 10 CFR 1004.11, anyone submitting information or data that he or she believes to be confidential and exempt by law from public disclosure should submit one complete copy of the document, as well as two copies, if possible, from which the information has been deleted. DOE will make its determination as to the confidentiality of the information and treat it accordingly.

B. Public Hearing

You will find the time and place of the public hearing listed at the beginning of this notice of proposed rulemaking. We invite any person who has an interest in today's notice of proposed rulemaking, or who is a representative of a group or class of persons that has an interest in these issues, to request an opportunity to make an oral presentation. If you would like to speak at the public hearing, please notify Andi Kasarsky at (202) 586–3012. You may also send your notification by mail or e-mail to the address given in the **ADDRESSES** section at the beginning of this notice of proposed rulemaking. The person making the request should briefly describe the nature of the interest in the rulemaking, and provide a telephone number for contact.

DOE will designate a DOE official to preside at the public hearing. The public hearing will not be a judicial or evidentiary-type hearing, but DOE will conduct it in accordance with 5 U.S.C. 553 and section 501 of the Department of Energy Organization Act (42 U.S.C. 7191). Oral statements should be limited to 10 minutes. At the conclusion of all initial oral statements, each person who

has made an oral statement will be given the opportunity, if he or she so desires, to make a rebuttal or clarifying statement. The statements will be given in the order in which the initial statements were made and will be subject to time limitations. Only those conducting the hearing may ask questions.

DOE will prepare a transcript of the hearing. DOE will retain the transcript and other records of this rulemaking and make them available for inspection in DOE's Freedom of Information Reading Room, as provided at the beginning of this notice of proposed rulemaking. Any person may purchase a copy of the transcript from the transcribing reporter.

The presiding official will announce any further procedural rules needed for the proper conduct of the hearing.

List of Subjects

10 CFR Part 709

Lie detector tests, Privacy.

10 CFR Part 710

Administrative practice and procedure, Classified information, Government contracts, Nuclear materials.

Issued in Washington, DC, on December 30, 2004.

Stephen W. Dillard,

Director, Office of Counterintelligence.

For the reasons stated in the preamble, DOE hereby proposes to amend chapter III of title 10 of the Code of Federal Regulations as follows:

1. Part 709 is revised to read as follows:

PART 709—COUNTERINTELLIGENCE EVALUATION PROGRAM

Subpart A—General Provisions

Sec.

709.1 Purpose.
709.2 Definitions.
709.3 Individuals subject to a CI evaluation and polygraph.
709.4 Notification of a CI evaluation.
709.5 Waiver of polygraph examination requirements.

Subpart B—CI Evaluation Protocols and Protection of National Security

709.10 Scope of a counterintelligence evaluation.
709.11 Topics within the scope of a polygraph examination.
709.12 Defining polygraph examination questions.
709.13 Implications of refusal to take a polygraph examination.
709.14 Consequences of a refusal to complete a CI evaluation including a polygraph examination.
709.15 Processing counterintelligence evaluation results.
709.16 Application of Counterintelligence Evaluation Review Boards in reaching conclusions regarding CI evaluations.
709.17 Final disposition of CI evaluation findings and recommendations.

Subpart C—Safeguarding Privacy and Employee Rights

709.21 Requirements for notification of a polygraph examination.
709.22 Individual rights to counsel or other representation.
709.23 Obtaining individual consent to a polygraph examination.
709.24 Other information provided to the individual prior to a polygraph examination.
709.25 Limits on use of polygraph examination results that reflect ''Significant Response'' or ''No Opinion''.
709.26 Protection of confidentiality of CI evaluation records to include polygraph examination records and other pertinent documentation.

Subpart D—Polygraph Examination and Examiner Standards

709.31 DOE standards for polygraph examiners and polygraph examinations.
709.32 Training requirements for polygraph examiners.

Authority: 42 U.S.C. 2011, *et seq.*, 7101, *et seq.*, 7144b, *et seq.*, 7383h–1; 50 U.S.C. 2401, *et seq.*

Subpart A—General Provisions

§ 709.1 Purpose.

This part:

(a) Describes the categories of individuals who are subject for counterintelligence evaluation processing;

(b) Provides guidelines for the counterintelligence evaluation process, including the use of counterintelligence-scope polygraph examinations, and for the use of event-specific polygraph examinations; and

(c) Provides guidelines for protecting the rights of individual DOE employees and DOE contractor employees subject to this part.

§ 709.2 Definitions.

For purposes of this part:

Access authorization means an administrative determination under the Atomic Energy Act of 1954, Executive Order 12968, or 10 CFR part 710 that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material.

Adverse personnel action means:

(1) With regard to a DOE employee, the removal, suspension for more than 14 days, reduction in grade or pay, or a furlough of 30 days or less as described in 5 U.S.C. chapter 75; or

(2) With regard to a contractor employee, the discharge, discipline, or denial of employment or promotion, or any other discrimination in regard to hire or tenure of employment or any term or condition of employment.

Contractor means any industrial, educational, commercial, or other entity, assistance recipient, or licensee, including an individual that has executed an agreement with DOE for the purpose of performing under a contract, license, or other agreement, and including any subcontractors of any tier.

Counterintelligence or CI means information gathered and activities conducted to protect against espionage, other intelligence activities, sabotage, or assassinations conducted for or on behalf of foreign powers, organizations or persons, or international terrorist activities, but not including personnel, physical, document or communications security programs.

Counterintelligence evaluation or CI evaluation means the process, including a counterintelligence scope polygraph examination, employed by the Office of Counterintelligence to make recommendations as to whether certain employees should have access to information or materials protected by this part.

Counterintelligence program office means the Office of Counterintelligence established under section 215 of the Department of Energy Organization Act (and any successor office to which that office's duties and authorities may be reassigned) and the Office of Defense Nuclear Counterintelligence established by section 3232 of the National Defense Authorization Act for Fiscal Year 2000 (and any successor office to which that office's duties and authorities may be reassigned).

Counterintelligence-scope or CI-scope polygraph examination means a polygraph examination using questions reasonably calculated to obtain counterintelligence information, including questions relating to espionage, sabotage, terrorism, unauthorized disclosure of classified information, deliberate damage to or malicious misuse of a United States Government information or defense system, and unauthorized contact with foreign nationals.

Covered person means an applicant for DOE or contractor employment, a DOE employee, a DOE contractor employee, and an detailee to DOE from another agency.

DOE means the Department of Energy including the National Nuclear Security Administration (NNSA).

Foreign nexus means specific indications that a subject DOE employee or contractor employee is or may be engaged in clandestine or unreported

relationships with foreign powers, organizations or persons, or international terrorists; contacts with foreign intelligence services; or other hostile activities directed against DOE facilities, property, personnel, programs or contractors by or on behalf of foreign powers, organizations or persons, or international terrorists.

Human reliability program means the program under 10 CFR part 712;

Intelligence means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations or foreign persons.

Local commuting area means the geographic area that usually constitutes one area for employment purposes. It includes any population center (or two or more neighboring ones) and the surrounding localities in which people live and can reasonably be expected to travel back and forth daily to their usual employment.

Materials means any ''nuclear explosive'' as defined in 10 CFR 712.3, and any ''special nuclear material,'' hazardous ''source material,'' and hazardous ''byproduct material'' as those terms are defined by the Atomic Energy Act of 1954 (42 U.S.C. 2014).

National security information means information that has been determined pursuant to Executive Order 12958, as amended by Executive Order 13292, or any predecessor order to require protection against unauthorized disclosure and is marked to indicate its classified status when in documentary form.

NNSA means DOE's National Nuclear Security Administration.

No opinion means an evaluation of a polygraph test by a polygraph examiner in which the polygraph examiner cannot render an opinion.

No significant response means an opinion indicating that the analysis of the polygraph charts revealed no consistent, significant, timely physiological responses to the relevant questions.

Polygraph examination means all activities that take place between a Polygraph Examiner and an examinee (person taking the test) during a specific series of interactions, including the pretest interview, the use of the polygraph instrument to collect physiological data from the examinee while presenting a series of tests, the test data analysis phase, and the post-test phase.

Polygraph examination records means all records of the polygraph examination, including the polygraph report, audio-video recording, and the polygraph consent form.

Polygraph instrument means a diagnostic instrument used during a polygraph examination, which is capable of monitoring, recording and/or measuring at a minimum, respiratory, electrodermal, and cardiovascular activity as a response to verbal or visual stimuli.

Polygraph report means a document that may contain identifying data of the examinee, a synopsis of the basis for which the examination was conducted, the relevant questions utilized, and the examiner's conclusion.

Polygraph test means that portion of the polygraph examination during which the polygraph instrument collects physiological data based upon the individual's responses to questions from the examiner.

Program Manager means a DOE official designated by the Secretary or the Head of a DOE Element to make an access determination under this part.

Random means a statistical process whereby eligible employees have an equal probability of selection for a CI evaluation each time the selection process occurs.

Regular and routine means access without further permission or individuals who access such information more than two times per quarter.

Relevant questions are those questions used during the polygraph examination that pertain directly to the issues for which the examination is being conducted.

Restricted data means all data concerning the design, manufacture, or utilization of atomic weapons; the production of special nuclear material; or the use of special nuclear material in the production of energy, but does not include data declassified or removed from the restricted data category pursuant to section 142 of the Atomic Energy Act of 1954.

Secret means the security classification that is applied to DOE-generated information or material the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security.

Secretary means the Secretary of Energy or the Secretary's designee.

Significant response means an opinion that the analysis of the polygraph charts revealed consistent, significant, timely physiological responses to the relevant questions.

Special Access Program or SAP means a program established under Executive Order 12958 for a specific class of classified information that imposes safeguarding and access requirements that exceed those normally required for information at the same classification level.

Suspend means temporarily to withdraw an employee's access to information or materials protected under § 709.3 of this part.

System Administrator means any individual who has privileged system, data, or software access that permits that individual to exceed the authorization of a normal system user and thereby override, alter, or negate integrity verification and accountability procedures or other automated and/or technical safeguards provided by the systems security assets for normal users.

Top Secret means the security classification that is applied to DOE-generated information or material the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security.

Unresolved issues means an opinion by a CI evaluator that the analysis of the information developed during a CI evaluation remains inconclusive and needs further clarification before a CI access recommendation can be made.

§ 709.3 Individuals subject to a CI evaluation and polygraph.

(a) *Mandatory CI evaluation.* Except as provided in § 709.5 of this part with regard to waivers, a CI evaluation, including a CI-scope polygraph examination, is required for any covered person who will have or has access to classified information or materials protected under this paragraph. Such an examination is required for covered persons who are incumbent employees at least once every five years and at intervals determined through random selection. This paragraph applies to covered persons:

(1) In a counterintelligence program office (or with programmatic reporting responsibility to a counterintelligence program office) because of access to classified information, or counterintelligence information, sources, and methods;

(2) In the DOE Office of Intelligence and all DOE field intelligence elements because of the direct, unrestricted nature of their employees' access to raw classified intelligence information;

(3) With access to information that is protected within a non-intelligence Special Access Program (SAP) designated by the Secretary;

(4) With regular and routine access to Top Secret Restricted Data;

(5) With regular and routine access to Top Secret National Security Information; and

(6) Designated, with approval of the Secretary, on the basis of a risk

assessment consistent with paragraph (e) and (f) of this section, by a Program Manager for the following DOE offices and programs (and any successors to those offices and programs): the Office of the Secretary; the Human Reliability Program; the National Nuclear Security Administration; the Office of Independent Oversight and Performance Assurance; the Office of Security; and the Office of Emergency Operations (OEO).

(b) *Random CI evaluation.* Except as provided in § 709.5 of this part with regard to waivers, DOE may require a CI evaluation, including a CI-scope polygraph examination, of covered persons who are incumbent employees selected on a random basis from the following:

(1) All employees in the Office of Security because of their access to classified information;

(2) All employees in the Office of Emergency Operations (OEO or any successor office) including DOE field offices or contractors who support OEO because of their access to classified information;

(3) All employees in the Office of Independent Oversight and Performance Assurance (or any successor office) because of access to classified information regarding the inspection and assessment of safeguards and security functions, including cyber security, of the DOE;

(4) All employees with regular and routine access to classified information concerning: the design and function of nuclear weapons use control systems, features, and their components (currently designated as Sigma 15); vulnerability of nuclear weapons to deliberate unauthorized nuclear detonation (currently designated as Sigma 14); and improvised nuclear device concepts or designs; and

(5) Any system administrator with access to a system containing classified information, as identified by the DOE or NNSA Chief Information Officer.

(c) *Specific incident polygraph examinations.* In response to specific facts or circumstances with potential counterintelligence implications with a defined foreign nexus, the Director of the Office of Counterintelligence may require a covered person with access to DOE classified information or materials to consent to and take an event-specific polygraph examination. Except as otherwise determined by the Secretary, on the recommendation of the appropriate Program Manager, if a covered person with access to DOE classified information or materials refuses to consent to or take a polygraph examination under this paragraph, then the Director of the Office of Counterintelligence will direct the denial of access (if any) to classified information and materials protected under paragraphs (a) and (b) of this section, and will refer the matter to the Office of Security for a review of access authorization eligibility under 10 CFR part 710. In addition, in the circumstances described in this paragraph, any covered person with access to DOE classified information or material may request a polygraph examination.

(d) *Risk assessment.* For the purpose of deciding whether to designate or remove employees for mandatory CI evaluations under paragraph (a)(6) of this section, Program Managers may consider:

(1)Access on a non-regular and non-routine basis to top secret restricted data or top secret national security information or the nature and extent of access to other classified information;

(2) Unescorted or unrestricted access to significant quantities or forms of special nuclear materials; and

(3) Any other factors concerning the employee's responsibilities that are relevant to determining risk of unauthorized disclosure of classified information or materials.

(e) Based on the risk assessments conducted under paragraph (e) of this section and in consultation with the Director of the Office of Counterintelligence, the Program Manager shall provide recommendations as to positions to be designated or removed under paragraph (a)(6) of this section for approval by the Secretary. Recommendations shall include a summary of the basis for designation or removal of the positions and of the views of the Director of Counterintelligence as to the recommendations.

(f) Not less than once every calendar year quarter, the responsible Program Manager must provide a list of all incumbent personnel covered above in paragraphs (a) and (b) of this section to the Director of the Office of Counterintelligence.

§ 709.4 Notification of a CI evaluation.

(a) If a polygraph examination is scheduled, DOE must notify the individual, in accordance with § 709.21of this part.

(b) Any job announcement or posting with respect to any position with access to classified information or materials protected under § 709.3(a) and (b) of this part must indicate that the selection of an individual for the position (§ 709.3(a)) or retention in that position (§ 709.3(a) and (b)) may be conditioned upon his or her successful completion of a CI evaluation, including a CI-scope polygraph examination.

(c) The Office of Counterintelligence provides advance notice to the affected Program Manager and laboratory/site/facility director of the individuals who are included in any random examinations that are administered in accordance with provisions at § 709.3(b).

§ 709.5 Waiver of polygraph examination requirements.

(a) *General.* The CI-scope polygraph examination requirement under § 709.3 of this part does not apply to:

(1) Any individual for whom the Director of the Office of Counterintelligence gives a waiver, based upon certification from another Federal agency that the individual has successfully completed a full scope or CI-scope polygraph examination administered within the previous five years;

(2) Any individual who is being treated for a medical or psychological condition that, based upon consultation with the individual and appropriate medical personnel, the Secretary or the Director of the Office of Counterintelligence determines would preclude the individual from being tested; or

(3) Any individual for whom the Secretary gives a written waiver in the interest of national security.

(b) *Submission of waiver requests.* Each request submitted under § 709.5(a)(2) shall assert the basis or waiver sought and shall be submitted, in writing, to the Director of the Office of Counterintelligence at the following address: U.S. Department of Energy, Attn: Director, Office of Counterintelligence, 1000 Independence Avenue, SW., Washington, DC 20585.

(c) *Disposition of waiver requests.* Decisions on waivers are issued in writing. If a waiver request is approved, the notification contains information regarding the duration of the waiver and any other relevant instructions, as deemed appropriate. If the waiver is denied, the notification explains the basis for the denial.

(d) *Reconsideration rights.* If a waiver is denied by the Director of the Office of Counterintelligence, the notification informs the candidate that a request for reconsideration by the Secretary of Energy may be filed within 30 days of receipt of the decision.

Subpart B—CI Evaluation Protocols and Protection of National Security

§ 709.10 Scope of a counterintelligence evaluation.

At a minimum, a counterintelligence evaluation consists of a counterintelligence-scope polygraph examination and a counterintelligence-based review of the covered individual's personnel security file. As set forth in § 709.15(b) and (c) of this part, a counterintelligence evaluation may also include other pertinent measures to address and resolve counterintelligence issues in accordance with Executive Order 12333, the DOE ''Procedures for Intelligence Activities,'' and other relevant laws, guidelines and authorities, as applicable.

§ 709.11 Topics within the scope of a polygraph examination.

(a) DOE may ask questions in a specific incident polygraph examination that are appropriate to a CI-scope examination or that are relevant to the counterintelligence concerns with a defined foreign nexus.

(b) A CI-scope polygraph examination is limited to topics concerning the individual's involvement in espionage, sabotage, terrorism, unauthorized disclosure of classified information, unauthorized foreign contacts, and deliberate damage to or malicious misuse of a U.S. government information or defense system.

(c) DOE may not ask questions that:

(1) Probe an individual's thoughts or beliefs;

(2) Concern conduct that has no CI implication with a defined foreign nexus; or

(3) Concern conduct that has no direct relevance to a CI evaluation.

§ 709.12 Defining polygraph examination questions.

The examiner determines the exact wording of the polygraph questions based on the examiner's pretest interview of the individual, the individual's understanding of the questions, established test question procedures from the Department of Defense Polygraph Institute, and other input from the individual.

§ 709.13 Implications of refusal to take a polygraph examination.

(a) Subject to § 709.14 of this part, an individual may refuse to take a polygraph examination pursuant to § 709.3 of this part, and an individual being examined may terminate the examination at any time.

(b) If an individual terminates a CI-scope examination prior to the completion of the examination, DOE may treat that termination as a refusal to take a polygraph examination under § 709.14.

§ 709.14 Consequences of a refusal to complete a CI evaluation including a polygraph examination.

(a) If an individual is an applicant for employment or assignment or a potential detailee and the individual refuses to complete a CI evaluation including a polygraph examination required by this part as an initial condition of access, DOE and its contractors must refuse to employ, assign, or detail that individual to the identified position.

(b) If an individual is an incumbent employee subject to a CI evaluation including a polygraph examination under § 709.3(a), (b), or (c), and the individual refuses to complete a CI evaluation, DOE and its contractors must deny that individual access to classified information and materials protected under § 709.3(a) and (b) and may take other actions consistent with the denial of access, including administrative review of access authorization under 10 CFR part 710. If the individual is a DOE employee, DOE may reassign or realign the individual's duties, or take other action, consistent with that denial of access and applicable personnel regulations.

(c) If a DOE employee refuses to take a CI polygraph examination, DOE may not record the fact of that refusal in the employee's personnel file.

§ 709.15 Processing counterintelligence evaluation results.

(a) *General.* A Counterintelligence Evaluation under this part consists of three elements:

(1) CI-scope polygraph examination;

(2) Review of the personnel security file; and

(3) Review of other relevant information available to DOE in accordance with applicable guidelines and authorities.

(b) If the polygraph examination and reviews under paragraph (a) of this section present unresolved foreign nexus issues that raise significant questions about the individual's access to classified information or materials protected under § 709.3 of this part that justified the counterintelligence evaluation, DOE may undertake a more comprehensive CI evaluation that may, in appropriate circumstances, include evaluation of financial, credit, travel, and other relevant information to resolve any identified issues. Participation by OCI in any such evaluation is subject to Executive Order 12333, the DOE ''Procedures for Intelligence Activities,'' and other relevant laws, guidelines, and authorities as may be applicable with respect to such matters.

(c) The Office of Counterintelligence may conduct an in-depth interview with the individual, may request relevant information from the individual, and may provide an opportunity for the individual to undergo an additional polygraph examination.

(d) Whenever information is developed by the Office of Security indicating counterintelligence issues, the Director of the Office of Security shall notify the Director of the Office of Counterintelligence.

(e) If, in carrying out a comprehensive CI evaluation of an individual under this section, there are significant unresolved issues, not exclusively related to polygraph examination results, indicating counterintelligence issues, then the Director of the Office of Counterintelligence shall notify the DOE national laboratory director (if applicable), plant manager (if applicable) and program manager(s) for whom the individual works that the individual is undergoing a CI evaluation pursuant to this part and that the evaluation is not yet complete.

§ 709.16 Application of Counterintelligence Evaluation Review Boards in reaching conclusions regarding CI evaluations.

(a) *General.* If the results of a counterintelligence evaluation are not dispositive, the Director of the Office of Counterintelligence may convene a Counterintelligence Evaluation Review Board to obtain the individual views of each member as assistance in resolving counterintelligence issues identified during a counterintelligence evaluation.

(b) *Composition.* A Counterintelligence Evaluation Review Board is chaired by the Director of the Office of Counterintelligence (or his/her designee) and includes representation from the appropriate line Program Managers, lab/site/facility management (if a contractor employee is involved), the DOE Senior Intelligence Officer, the DOE Office of Security and security directors for the DOE or NNSA site or operations office.

(c) When making a final recommendation under § 709.17 of this part, to a program manager, the Director of Counterintelligence shall report on the Counterintelligence Evaluation Review Board's views, including any consensus recommendation, or if the members are divided, a summary of majority and dissenting views.

§ 709.17 Final disposition of CI evaluation findings and recommendations.

(a) Following completion of a CI evaluation, the Director of the Office of Counterintelligence must recommend, in writing, to the appropriate Program Manager that the individual's access be approved or retained, or denied or revoked.

(b) If the Program Manager agrees with the recommendation, the Program Manager will notify the individual that the individual's access has been approved or retained, or denied or revoked.

(c) If the Program Manager disagrees with recommendation of the Director of the Office of Counterintelligence, the matter is referred to the Secretary for a final decision.

(d) If the Program Manager denies or revokes the individual's access, and the individual is a DOE employee, DOE may reassign the individual or realign the individual's duties within the local commuting area or take other actions consistent with the denial of access.

(e) If the Program Manager revokes the access of an individual detailed to DOE, DOE may remove the individual from access to the information that justified the CI evaluation and return the individual to the agency of origin.

(f) For cases involving a question of loyalty to the United States, the Director of the Office of Counterintelligence may refer the matter to the FBI as required by section 145d of the AEA. For cases indicating that classified information is being, or may have been, disclosed in an unauthorized manner to a foreign power or an agent of a foreign power, DOE is required by 50 U.S.C. 402a(e) to refer the matter to the Federal Bureau of Investigation.

(g) Utilizing the DOE security criteria for granting or denying an access authorization under 10 CFR part 710, the Office of Counterintelligence makes a determination whether an individual completing a CI evaluation has made disclosures that warrant referral, as appropriate, to the Office of Security or the Manager of the applicable DOE/NNSA Site, Operations Office or Service Center. The Office of Counterintelligence does not report minor security infractions that do not create a serious question as to the individual's eligibility for a personnel security clearance.

Subpart C—Safeguarding Privacy and Employee Rights

§ 709.21 Requirements for notification of a polygraph examination.

When a polygraph examination is scheduled, the DOE must notify the individual, in writing, of the date, time, and place of the polygraph examination, the provisions for a medical waiver, and the individual's right to obtain and consult with legal counsel or to secure another representative prior to the examination. DOE must provide a copy of this part to the individual. The individual must receive the notification at least ten days, excluding weekend days and holidays, before the time of the examination except when good cause is shown or when the individual waives the advance notice provision.

§ 709.22 Individual rights to counsel or other representation.

(a) At the individual's own expense, an individual has the right to obtain and consult with legal counsel or another representative. The counsel or representative may not be present during the polygraph examination. Except for interpreters and signers, no one other than the individual and the examiner may be present in the examination room during the polygraph examination.

(b) At the individual's own expense, an individual has the right to obtain and consult with legal counsel or another representative at any time during an interview conducted in accordance with § 709.15 of this part.

§ 709.23 Obtaining individual consent to a polygraph examination.

DOE may not administer a polygraph examination unless DOE:

(a) Notifies the individual of the polygraph examination in writing in accordance with § 709.21of this part; and

(b) Obtains written consent from the individual prior to the polygraph examination.

§ 709.24 Other information provided to the individual prior to a polygraph examination.

Before administering the polygraph examination, the examiner must:

(a) Inform the individual of the use of audio and video recording devices and other observation devices, such as two-way mirrors and observation rooms;

(b) Explain to the individual the characteristics and nature of the polygraph instrument and examination;

(c) Explain the physical operation of the instrument and the procedures to be followed during the examination;

(d) Review with the individual the relevant questions to be asked during the examination;

(e) Advise the individual of the individual's privilege against self-incrimination; and

(f) Provide the individual with a pre-addressed envelope addressed to the Director of the Office of Counterintelligence in Washington, DC, which may be used to submit a quality assurance questionnaire, comments or complaints concerning the examination.

§ 709.25 Limits on use of polygraph examination results that reflect ''Significant Response'' or ''No Opinion''.

DOE or its contractors may not:

(a) Take an adverse personnel action against an individual or make an adverse access recommendation solely on the basis of a polygraph examination result of ''significant response'' or ''no opinion''; or

(b) Use a polygraph examination that reflects ''significant response'' or ''no opinion'' as a substitute for any other required investigation.

§ 709.26 Protection of confidentiality of CI evaluation records to include polygraph examination records and other pertinent documentation.

(a) DOE owns all CI evaluation records, including polygraph examination records and reports and other evaluation documentation.

(b) Except as provided in paragraph (c) of this section, the Office of Counterintelligence maintains all CI evaluation records to include polygraph examination records and other pertinent documentation acquired in conjunction with a counterintelligence evaluation in a system of records established under the Privacy Act of 1974 (5 U.S.C. 552a).

(c) The Office of Intelligence also may maintain polygraph examination reports generated with respect to individuals identified under § 709.3(a)(2) in a system of records established under the Privacy Act of 1974.

(d) DOE must afford the full privacy protection provided by law to information regarding an employee's refusal to participate in a CI evaluation to include a polygraph examination and the completion of other pertinent documentation.

(e) With the exception of the polygraph report, all other polygraph examination records are destroyed ninety days after the CI evaluation is completed, provided that a favorable recommendation has been made to grant or continue the access to the position. If a recommendation is made to deny or revoke access to the information or involvement in the activities that justified conducting the CI evaluation, then all the records are retained at least until the final resolution of any request for reconsideration by the individual or the completion of any ongoing investigation.

Subpart D—Polygraph Examination and Examiner Standards

§ 709.31 DOE standards for polygraph examiners and polygraph examinations.

(a) DOE adheres to the procedures and standards established by the Department of Defense Polygraph Institute (DODPI). DOE administers only DODPI approved testing formats.

(b) A polygraph examiner may administer no more than five polygraph examinations in any twenty-four hour period. This does not include those instances in which an individual voluntarily terminates an examination prior to the actual testing phase.

(c) The polygraph examiner must be certified to conduct polygraph examinations under this part by the DOE Psychophysiological Detection of Deception/Polygraph Program Quality Control Official.

(d) To be certified under paragraph (c) of this section, an examiner must have the following minimum qualifications:

(1) The examiner must be an experienced CI or criminal investigator with extensive additional training in using computerized instrumentation in Psychophysiological Detection of Deception and in psychology, physiology, interviewing, and interrogation.

(2) The examiner must have a favorably adjudicated single-scope background investigation, complete a CI-scope polygraph examination, and must hold a ''Q'' access authorization, which is necessary for access to Secret Restricted Data and Top Secret National Security Information. In addition, he or she must have been granted SCI access approval.

(3) The examiner must receive basic Forensic Psychophysiological Detection of Deception training from the DODPI.

§ 709.32 Training requirements for polygraph examiners.

(a) Examiners must complete an initial training course of thirteen weeks, or longer, in conformance with the procedures and standards established by DODPI.

(b) Examiners must undergo annual continuing education for a minimum of forty hours training within the discipline of Forensic Psychophysiological Detection of Deception.

(c) The following organizations provide acceptable curricula to meet the training requirement of paragraph (b) of this section:

(1) American Polygraph Association;

(2) American Association of Police Polygraphists; and

(3) Department of Defense Polygraph Institute.

PART 710—CRITERIA AND PROCEDURES FOR DETERMINING ELIGIBILITY FOR ACCESS TO CLASSIFIED MATTER OR SPECIAL NUCLEAR MATERIAL

2. The authority citation for part 710 is revised to read as follows:

Authority: 42 U.S.C. 2165, 2201, 5815, 7101, *et seq.*; 7383h–1; 50 U.S.C. 2401, *et seq.;* E.O. 10450, 3 CFR 1949–1953 Comp. p. 936, *as amended;* E.O. 10865, 3 CFR 1959–1963 Comp. 398, *as amended.*

3. Section 710.6 is amended by redesignating paragraph (a) as paragraph (a)(1) and by adding a new paragraph (a)(2) which reads as follows:

§ 710.6 Cooperation by the individual.

(a) * * *

(2) It is the responsibility of an individual subject to 10 CFR 709.3(c) to consent to and take an event-specific polygraph examination. A refusal to consent to or take such an examination may prevent DOE from reaching an affirmative finding required for continuing access authorization. In this event, DOE may suspend or terminate any access authorization.

* * * * *

[FR Doc. 05–248 Filed 1–6–05; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2004–19813; Airspace Docket No. 04–AAL–26]

Proposed Revision of Class E Airspace; Point Lay, AK

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This action proposes to revise the Class E airspace at Point Lay, AK. Three new Standard instrument approach procedures (SIAP's) are being published for Point Lay, AK. Additional Class E airspace is needed to contain aircraft executing instrument approaches at Point Lay Airport. Adoption of this proposal would result in additional Class E airspace upward from 1,200 feet (ft.) above the surface at Point Lay, AK.

DATES: Comments must be received on or before February 22, 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–2004–19813/Airspace Docket No. 04–AAL–26, 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 Manager, Safety, Alaska Flight Services Operations, Federal Aviation Administration, 222 West 7th Avenue, Box 14, Anchorage, AK 99513–7587.

FOR FURTHER INFORMATION CONTACT: Jesse Patterson, AAL–538G, Federal Aviation Administration, 222 West 7th Avenue, Box 14, Anchorage, AK 99513–7587; telephone number (907) 271–5898; fax: (907) 271–2850; e-mail: *Jesse.CTR.Patterson@faa.gov.* Internet address: *http://www.alaska.faa.gov/at.*

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 notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2004–19813/Airspace Docket No. 04–AAL–26.'' 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 notice may be changed in light of comments received. All comments submitted will be available for examination in the

public docket 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 Notice of Proposed Rulemakings (NPRMs)

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 NPRMs 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 the Code of Federal Regulations (14 CFR part 71), by adding Class E airspace at Point Lay, AK. The intended effect of this proposal is to revise Class E airspace upward from 1,200 ft. above the surface to contain Instrument Flight Rules (IFR) operations at Point Lay, AK.

The FAA Instrument Flight Procedures Production and Maintenance Branch has developed three new SIAPs for the Point Lay Airport. The new approaches are (1) Area Navigation (Global Positioning System) (RNAV GPS) Runway (RWY) 5, original; (2) RNAV (GPS) RWY 23, original; and (3) Non-directional Beacon (NDB) RWY 5, original. Revised Class E controlled airspace extending upward from 1,200 ft above the surface within the 46-mile radius of the Point Lay Airport would be created by this action. The proposed airspace is sufficient to contain aircraft executing the new instrument procedures for the Point Lay Airport.

The area would be depicted on aeronautical charts for pilot reference. The coordinates for this airspace docket are based on North American Datum 83. The Class E airspace areas designated as 700/1200 foot transition areas are published in paragraph 6005 in FAA Order 7400.9M, *Airspace Designations and Reporting Points,* dated August 30, 2004, and effective September 16, 2004, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document would be published subsequently in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(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 rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle 1, section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in subtitle VII, part A, subpart 1, section 40103, Sovereignty and use of airspace. Under that section, the FAA is charged with prescribing regulations to ensure the safe and efficient use of the navigable airspace. This regulation is within the scope of that authority because in proposes to revise Class E airspace sufficient to contain aircraft executing instrument approaches at Point Lay Airport and represents the FAA's continuing effort to safely and efficiently use the navigable airspace.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

In consideration of the foregoing, 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 14 CFR 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 Federal Aviation Administration Order 7400.9M, *Airspace Designations and Reporting Points,* dated August 30, 2004, and effective September 16, 2004, is to be amended as follows:

* * * * *

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

* * * * *

AAL AK E5 Point Lay, AK [Revised]

Point Lay Airport, AK
(Lat. 69°43′58″ N., long. 163°00′19″ W.)

That airspace extending upward from 700 feet above the surface within an 8-mile radius of the Point Lay Airport and that airspace extending upward from 1,200 feet above the surface within a 46-mile radius of the Point Lay Airport, excluding that airspace outside 12 nautical miles from the State of Alaska shoreline.

* * * * *

Issued in Anchorage, AK, on December 30, 2004.

Anthony M. Wylie,

Acting Area Director, Alaska Flight Services Area Office.

[FR Doc. 05–295 Filed 1–6–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2004–19580; Airspace Docket No. 04–ACE–70]

Proposed Establishment of Class E2 Airspace; and Modification of Class E5 Airspace; Ames, IA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice proposes to create a Class E surface area at Ames, IA. It also proposes to modify the Class E5 airspace at Ames, IA.

DATES: Comments for inclusion in the Rules Docket must be received on or before March 1, 2005.

ADDRESSES: Send comments on this 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–2004–19580/ Airspace Docket No. 04–ACE–70, 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.

FOR FURTHER INFORMATION CONTACT: Brenda Mumper, Air Traffic Division, Airspace Branch, ACE–520A, DOT Regional Headquarters Building, Federal Aviation Administration, 901 Locust, Kansas City, MO 64106; telephone: (816) 329–2524.

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 notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2004–19580/Air Docket No. 04–ACE–70.'' The postcard will be date/time stamped and returned to the commenter.

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

This notice proposed to amend part 71 of the Federal Aviation Regulations (14 CFR part 71) to establish Class E airspace designated as a surface area for an airport at Ames, IA. Controlled airspace extending upward from the surface of the earth is needed to contain aircraft executing approach procedures to Ames Municipal Airport. Weather observations would be provided by an Automatic Surface Observing System (ASOS) and communications would be direct with Des Moines Terminal Radar Approach Control Facility.

This notice also proposes to revise the Class E airspace area extending upward from 700 feet above the surface at Ames, IA. An examination of this Class E airspace area for Ames, IA revealed its extensions are unnecessary and do not comply with FAA airspace directives This proposal would correct these discrepancies by eliminating the extensions, defining airspace of appropriate dimensions to protect aircraft departing and executing instrument approach procedures to Ames Municipal Airport and bringing the airspace area into compliance with FAA directives. Both areas would be depicted on appropriate aeronautical charts.

Class E airspace areas designated as surface areas are published in Paragraph 6002 of FAA Order 7400.9M, dated August 30, 2004, and effective September 16, 2004, which is incorporated by reference in 14 CFR 71.1. Class E airspace areas extending upward from 700 feet or more above the surface of the earth are published in Paragraph 6005 of the same Order. The Class E airspace designations listed in this document would be published subsequently in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore, (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 rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

This proposed rulemaking is promulgated under the authority described in subtitle VII, part A, subpart I, section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This proposed regulation is within the scope of that authority since it would contain aircraft executing instrument approach procedures to Ames Municipal Airport.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (Air).

The Proposed Amendment

In consideration of the foregoing, 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 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 6002 Class E airspace designated as surface areas.

* * * * *

ACE IA E2 Ames, IA,

Ames Municipal Airport, IA,
(Lat. 41°59′31″ N., long. 93°37′19″ W.)

Within a 4.1-mile radius of Ames Municipal Airport and within 1.8 miles each side of the 197° bearing from the airport

extending from the 4.1-mile radius to 4.9 miles south of the airport.

* * * * *

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

* * * * *

ACE IA E5 Ames, IA,

Ames Municipal Airport, IA,
(Lat. 41°59′31″ N., long. 93°37′19″ W.)

That airspace extending upward from 700 feet above the surface within a 6.6-mile radius of Ames Municipal Airport.

* * * * *

Issued in Kansas City, MO, on December 22, 2004.

Rosalyn R. Ward,

Acting Area Director, Western Flight Services Operations.

[FR Doc. 05–373 Filed 1–6–04; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2004–19579; Airspace Docket No. 04–ACE–69]

Proposed Establishment of Class E2 Airspace; and Modification of Class E5 Airspace; Newton, KS

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice proposes to create a Class E surface area at Newton, KS. It also proposes to modify the Class E5 airspace at Newton, KS.

DATES: Comments for inclusion in the Rules Docket must be received on or before March 1, 2005.

ADDRESSES: Send comments on this 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–2004–19579/ Airspace Docket No. 04–ACE–69, 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.

FOR FURTHER INFORMATION CONTACT: Brenda Mumper, Air Traffic Division, Airspace Branch, ACE–530A, DOT Regional Headquarters Building, Federal Aviation Administration, 901 Locust, Kansas City, MO 64106; telephone: (816) 329–2524.

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 notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2004–19579/Airspace Docket No. 04–ACE–69.'' The postcard will be date/time stamped and returned to the commenter.

Availability of NPRMs

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 Documents' 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 NPRMs 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

This notice proposes to amend part 71 of the Federal Aviation Regulations (14 CFR part 71) to establish Class E airspace designated as a surface area for an airport at Newton, KS. Controlled airspace extending upward from the surface of the earth is needed to contain aircraft executing instrument approach procedures to Newton-City-County Airport. Weather observations would be provided by an Automatic Weather Observing/Reporting System (AWOS) and communications would be direct with Wichita Terminal Radar Approach Control Facility.

This notice also proposes to revise the Class E airspace area extending upward from 700 feet above the surface at Newton, KS. An examination of this Class E airspace area for Newton, KS revealed discrepancies in its extension. This proposal would correct these discrepancies. The areas would be depicted on appropriate aeronautical charts.

Class E airspace areas designated as surface areas are published in Paragraph 6002 of FAA Order 7400.9M, dated August 30, 2004, and effective September 16, 2004, which is incorporated by reference in 14 CFR 71.1. Class E airspace areas extending upward from 700 feet or more above the surface of the earth are published in Paragraph 6005 of the same Order. The Class E airspace designations listed in this document would be published subsequently in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore, (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 rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

This proposed rulemaking is promulgated under the authority described in subtitle VII, part A, subpart I, section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This proposed regulation is within the scope of that authority since it would contain aircraft executing instrument approach procedures to Newton-City-County Airport.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (Air).

The Proposed Amendment

In consideration of the foregoing, 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 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 6002 Class E airspace designated as surface areas.

* * * * *

ACE KS E2 Newton, KS,

Newton-City-County Airport, KS,
(Lat. 38°05′26″ N., long. 97°16′31″ W.)
Newton NDB,
(Lat. 38°03′51″ N., long. 97°16′24″ W.)

Within a 4.2-mile radius of Newton-City-County Airport and within 2.5 miles each side of the 185° bearing from the Newton NDB extending from the 4.2-mile radius of the airport to 7 miles south of the NDB.

* * * * *

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

* * * * *

ACE KS E5 Newton, KS,

Newton-City-County Airport, KS,
(Lat. 38°05′26″ N., long. 97°16′31″ W.)
Newton NDB
(Lat. 38°03′51″ N., long. 97°16′24″ W.)

That airspace extending upward from 700 feet above the surface within a 6.7-mile radius of Newton-City-County Airport, and within 2.5 miles each side of the 185° bearing from the Newton NDB extending from the 6.7-mile radius of the airport to 7 miles south of the NDB.

* * * * *

Dated: Issued in Kansas City, MO, on December 22, 2004.

Rosalyn R. Ward,

Acting Area Director, Western Flight Services Operations.

[FR Doc. 05–374 Filed 1–6–04; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–128767–04]

RIN 1545–BD48

Treatment of Disregarded Entities Under Section 752; Hearing Cancellation

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Cancellation of notice of public hearing on proposed rulemaking.

SUMMARY: This document provides cancellation of a public hearing for proposed regulations that provide rules under section 752 for taking into account certain obligations of a business entity that is disregarded as separate from its owner under section 856(i), 1361(b)(3), or §§ 301.7701–1 through 301.7701–3 (disregarded entity) for purposes of characterizing and allocating partnership liabilities.

DATES: The public hearing originally scheduled for January 14, 2005, at 10 a.m., is cancelled.

FOR FURTHER INFORMATION CONTACT: Robin R. Jones of the Publications and Regulations Branch, Legal Processing Division at (202) 622–7180 (not a toll-free number).

SUPPLEMENTARY INFORMATION: A notice of proposed rulemaking appeared in the **Federal Register** on Thursday, August 12, 2004 (69 FR 49832). The notice of public hearing appeared in the **Federal Register** on Tuesday, November 30, 2004 (69 FR 69557) announcing that a public hearing was scheduled for January 14, 2005, at 10 a.m., in the auditorium. The subject of the public hearing is proposed regulations under section 752 of the Internal Revenue Code. The public comment period for these regulations expired on November 10, 2004. Outlines of oral comments were due on December 24, 2004.

The notice of public hearing, instructed those interested in testifying at the public hearing to submit an outline of the topics to be addressed. As of Tuesday, January 4, 2005, no one has requested to speak. Therefore, the public hearing scheduled for January 14, 2005, is cancelled.

Cynthia E. Grigsby,

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

[FR Doc. 05–393 Filed 1–4–05; 4:19 pm]

BILLING CODE 4830–01–U

DEPARTMENT OF HOMELAND SECURITY

33 CFR Part 151

[USCG–2004–19621]

RIN 1625–AA89

Dry Cargo Residue Discharges in the Great Lakes; Correction

AGENCY: Coast Guard, DHS.

ACTION: Notice of inquiry; correction.

SUMMARY: The Coast Guard published a document in the **Federal Register** of December 27, 2004, requesting information about the current status of dry cargo operations on the Great Lakes. The document contained an incorrect **ACTION** caption.

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.*

Correction

In the **Federal Register** of December 27, 2004, in FR Doc. 04–28227, (69 FR 77147), correct the **ACTION** caption to read:

ACTION: Notice of inquiry.

Dated: December 30, 2004.

David L. Nichols,

CDR, USCG Chief, Office of Regulations and Administrative Law, Acting.

[FR Doc. 05–215 Filed 1–6–05; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[COTP Mobile–04–057]

RIN 1625–AA87

Security Zone; Port of Mobile, Mobile Ship Channel, Mobile, AL

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to establish permanent security zones around all cruise ships while transiting or moored in the Port of Mobile and Mobile Ship Channel shoreward of the Mobile Sea Buoy. These proposed security zones are needed to ensure the safety and security of these vessels. Entry into these proposed zones would be prohibited unless specifically authorized by the Captain of the Port Mobile or a designated representative.

DATES: Comments and related material must reach the Coast Guard on or before February 7, 2005.

ADDRESSES: You may mail comments and related material to Marine Safety Office Mobile, Brookley Complex, Bldg 102, South Broad Street, Mobile, AL 36615–1390, Attn: LT Maurice York. Marine Safety Office Mobile maintains the public docket for this rulemaking. Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, will become part of this docket and will be available for inspection or copying at Marine Safety Office Mobile, Brookley Complex, Bldg 102, South Broad Street, Mobile, AL 36615–1390 between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Lieutenant (LT) Maurice York, Operations Department, Marine Safety Office Mobile, at (251) 441–5940.

SUPPLEMENTARY INFORMATION:

Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related material. If you do so, please include your name and address, identify the docket number for this rulemaking [COTP Mobile 04–057], indicate the specific section of this document to which each comment applies, and give the reason for each comment. Please submit all comments and related material in an unbound format, no larger than 8½ by 11 inches, suitable for copying. If you would like to know they reached us, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this proposed rule in view of them.

Public Meeting

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

Background and Purpose

On September 11, 2001, both towers of the World Trade Center and the Pentagon were attacked by terrorists. The President has continued the national emergencies he declared following those attacks (69 FR 55313 (Sep. 13, 2004) (continuing the emergency declared with respect to terrorist attacks); 69 FR 56923 (Sep. 22, 2004) (continuing emergency with respect to persons who commit, threaten to commit or support terrorism). The President also has found pursuant to law, including the Magnuson Act (50 U.S.C. 191 *et seq.*), that the security of the United States is and continues to be endangered following the terrorist attacks (E.O. 13,273, 67 FR 56215 (Sep. 3, 2002) (security of U.S. endangered by disturbances in international relations of U.S and such disturbances continue to endanger such relations). In response to these terrorist acts and warnings, heightened awareness for the security and safety of all vessels, ports, and harbors is necessary.

On November 12, 2004, the Coast Guard published a temporary final rule entitled ''Security Zone; Port of Mobile, Mobile Ship Channel, Mobile, AL'' (69 FR 65373). This temporary final rule established security zones around cruise ships when transiting the Mobile Ship Channel and Port of Mobile, as well as when moored in the Port of Mobile. This temporary final rule will expire at 6 p.m. on April 14, 2005. However, due to the increased security concerns surrounding the transit of cruise ships, the Captain of the Port Mobile is proposing to establish permanent security zones around all cruise ships while such vessels are transiting the Mobile Ship Channel or Port of Mobile, and while moored in the Port of Mobile.

Discussion of Proposed Rule

The Captain of the Port Mobile proposes to establish permanent security zones for the Port of Mobile and Mobile Ship Channel. This proposed rule would establish security zones that prohibit movement within 25 yards of all cruise ships while moored in the Port of Mobile, and would prohibit movement within 100 yards of any cruise ship while transiting the Mobile Ship Channel or the Port of Mobile. For the purpose of this rule the term ''cruise ship'' is defined as a passenger vessel over 100 gross tons, carrying more than 12 passengers for hire, making a voyage lasting more than 24 hours any part of which is on the high seas, and for which passengers are embarked or disembarked in the United States or its territories. This definition covers passenger vessels that must comply with 33 CFR parts 120 and 128.

These security zones would be enforced when a cruise ship transiting inbound passes the Mobile Sea Buoy in approximate position 28°07′50″ N, 88°04′12″ W, at all times during transit through the Mobile Ship Channel and Port of Mobile, and while moored in the Port of Mobile. A security zone would also exist during each cruise ship's transit outbound of the Port of Mobile and the Mobile Ship Channel. Enforcement of the security zones would cease once the cruise ship passes the Mobile Sea Buoy on its outbound voyage.

These proposed security zones are needed to protect the safety of life, property, and the environment in the area. All vessels would be prohibited from moving within these zones unless specifically authorized by the Captain of the Port Mobile, or a designated representative. Persons or vessels that desire to enter into one of these proposed security zones for the purpose of passing or overtaking a cruise ship that is in transit on the Mobile Ship Channel or in the Port of Mobile would be required to contact the on-scene Coast Guard representative, request permission to conduct such action, and receive authorization from the on-scene Coast Guard representative prior to initiating such action. The on-scene Coast Guard representative may be contacted on VHF–FM channel 16. All persons and vessels authorized to enter into a security zone must obey any direction or order of the Captain of the Port or designated representative.

The Captain of the Port Mobile or a designated representative would inform the public through broadcast notice to mariners of the enforcement periods for the security zone.

Regulatory Evaluation

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

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

These proposed security zones would only be enforced while cruise ships are located shoreward of the Mobile Sea Buoy, are transiting the Mobile Ship Channel, and are moored in the Port of Mobile. Once a cruise ship is moored in the Port of Mobile, the security zone would be reduced to 25 yards. While the cruise ship is moored, other vessels would be able to safely transit around this zone provided they approach no

closer than 25 yards. Additionally, while a cruise ship is in transit on the Mobile Ship Channel or in the Port of Mobile, the Captain of the Port or a designated representative may allow other persons or vessels to enter into the security zone for the purpose of passing or overtaking a cruise ship if such persons or vessels obtain permission from the on-scene Coast Guard representative prior to initiating such action.

Notifications of the enforcement periods of this security zone would be made to the marine community through broadcast notice to mariners. The impacts on routine navigation are expected to be minimal.

Small Entities

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities.

This proposed rule would affect the following entities, some of which may be small entities: the owners or operators of vessels intending to transit the waters of the Port of Mobile or the Mobile Ship Channel while cruise ships are shoreward of Mobile Sea Buoy.

This proposed rule zone would not have a significant economic impact on a substantial number of small entities for the following reasons: (1) This proposed rule would only be enforced while cruise ships are shoreward of the Mobile Sea Buoy; (2) Once a cruise ship is moored in the Port of Mobile, the security zone would be reduced to 25 yards and other vessels would be able to safely transit around this zone provided they approach no closer than 25 yards; (3) The Captain of the Port Mobile may permit vessels to transit through the security zone for the purpose of passing or overtaking a transiting cruise ship if permission is sought and obtained from the on-scene Coast Guard representative prior to initiating such action. If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this proposed rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact Lieutenant (LT) Maurice York, Operations Department, Marine Safety Office Mobile, at (251) 441–5940. The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

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.

Environment

We have analyzed this proposed rule under Commandant Instruction M16475.lD, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction, from further environmental documentation because this rule is not expected to result in any significant adverse environmental impact as described in the National Environmental Policy Act of 1969 (NEPA).

A draft ''Environmental Analysis Check List'' and a draft ''Categorical Exclusion Determination'' are available in the docket where indicated under **ADDRESSES.** Comments on this section will be considered before we make the final decision on whether the rule should be categorically excluded from further environmental review.

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 proposes to amend 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 33 U.S.C. 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 § 165.835 to read as follows:

§ 165.835 Security Zone; Port of Mobile, Mobile Ship Channel, Mobile, AL.

(a) *Definition.* As used in this section—

Cruise Ship means a passenger vessel over 100 gross tons, carrying more than 12 passengers for hire, making a voyage lasting more than 24 hours any part of which is on the high seas, and for which passengers are embarked or disembarked in the United States or its territories. This definition covers passenger vessels that must comply with 33 CFR parts 120 and 128.

(b) *Location.* The following areas are security zones: all waters of the Port of Mobile and Mobile Ship Channel?

(1) Within 100 yards of a cruise ship that is transiting shoreward of the Mobile Sea Buoy (located in approximate position 28°07′50″ N, 88°04′12″ W; NAD 83), and

(2) Within 25 yards of a cruise ship that is moored shoreward of the Mobile Sea Buoy.

(c) *Periods of enforcement.* This rule will only be enforced when a cruise ship is transiting the Mobile Ship Channel shoreward of the Mobile Sea Buoy, while transiting in the Port of Mobile, or while moored in the Port of Mobile. The Captain of the Port Mobile or a designated representative would inform the public through broadcast notice to mariners of the enforcement periods for the security zone.

(d) *Regulations.* (1) Under § 165.33, entry into a security zone is prohibited unless authorized by the Captain of the Port Mobile or a designated representative.

(2) While a cruise ship is transiting on the Mobile Ship Channel shoreward of the Mobile Sea Buoy, and while transiting in the Port of Mobile, all persons and vessels are prohibited from entering within 100 yards of a cruise ship.

(3) While a cruise ship is moored in the Port of Mobile, all persons and vessels are prohibited from entering within 25 yards of a cruise ship.

(4) Persons or vessels that desire to enter into the security zone for the purpose of passing or overtaking a cruise ship that is in transit on the Mobile Ship Channel or in the Port of Mobile must contact the on-scene Coast Guard representative, request permission to conduct such action, and receive authorization from the on-scene Coast Guard representative prior to initiating such action. The on-scene Coast Guard representative may be contacted on VHF–FM channel 16.

(5) All persons and vessels authorized to enter into this security zone must obey any direction or order of the Captain of the Port or designated representative. The Captain of the Port Mobile may be contacted by telephone at (251) 441–5976. The on-scene Coast Guard representative may be contacted on VHF–FM channel 16.

(6) All persons and vessels must comply with the instructions of the Captain of the Port Mobile and designated on-scene U.S. Coast Guard patrol personnel. On-scene Coast Guard patrol personnel include commissioned, warrant, and petty officers of the U.S. Coast Guard.

Dated: December 6, 2004.

Steven D. Hardy,

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

[FR Doc. 05–379 Filed 1–6–05; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF COMMERCE

37 CFR Part 404

[Docket No. 040305084–4084–01]

RIN 0692–AA19

Assistant Secretary for Technology Policy; Licensing of Government Owned Inventions

AGENCY: Assistant Secretary for Technology Policy, Department of Commerce (DOC).

ACTION: Notice of proposed rule making; request for comments.

SUMMARY: This proposed rule incorporates several changes made by the Technology Transfer Commercialization Act of 2000 with respect to the granting of licenses by Federal agencies on Federally owned inventions. It also streamlines the licensing procedures to focus primarily on statutory requirements.

DATES: Comments must be received no later than February 7, 2005.

ADDRESSES: Comments on the proposed revisions must be submitted to: Mr. John Raubitschek, Office of the Chief Counsel for Technology, Room 4835, HCHB, Department of Commerce, Washington, DC 20230.

FOR FURTHER INFORMATION CONTACT: Mr. John Raubitschek, Patent Counsel, at telephone: (202) 482–8010.

SUPPLEMENTARY INFORMATION: *Summary of the Proposed Amendments:*

1. DOC proposes to revise the index of sections to remove § 404.9 which would become reserved and to modify the title of § 404.7 to add ''co-exclusive.''

2. DOC proposes to revise § 404.1 to change the effective date of the regulation and remove the reference to the first licensing regulation in 1981. Other proposed changes include the adding of additional examples of licenses which would not be subject to the regulation, including exchange of rights in settlements of patent disputes, licenses and assignments of certain joint inventions as authorized by 35 U.S.C. 202(e) or of inventions under cooperative research and development agreements (CRADAs) as authorized by

15 U.S.C. 3710a or by a treaty, or licenses where the agency has acquired rights under 35 U.S.C. 207(a)(3) to facilitate the licensing of a federally owned invention, sometimes referred to as ''bundling inventions.''

3. DOC proposes to revise § 404.3(a) to remove the limitation that the invention must be described in a patent or application to be licensable in view of the change to 35 U.S.C. 207 made by Public Law 106–404. The only requirement would be that the invention is or may be patentable or protectable subject matter although it may be covered by a patent or patent application. Since ''invention'' is defined in 35 U.S.C. 201(d), this is included in subparagraph (a) with the additional reference to foreign patent law. Under this authority, agencies may now license computer software and biological materials as inventions without filing a patent application because they are patentable subject matter. In addition, the phrase ''in whole or in part'' is added to make it clear that an agency can license its undivided interest in a joint invention.

4. DOC proposes to revise § 404.4 to require each agency to notify the public of its inventions which are available for licensing. Such notification was encouraged by the House Committee on Science in H.R. Report 106–129, Part I, 106th Cong., 1st sess. Previously, notice was required only if the agency was going to exclusively license the invention. *See* § 404.7(a)(1). However, the form of notification is left to the discretion of the agency, which is strongly encouraged to use the internet or other electronic means to notify the public. Also, DOC proposes to move the substance of §§ 404.5(b)(2), (7) and (11) to this section.

5. DOC proposes to add a sentence in § 404.5(a)(1) to permit an abbreviated development plan for a non-exclusive research license because 35 U.S.C. 209(a) requires that all applicants for a license submit a plan even though the applicant may have no present intent to commercialize the invention. Such a license would be appropriate for a party working with an agency under a CRADA on the agency's pre-existing invention(s), which may now be included in the CRADA under Public Law 106–404 if a patent application was filed prior to the CRADA.

6. DOC proposes to add a sentence to § 404.5(a)(2) to provide guidance for an agency to waive or modify the domestic manufacturing requirement. This proposal is based substantially on 35 U.S.C. 204, which applies to inventions made by nonprofit organizations and small business firms with federal funds.

7. As mentioned in paragraph no. 4, DOC proposes to move §§ 404.5(b)(2), (7) and (11) to § 404.4, which is more directed to policy. This will result in a renumbering of § 404.5. A new § 404.5(b)(2) is being added to permit any licensee to enforce a licensed patent. As noted in *Nutrition 21* v. *U.S.,* 930 F.2d 867, 871, 18 USPQ2d (BNA) 1351, 1354, n.7 (Fed. Cir. 1991), the authority for enforcement in 35 U.S.C. 207(b)(1) is not limited to exclusive licensees. Editorial changes are proposed to § 404.5(b)(4) as well as adding a requirement that copies of sublicenses and modifications be promptly provided to the agencies. § § 404.5(b)(5) and (b)(6) are being slightly modified to adopt the language from Public Law 106–404.

8. DOC proposes to modify § 404.5(b)(9), now renumbered as 404.5(b)(8), to include the language of Public Law 106–404, which specifically mentions terminating for a breach of the domestic manufacturing requirement in § 404.5(a)(2) and the new requirement in § 404.5(b)(8)(v) that a license be terminated if a court determines that it violates the antitrust laws.

9. DOC proposes to remove the exclusion in § 404.6(a) for publishing the availability of an invention for licensing, which is subsequently licensed non-exclusively. This is not necessary in view of the proposed change described in paragraph no. 4 that the public will be notified of all inventions which are available for licensing. In addition, the suggestion in § 404.6(b) that after expiration of a specific time period, the field of use be limited to where the licensee has commercialized the invention is being deleted because it implies that non-exclusive licenses should contain such a clause. In fact, few agencies use such a clause because most nonexclusive licenses are for the full term of the patent. However, an agency may still use such a clause if it so chooses.

10. DOC proposes to add co-exclusive licenses to § 404.7 to specifically recognize that an agency may grant an exclusive license to more than one company to better achieve commercialization or to resolve disputes with competing license applications.

11. DOC proposes to remove the requirement in § 404.7(a)(1) to publish in the **Federal Register** a notice of availability of an invention for licensing prior to granting an exclusive license on that invention. However, agencies will be required to make the public aware of their inventions through use of the Internet or other electronic means in accordance with the revised § 404.4.

12. DOC proposes to delete § 404.7(a)(1)(ii)(B) because the new law does not contain a preference for nonexclusive licenses. § 404.7(a)(1)(ii)(C) would be renumbered as (B) and contain the slightly different language from the new law for the justification for an exclusive license. Similarly, the justification in § 404.7(a)(1)(ii)(A) is being slightly revised in view of the language in the new law. The antitrust consideration in §§ 404.7(a)(1)(iii) and (b)(1)(iii) is being revised in view of the new law although a positive determination by the agency is not required. Similarly, the small business preference in § 404.7(a)(1)(iv) is being revised slightly because of the new law.

13. DOC proposes to change the semicolon to a colon at the end of § 407(a)(2) and delete §§ 404.7(a)(2)(iv) and (b)(2)(iii) in view of the new § 404.5(b)(2), which permits all licensees to have the right to enforce licensed patents.

14. DOC proposes to delete § 404.9 since review by the Attorney General of an exclusive license notice is not required by statute. It is noted that the license may be terminated if there is a violation of the antitrust law. *See* proposed 404.5(b)(8)(v).

15. DOC proposes to delete the second reference to a sublicensee in § 404.10 because there is no need to give a sublicensee the right to be involved in the modification or termination of a license to which it is not a party. However, many agencies allow a sublicensee to become a direct licensee if the license is terminated.

16. DOC proposes to modify the appeal rights in § 404.11 to remove a dispute over the interpretation of a license from being appealable except as it may relate to the termination of a license, which is appealable. DOC also proposes adding a right for a hearing when a license has been modified or terminated if there is a dispute over any relevant fact. Alternate Dispute Resolution is now being authorized instead of an appeal, if the parties agree.

17. DOC proposes to corrects the misspelling of ''owned'' in § 404.12.

18. DOC proposes to make the FOIA exemption in § 404.14 mandatory in accordance with the new law.

Classification

Executive Order 12866

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

Executive Order 13132

This rule does not contain policies with Federalism implications as that term is defined in E.O. 13132.

Administrative Procedure Act

This rule involves rules of agency practice and procedure under 5 U.S.C. 553(b)(A) and prior notice and an opportunity for public comment are, therefore, not required by the Administrative Procedure Act, or any other statute or regulation, for this rule.

Regulatory Flexibility Act

Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule pursuant to 5 U.S.C. 553(b)(A), or by any other law, this rule is not subject to the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

Paperwork Reduction Act

The proposed rule does not impose any new collection of information requirements under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*). However, OMB approval for the application for a license in 404.8 and the utilization reports in 404.5(a)(6) (number 0692–0006) expired on June 30, 2003, we are resubmitting the package to OMB. The time to complete the license application is estimated to be 2 hours and the utilization report 1 hour. These estimated response times include the time for completing and reviewing the collections of information.

Comments are invited on (a) whether the collections of information are necessary for the functions of the agencies; (b) the accuracy of the estimates on the time to complete and review the collected information; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden on respondents to collect the information.

Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB control number.

List of Subjects in 37 CFR Part 404

Inventions, Patents, Licenses.

Dated: January 4, 2005.

Benjamin H. Wu,

Assistant Secretary of Commerce for Technology Policy.

For the reasons set forth in the preamble, 37 CFR Part 404 is proposed to be amended as follows:

PART 404—LICENSING OF GOVERNMENT OWNED INVENTIONS

1. The authority citation for Part 404 is revised to read as follows:

Authority: 35 U.S.C. 207–209.

2. Section 404.1 is revised to read as follows:

§ 404.1 Scope of part.

This part prescribes the terms, conditions, and procedures upon which a federally owned invention, other than an invention in the custody of the Tennessee Valley Authority, may be licensed. This part does not affect licenses which:

(a) Were in effect prior to [INSERT FINAL RULE EFFECTIVE DATE];

(b) May exist at the time of the Government's acquisition of title to the invention, including those resulting from the allocation of rights to inventions made under Government research and development contracts;

(c) Are the result of an authorized exchange of rights in the settlement of patent disputes, including interferences; or

(d) Are otherwise authorized by law or treaty, including 35 U.S.C. 202(e), 35 U.S.C. 207(a)(3) and 15 U.S.C. 3710a, which also may authorize the assignment of inventions. Although licenses on inventions made under a cooperative research and development agreement (CRADA) are not subject to this regulation, agencies are encouraged to apply the same policies and use similar terms when appropriate. Similarly, this should be done for licenses granted under inventions where the agency has acquired rights pursuant to 35 U.S.C. 207(a)(3).

3. In § 404.3, paragraph (a) is revised to read as follows:

§ 404.3 Definitions.

(a) *Federally owned invention* means an invention, whether or not covered by a patent or patent application, or discovery which is or may be patentable or otherwise protectable under title 35, the Plant Variety Protection Act (7 U.S.C. 2321 *et seq.*) or foreign patent law, owned in whole or in part by the United States Government.

* * * * *

4. Section 404.4 is revised to read as follows:

§ 404.4 Authority to grant licenses.

Federally owned inventions shall be made available for licensing as deemed appropriate in the public interest and each agency shall notify the public of these inventions. The agencies having custody of these inventions may grant nonexclusive, co-exclusive, partially exclusive, or exclusive licenses thereto under this part. Licenses may be royalty-free or for royalties or other consideration. They may be for all or less than all fields of use or in specified geographic areas and may include a release for past infringement. Any license shall not confer on any person immunity from the antitrust laws or from a charge of patent misuse, and the exercise of such rights pursuant to this part shall not be immunized from the operation of state or federal law by reason of the source of the grant.

5. In Section 404.5, paragraph (a), paragraph (b)(2) and paragraphs (b)(4) through (b)(9) are revised to read as follows:

§ 404.5 Restrictions and conditions on all licenses granted under this part.

(a)(1) A license may be granted only if the applicant has supplied the Federal agency with a satisfactory plan for development or marketing of the invention, or both, and with information about the applicant's capability to fulfill the plan. The plan for a non-exclusive research license may be limited to describing the research phase of development.

(2) A license granting rights to use or sell under a federally owned invention in the United States shall normally be granted only to a license who agrees that any products embodying the invention or produced through the use of the invention will be manufactured substantially in the United States. However, this condition may be waived or modified if reasonable but unsuccessful efforts have been made to grant licenses to potential licensees that would be likely to manufacture substantially in the United States or if domestic manufacture is not commercially feasible.

(b) * * *

(1) * * *

(2) Any patent license may grant the licensee the right of enforcement of the licensed patent without joining the Federal agency as a party as determined appropriate in the public interest.

(3) * * *

(4) The license may provide the licensee the right to grant sublicenses under the license, subject to the approval of the Federal agency. Each sublicense shall make reference to the license, including the rights retained by

the Government, and a copy of such sublicense with any modifications thereto, shall be promptly furnished to the Federal agency.

(5) The license shall require the licensee to carry out the plan for development or marketing of the invention, or both, to bring the invention to practical application within a reasonable time as specified in the license, and continue to make the benefits of the invention reasonably accessible to the public.

(6) The license shall require the licensee to report periodically on the utilization or efforts at obtaining utilization that are being made by the licensee, with particular reference to the plan submitted but only to the extent necessary to enable the agency to determine compliance with the terms of the license.

(7) Where an agreement is obtained pursuant to § 404.5(a)(2) that any products embodying the invention or produced through the use of the invention will be manufactured substantially in the United States, the license shall recite such an agreement.

(8) The license shall provide for the right of the Federal agency to terminate the license, in whole or in part, if the agency determines that:

(i) The licensee is not executing its commitment to achieve practical application of the invention, including commitments contained in any plan submitted in support of its request for a license and the licensee cannot otherwise demonstrate to the satisfaction of the Federal agency that it has taken, or can be expected to take within a reasonable time, effective steps to achieve practical application of the invention;

(ii) Termination is necessary to meet requirements for public use specified by Federal regulations issued after the date of the license and such requirements are not reasonably satisfied by the licensee;

(iii) The licensee has willfully made a false statement of or willfully omitted a material fact in the license application or in any report required by the license agreement;

(iv) The licensee commits a substantial breach of a covenant or provision contained in the license agreement, including the requirement in § 404.5(a)(2); or

(v) The licensee has been found by a court of competent jurisdiction to have violated the Federal antitrust laws in connection with its performance under the license agreement.

(9) The license may be modified or terminated, consistent with this part, upon mutual agreement of the Federal agency and the licensee.

* * * * *

6. Section 404.6 is revised to read as follows:

§ 404.6 Nonexclusive licenses.

Nonexclusive licenses may be granted under federally owned inventions without a public notice of a prospective license.

7. Section 404.7 is revised to read as follows:

§ 404.7 Exclusive, co-exclusive and partially exclusive licenses.

(a)(1) Exclusive, co-exclusive or partially exclusive domestic licenses may be granted on federally owned inventions, only if;

(i) Notice of a prospective license, identifying the invention and the prospective licensee, has been published in the **Federal Register**, providing opportunity for filing written objections within at least a 15-day period;

(ii) After expiration of the period in § 404.7(a)(1)(i) and consideration of any written objections received during the period, the Federal agency has determined that;

(A) The public will be served by the granting of the license, in view of the applicant's intentions, plans and ability to bring the invention to the point of practical application or otherwise promote the invention's utilization by the public.

(B) Exclusive, co-exclusive or partially exclusive licensing is a reasonable and necessary incentive to call forth the investment capital and expenditures needed to bring the invention to practical application or otherwise promote the invention's utilization by the public; and

(C) The proposed scope of exclusivity is not greater than reasonably necessary to provide the incentive for bringing the invention to practical application, as proposed by the applicant, or otherwise to promote the invention's utilization by the public;

(iii) The Federal agency has not determined that the grant of such a license will tend substantially to lessen competition or create or maintain a violation of the Federal antitrust laws; and

(iv) The Federal agency has given first preference to any small business firms submitting plans that are determined by the agency to be within the capability of the firms and as having equal or greater likelihood as those from other applicants to bring the invention to practical application within a reasonable time.

(2) In addition to the provisions of § 404.5, the following terms and conditions apply to domestic exclusive, co-exclusive and partially exclusive licenses:

(i) The license shall be subject to the irrevocable, royalty-free right of the Government of the United States to practice or have practiced the invention on behalf of the United States and on behalf of any foreign government or international organization pursuant to any existing or future treaty or agreement with the United States.

(ii) The license shall reserve to the Federal agency the right to require the licensee to grant sublicenses to responsible applicants, on reasonable terms, when necessary to fulfill health or safety needs.

(iii) The license shall be subject to any licenses in force at the time of the grant of the exclusive, co-exclusive or partially exclusive license.

(b)(1) Exclusive, co-exclusive or partially exclusive foreign licenses may be granted on a federally owned invention provided that;

(i) Notice of the prospective license, identifying the invention and prospective licensee, has been published in the **Federal Register**, providing opportunity for filing written objections within at least a 15-day period and following consideration of such objections received during the period;

(ii) The agency has considered whether the interests of the Federal Government or United States industry in foreign commerce will be enhanced; and

(iii) The Federal agency has not determined that the grant of such a license will tend substantially to lessen competition or create or maintain a violation of the Federal antitrust laws.

(2) In addition to the provisions of § 404.5, the following terms and conditions apply to foreign exclusive, co-exclusive and partially exclusive licenses:

(i) The license shall be subject to the irrevocable, royalty-free right of the Government of the United States to practice and have practiced the invention on behalf of the United States and on behalf of any foreign government or international organization pursuant to any existing or future treaty or agreement with the United States.

(ii) The license shall be subject to any licenses in force at the time of the grant of the exclusive, co-exclusive or partially exclusive license.

(iii) The license may grant the licensee the right to take any suitable and necessary actions to protect the

licensed property, on behalf of the Federal Government.

(c) Federal agencies shall maintain a record of determinations to grant exclusive, co-exclusive or partially exclusive licenses.

§ 404.9 [Removed and reserved]

8. Section 404.9 is removed and reserved:

9. Section 404.10 is revised to read as follows:

§ 404.10 Modification and termination of licenses.

Before modifying or terminating a license, other than by mutual agreement, the Federal agency shall furnish the licensee and any sublicensee of record a written notice of intention to modify or terminate the license, and the licensee shall be allowed 30 days after such notice to remedy any breach of the license or show cause why the license shall not be modified or terminated.

10. Section 404.11 is revised to read as follows:

§ 404.11 Appeals.

(a) In accordance with procedures prescribed by the Federal agency, the following parties may appeal to the agency head or designee any decision or determination concerning the grant, denial, modification, or termination of a license:

(1) A person whose application for a license has been denied;

(2) A licensee whose license has been modified or terminated, in whole or in part; or

(3) A person who timely filed a written objection in response to the notice required by § 404.7(a)(1)(i) or § 404.7(b)(1)(i) and who can demonstrate to the satisfaction of the Federal agency that such person may be damaged by the agency action.

(b) An appeal by a licensee under paragraph (a)(2) of this section may include a hearing, upon the request of the licensee, to address a dispute over any relevant fact. The parties may agree to Alternate Dispute Resolution in lieu of an appeal.

11. Section 404.12 is revised to read as follows:

§ 404.12 Protection and administration of inventions.

A Federal agency may take any suitable and necessary steps to protect and administer rights to federally owned inventions, either directly or through contract.

12. Section 404.14 is revised to read as follows:

§ 404.14 Confidentiality of information.

Title 35, United States Code, section 209, requires that any plan submitted pursuant to § 404.8(h) and any report required by § 404.5(b)(6) shall be treated as commercial or financial information obtained from a person and privileged and confidential and not subject to disclosure under section 552 of title 5 of the United States Code.

[FR Doc. 05–338 Filed 1–6–05; 8:45 am]

BILLING CODE 3510–18–P

Notices

Federal Register
Vol. 70, No. 5
Friday, January 7, 2005

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

Submission for OMB Review; Comment Request

January 3, 2005.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (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 through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *Pamela_Beverly_OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8681.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Agricultural Marketing Service

Title: Reporting Requirements Under the Regulations Governing Inspection and Certification of Processed Fruits and Vegetable and Related Products.

OMB Control Number: 0581–0123.

Summary of Collection: The Agricultural Marketing Act of 1946 (7 U.S.C. 1622(h)) requires and directs the Department of Agriculture to promulgate rules and regulations to carry out voluntary inspection and grading services of processed fruits and vegetables on a fee for service basis. The Regulations Governing Inspection and Certification of Processed Fruit and Vegetables and Related Products (7 CFR 52) authorizes the collection of information to assure that the products sampled, inspected, graded and certified are actually the products requested to be sampled and inspected.

Need and Use of the Information: The Agricultural Marketing Service (AMS) uses the data collected for grading and certification purposes and for hiring licensed samplers. The following forms are used by AMS for information collection: FV–159, *Application for Inspection of Unofficially Submitted Samples of Food Products,* is used to determine the purpose for which the inspection is desired for unofficially submitted samples. FV–356, *Application for Inspection and Certificate of Sampling,* is used to fill in information about the respondent, to describe the containers, the location code marks and the number of containers in the lot. FV–468, *Application for License to Sample Processed Foods,* the information collected is used to hire prospective employees desiring to become licensed and to certify as to the identification, location, kinds and condition of containers of processed products that are sampled.

Description of Respondents: Business or other for-profit; Federal Government; State, Local or Tribal Government.

Number of Respondents: 1,406.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 1,125.

Agricultural Marketing Service

Title: Specified Commodities Imported into the United States Exempt from Import Requirements, 7 CFR part 944, 980, and 999.

OMB Control Number: 0581–0167.

Summary of Collection: Agricultural Marketing Agreement Act of 1937 (AMAA), as amended (7 U.S.C. 601–674) provides that when certain domestically produced commodities are regulated under a Federal marketing order; imports of the commodity must meet the same or comparable requirements. The North American Free Trade Agreement (NAFTA) provides that imported products destined for processing or other exempt outlets must be given no less favorable treatment than that afforded to domestic products. Import regulations apply only during those periods when domestic marketing order regulations are in effect. No person may import products for processing or other exempt purposes unless an executed FV–6, *Importers Exempt Commodity Form,* accompanies the shipment. The FV–7, *Civil Penalty Stipulation Agreement,* is a ''volunteer'' form that provides the Agricultural Marketing Service (AMS) with an additional tool to obtain resolution of certain cases without the cost of going to a hearing.

Need and Use of the Information: AMS utilizes the information to ensure that imported goods destined for exempt outlets are given no less favorable treatment than that afforded to domestic goods destined for such exempt outlets. The importers wishing to import commodities will use form FV–6, ''Importer's Exempt Commodity'', which requires a minimum amount of information.

Description of Respondents: Business or other for-profit; Not-for-profit institutions.

Number of Respondents: 536.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 915.

Sondra Blakey,

Departmental Information Collection Clearance Officer.

[FR Doc. 05–303 Filed 1–6–05; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

January 3, 2005.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (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 through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *Pamela_Beverly_OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8681.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Rural Utilities Service

Title: 7 CFR Part 1744, Subpart B, Lien Accommodations and Subordination Policy.

OMB Control Number: 0572–0126.

Summary of Collection: Rural Utilities Service (RUS) borrowers and other organizations providing telecommunications services will undertake projects that provide new telecommunications services and other telecommunications services not ordinarily financed by RUS. RUS is willing to consider accommodating the Government's lien on telecommunications borrowers' systems based on the financial strength of the borrowers operations. The RUS telecommunication program provides loans to borrowers at interest rates and on terms that are more favorable than those generally available from the private sector.

Need and Use of the Information: Depending on the purposes for which a lien accommodation is sought, RUS will use the information to provide approval for borrowers that meet the financial tests. These tests are designed to ensure that the financial strength of the borrower is sufficient to protect the government's loan security interests.

Description of Respondents: Business or other for-profit; Not for-profit institutions.

Number of Respondents: 30.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 23.

Sondra Blakey,

Departmental Information Collection Clearance Officer.

[FR Doc. 05–304 Filed 1–6–05; 8:45 am]

BILLING CODE 3410–15–P

DEPARTMENT OF AGRICULTURE

Forest Service

Information Collection; Request for Comments; Aviation Forms

AGENCY: Forest Service, USDA.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the Forest Service is seeking comments from all interested individuals and organizations on the reinstatement of the currently approved collection for four aviation forms that assist in the documentation of pilot and aircraft qualifications, approval, and data records. These Office of Management and Budget approved forms include (1) FS–5700–20, Airplane Pilot Qualifications and Approval Record; (2) FS–5700–20a, Helicopter Pilot Qualifications and Approval Record; (3) FS–5700–21, Airplane Data Record; and (4) FS–5700–21a, Helicopter Data Record.

DATES: Comments must be received in writing on or before March 8, 2005, to be assured of consideration. Comments received after that date will be considered to the extent practicable.

ADDRESSES: Comments concerning this notice should be addressed to John Nelson, Fire and Aviation Management, Mail Stop 1107, Forest Service, USDA, 1400 Independence Avenue, Washington, DC 20250–0003.

Comments also may be submitted via facsimile to (202) 205–1401 or by e-mail to: *janelson03@fs.fed.us.*

The public may inspect comments received at the Office of Fire and Aviation Management, Yates Building, 2 SW., Forest Service, USDA 201 Independence Ave. SW., Washington, DC, during normal business hours. Visitors are encouraged to call ahead to (202) 205–0995 to facilitate entry to the building.

FOR FURTHER INFORMATION CONTACT: John Nelson, Aviation Management Specialist at (202) 205–0995. Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339 twenty-four hours a day, every day of the year, including holidays.

SUPPLEMENTARY INFORMATION: Title: FS–5700–20, Airplane Pilot Qualifications and Approval Record; FS–5700–20a, Helicopter Pilot Qualifications and Approval Record; FS–5700–21, Airplane Data Record; and FS–5700–21a, Helicopter Data Record.

OMB Number: 0596–0015.

Expiration Date of Approval: January 31, 2005.

Type of Request: Reinstatement with revision to the FS–5700–20, Airplane Pilot Qualifications and Approval Record; FS–5700–20a, Helicopter Pilot Qualifications and Approval Record, including electronic versions.

Abstract: The Forest Service (FS) contracts with approximately 400 vendors for aviation services that are utilized in resource protection and project management. Total annual use of contract aircraft and pilots in recent years has exceeded 100,000 hours. Hence, in order to maintain an acceptable level of safety, mission preparedness, and cost effectiveness in aviation operations, Forest Service contracts call for rigorous qualifications for pilots and specific conditions, equipment and performance requirements for aircraft. Aviation operations are conducted under extremely adverse conditions of weather, terrain, turbulence, smoke-reduced visibility, minimally improved landing areas, and congested airspace around wildfires.

To ensure agency contracting officers that the pilots and aircraft for aviation operations meet the specific Forest Service qualifications and other requirements for aviation operations, prospective contract pilots must provide

information on the FS–5700–20, Airplane Pilot Qualifications and Approval Record, and FS–5700–20(a), Helicopter Pilot Qualifications and Approval Record. Contract Officers' Technical Representatives use FS–5700–21, Airplane Data Record, and FS–5700–21(a), Helicopter Data Record, when inspecting the aircraft for contract compliance. A portion of the completed form is furnished to the contractor as proof of compliance.

Without the information supplied, Forest Service contracting officers and pilot and aircraft inspectors cannot determine if pilots and aircraft meet the detailed qualification, equipment, and condition requirements essential to safe, effective accomplishment of Forest Service specified flying missions. Without reasonable basis to determine pilot qualifications and aircraft capability, Forest Service employees using these resources would be unnecessarily exposed to flying hazards.

The completed forms are maintained in Forest Service Regional headquarters under the care of the Regional aviation pilot and aircraft inspectors. Copies of the forms may be shared with the Office of Aircraft Services, Department of Interior, since each organization accepts contract inspections conducted by the other as meeting their own requirements. The data collected from these forms will be used to document the basis for approval of contract pilots and aircraft for specific Forest Service aviation missions. Based upon the approvals documented on these forms, approval cards are issued to each contractor pilot and for each contractor aircraft. Forest Service personnel verify possession of properly approved cards before using contracted pilots and aircraft. Information will be collected and reviewed by Contracting Officers or their representatives, including aircraft inspectors, and will represent data that determines whether the aircraft and/or pilots meet all contract specifications in accordance with FSH 5709.16, Chapter 10, section 16.

Estimate of Annual Burden:

(1) FS–5700–20, Airplane Pilot Qualifications and Approval Record: 25 minutes.

(2) FS–5700–20a, Helicopter Pilot Qualifications and Approval Record: 25 minutes.

(3) FS–5700–21, Airplane Data Record: 35 minutes.

(4) FS–5700–21a, Helicopter Data Record: 35 minutes.

Type of Respondents: Aircraft vendors that wish to contract with the federal government for aircraft services and pilots.

Estimated Annual Number of Respondents: 2,100.

Estimated Annual Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 1,058 hours.

Comment is invited on: (1) Whether this collection of information is necessary for the stated purposes and the proper performance of the functions of the agency, including whether the information will have practical or scientific utility; (2) the accuracy of the agency's estimate of the burden of the 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 the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

All comments received in response to this notice, including names and addresses when provided, will be a matter of public record. Comments will be summarized and included in the submission request for Office of Management and Budget approval.

Dated: January 3, 2005.

Robin L. Thompson,

Associate Deputy Chief, State and Private Forestry.

[FR Doc. 05–307 Filed 1–6–05; 8:45 am]

BILLING CODE 3410–11–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Information Collection Submitted to the Office of Management and Budget (OMB) for Approval Under the Paperwork Reduction Act; Nonprofit Agency Recordkeeping Requirements

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Notice; request for comments.

SUMMARY: The Committee for Purchase From People Who Are Blind or Severely Disabled (The Committee) has submitted the collection of information listed below to OMB for approval under the provisions of the Paperwork Reduction Act. This notice solicits comments on that collection of information.

DATES: The Office of Management and Budget (OMB) has up to 60 days to approve or disapprove information collection but may respond after 30 days. Therefore, to ensure maximum consideration, your comments should be received by OMB by February 7, 2005.

ADDRESSES: Mail your comments on the recordkeeping requirements to the Desk Officer for the Committee for Purchase From People Who Are Blind or Severely Disabled, OMB, Office of Information and Regulatory Affairs, via facsimile or e-mail using the following fax number and e-mail address: (202) 395–6566 (fax); *OIRA_DOCKET@omb.eop.gov* (e-mail). Please provide a copy of your comments to Janet Yandik, Information Management Specialist, Committee for Purchase From People Who Are Blind or Severely Disabled, 1421 Jefferson Davis Highway, Jefferson Plaza 2, Suite 10800, Arlington, VA, 22202–3259; (703) 603–0655 (fax); or *rulecomments@jwod.gov* (e-mail).

FOR FURTHER INFORMATION CONTACT: Anissa Craghead, Regulatory Affairs Specialist, Committee for Purchase From People Who Are Blind or Severely Disabled, 1421 Jefferson Davis Highway, Jefferson Plaza 2, Suite 10800, Arlington, VA, 22202–3259; phone (703) 603–0033; fax (703) 603–0655; or e-mail *acraghead@jwod.gov.*

SUPPLEMENTARY INFORMATION: The Office of Management and Budget (OMB) regulations at 5 CFR part 1320, which implement provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), require that interested members of the public and affected agencies have an opportunity to comment on information collection and recordkeeping activities (*see* 5 CFR 1320.8(d)). The Committee has submitted a request to OMB to renew its approval of the collection of information for nonprofit agency responsibilities related to recordkeeping. The Committee is requesting a 3-year term of approval for this information collection activity.

Federal agencies may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control number for this collection of information is 3037–0005.

The Javits-Wagner-O'Day (JWOD) Act of 1971 (41 U.S.C. 46–48c) is the authorizing legislation for the JWOD Program. The JWOD Program creates jobs and training opportunities for people who are blind or who have other severe disabilities. Its primary means of doing so is by requiring Government agencies to purchase selected products and services from nonprofit agencies employing such individuals. The JWOD

Program is administered by the Committee. Two national, independent organizations, National Industries for the Blind (NIB) and NISH, help State and private nonprofit agencies participate in the JWOD Program.

The implementing regulations for the JWOD Act, which are located at 41 CFR Chapter 51, detail the recordkeeping requirements imposed on nonprofit agencies participating in the JWOD Program. Section 51–2.4 of the regulations describes the criteria that the Committee must consider when adding a product or service to its Procurement List. One of these criteria is that a proposed addition must demonstrate a potential to generate employment for people who are blind or severely disabled. The Committee decided that evidence that employment will be generated for those individuals consists of recordkeeping that tracks direct labor and revenues for products or services sold through a JWOD Program contract. This recordkeeping can be done on each individual JWOD project or by product or service family.

In addition, § 51–4.3 of the regulations requires that nonprofit agencies keep records on direct labor hours performed by each worker and keep an individual record or file for each blind or severely disabled individual documenting that individual's disability and capabilities for competitive employment. The records that nonprofit agencies must keep in accordance with § 51–4.3 of the regulations constitute the bulk of the hour burden associated with this OMB control number.

On October 4, 2004, we published in the **Federal Register** (69 FR 59185–59186) a notice requesting public comment on these recordkeeping requirements for 60 days, ending December 3, 2004. By that date, we received one comment. That commenter, a participating nonprofit agency, supported our efforts to renew this recordkeeping requirement.

The information collection renewal request seeks approval for the Committee to continue to ensure compliance with recordkeeping requirements established by the authority of the JWOD Act and set forth in the Act's implementing regulations. A renewal of the approval for this collection would also help ensure that the Committee has the ability to confirm the suitability of products and services on its Procurement List. The recordkeeping requirements described in this document are the same as those currently imposed on nonprofit agencies participating in the JWOD Program.

Title: Nonprofit Agency Responsibilities, 41 CFR 51–2.4 and 51–4.3.

OMB Control Number: 3037–0005.

Description of Collection: Recordkeeping.

Description of Respondents: Nonprofit agencies participating in the JWOD Program.

Annual Number of Respondents: About 650 nonprofit agencies will annually participate in recordkeeping.

Total Annual Burden Hours: The recordkeeping burden is estimated to average 5 hours per respondent. Total annual burden is 3,250 hours.

We invite comments concerning this renewal on: (1) Whether the collection of information is necessary for the proper performance of our agency's functions, including whether the information will have practical utility; (2) the accuracy of our estimate of the burden of the collection of information; (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.

Dated: January 4, 2005.

Sheryl D. Kennerly,

Director, Information Management.

[FR Doc. 05–358 Filed 1–6–05; 8:45 am]

BILLING CODE 6353–01–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Addition and Deletions

AGENCY: Committee for Purchase from People Who Are Blind or Severely Disabled.

ACTION: Addition to and deletions from Procurement List.

SUMMARY: This action adds to the Procurement List a product to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities, and deletes from the Procurement List services previously furnished by such agencies.

DATES: *Effective Date:* February 6, 2005.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia, 22202–3259.

FOR FURTHER INFORMATION CONTACT: Sheryl D. Kennerly, Telephone: (703) 603–7740, Fax: (703) 603–0655, or e-mail *SKennerly@jwod.gov*.

SUPPLEMENTARY INFORMATION:

Addition

On November 5, 2004, the Committee for Purchase From People Who Are Blind or Severely Disabled published notice (69 F.R. 64562) of proposed addition to the Procurement List.

The following comments pertain to Body Fluids Barrier Kit:

Comments were received from the current contractor for this kit and from a district office of the Small Business Administration (SBA). The contractor addressed the impact of this addition to the Procurement List on the contractor's business, and set forth technical reasons why it does not believe the designated nonprofit agency and its blind workers can produce the kit in accordance with Government technical and health requirements.

The contractor claimed that it would be severely impacted by this addition to the Procurement List because the addition would make the difference between a net profit and a net loss for the company. The contractor stated that it operates on a narrow profit margin because it reinvests most of its profits in the company. However, the Committee's measure of contractor impact, as stated at 41 CFR 51–2.4(a)(4), is the percentage of the contractor's total sales represented by this addition, with consideration being given to the length of time the contractor has held a Government contract for the kit. That percentage of sales is very small (less than one percent), so even taking into account the length of time the contractor has held a contract for the kit, the Committee does not consider this addition to the Procurement List to have a severe adverse impact on the contractor, particularly as the contractor may vary its profit level by changing its profit reinvestment pattern.

The contractor claimed that the kit requires an FDA 501(k) certification, along with Letters of Certification/Compliance for each component in the kit. However, these requirements apply to the manufacturers of the kit and its components, not to the assembler, which is what the nonprofit agency designated by the Committee will be doing. The contractor also claimed that specifications for the kit require 100 percent visual inspection of components and the assembly operation. However, the Contracting Officer has informed the Committee that there is no such inspection requirement. In addition, inspections will be performed by the nonprofit agency's quality control personnel. The Committee's law, at 41 U.S.C. 48b(5), excludes inspection from the definition of direct labor tasks

which must be performed by blind individuals in this situation.

The contractor claimed that there is a long learning curve to manufacturing the kit, and that letting an inexperienced producer like the designated nonprofit agency have the contract would expose the Government customer to significant risks. As noted above, the nonprofit agency will only be assembling the kits, not manufacturing any part of them. The Government procuring activity has inspected the nonprofit agency and concluded that it is capable of performing all tasks necessary to assemble the kit. The nonprofit agency has experience in assembling a First Aid kit which is similar to the body fluids barrier kit being added to the Procurement List.

The SBA office stated that the Committee cannot add the kit to the Procurement List because the current contractor is a participant in SBA's 8(a) program, so the addition is prohibited by an agreement between SBA and NISH, one of the Committee's designated central nonprofit agencies. What the SBA office is actually referring to is a Committee policy by which the Committee will not add to the Procurement List items produced by a contractor which holds the Government contract for the item through the 8(a) program, until that contractor graduates from the 8(a) program. However, while the current contractor for the kit is a participant in the 8(a) program, its contract for the kit was not awarded under the 8(a) program, so the limitation on additions to the Procurement List expressed in the Committee policy is not applicable to this addition.

The following material pertains to the item being added to the Procurement List.

After consideration of the material presented to it concerning capability of qualified nonprofit agencies to provide the products and impact of the additions on the current or most recent contractors, the Committee has determined that the product listed below is suitable for procurement by the Federal Government under 41 U.S.C. 46–48c and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the product to the Government.

2. The action will result in authorizing small entities to furnish the product to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the product proposed for addition to the Procurement List.

End of Certification

Accordingly, the following product is added to the Procurement List:

Product

Product/NSN: Body Fluids Barrier Kit, 6515–01–376–7247.
NPA: The Oklahoma League for the Blind, Oklahoma City, Oklahoma.
Contracting Activity: GSA, Southwest Supply Center, Fort Worth, Texas.

Deletions

On November 12, 2004, the Committee for Purchase From People Who Are Blind or Severely Disabled published notice (69 FR 65409) of proposed deletions to the Procurement List. After consideration of the relevant matter presented, the Committee has determined that the services listed below are no longer suitable for procurement by the Federal Government under 41 U.S.C. 46–48c and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action may result in additional reporting, recordkeeping or other compliance requirements for small entities.

2. The action may result in authorizing small entities to furnish the services to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the services deleted from the Procurement List.

End of Certification

Accordingly, the following services are deleted from the Procurement List:

Services

Service Type/Location: Medical Transcription, 97th Medical Group, Altus AFB, Oklahoma.
NPA: New Vision Enterprises, Inc., Louisville, Kentucky.
Contracting Activity: Department of the Air Force.
Service Type/Location: Medical Transcription, Dwight D. Eisenhower, Veterans Affairs Medical Center, Leavenworth, Kansas.
NPA: New Vision Enterprises, Inc., Louisville, Kentucky.
Contracting Activity: Department of Veterans Affairs, Washington, DC.

Sheryl D. Kennerly,

Director, Information Management.

[FR Doc. 05–356 Filed 1–6–05; 8:45 am]

BILLING CODE 6353–01–U

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Proposed Additions

AGENCY: Committee for Purchase from People Who Are Blind or Severely Disabled.

ACTION: Proposed additions to Procurement List.

SUMMARY: The Committee is proposing to add to the Procurement List a product and services to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

Comments Must Be Received On or Before: February 6, 2005.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia, 22202–3259.

FOR FURTHER INFORMATION CONTACT: Sheryl D. Kennerly, Telephone: (703) 603–7740, Fax: (703) 603–0655, or e-mail *SKennerly@jwod.gov*.

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C. 47(a)(2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed actions. If the Committee approves the proposed additions, the entities of the Federal Government identified in the notice for each product or service will be required to procure the product and services listed below from nonprofit agencies employing persons who are blind or have other severe disabilities.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. If approved, the action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the product and services to the Government.

2. If approved, the action will result in authorizing small entities to furnish

the product and services to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the product and services proposed for addition to the Procurement List. Comments on this certification are invited.

Commenters should identify the statement(s) underlying the certification on which they are providing additional information.

End of Certification

The following product and services are proposed for addition to Procurement List for production by the nonprofit agencies listed:

Product

Product/NSN: Flat Highlighter, Yellow, 7520–01–201–7791.
NPA: Winston-Salem Industries for the Blind, Winston-Salem, North Carolina.
Contracting Activity: Office Supplies & Paper Products Acquisition Center, New York, New York.

Services

Service Type/Location: Base Supply Center & Individual Equipment Element, Hill Air Force Base, Utah.
NPA: Industries for the Blind, Inc., Milwaukee, Wisconsin.
Contracting Activity: Hill Air Force Base, Utah.
Service Type/Location: Commissary Shelf Stocking, Custodial & Warehousing, Offutt Air Force Base, Nebraska.
NPA: BH Services, Inc., Box Elder, South Dakota.
Contracting Activity: Defense Commissary Agency, Fort Lee, Virginia.
Service Type/Location: Custodial & Grounds Maintenance, Navy and Marine Corps Reserve Center, 314 Graves Mill Road, Lynchburg, Virginia.
NPA: Goodwill Industries of the Valleys, Inc., Salem, Virginia.
Contracting Activity: Naval Facilities Engineering Command Contracts, Norfolk, Virginia.
Service Type/Location: Laundry Service, Fort Eustis, Virginia.
NPA: Louise W. Eggleston Center, Inc., Norfolk, Virginia.
Contracting Activity: Army Contracting Agency/NRCC Installation Division, Fort Eustis, Virginia.
Service Type/Location: Laundry Service, Veterans Integrated Service Network (VISN12), Jesse Brown VA Medical Center, 820 S. Damen Avenue, Chicago, Illinois (and its Divisions at Lake Side and Crown Point), VA Medical Center, Hines, 5th & Roosevelt Road, Hines, Illinois.
NPA: Goodwill Industries of Southeastern Wisconsin, Inc., Milwaukee, Wisconsin.
Contracting Activity: VISN 12, Great Lakes Network, Milwaukee, Wisconsin.

Sheryl D. Kennerly,

Director, Information Management.

[FR Doc. 05–357 Filed 1–6–05; 8:45 am]

BILLING CODE 6353–01–U

BROADCASTING BOARD OF GOVERNORS

Sunshine Act Meeting

DATE AND TIME: January 11, 2005, 3 p.m.–5 p.m.

PLACE: Cohen Building, Room 3321, 330 Independence Ave., SW., Washington, DC 20237.

CLOSED MEETING: The members of the Broadcasting Board of Governors (BBG) will meet in closed session to review and discuss a number of issues relating to U.S. Government-funded non-military international broadcasting. They will address internal procedural, budgetary, and personnel issues, as well as sensitive foreign policy issues relating to potential options in the U.S. international broadcasting field. This meeting is closed because if open it likely would either disclose matters that would be properly classified to be kept secret in the interest of foreign policy under the appropriate executive order (5 U.S.C. 552b.(c)(1)) or would disclose information, the premature disclosure of which, would be likely to significantly frustrate implementation of a proposed agency action. (5 U.S.C. 552b.(c)(9)(B)). In addition, part of the discussion will relate solely to the internal personnel and organizational issues of the BBG or the International Broadcasting Bureau. (5 U.S.C. 552b.(c)(2) and (6)).

CONTACT PERSON FOR MORE INFORMATION: Persons interested in obtaining more information should contact either Brenda Hardnett or Carol Booker at (202) 203–4545.

Dated: January 4, 2005.

Carol Booker,

Legal Counsel.

[FR Doc. 05–404 Filed 1–5–05; 9:53 am]

BILLING CODE 8230–01–M

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Sensors and Instrumentation Technical Advisory Committee; Notice of Open Meeting

The Sensors and Instrumentation Technical Advisory Committee will meet on January 25, 2005, 9:30 a.m., in the Herbert C. Hoover Building, Room 3884, 14th Street between Pennsylvania and Constitution Avenues, NW., Washington, DC. The Committee advises the Office of the Assistant Secretary for Export Administration with respect to technical questions that affect the level of export controls applicable to sensors and instrumentation equipment and technology.

Agenda

1. Introductions and opening remarks.
2. Update on Bureau of Industry and Security initiatives.
3. Update on Wassenaar Arrangement negotiations.
4. Discussion on future SITAC topics.
5. Presentation of papers and comments by the public.

The meeting will be open to the public and a limited number of seats will be available. Reservations are not accepted. To the extent that time permits, members of the public may present oral statements to the Committee. Written statements may be submitted at any time before or after the meeting. However, to facilitate distribution of public presentation materials to the Committee members, the Committee suggests that presenters forward the public presentation materials two weeks prior to the meeting date to Lee Ann Carpenter at *Lcarpent@bis.doc.gov.*

For more information contact Lee Ann Carpenter on (202) 482–2583.

Dated: January 4, 2005.

Lee Ann Carpenter,

Committee Liaison Officer.

[FR Doc. 05–367 Filed 1–6–05; 8:45 am]

BILLING CODE 3510–JT–M

DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–808]

Stainless Steel Wire Rods From India: Preliminary Results of Antidumping Duty Administrative Review, Intent To Revoke Order In Part, and Extension of Time for the Final Results of Review

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

SUMMARY: In response to requests from interested parties, the Department of Commerce is conducting an administrative review of the antidumping duty order on stainless steel wire rods from India. The period of review is December 1, 2002, through November 30, 2003. This review covers three companies.

We have preliminarily determined that Chandan Steel, Ltd., and Isibars Steel, Ltd., sold subject merchandise at less than normal value during the period of review and that the Viraj Group has made sales in the United States at prices not below normal value.[1] We have also preliminarily determined to revoke the order with respect to subject merchandise produced and exported by Viraj Alloys, Ltd., and VSL Wires, Ltd.

We invite interested parties to comment on these preliminary results. Parties who submit arguments in this segment of the proceeding are requested to submit with each argument a statement of the issue, and a brief summary of the argument.

EFFECTIVE DATE: January 7, 2005.

FOR FURTHER INFORMATION CONTACT: Hermes Pinilla or Minoo Hatten, AD/CVD Operations 5, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone (202) 482–3477 or (202) 482–1690 respectively.

Background

On October 20, 1993, the Department of Commerce (the Department) published the final determination in the **Federal Register** that resulted in the antidumping duty order on certain stainless steel wire rods (SSWR) from India. See *Final Determination of Sales at Less Than Fair Value: Certain Stainless Steel Wire Rods From India*, 58 FR 54110 (October 20, 1993) and *Antidumping Duty Order: Certain Stainless Steel Wire Rods from India*, 58 FR 63335 (December 1, 1993). On December 2, 2003, the Department published in the **Federal Register** a notice of opportunity to request an administrative review of this antidumping duty order. See *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation: Opportunity To Request Administrative Review*, 68 FR 67401 (December 2, 2003).

On December 24, 2003, Isibars Steel, Ltd. (Isibars) requested that the Department initiate an administrative review of the antidumping duty order on SSWR from India. On December 31, 2003, the Viraj Group (Viraj) requested that the Department initiate an administrative review of the antidumping duty order on SSWR from India. On January 22, 2004, we published in the **Federal Register** the *Notice of Initiation of Antidumping and Countervailing Duty Administrative Reviews* (69 FR 3117) in which we initiated the administrative review of the antidumping duty order on SSWR from India with respect to Isibars and Viraj. The Department did not include Chandan Steel, Ltd. (Chandan) in the initiation notice for December cases because on December 30, 2003, the company requested a review as a new shipper. The Department denied this request after publication of the January 22, 2004, initiation notice for December cases. This request was denied because the certifications provided by Chandan in conjunction with its request under section 351.214(b)(2) of the Department's regulations did not satisfy several requirements of the Department's regulations. However, Chandan's December 30, 2003, letter requesting a new shipper review also included a request for an administrative review, which was timely filed in accordance with section 351.213(b) of the Department's regulations. Therefore, the Department included Chandan in the 2002–2003 administrative review. Accordingly, all deadlines applicable to the companies included in the January 2004 initiation notice are applicable to Chandan.

On July 15, 2004, the Department extended the due date for the preliminary results. See *Stainless Steel Wire Rod from India: Extension of Time Limit for the Preliminary Results of the Antidumping Duty Administrative Review*, 68 FR 42421 (July 15, 2004). In accordance with section 751(a)(3)(A) of the Tariff Act of 1930, as amended (the Act), the Department extended the due date for the notice of preliminary results by 100 days, from the original date of September 1, 2004, to December 10, 2004.

On November 26, 2004, in accordance with section 751(a)(3)(A) of the Act, the Department extended the due date for the notice of preliminary results by an additional 20 days from the revised due date of December 10, 2004, to December 30, 2004. See *Stainless Steel Wire Rods from India: Extension of Time Limit for the Preliminary Results of the Antidumping Duty Administrative Review*, 69 FR 68882 (November 26, 2004).

Period of Review

The period of review (POR) is December 1, 2002, through November 30, 2003.

Scope of the Antidumping Duty Order

The products covered by this order are certain SSWR, which are hot-rolled or hot-rolled annealed and/or pickled rounds, squares, octagons, hexagons or other shapes, in coils. SSWR are made of alloy steels containing, by weight, 1.2 percent or less of carbon and 10.5 percent or more of chromium, with or without other elements. These products are only manufactured by hot-rolling, are normally sold in coiled form, and are of solid cross section. The majority of SSWR sold in the United States are round in cross-section shape, annealed and pickled. The most common size is 5.5 millimeters in diameter.

The products are currently classifiable under subheadings 7221.00.0005, 7221.00.0015, 7221.00.0030, 7221.00.0045, and 7221.00.0075 of the *Harmonized Tariff Schedule of the United States* (HTSUS). Although the HTSUS subheadings are provided for convenience and customs purposes our written description of the scope of this proceeding remains dispositive.

Verification

As provided in section 782(i)(3) of the Act, we verified sales and cost information provided by Chandan from October 25, 2004, through October 29, 2004, the sales information provided by Isibars from November 1, 2004, through November 5, 2004, and sales and cost information provided by Viraj from December 5, 2004, through December 16, 2004, using standard verification procedures, including an examination of relevant sales, cost, financial records, and selection of original documentation containing relevant information. For Chandan and Isibars, our verification results are outlined in the public versions of the verification reports and are on file in the Department's Central Records Unit located in Room B–099 of the main Department of Commerce Building, 14th Street and Constitution Avenue, NW., Washington, DC. The verification results for Viraj will be released subsequent to these preliminary results of review. Verification findings for Viraj and Chandan are reflected in these preliminary results.

Intent to Revoke

On December 31, 2003, Viraj requested the revocation of the order covering SSWR from India as it pertains to its sales.

Under section 751(d)(1) of the Act the Department ''may revoke, in whole or in part'' an antidumping duty order upon completion of a review. Although Congress has not specified the procedures that the Department must follow in revoking an order, the Department has developed a procedure for revocation that is set forth in 19 CFR 351.222. Pursuant to subsection 351.222(b), the Department may revoke

[1] The Viraj Group consists of Viraj Alloys Limited (VAL) and VSL Wires Limited (VSL).

an antidumping duty order, in part, if it concludes that (i) An exporter or producer has sold the merchandise at not less than normal value for a period of at least three consecutive years, (ii) the exporter or producer has agreed in writing to its immediate reinstatement in the order if the Secretary concludes that the exporter or producer, subsequent to the revocation, sold the subject merchandise at less than normal value, and (iii) the continued application of the antidumping duty order is no longer necessary to offset dumping. Subsection 351.222(b)(3) states that, in the case of an exporter that is not the producer of subject merchandise, the Department normally will revoke an order in part under subsection 351.222(b)(2) only with respect to subject merchandise produced or supplied by those companies that supplied the exporter during the time period that formed the basis for revocation.

A request for revocation of an order in part must address three elements. The company requesting the revocation must do so in writing and submit the following statements with the request: (1) The company's certification that it sold the subject merchandise at not less than normal value during the current review period and that, in the future, it will not sell at less than normal value; (2) the company's certification that, during each of the consecutive years forming the basis of the request, it sold the subject merchandise to the United States in commercial quantities; (3) the agreement to reinstatement in the order if the Department concludes that the company, subsequent to revocation, has sold the subject merchandise at less than normal value. See 19 CFR 351.222(e)(1).

We preliminarily determine that the request from Viraj meets all of the criteria of 19 CFR 351.222(e)(1). With regard to the criteria of subsection 351.222(b)(2), our preliminary margin calculations show that Viraj sold SSWR at not less than normal value during the current review period. See Preliminary Results of Review section below. In addition, it sold SSWR at not less than normal value in the two previous administrative reviews in which it was involved. See *Stainless Steel Wire Rods From India: Notice of Amended Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 68 FR 38301 (June 27, 2003), covering the period December 1, 2000, through November 30, 2001, and *Stainless Steel Wire Rods From India: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 69 FR 29923 (May 26, 2004), covering the period December 1, 2001, through November 30, 2002 (*01–02 SSWR Final Results*).

Based on our examination of the sales data submitted by Viraj, we preliminarily determine that Viraj sold the subject merchandise in the United States in commercial quantities in each of the consecutive years cited by Viraj to support its request for revocation. See *Analysis Memorandum for Viraj Alloys Limited and VSL Wires Limited for the Preliminary Results of the Administrative Review of Stainless Steel Wire Rods from India*, dated December 30, 2004. (*Viraj Preliminary Analysis Memo*), which is in the Department's CRU, Room B–099. Thus, we preliminarily find that Viraj had zero or *de minimis* dumping margins for the last three consecutive administrative reviews and sold in commercial quantities in all three years. Also, we preliminarily determine that application of the antidumping order to Viraj is no longer warranted for the following reasons: (1) The company had zero or *de minimis* margins for a period of at least three consecutive years; (2) the company has agreed to immediate reinstatement of the order if the Department finds that it has resumed making sales at less than fair value; and (3) the continued application of the order is not otherwise necessary to offset dumping.

Therefore, we preliminarily determine that Viraj qualifies for revocation of the order on SSWR from India pursuant to 19 CFR 351.222(b)(2) and that the order with respect to merchandise produced and exported by Viraj Alloys, Ltd. and VSL Wires, Ltd. should be revoked.

If these preliminary findings are affirmed in our final results, we will revoke the order in part with respect to SSWR from India produced and exported by Viraj Alloys, Ltd., (VAL) and VSL Wires, Ltd., (VSL). In accordance with 19 CFR 351.222(f)(3), we will terminate the suspension of liquidation for SSWR produced and exported by VAL and VSL that were entered, or withdrawn from warehouse, for consumption on or after December 1, 2003, and will instruct U.S. Customs and Border Protection (CBP) to refund any cash deposits for such entries.

Affiliation/Collapsing

Viraj

In the previous administrative review, the Department collapsed VAL and VSL because VAL and VSL were affiliated, would not need to engage in major retooling to shift production of SSWR from one company to the other, and were capable, through their sales and production operations, of manipulating prices or affecting production decisions. See *Stainless Steel Wire Rods From India: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review*, 68 FR 70765 (December 19, 2003), and, for detailed analysis, see the Memorandum to Edward C. Yang from Robert Bolling (''Collapsing Memorandum'') (December 12, 2003), regarding the collapsing of VAL and VSL.

The production and sales structure of the sales currently under review is similar to that of the 2001–2002 administrative review. The record shows that VAL and VSL produce subject merchandise that is sold in the home and U.S. markets by VSL. The record also indicates, as in earlier reviews, that the various companies which make up the Viraj group are connected by a series of familial relationships between directors and significant shareholders.

Section 771(33)(A) of the Act states that the Department considers affiliated persons as ''members of a family, including brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants.'' Section 771(33)(E) states that an affiliation exists when any person directly or indirectly owns, controls, or holds with power to vote, five percent or more of the outstanding voting stock or shares of two organizations. Section 771(33)(F) of the Act also states that, ''two or more persons directly or indirectly controlling, controlled by, or under common control with, any person,'' shall be considered to be affiliated. A ''person'' may be an individual, corporation, or group. Further, section 771(33) of the Act states ''a person 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.'' The Department has analyzed the information regarding affiliation on the record in this administrative review, and preliminarily determines that VAL and VSL should be considered affiliated under sections 771(33)(A), (E), and (F) of the Act. For a detailed discussion, see memorandum to Barbara Tillman, Acting Deputy Assistant Secretary, titled ''Antidumping Duty Administrative Review of Stainless Steel Wire Rods from India: Collapsing of Viraj Alloys, Ltd. and VSL Wires, Ltd.'' dated November 30, 2004, at pages 3 through 5 (*02–03 Viraj Collapsing Memo*).

Further, the Department preliminarily determines that VAL and VSL should be collapsed. As explained in the *02–03 Viraj Collapsing Memo*, VAL and VSL

have production facilities to produce similar or identical merchandise without substantial retooling and should be treated as a single entity in accordance with 19 CFR 351.401(f)(1). Additionally, in determining whether there is a significant potential for manipulation, as contemplated by 19 CFR 351.401(f)(2), the Department considers the totality of the circumstances of the situation and may place more reliance on some factors than others. The totality of the circumstances here shows that there is a significant potential for the manipulation of price or production. See *02–03 Viraj Collapsing Memo*.

Based on our analyses of the relationship between VAL and VSL, we conclude that they warrant treatment as a single entity. Applying the criteria of our collapsing inquiry as set forth at pages 5 through 9 of the *02–03 Viraj Collapsing Memo*, we find that: (1) VAL and VSL are affiliated under subsections 771(33)(A), (E), and (F) of the Act; (2) a shift in production would not require substantial retooling of the facilities of either company; and (3) there is a significant potential for price and production manipulation due to the significant degree of common ownership and the intertwining of operations between the two companies. Therefore, the Department determines that VAL and VSL are affiliated and should be collapsed for the purposes of this administrative review.

Isibars

Isibars is a respondent that requested an administrative review in this segment of the proceeding. As discussed in detail in the Use of Facts Available section below, we have preliminarily determined to apply an adverse-facts-available rate to all sales of Isibars subject to this review.

For these preliminary results, we have evaluated the information on the record with respect to Isibars and its affiliates (Zenstar Impex and Shaktiman Steel Casting Pvt. Ltd.). Based on this information, the Department has preliminarily determined to treat Isibars and its affiliates as a single entity and calculate a single dumping margin as discussed below.

Section 771(33)(F) of the Act provides that two or more persons directly or indirectly controlling, controlled by, or under common control with, any person, are affiliated. The Act goes on to state that a person shall be considered to control another person if that person is legally or operationally in a position to exercise restraint or direction over the other person. Evidence of actual control is not required; it is the ability to control that is at issue. See section 771(33)(G) of the Act; *Antidumping Duties; Countervailing Duties; Final Rule*, 62 FR 27296, 27297–27298 (May 19, 1997). Moreover, the Department may consider control to arise from the potential for manipulation of price and production. See *Certain Welded Carbon Standard Steel Pipe and Tubes From India; Final Results of New Shippers Antidumping Duty Administrative Review*, 62 FR 47632, 47638 (September 10, 1997).

During the POR, all sales of Isibars' SSWR to the United States were made by Zenstar Impex (Zenstar). Zenstar also accounted for most of the home-market sales of Isibars' SSWR. During the last three months of the POR, Shaktiman Steel Casting Pvt. Ltd. (Shaktiman), made sales of Isibars' SSWR in the home market but not to the United States. Isibars claims that it is affiliated with Zenstar and Shaktiman. As explained below, based on the record, there is no cross ownership among Isibars, Zenstar, and Shaktiman.

Zenstar is a financing company and does not own any production facilities. It was founded in 1995 but was a dormant firm, not engaged in any activities, until its relationship with Isibars began in 2001. Since then, Zenstar's only activity is to sell Isibars' products. Zenstar provides the capital for the raw materials and other expenses incurred in production. Zenstar is the owner of the raw materials and finished products and those expenses are reflected in its financial statements. However, Isibars performs the actual transformation of Zenstar's raw materials and makes all the necessary arrangements for purchasing raw materials. A fee is paid for this transformation. Zenstar only sold Isibars' SSWR. See memorandum from the case analyst to the file titled, ''Verification Report of Home-Market and U.S. Sales by Isibars Limited,'' dated December 30, 2004 (*Isibars Verification Report*), and Memorandum to File From Analyst titled ''Communications with Isibars Limited,'' dated December 30, 2004 (*December 30, 2004 Memo*).

Usually, Zenstar pays a job work charge to Isibars after production is complete. In some cases, Zenstar paid in advance. Zenstar did not provide any loans to Isibars. Glance, a financing company that owns 80 percent of Zenstar, arranges for loan syndication for Isibars, and a director at Glance is a former employee of Isibars. See *Isibars Verification Report* at pages 2–6 and *December 30, 2004, Memo*.

Isibars' personnel handle almost all aspects of sales made by Zenstar. Isibars obtains and deals with the customers, negotiates the price and terms of sale of SSWR, issues the order confirmations, makes arrangements for delivery of SSWR directly from the factory to the customer, collects payment for sales, and gives the payments to Zenstar to deposit in Zenstar's bank account. Zenstar only prints the invoice which is sent to the customer. Zenstar does not provide any warranties, technical or customer service, or registration services to the customers and cannot approve or reject a particular sale. See *Isibars Verification Report* at pages 2–6 and the *December 30, 2004, Memo*. We preliminarily conclude that Isibars and Zenstar are affiliated pursuant to section 771(33)(F) and (G) of the Act. As described above, Zenstar controls Isibars' production by providing the financing (capital for raw material and other expenses) and Isibars controls Zenstar's sales activities. The sales and production activities between these two companies are intertwined.

Prior to August 1, 2003, Zenstar bought the raw materials for Isibars' billets and was reimbursed at a charge per unit as described above. On August 1, 2003, Isibars contracted its entire billet-making capacity to Shaktiman under an exclusive agreement in which Shaktiman buys all the scrap and ferro alloys and Isibars uses its machinery, labor, consumables, etc. to produce billets from Shaktiman's raw materials. Shaktiman paid Isibars upon completion of the work and did not provide any loans or advances to Isibars during the POR. Unlike Zenstar, Shaktiman actually makes the arrangements for purchases of raw materials. Also, unlike Zenstar, Shaktiman is more involved in the production process. Shaktiman has its own staff at Isibars' mill for general supervision, and they consequently influence the production schedule and accordingly the production costs of Isibars. See *Isibars Verification Report* at pages 2–6 and the *December 30, 2004 Memo*.

Shaktiman sold a major part of Isibars' billets to Zenstar at a negotiated price, and Isibars converted those billets into SSWR for Zenstar for a charge. The remainder of the billets were either sold as billets by Shaktiman or converted into SSWR by Isibars for sale in the home market by Shaktiman. Shaktiman does not have any production facilities of its own. All foreign-like product sold by Shaktiman was processed by Isibars. Shaktiman's only business activity is its arrangement with Isibars. See *Isibars Verification Report* at pages 2–6 and *December 30, 2004, Memo*.

Isibars' personnel handle almost all aspects of sales made by Shaktiman.

Isibars obtains and deals with the customers, negotiates the price and terms of sale of SSWR, issues the order confirmations, makes arrangements for delivery of SSWR directly from the factory to the customer, collects payment for sales, and deposits it in Shaktiman's bank account. Shaktiman only prints the invoice which is sent to the customer. Shaktiman does not provide any warranties, technical or customer service, or registration services to the customers and cannot approve or reject a particular sale. See *Isibars Verification Report* at pages 2–6 and *December 30, 2004, Memo*. The reasons that Isibars' transactions are structured in such a non-traditional manner are proprietary in nature and are discussed in *Isibars Verification Report* at pages 2–4. We preliminarily find that Isibars and Shaktiman are affiliated, pursuant to section 771(33)(F) and (G). As described above, Shaktiman controls Isibars' production by providing the financing (capital for raw material and other expenses) and Isibars controls Shaktiman's sales activities. The sales and production activities between these two companies are intertwined.

Section 351.401(f) of our regulations states that the Department will treat two or more affiliated producers as a single entity where:

(1) Those producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities; and

(2) where there is a significant potential for the manipulation of price or production.

In identifying a significant potential for the manipulation of price or production, the Department may consider ''whether operations are intertwined, such as through the sharing of sales information, involvement in production and pricing decisions, the sharing of facilities or employees, or significant transactions between affiliated producers.''

The Department has long recognized that it is appropriate to treat certain groups of companies as a single entity, and to determine a single weighted-average margin for that entity, in order to determine margins accurately and to prevent manipulation that would undermine the effectiveness of the antidumping law. The Department ''collapsed'' entities prior to the promulgation of section 351.401(f) of its regulations. In *Queen's Flowers*, the CIT upheld the Department's practice of collapsing two entities that were sufficiently related to present the possibility of price manipulation. *Queen's Flowers de Colon* v. *United States*, 981 F. Supp 617, 628 (CIT 1997). More recently the CIT found that collapsing exporters, rather than producers, is consistent with a ''reasonable interpretation of the antidumping duty statute.'' See *Hontex Enterprises Inc. d/b/a Louisiana Packing Company v. United States of America*, 248 F. Supp. 2d. 1323 (CIT 2003) (Hontex).

While 19 CFR 351.401(f) applies only to producers, the Department has found it to be instructive in determining whether non-producers should be collapsed and used the criteria outlined in the regulation in its analysis. See *Freshwater Crawfish Tail Meat From the People's Republic of China: Final Results of Administrative Antidumping Duty and New Shipper Reviews, and Final Rescission of New Shipper Review*, 65 FR 20948 (April 19, 2000) and accompanying Issues and Decision Memorandum at section C (the administrative determination under review in *Hontex*) and *Certain Preserved Mushrooms From the People's Republic of China: Final Results of Sixth Antidumping Duty New Shipper Review and Final Results and Partial Rescission of the Fourth Antidumping Duty Administrative Review*, 69 FR 54635 (September 9, 2004) (where the Department collapsed a producer and its exporters).

Section 351.401(f)(2)(iii) specifically calls on the Department to examine whether ''operations are intertwined, such as through the sharing of sales information, involvement in production and pricing decisions, the sharing of facilities or employees, or significant transactions between the affiliated {parties}.'' The evidence on the record, from Isibars' submissions and from verification, demonstrate that Isibars has significant control over the sales of Shaktiman and Zenstar. Moreover, the operations of Zenstar and Shaktiman demonstrate that Shaktiman and Zenstar have significant control over Isibars' production. While Zenstar and Shaktiman hold title to the goods and they provide complete financing to Isibars, these three companies' operations are so intertwined that there is a significant potential for the manipulation of price and production. Therefore, we find that these entities should be collapsed and assigned a single dumping margin and that the actual costs incurred by each company in producing the merchandise under consideration must be used for purposes of calculating constructed value and cost of production.

Use of Facts Available

In the instant review, despite numerous requests and clarifications from the Department, Isibars failed to adequately provide the information necessary for the margin analysis. As explained in detail below, the Department received deficient, misleading, and incomplete responses to the questionnaire and supplemental questionnaire from Isibars for section D. Moreover, the Department was unable to determine the accuracy of the information that Isibars did provide, which is necessary for the margin analysis.

On August 18, 2004, we sent the section D questionnaire to Isibars. On September 21, 2004, the Department received Isibars' section D response one day late. Isibars' section D response did not answer question II.A.7, which requested a list of major inputs purchased from affiliated parties and various information about those inputs such as the transfer price, the market price, and the affiliates cost of production. See 19 CFR 351.407(b). Further, Isibars' answers to questions III.A.1 and III.A.2.a, c, d, and e were insufficient and did not explain how the cost information contained in Isibars' constructed-value and cost-of-production databases was derived. For example, when asked to describe the method it used to compute the cost of direct materials and to describe how it used its financial accounting records to compute the cost of direct materials, Isibars responded, ''We have arrived at the direct material cost based on the input output norms multiplied by the inefficiency factor multiplied by the yields during the hot rolled and cold finished products. See Isibars' section D Response, dated September 21, 2004, page 26. For direct labor, Isibars responded, ''Direct labor includes labor charges paid by Isibars and wages including benefits thereon.'' See Isibars' section D Response, dated September 21, 2004, page 27. Isibars' response did not describe the method it used, or how it used its financial accounting records, to compute those expenses used to determine the constructed value and the cost of production reported in section D. Nor did Isibars explain whether it reported the actual expenses incurred by Zenstar and Shaktiman for raw materials or the actual expenses incurred by Isibars to produce the SSWR.

On October 20, 2004, the Department received Isibars' section D supplemental response two days late. Notwithstanding the delay, Isibars did not provide the requested explanation on the fixed and

variable overhead expenses. Although it provided more information on how the direct materials and direct labor costs were determined, for the first time, Isibars explained that it did not report the actual costs incurred by Isibars for producing the subject merchandise but instead reported the amount that Zenstar paid Isibars for production. This explanation is materially different than Isibars' September 21, 2004, response where it stated that ''direct labor includes labor charges *paid by* Isibars'' (emphasis added). Further, while Isibars listed some major inputs purchased from affiliates, it did not list the most significant major input, the job work charges of Isibars, and did not provide the requested information with respect to those charges. Isibars' incomprehensible explanations make it impossible for the Department to confirm the accuracy of the reported material and labor costs.

Section 782(c)(1) of the Act provides that if an interested party ''promptly after receiving a request from {the Department} for information, notifies {the Department} that such party is unable to submit the information requested in the requested form and manner, together with a full explanation and suggested alternative form in which such party is able to submit the information,'' the Department may modify the requirements to avoid imposing an unreasonable burden on that party. Likewise, the August 18, 2004, questionnaire advised Isibars to contact the Department if it needed clarification. At no point before submitting its response did Isibars seek clarification or express confusion with regard to any of these questions.

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 request, the Department will inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person the opportunity to remedy or explain the deficiency. If that person submits further information that continues to be unsatisfactory, or this information is not submitted within the applicable time limits, the Department may, subject to section 782(e), disregard all or part of the original and subsequent responses, as appropriate. Consistent with section 782(d), on October 6, 2004, we issued a supplemental questionnaire to Isibars requesting it to clarify how it calculated the direct materials, direct labor, variable overhead, and fixed overhead used in the cost-of-production and constructed-value databases. We also requested that Isibars answer question II.A.7 concerning its major inputs.

In reviews such as this where the Department is conducting a sales-below-cost investigation, it is necessary to have the cost-of-production information. Without this information the Department cannot determine the reliability of sales prices in the home market and, whether they form an appropriate basis for determining normal value. Given Isibars' failure to report its actual cost of production for the foreign-like product and subject merchandise, the Department is unable to calculate a dumping margin.

Section 776(a)(2) of the Act provides that, if necessary information is not available on the record because an interested party (A) withholds information that has been requested by the Department, (B) fails to provide such information in a timely manner or in the form or manner requested, (C) significantly impedes a proceeding under the antidumping statute, or (D) provides such information but the information cannot be verified, then the Department shall, subject to section 782(d) of the Act, use the facts otherwise available in reaching the applicable determination.

Because Isibars did not report its job-work charges as a major input purchased by affiliates Zenstar and Shaktiman, did not report its actual cost of production for this work, and did not provide complete and adequate responses as to how it computed the amounts for fixed and variable overhead, we preliminarily find that information specifically requested by the Department has been withheld. Finally, in the last review, the Department had similar difficulties obtaining major input information from Isibars. Given Isibars' familiarity with the requisite information, we must preliminary conclude that it significantly impeded this proceeding. Therefore, we preliminarily determine that the use of facts otherwise available is warranted to determine a margin for Isibars' sales of merchandise subject to this review.

Section 776(b) of the Act provides that, if the Department finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information, the Department may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available. In addition, the *Statement of Administrative Action* accompanying the *Uruguay Round Agreements Act,* H. Doc. 316, Vol. 1, 103d Cong. (1994) (SAA), establishes that the Department may employ an adverse inference ''* * * to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.'' See SAA at 870. It also instructs the Department, in employing adverse inferences, to consider ''* * * the extent to which a party may benefit from its own lack of cooperation.'' *Id.*

In this case, we find that Isibars did not act to the best of its ability. Despite repeated requests and absent any indication of confusion or inability to provide the requisite information, Isibars provided incomplete, unusable responses to section D of our questionnaire. Although Isibars is appearing in this proceeding *pro se,* it has extensive experience with the Department's procedures and requirements, having participated in several stainless steel bar and SSWR reviews. In fact, one of the reasons we applied adverse facts available in the last review of SSWR was because Isibars failed to provide the requested information on its major inputs supplied by an affiliate. See *Stainless Steel Wire Rods from India: Preliminary Results and Partial Recision of Antidumping Duty Administrative Review,* 68 FR 70765, 70768 (December 19, 2003). Thus, Isibars was aware of the importance of providing the requested information on major inputs. Notwithstanding its previous experience, Isibars' responses were not clear and even misleading as to how it derived its reported cost-of-production information. Therefore, pursuant to sections 776(a)(2)(A) and (C) and section 776(b) of the Act, we have preliminarily determined to use adverse facts available in reaching the preliminary results of review.

As adverse facts available, we have preliminarily assigned Isibars a rate of 48.80 percent, which is the highest rate determined in any segment of the proceeding and the rate currently applicable to Isibars. See *Antidumping Duty Order: Stainless Steel Wire Rods from India,* 58 FR 63335 (December 1, 1993) and *01–02 SSWR Final Results.* This rate is based on information provided in the petition.

Section 776(b) of the Act states that an adverse inference may include reliance on information derived from the petition. See also 19 CFR 351.308(c); Uruguay Round Agreement Act, Statement of Administrative Action (''SAA'') at 829–831. Section 776(c) of the Act provides that, when the Department relies on secondary information (such as the petition rates) as facts available, it must, to the extent practicable, corroborate that information from independent sources that are

reasonably at its disposal. The SAA clarifies that ''corroborate'' means that the Department will satisfy itself that the secondary information to be used has probative value. See SAA at 870. To corroborate secondary information, the Department will, to the extent practicable, examine the reliability and relevance of the information used. See *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); *Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Barium Carbonate From the People's Republic of China,* 68 FR 12664 (March 17, 2003). The Department's regulations state that independent sources used to corroborate may include, but are not limited to, published price lists, official import statistics and customs data, and information obtained from interested parties during the particular review. See 19 CFR 351.308(d); SAA at 870. Further, in accordance with *F. LII De Cecco Di Filippo Fara S. Martino S.p.A.* v. *United States,* 216 F.3d 1027, 1034 (Fed. Cir. 2000), we examine whether information on the record supporting the selected adverse facts available is reasonable and has some basis in reality.

The Department first assigned this rate to Isibars in the preceding review and, at that time, also corroborated the rate, to the extent practicable. As to corroborating the rate for the current review, nothing on the record of this review calls into question the reliability of the rate. Further, the rate has not been judicially invalidated. There is no reason to believe that the rate we have selected is inappropriate for use as the total adverse facts-available rate with respect to Isibars. This rate is Isibars' current rate and, therefore, applying a lesser rate would reward Isibars for not cooperating fully. The Department assumes that if an uncooperative respondent could have demonstrated that its dumping margin is lower than the highest prior margin it would have provided information showing the margin to be less. See *Rhone Poulenc, Inc.* v. *United States,* 899 F.2d 1185, 1190–91 (Fed. Cir. 1990). We have preliminarily selected this rate because it is sufficiently high as to reasonably assure that Isibars does not obtain a more favorable result by failing to cooperate than if it had cooperated fully. Therefore, we consider the selected rate to have probative value and to reflect the appropriate adverse inferences. Thus, we consider the rate of 48.80 percent as the most appropriate information on the record upon which to base adverse facts available with respect to Isibars in the instant review.

The implementing regulation for section 776 of the Act, codified 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.'' Additionally, the SAA at 870 states specifically that, where ''corroboration may not be practicable in a given circumstance,'' the Department may nevertheless apply an adverse inference. The SAA at 869 emphasizes that the Department need not prove that the facts available are the best alternative information. Therefore, in accordance with 776(c) of the Act, we consider the rate selected to be corroborated to the extent practicable for purposes of these preliminary results. See *CTL Plate from Mexico,* where although the Department was provided no useful information by the parties and was unaware of other independent sources of information that would permit further corroboration of the margin calculated in the petition, the Department found that its efforts corroborated information contained in the petition to the extent practicable.

Although the Department has already given Isibars a second chance to correct its response deficiencies, we have decided to issue a second section D supplemental questionnaire to Isibars to allow it the opportunity to correct its responses before a final decision is rendered. We will analyze the sufficiency of the second supplemental response and, if appropriate, issue our preliminary analysis of that response prior to the deadline for the case briefs in this review.

Extension of Time for Final Results

Section 751(a)(3)(A) of the Act, requires the Department to issue the final results of an antidumping duty administrative review within 120 days of the date on which the preliminary results are published. The Act also provides that the Department may extend the 120-day period to 180 days, if it determines that it is not practicable to complete the review within the foregoing time period.

Because of the Department's decision to afford Isibars another opportunity to correct the deficiencies in its responses, the Department needs the additional time to analyze Isibars' responses and conduct a cost verification. For this reason, the Department has determined that it is not practicable to complete the final results within the time limit mandated by section 751(a)(3)(A) of the Act. Therefore, in accordance with that section, the Department is extending the time limit for completion of the final results by 60 days.

The final results of review are now due no later than 180 days of the date on which the preliminary results are published. This extension of the time limit is in accordance with section 751(a)(3)(A) of the Act.

Normal Value Comparisons

To determine whether sales of subject merchandise from to the United States by Viraj were made at less than normal value, we compared the constructed export price (CEP), as appropriate, to the normal value, as described in the ''Export Price and Constructed Export Price'' and ''Normal Value'' sections of this notice, below. In accordance with section 777A(d)(2) of the Act, we calculated monthly weighted-average prices for normal value and compared these to individual CEP transactions.

As discussed below, Chandan had no home-market or third-country sales of subject merchandise during the POR. Therefore, in accordance with section 773(a)(4) of the Act, we used constructed value as the basis for normal value when making comparisons.

Product Comparisons

In accordance with section 771(16) of the Act, we considered all products described by the Scope of the Antidumping Duty Order section above, which were produced and sold by Viraj in the home market during the POR, to be foreign like products for purposes of determining appropriate comparisons to U.S. sales. Where there were no sales of identical merchandise in the home 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 Department's questionnaire. Where there were no sales of identical or similar merchandise in the home market to compare to U.S. sales, we compared U.S. sales to the constructed value of the product.

For Chandan, we compared U.S. sales to the constructed value of the product because Chandan did not have any home-market or third-country sales of SSWR during the POR. See the Normal Value section below for further discussion.

Export Price and Constructed Export Price

In accordance with section 772(a) of the Act, Export Price (EP) is 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 the 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. 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).

Chandan

For purposes of this review, Chandan has classified all sales as EP sales. Based on the information on the record, the Department determines that Chandan's U.S. sales were made ''outside of the United States'' within the meaning of section 772(a) of the Act and, thus, have been appropriately classified by Chandan as EP transactions.

The Department calculated EP, in accordance with section 772(a) of the Act, based on the packed price to the first unaffiliated customer in the United States. In accordance with section 772(c)(2)(A) of the Act, the Department made deductions for movement expenses.

Viraj

For purposes of this review, Viraj has classified all of its sales as CEP sales. Based on the information on the record, we are using CEP as defined in section 772(b) of the Act.

Viraj has classified those sales made by VSL through Viraj USA Inc. (''VUI''), an affiliated reseller in the United States, as CEP sales. VUI sells the goods to the unaffiliated U.S. customer, who makes payment to VUI.

Based on the record evidence, the Department preliminarily determines that VSL's U.S. sales through VUI were made ''in the United States'' within the meaning of section 772(b) of the Act and, thus, have been appropriately classified by Viraj as CEP transactions.

The Department calculated CEP, in accordance with section 772(b) of the Act, based on the packed ex-dock duty paid prices to the first unaffiliated customer in the United States. The Department made deductions for movement expenses in accordance with section 772(c)(2)(A) of the Act; these included, where appropriate, brokerage and handling, inland freight, international freight, U.S. customs duties, marine insurance, and customs clearance and delivery arrangements. In accordance with section 772(d)(1) of the Act, we deducted those selling expense associated with economic activities occurring in the United States, including direct selling expenses (bank charges and credit expenses) and indirect selling expenses.

We deducted the profit allocated to expenses deducted under sections 772(d)(1) in accordance with sections 772(d)(3) and 772(f) of the Act. In accordance with section 772(f) of the Act, we computed profit based on total revenues realized on sales in both the U.S. and home markets, less all expenses associated with those sales. We then allocated profit to expenses incurred with respect to U.S. economic activity, based on the ratio of total U.S. expenses to total expenses for both the U.S. and home market.

Duty Drawback

Viraj

In the previous two administrative reviews, the Department denied Viraj's request for an upward adjustment to the U.S. starting price based on duty drawback pursuant to section 772(c)(1)(B) of the Act. See *Stainless Steel Wire Rods from India: Final Results of Antidumping Duty Administrative Review,* 67 FR 37391 (May 29, 2002) and *01–02 SSWR Final Results* and accompanying Issues and Decision memorandum at Comment 14. The Department denied the duty drawback adjustment because the reported duty drawback was not directly linked to the amount of duty paid on imports used in the production of merchandise for export as required by the Department's two-part test, which states there must be: (1) A sufficient link between the import duty and the rebate, and (2) a sufficient amount of raw materials imported and used in the production of the final exported product. See *Rajinder Pipes Ltd. v. United States,* 70 F. Supp. 2d 1350, 1358 (CIT September 17, 1999). The Court of International Trade has upheld the Department's past decisions to deny respondent an adjustment for duty drawback because there was not substantial evidence on the record to establish that part one of the Department's test had been met. See *Viraj Group, Ltd.* v. *United States,* 162 F.Supp. 2d 656 (CIT August 15, 2001).

Similarly, in the current review, the Department finds that Viraj has not provided substantial evidence on the record to establish the necessary link between the import duty and the reported rebate for duty drawback. Viraj has reported that it received duty drawback in the form of duty entitlement certificates which are issued by the Government of India to neutralize the incidence of basic custom duty on the import of raw materials used in the production of subject merchandise, but has failed to establish the necessary link between the import duty paid and the rebate given by the Government of India. See Viraj's April 12, 2004, response at C–24. As in the previous review, Viraj was not able to demonstrate that the import duty paid and the duty drawback rebate were directly linked. Therefore, the Department is denying a duty drawback credit for the preliminary results of this review.

Normal Value

After testing home market viability, we calculated normal value as stated in the ''Price-to-CV Comparisons'' and ''Price-to-Price Comparisons'' sections of this notice.

1. Home-Market Viability

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 normal value (*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 compared the volume of home-market sales of the foreign like product by Viraj to the volume of its U.S. sales of subject merchandise. Pursuant to sections 773(a)(1)(B) and (C) of the Act, because the aggregate volume of home-market sales of the foreign like product by Viraj was greater than five percent of the aggregate volume of U.S. sales for the subject merchandise, we determined that sales in the home market provide a viable basis for calculating normal value. We therefore based normal value on home-market sales to unaffiliated purchasers made in the usual commercial quantities and in the ordinary course of trade for Viraj.

For normal value, we used the prices at which the foreign like product was first sold for consumption in India, in the usual commercial quantities, in the ordinary course of trade, and, to the extent possible, at the same level of trade as the CEP as appropriate. After testing home-market viability and whether home-market sales were at

below-cost prices for Viraj, we calculated normal value as stated in the ''Price-to-Price Comparisons'' and ''Price-to-CV'' sections of this notice.

Because we determined that Chandan had neither home-market nor third-country sales of subject merchandise during the POR, in accordance with section 773(a)(4) of the Act, we used constructed value as the basis for calculating normal value.

2. Cost-of-Production Analysis

Because the Department disregarded certain Viraj Group sales made in the home market at prices below the cost of producing the subject merchandise in the most recently completed segment of this proceeding and excluded such sales from normal value, the Department determined that there are reasonable grounds to believe or suspect that Viraj made sales in the home market at prices below the cost of producing the merchandise in this review. See *01–02 SSWR Final Results;* section 773(b)(2)(A)(ii) of the Act. As a result, Viraj submitted its section D questionnaire response to the Department on April 12, 2004.

3. Calculation of COP

In accordance with section 773(b)(3) of the Act, we calculated cost of production (''COP'') based on the sum of Viraj's costs of materials and fabrication for the foreign like product, plus amounts for home market selling, general and administrative expenses (''SG&A''), including interest expenses, and packing costs. The Department relied on the COP data submitted by Viraj in its original and supplemental cost questionnaire responses for this calculation.

4. Test of Home-Market Prices

We compared the weighted-average COP for Viraj's home-market sales of the foreign like product as required under section 773(b) of the Act, in order to determine whether these sales had been made at prices below the COP. In determining whether to disregard home-market sales made at prices less than the COP, we examined whether such sales were made: (1) In substantial quantities within an extended period of time; and (2) at prices which permitted the recovery of all costs within a reasonable period of time, in accordance with sections 773(b)(1)(A) and (B) of the Act. We compared the COP to home market-prices, less any applicable billing adjustments, movement charges, discounts, and selling expenses.

5. Results of the COP Test

Pursuant to section 773(b)(2)(C) of the Act, when less than 20 percent of a respondent's sales of a given product were at prices less than the COP, we did not disregard any below-cost sales of that product because the below-cost sales were not made in substantial quantities within an extended period of time. When 20 percent or more of a respondent's sales of a given product during the POR were at prices less than the COP, we disregarded the below-cost sales because they were made in substantial quantities within an extended period of time pursuant to sections 773(b)(2)(B) and (C) of the Act and, based on comparisons of prices to weighted-average COPs for the POR, we determined that these sales were at prices which would not permit recovery of all costs within a reasonable period of time in accordance with section 773(b)(2)(D) of the Act. See *Viraj Preliminary Analysis Memo.* Based on this test, we disregarded below-cost sales with respect to Viraj.

Price-to-Price Comparisons

Viraj

For those product comparisons for which there were sales at or above the COP, we based normal value on the packed, ex-factory, or delivered prices to affiliated or unaffiliated purchasers. When applicable, we made adjustments for differences in packing and for movement expenses in accordance with sections 773(a)(6)(A) and (B) of the Act. We also made adjustments for differences in cost attributable to differences in physical characteristics of the merchandise pursuant to section 773(a)(6)(C)(ii) of the Act and 19 CFR 351.411 and for differences in circumstances of sale in accordance with section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410.

In accordance with the Department's practice, where all contemporaneous matches to a U.S. sale observation resulted in difference-in-merchandise adjustments exceeding 20 percent of the cost of manufacturing (''COM'') of the U.S. product, we based normal value on CV.

Price-to-CV Comparisons

Viraj

In accordance with section 773(a)(4) of the Act, we based normal value on CV if we were unable to find a home-market match of identical or similar merchandise. We calculated CV based on the sum of the cost of materials, fabrication employed by Viraj in producing the subject merchandise, and SG&A, including interest expenses, and profit. We calculated the COP included in the calculation of CV as stated above in the Calculation of COP section of this notice. In accordance with section 773(e)(2)(A) of the Act, we based SG&A expense and profit on the amounts incurred and realized by the respondent in connection with the production and sale of the foreign like product in the ordinary course of trade for consumption in India. For selling expenses, we used the actual weighted-average home-market direct and indirect selling expenses. For CV, we made the same adjustments described in the Calculation of COP section above.

Our price comparisons reflect adjustments to reported costs and expenses as a result of findings at verification. For details regarding these findings and our calculations, see *Viraj Preliminary Analysis Memo.*

Chandan

Chandan had neither home-market sales nor third-country sales of SSWR. Accordingly, pursuant to section 773(a)(4) of the Act, we based normal value on constructed value. In accordance with section 773(e) of the Act, we calculated CV based on the sum of Chandan's cost of materials and fabrication for the subject merchandise, plus amounts for profit, SG&A, interest, and U.S. packing costs. For further details of our calculations, see *Analysis Memorandum for Chandan Steel Ltd. for the Preliminary Results of the Administrative Review of Stainless Steel Wire Rods from India,* dated December 30, 2004 (*Chandan's Preliminary Analysis Memo*).

Because Chandan does not have a viable comparison market, the Department cannot determine profit under section 773(e)(2)(A) of the Act, which requires sales by the respondent in question in the ordinary course of trade in a comparison market. Likewise, because Chandan does not have any sales in the same general category of products as the subject merchandise, we are unable to apply the alternative (i) of section 773(e)(2)(B) of the Act. Further, the Department cannot calculate profit based on alternative (ii) of this section without violating our responsibility to protect respondents' business proprietary information because Viraj is the only other respondent with viable home-market sales (19 CFR 351.405(b) requires that a profit ratio under this alternative be based solely on home-market sales) for which we have calculated a margin. If we were to use Viraj's profit ratio exclusively under this alternative, Chandan would be able to determine Viraj's proprietary profit rate.

Therefore, we have calculated Chandan's CV profit based on the third alternative, any other reasonable method, in accordance with section 773(e)(2)(B)(iii) of the Act. As a result, as a reasonable method, we calculated Chandan's CV profit based on the publicly available financial information of another Indian steel producer who is not a respondent in this administrative review. For a detailed discussion of our calculation see *Chandan's Preliminary Analysis Memo.*

Except for our calculation of surrogate CV profit, we have relied on submitted CV information. However, because we determined that Chandan had calculated its G&A ratio incorrectly, we recalculated Chandan's G&A ratio based on Chandan's fiscal year data. For a detailed description of our recalculation, see *Chandan's Preliminary Analysis Memo.*

Level of Trade

In accordance with section 773(a)(1)(B) of the Act, to the extent practicable, we determine normal value based on sales in the comparison market at the same level of trade as the EP or CEP transaction. See also 19 CFR 351.412. The normal value level of trade is that of the starting-price sales in the comparison market or, when normal value is based on CV, that of the sales from which we derive SG&A expenses and profit. See 19 CFR 351.412(2)(iii). For EP, the level of trade is also the level of the starting-price sale, which is usually from the exporter to the importer. See 19 CFR 351.412(2)(i). For CEP, it is the level of the constructed sale from the exporter to the affiliated importer. See 19 CFR 351.412(c)(ii).

To determine the level of trade of a sale, we examine stages in the marketing process and selling functions along the chain of distribution between the producer and the unaffiliated customer. Substantial differences in selling activities are a necessary, but not sufficient condition for determining that there is a difference in the stage of marketing. See 19 CFR 351.412(c)(2). If the comparison market sales are at a different level of trade, and the difference affects price comparability, as manifested in a pattern of consistent price differences between the sales on which normal value is based and comparison-market sales at the level of trade of the export transaction, we make a level-of-trade adjustment under section 773(a)(7)(A) of the Act. Finally, for CEP sales, if the normal value level is more remote from the factory than the CEP level and there is no basis for determining whether the differences in the levels between normal value and CEP sales affect price comparability, we adjust normal value under section 773(A)(7)(B) of the Act (the CEP offset provision). See *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate from South Africa*, 62 FR 61731 (November 19, 1997).

In implementing these principles in this review, we obtained information from Viraj about the marketing stages involved in its U.S. and home-market sales, including a description of the selling activities for each channel of distribution. In identifying levels of trade for CEP, we considered only the selling activities reflected in the price after the deduction of expenses and profit under section 772(d) of the Act. See *Micron Technology, Inc.* v. *United States*, 243 F.3d 1301, 1314–1315 (Fed. Cir. 2001). Generally, if the reported levels of trade are the same in the home and U.S. markets, the functions and activities of the seller should be similar. Conversely, if a party reports differences in levels of trade the functions and activities should be dissimilar.

In the present review, we performed a level-of-trade analysis for Viraj. To determine whether an adjustment was necessary, in accordance with the principles discussed above, we examined information regarding the distribution systems in both the United States and home markets, including the selling functions, classes of customer, and selling expenses.

Viraj claimed three levels of trade in the home market. See Viraj sections B, C, and D Questionnaire Response, dated April 12, 2004 (''*Viraj Sections B–D Response*'') at B–17. Additionally, Viraj reported that it sold through one channel of distribution in the home market: directly to unaffiliated customers (''actual user'', ''trading company'', and ''distributors''). See *Viraj Sections B–D Response* at B–9. For sales in the home market, Viraj reported that all of its sales are sold ex-works. See *Viraj Sections B–D Response* at B–12. Viraj reported that it performs the following selling functions in the home market: Sales promotion, packing, order input/processing, and direct sales personnel. See Viraj section A Questionnaire Response, dated March 24, 2004, at A–29. Because there is only one channel of distribution in the home market and identical selling functions are performed for all home-market sales, we preliminarily determine that there is one level of trade in the home market.

Viraj claimed three levels of trade in the U.S. market. See *Viraj Sections B–D Response* at C–17. Viraj reported that it sold through one channel of distribution in the U.S. market, directly from its mill to its U.S. affiliate (*i.e.*, VUI). See *Viraj Section B and C Response* at C–10. The Department examined the selling functions and services performed by Viraj to its U.S. affiliate. We found that the selling functions (*i.e.*, sales promotion, packing, order input/processing, direct sales personnel, paying commissions, and providing freight and delivery) Viraj performs after the section 772(d) adjustments are the same for all of its U.S. sales. See Viraj section A Questionnaire Response March 24, 2004 (''*Viraj Section A Response*'') at A–29. Therefore, we preliminarily determine that Viraj has one level of trade in the U.S. market based on its selling functions to the United States.

In order to determine whether normal value was established at a different level of trade than CEP sales, we examined stages in the marketing process and selling functions along the chains of distribution between (1) Viraj and its home market customers and (2) Viraj and its affiliated U.S. reseller, VUI, after deductions for expenses and profits. Specifically, we compared the selling functions performed for home-market sales with those performed with respect to the CEP transaction, after deductions for economic activities occurring in the United States, pursuant to section 772(d) of the Act, to determine if the home-market level of trade constituted a different level of trade than the CEP level of trade.

Viraj did not request a CEP offset. Nonetheless, in accordance with the principles discussed above, we examined information regarding the distribution systems in both the United States and Indian markets, including the selling functions, classes of customer, and selling expenses to determine whether a CEP offset was necessary. For CEP sales, we found that Viraj provided many of the same selling functions and expenses for its sale to its affiliated U.S. reseller VUI as it provided for its home-market sales, including sales promotion, packing, order input/processing, and direct sales personnel. Based on our analysis of the channels of distribution and selling functions performed for sales in the home market and CEP sales in the U.S. market, we preliminarily find that there is no significant difference in the selling functions performed in the home market and the U.S. market for CEP sales. Thus, we find that Viraj's normal value and CEP sales were made at the same level of trade, and no level of trade adjustment or CEP offset need be granted.

Currency Conversion

We made currency conversions into U.S. dollars in accordance with section 773A(a) of the Act, based on the exchange rates in effect on the dates of the U.S. sales, as certified by the Federal Reserve Bank.

Preliminary Results of Review

As a result of our review, we preliminarily determine that the following weighted-average dumping margins exist for the period December 1, 2002, through November 30, 2003:

Producer or exporter	Weighted-average margin (percent)
Chandan Steel, Ltd	1.27
Isibars Steel, Ltd., Zenstar Impex, and Shaktiman Steel Casting Pvt. Ltd	48.80
The Viraj Group (Viraj Alloys, Ltd. and VSL Wires, Ltd.)	0.00

Pursuant to section 351.224(b) of the Department's regulations, the Department will disclose to parties calculations performed in connection with these preliminary results within five days of the date of publication of this notice. Any interested party may request a hearing within 30 days of publication of this notice. We will notify parties of the exact date, time, and place for any such hearing.

Issues raised in hearings will be limited to those raised in the respective case and rebuttal briefs. Parties who submit case or rebuttal briefs in these proceedings are requested to submit with each argument (1) a statement of the issue, and (2) a brief summary of the argument with an electronic version included. The Department will notify all parties as to the applicable briefing schedule.

As discussed in the Extension of Final Results section above, the Department will publish a notice of final results of this administrative review, which will include the results of its analysis of issues raised in the case briefs, within 180 days from the publication of these preliminary results.

Assessment

Upon issuance of the final results of this review, the Department shall determine, and CBP shall assess, antidumping duties on all appropriate entries. Pursuant to 19 CFR 351.212(b), the Department has calculated an assessment rate applicable to all appropriate entries. We calculated importer-specific duty assessment rates on the basis of the ratio of the total amount of antidumping duties calculated for the examined sales to the total entered value, or entered quantity, as appropriate, of the examined sales for that importer. Upon completion of this review, where the assessment rate is above *de minimis*, we will instruct CBP to assess duties on all entries of subject merchandise by that importer.

Cash Deposit

The following cash-deposit requirements will be effective upon publication of the final results of this administrative review for all shipments of the subject merchandise 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 rate for each of the reviewed companies will be the rate listed in the final results of review (except that if the rate for a particular company is *de minimis*, *i.e.*, less than 0.5 percent, no cash deposit will be required for that company); (2) for previously investigated companies not listed above, the cash-deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the original 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) the cash-deposit rate for all other manufacturers or exporters will continue to be the ''all others'' rate of 48.80 percent, which is the ''all others'' rate established in the LTFV investigation. These deposit requirements, when imposed, shall remain in effect until publication of the final results of the next administrative review.

Notification to Interested Parties

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) 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 the antidumping duties occurred and the subsequent assessment of double antidumping duties.

These preliminary results are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: December 30, 2004.

Joseph A. Spetrini,

Acting Assistant Secretary for Import Administration.

[FR Doc. E5–33 Filed 1–6–05; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

North American Free-Trade Agreement, Article 1904 NAFTA Panel Reviews; Request for Panel Review

AGENCY: NAFTA Secretariat, United States Section, International Trade Administration, Department of Commerce.

ACTION: Notice of first request for panel review.

SUMMARY: On December 27, 2004, the counsel for the Sivaco Wire Group 2004 LLP (formerly Ivaco Inc.), Sivaco Ontario a Divison of Sivaco Wire Group 2004 LLP (formerly Sivaco Ontario a Division of Ivaco Inc.), and Ivaco Rolling Mills 2004 L.P. (formerly Ivaco Rolling Mills L.P. filed a First Request for Panel Review with the United States Section of the NAFTA Secretariat pursuant to Article 1904 of the North American Free Trade Agreement. Panel review was requested of the final results of the antidumping duty administrative review made by the United States Department of Commerce, International Trade Administration, respecting Carbon and Certain Alloy Steel Wire Rod from Canada. This determination was published in the **Federal Register**, (69 FR 68309) on November 24, 2004. The NAFTA Secretariat has assigned Case Number USA–CDA–2004–1904–02 to this request.

FOR FURTHER INFORMATION CONTACT: Caratina L. Alston, United States Secretary, NAFTA Secretariat, Suite 2061, 14th and Constitution Avenue, Washington, DC 20230, (202) 482–5438.

SUPPLEMENTARY INFORMATION: Chapter 19 of the North American Free-Trade Agreement (''Agreement'') establishes a mechanism to replace domestic judicial review of final determinations in antidumping and countervailing duty cases involving imports from a NAFTA country with review by independent binational panels. When a Request for Panel Review is filed, a panel is established to act in place of national courts to review expeditiously the final determination to determine whether it conforms with the antidumping or countervailing duty law of the country that made the determination.

Under Article 1904 of the Agreement, which came into force on January 1, 1994, the Government of the United States, the Government of Canada and the Government of Mexico established *Rules of Procedure for Article 1904 Binational Panel Reviews* (''Rules''). These Rules were published in the **Federal Register** on February 23, 1994 (59 FR 8686).

A first Request for Panel Review was filed with the United States Section of the NAFTA Secretariat, pursuant to Article 1904 of the Agreement, on December 27, 2004, requesting panel review of the final determination described above.

The Rules provide that:

(a) A Party or interested person may challenge the final determination in whole or in part by filing a Complaint in accordance with Rule 39 within 30 days after the filing of the first Request for Panel Review (the deadline for filing a Complaint is January 24, 2005);

(b) A Party, investigating authority or interested person that does not file a Complaint but that intends to appear in support of any reviewable portion of the final determination may participate in the panel review by filing a Notice of Appearance in accordance with Rule 40 within 45 days after the filing of the first Request for Panel Review (the deadline for filing a Notice of Appearance is February 10, 2005); and

(c) The panel review shall be limited to the allegations of error of fact or law, including the jurisdiction of the investigating authority, that are set out in the Complaints filed in the panel review and the procedural and substantive defenses raised in the panel review.

Dated: January 3, 2005.

Caratina L. Alston,

United States Secretary, NAFTA Secretariat.

[FR Doc. 05–298 Filed 1–6–05; 8:45 am]

BILLING CODE 3510–GT–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 121504F]

New England Fishery Management Council; Public Meeting

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

ACTION: Agenda revision of a public meeting.

SUMMARY: The New England Fishery Management Council (Council) is scheduling a public meeting of its Scallop Oversight Committee in January, 2005.

DATES: The meeting will be held on Wednesday, January 26, 2005, at 9:30 a.m.

ADDRESSES: Four Points By Sheraton, 407 Squire Road, Revere, MA 02151; telephone:(781) 284–7200.

FOR FURTHER INFORMATION CONTACT: Paul J. Howard, Executive Director, New England Fishery Management Council (978) 465–0492. Requests for special accommodations should be addressed to the New England Fishery Management Council, 50 Water Street, Newburyport, MA 01950; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION: The Oversight Committee will review the analysis of General Category vessel monitoring system (VMS) alternatives in Framework Adjustment 17 and recommend a final alternative to the Council. The committee will also discuss safety at sea issues with respect to the broken trip/DAS rebate program, and any other aspects of the scallop plan as may be deemed appropriate, and the related Executive Committee discussion held on January 5, 2005, scallop research priorities and the TAC/DAS set-aside research application review process, following a presentation by NMFS Regional Office staff. Other business may be discussed, as needed. Finally, the agenda includes a closed-door session at the end of the meeting to develop Advisory Panel appointment recommendations.

Although non-emergency issues not contained in this agenda may come before this Council for discussion, those issues may not be the subject of formal Council action during this meeting. Council action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Paul J. Howard (see **ADDRESSES**) at least 5 days prior to the meeting dates.

Dated: January 4, 2005.

Alan D. Risenhoover,

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

[FR Doc. E5–30 Filed 1–6–05; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 010305A]

Fisheries of the South Atlantic, Gulf of Mexico, and Caribbean; Southeastern Data, Assessment, and Review (SEDAR) Steering Committee Meeting

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

ACTION: Notice of the Southeastern Data, Assessment, and Review (SEDAR) Steering Committee meeting.

SUMMARY: The SEDAR Steering Committee will meet to discuss the SEDAR schedule; receive updates on SEDAR 7, Gulf of Mexico red snapper and SEDAR 8, Caribbean yellowtail snapper and spiny lobster; discuss the process for conducting assessment updates; establish the assessment schedule for 2005 and 2006; and clarify objectives for the 2005 CY budget. See **SUPPLEMENTARY INFORMATION**.

DATES: The SEDAR Steering Committee will meet on Tuesday, February 1, 2005, from 8:30 am to 5:30 pm; and Wednesday, February 2, 2005, from 8:30 am to 1 pm.

ADDRESSES: The meeting will be held at the Hampton Inn and Suites, 678 Citadel Haven Drive, Charleston SC 29414, Phone: 800–426–7866 or 843–573–1200/Fax: 843–556–6078.

FOR FURTHER INFORMATION CONTACT: John Carmichael, SEDAR Coordinator, SEDAR/SAFMC, One Southpark Circle, Suite 306, Charleston, S.C., 29407; phone 843/571–4366 or toll free 866/SAFMC–10; FAX 843/769–4520.

SUPPLEMENTARY INFORMATION: The South Atlantic, Gulf of Mexico, and Caribbean Fishery Management Councils; in conjunction with NOAA Fisheries, the Atlantic States Marine Fisheries Commission, and the Gulf States Marine Fisheries Commission; implemented the SEDAR process, a multi-step method for determining the status of fish stocks. The SEDAR Steering Committee provides oversight of the SEDAR process and establishes assessment priorities.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to the South Atlantic Fishery Management Council office at the address listed above at least 5 business days prior to the meeting.

January 4, 2005.

Alan D. Risenhoover,

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

[FR Doc. E5–28 Filed 1–6–05; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Science Board

AGENCY: Department of Defense.

ACTION: Notice of Advisory Committee Meetings.

SUMMARY: The Defense Science Board Task Force on Critical Homeland Installation Protection will meet in closed sessions on January 12, 2005, at SAIC, 4001 N. Fairfax Drive, Suite 500, Arlington, VA. The Task Force will assess best practices for protecting U.S. homeland installations and recommend various approaches to enhancing security and protection of these facilities.

The mission of the Defense Science Board is to advise the Secretary of Defense and the Under Secretary of Defense for Acquisition, Technology & Logistics on scientific and technical matters as they affect the perceived needs of the Department of Defense. At these meetings, the Task Force will assess investments in technology and manpower in order to ensure proper security levels at our nation's high-value installations with particular emphasis on airports, harbors, nuclear power facilities and military bases. To that end, the Task Force will review existing best practices in force protection and security at civil, industrial and military complexes; assess shortfalls and deficiencies associated with operational security; identify promising technology and/or processes that will enhance security; and recommend methods for reducing overall manpower requirements without relinquishing robust security measures.

In accordance with Section 10(d) of the Federal Advisory Committee Act, Pub. L. 92–463, as amended (5 U.S.C. App. II), it has been determined that these Defense Science Board Task Force meetings concern matters listed in 5 U.S.C. 552b(c)(1) and that, accordingly, the meetings will be closed to the public.

Dated: December 30, 2004.

Jeannette Owings-Ballard,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 05–301 Filed 1–6–04; 8:45 am]

BILLING CODE 5001–06–M

DEPARTMENT OF DEFENSE

Department of the Navy

Notice of Intent To Grant Exclusive Patent License; Lewis Machine & Tool Co. Inc.

AGENCY: Department of the Navy, DOD.

ACTION: Notice.

SUMMARY: The invention listed below is assigned to the United States Government as represented by the Secretary of the Navy. The Department of the Navy hereby gives notice of its intent to grant to Lewis Machine & Tool Co. Inc. a revocable, nonassignable, exclusive license to practice in the United States, the Government-Owned invention described below:

U.S. Patent 6,543,172 (Navy Case 83187): issued April 8, 2003, entitled ''BUTTSTOCK ASSEMBLY WITH REMOVABLE AND SEALABLE STORAGE TUBES.''

DATES: Anyone wishing to object to the grant of this license has fifteen (15) days from the date of this notice to file written objections along with supporting evidence, if any.

ADDRESSES: Written objections are to be filed with Naval Surface Warfare Center, Crane Division, Code 054, Bldg 1, 300 HWY 361, Crane, IN 47522–5001.

FOR FURTHER INFORMATION CONTACT: Mr. Brian Bailey, Naval Surface Warfare Center, Crane Division, Code 054, Bldg 1, 300 HWY 361, Crane, IN 47522–5001, telephone 812–854–2378.

(**Authority:** 35 U.S.C. 207, 37 CFR Part 404.)

Dated: December 28, 2004.

J.H. Wagshul,

Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. 05–310 Filed 1–6–05; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Uninformed Services University of the Health Sciences Meeting Notice

Agency Holding the Meeting: Uniformed Services University of Health Sciences.

Time and Date: 8 a.m. to 4 p.m., February 8, 2005.

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

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

Matters To Be Considered:

8 a.m. Meeting—Board of Regents

(1) Approval of Minutes—November 9, 2004
(2) Faculty Matters
(3) Departmental Reports
(4) Financial Report
(5) Report—Interim President, USUHS
(6) Report—Dean, School of Medicine
(7) Report—Dean, Graduate School of Nursing
(8) Approval of Degrees—School of Medicine; Graduate School of Nursing
(9) Comments—Chairman, Board of Regents
(10) New Business

Contact Person for More Information: Barry W. Wolcott, M.D., Executive Secretary, Board of Regents, (301) 295–3681.

Dated: January 4, 2005.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 05–458 Filed 1–5–04; 8:45 am]

BILLING CODE 5001–06–M

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

SUMMARY: The Director, Regulatory Information Management Services, Office of the Chief Information Officer, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before March 8, 2005.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Director, Regulatory Information Management Services, Office of the Chief Information Officer, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, *e.g.* new, revision,

extension, existing or reinstatement; (2) title; (3) summary of the collection; (4) description of the need for, and proposed use of, the information; (5) respondents and frequency of collection; and (6) reporting and/or Recordkeeping burden. OMB invites public comment.

The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: January 3, 2005.

Jeanne Van Vlandren,

Director, Regulatory Information Management Services, Office of the Chief Information Officer.

Institute of Education Sciences

Type of Review: New.

Title: Impact Evaluation of the DC Opportunity Scholarship Program.

Frequency: Annually.

Affected Public: Individuals or household; Not-for-profit institutions; State, Local, or Tribal Gov't, SEAs or LEAs.

Reporting and Recordkeeping Hour Burden:

Responses: 9,662.

Burden Hours: 9,248.

Abstract: The DC Opportunity Scholarship Program is a five-year school choice program that provides scholarships for children in low-income families in Washington, DC. This evaluation uses a randomized control trial to compare the outcomes of eligible applicants who received scholarships to eligible applicants who did not receive a scholarship.

Requests for copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov*, by selecting the ''Browse Pending Collections'' link and by clicking on link number 2659. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., Potomac Center, 9th Floor, Washington, DC 20202–4700. Requests may also be electronically mailed to the Internet address *OCIO_RIMG@ed.gov* or faxed to 202–245–6621. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be directed to Kathy Axt at her e-mail address *Kathy.Axt@ed.gov*. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. E5–17 Filed 1–6–05; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Savannah River

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Savannah River. The Federal Advisory Committee Act (Public Law 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Monday, January 24, 2005, 1 p.m.–5:15 p.m., Tuesday, January 25,2005, 8:30 a.m.–4 p.m.

ADDRESSES: Hilton-Palmetto Dunes, 23 Ocean Lane, Hilton Head, SC 29928.

FOR FURTHER INFORMATION CONTACT: Gerri Flemming, Closure Project Office, Department of Energy Savannah River Operations Office, P.O. Box A, Aiken, SC 29802; Phone: (803) 952–7886.

SUPPLEMENTARY INFORMATION:

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

Tentative Agenda

Monday, January 24, 2005

1 p.m.—2005 Workplan Session.
3 p.m.—Combined Committee Session.
5.15 p.m.—Adjourn.

Tuesday, January 25, 2005

8:30 a.m.—Recognition of Outgoing Board Members & Remarks.
9 a.m.—Approval of Minutes, Agency Updates.
9:45 a.m.—Public Comment Session.
10 a.m.—Chair and Facilitator Update.
10:15 a.m.—Waste Management Committee Report.
11:15 a.m.—Facilities Disposition & Site Remediation Committee Report.
11:50 a.m.—Public Comments.
12 p.m.—Lunch Break.
1 p.m.—Nuclear Materials Committee Report.
2 p.m.—Strategic & Legacy Management Committee Report.
3 p.m.—Administrative Committee Report, 2005 Candidate Review and Elections, 2005 Committee Chair Elections.
3:45 p.m.—Public Comments.
4 p.m.—Adjourn.

Public Participation: The meeting is open to the public. Written statements may be filed with the Board either before or after the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact Gerri Flemming's office at the address or telephone listed above. Requests must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct business. Each individual wishing to make public comment will be provided a maximum of five minutes to present their comments. This notice is being published less that 15 days before the date of the meeting due to programmatic issues.

Minutes: The minutes of this meeting will be available for public review and copying at the Department of Energy's Freedom of Information Public Reading Room, 1E–190, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585 between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. Minutes will also be available by writing to Gerri Flemming, Department of Energy Savannah River Operations Office, P.O. Box A, Aiken, SC 29802, or by calling her at (803) 952–7886.

Issued at Washington, DC on January 4, 2004.

Carol Anne Matthews,

Acting Advisory Committee Management Officer.

[FR Doc. 05–334 Filed 1–4–05; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Energy Information Administration

Agency Information Collection Activities: Policy for Revisions to the Weekly Natural Gas Storage Report; Comment Request

AGENCY: Energy Information Administration (EIA), Department of Energy (DOE).

ACTION: Agency information collection activities: policy for revisions to the

Weekly Natural Gas Storage Report; comment request.

SUMMARY: The EIA is soliciting comments on the revision policy for the *Weekly Natural Gas Storage Report* (WNGSR). The WNGSR provides weekly estimates of working gas volumes held in underground storage facilities at the national and regional levels. The WNGSR is based on information collected by EIA on Form EIA–912, ''Weekly Underground Gas Storage Report.''

DATES: Comments must be filed by February 7, 2005. If you anticipate difficulty in submitting comments within that period, contact the person listed below as soon as possible.

ADDRESSES: Send comments to William Trapmann. To ensure receipt of the comments by the due date, submission by fax (202) 586–4220 or e-mail (*William.Trapmann@eia.doe.gov*) is recommended. The mailing address is Energy Information Administration, EI–44, Forrestal Building, U.S. Department of Energy, Washington, DC 20585. Alternatively, Mr. Trapmann may be contacted by telephone at (202) 586–6408.

FOR FURTHER INFORMATION CONTACT: The WNGSR is available on EIA's Internet site at *http://tonto.eia.doe.gov/oog/info/ngs/ngs.html.* The survey Form EIA–912 and instructions used to collect information for the WNGSR are available at *http://www.eia.doe.gov/oil_gas/natural_gas/survey_forms/nat_survey_forms.html.* Requests for additional information should be directed to Mr. Trapmann at the address listed above.

SUPPLEMENTARY INFORMATION:

I. Background
II. Current Actions
III. Request for Comments

I. Background

The Federal Energy Administration Act of 1974 (Public Law 93–275, 15 U.S.C. 761 *et seq.*) and the DOE Organization Act (Public Law 95–91, 42 U.S.C. 7101 *et seq.*) require the EIA to carry out a centralized, comprehensive, and unified energy information program. This program collects, evaluates, assembles, analyzes, and disseminates information on energy resource reserves, production, demand, technology, and related economic and statistical information. This information is used to assess the adequacy of energy resources to meet near and longer term domestic demands.

The EIA provides the public and other Federal agencies with opportunities to comment on collections of energy information conducted by EIA. As appropriate, EIA also requests comments on important issues relevant to its dissemination of energy information. Comments received help the EIA when preparing information collections and information products necessary to EIA's mission.

The *Weekly Natural Gas Storage Report* (WNGSR) which has been issued by EIA since May 9, 2002, provides weekly estimates of working gas volumes held in underground storage facilities at the national and regional levels. WNGSR users include policymakers, commodity market analysts, and industry experts. EIA uses the data to prepare analytical products assessing storage operations and the impact on supplies available, and to analyze relationships between demand, heating-degree-days, and inventory levels.

EIA is requesting comments because of a possible need to modify the policy on revisions to data disseminated in the WNGSR. The policy was established in 2002 on the basis of public comments in response to a **Federal Register** notice. After EIA released the WNGSR on November 24, 2004, EIA received revised survey data. Adhering to its established policy, EIA disseminated revised underground gas storage statistics reflecting the revised survey data in the next WNGSR released on December 2, 2004.

II. Current Actions

The WNGSR is based on information collected on Form EIA–912. Form EIA–912 respondents provide estimates for working gas in storage as of 9 a.m. Friday each week. The deadline for submitting reports to the EIA is 5 p.m. eastern time the following Monday, except when Monday is a Federal holiday. In that case, forms should be submitted by 5 p.m. on Tuesday. The WNGSR is released on Thursday between 10:30 and 10:40 a.m. eastern time on EIA's Web site, except when Thursday is a Federal holiday. Notification of changes in this general schedule is maintained on the EIA Web site at *http://tonto.eia.doe.gov/oog/info/ngs/schedule.html.*

A Form EIA–912 respondent is instructed to submit revisions to previously reported data if the revisions are greater than 500 million cubic feet. As with any EIA information product based on survey data, the WNGSR data may undergo revision(s) based on a number of reporting factors including:

(1) As more accurate information becomes available to a respondent after the Form EIA–912 is filed, a respondent may need to file new data.

(2) After submitting Form EIA–912 and prior to the next weekly submission, a respondent may determine that information submitted was incorrect (*e.g.*, numbers were transposed, numbers were entered in the wrong item on the form, or other reporting errors).

(3) A respondent may submit Form EIA–912 too late for inclusion in the current week estimates for the WNGSR.

(4) A respondent may report a reclassification of base and working gas.

(5) A respondent may report a change in field operating status.

In addition to the reporting factors cited above, WNGSR data may be revised in response to EIA actions such as a new estimation methodology or sample used in the estimation process. Such revisions differ from reporting issues in that their occurrence is known by EIA in advance and EIA can plan for the resulting implementation. Because of that, EIA schedules dissemination of those revisions and provides users with early notification of the forthcoming WNGSR that will include the revisions.

In 2002 EIA adopted a policy for releasing revisions to data disseminated in the WNGSR. The policy was developed following a public comment period and released in the **Federal Register** on November 12, 2002 (67 FR 68581). Under that policy, revisions are not disseminated on an unscheduled basis. Rather, revisions are disseminated in the next release of the WNGSR when the effect of reported changes is at least 7 billion cubic feet (Bcf) at either a regional or national level. If a revision is made, changes to all regions are included.

Data for the previous week have been revised in 10 of the 136 issues released between May 9, 2002 and December 9, 2004. At the U.S. level, these revisions ranged (in absolute value) from 7 to 41 Bcf. The sizes and reasons are illustrated in the table below. The two revisions greater than 15 Bcf attributable to data changes occurred for estimates initially released on July 3, 2002 (26 Bcf) and November 24, 2004 (32 Bcf).

Revision size (absolute value)	Reasons for revisions		
	Survey data change	Methodology or sample change	All reasons
7–14 Bcf	5	1	6
15 or more Bcf	2	2	4

With respect to the dissemination of revisions to WNGSR data, EIA is reconsidering its policy. Important issues to consider include: the size of a revision justifying a revised WNGSR release, the problem of equal and adequate notification of an upcoming revision, and the timing of revisions in light of government and market hours of operation. The current policy and two examples of alternative policies are described below.

Current Policy (No Unscheduled Release of Revisions). Revisions are disseminated in the next release of the WNGSR when the effect of changes from any cause is at least 7 billion cubic feet (Bcf) at either a regional or national level. If a revision is made, changes to all regions are included. Revisions are not disseminated on an unscheduled basis.

Alternative 1 (Fixed Revision Timing). When the cumulative effect of all revised data for the most recent report period is at least 15 billion cubic feet (BCF) at either a regional or national level, a revised WNGSR would be issued prior to the customary WNGSR release schedule (*i.e.*, generally Thursday at 10:30 a.m.). If a revision is necessary, it would be released in a revised WNGSR at 10:30 a.m. on the first Federal government workday of the following week. In most instances the timing would be 10:30 a.m. Monday unless there is a Monday holiday. In that case the revision would be released on Tuesday. No notification of a coming revision would be provided. If the issues underlying the revision could not be resolved and systems changes could not be implemented before the fixed release date, the revision would be released during the next regularly scheduled WNGSR release (usually Thursday morning). Revisions from 7 to 14 Bcf as well as a revision greater than 7 Bcf resulting from a new estimation methodology or sample used in the estimation process would be issued in the next regularly scheduled (usually Thursday) release of the WNGSR. This alternative provides a date and time for a mid-week release of a revision greater than 15 Bcf without relying on any notification to users of the estimates.

Alternative 2 (Variable Revision Timing). When the cumulative effect of revised data for the most recent report period is at least 15 billion cubic feet (BCF) at either a regional or national level, a revised WNGSR would be issued two hours after EIA issues a notification of the planned release of the revised WNGSR. However, EIA would not issue a revised WNGSR if the next scheduled release is less than 24 hours later. Also, revisions from 7 to 14 Bcf as well as a revision of any magnitude greater than 7 Bcf resulting from a new estimation methodology or sample used in the estimation process would be issued in the next release of the WNGSR.

For alternative 2, EIA would notify the public of the planned release by announcing it on its Web site and sending e-mail notifications to parties registered on EIA's WNGSR list serve. (Interested parties may sign up for the WNGSR list serve without charge through the EIA Web site at *http://www.eia.doe.gov/listserv_signup.html*.) EIA proposes that the revision be released two hours after the announcement is posted and e-mail notices are issued irrespective of whether any specific markets are in operation at the time of the revision release. EIA would post a notification of an upcoming revision only when it has resolved all implementation issues and is prepared to issue the revised WNGSR two hours later. Also, revisions from 7 to 14 Bcf as well as a revision of any magnitude greater than 7 Bcf resulting from a new estimation methodology or sample used in the estimation process would be issued in the next release of the WNGSR.

III. Request for Comments

The public should comment on the alternatives discussed in item II as well as the questions below. Comments may also address other issues and alternatives related to changes in the WNGSR revision policy.

General Issues:

A. What policy do you prefer for release of revised WNGSR data and why? What are the features of each policy that are attractive and unattractive?

B. What is the threshold, if any, at which a revised WNGSR should be issued outside a regular schedule? Is a threshold change of 15 Bcf appropriate to require such an issuance?

C. Is a fixed revision date and time a useful alternative to an approach requiring a notification process for EIA customers? What particular dates and/or times are most appropriate?

D. If a notification approach is used, is a posting on EIA's web site and e-mail notification adequate and equitable? How much time should pass between a notification of a revised WNGSR and its release?

E. Should the release of a revised WNGSR be restricted to specific business hours or days because of the operating hours of various trading markets? For example, if a revised WNGSR is approved late in the work day, should EIA withhold issuing it until specific major energy markets are open?

Comments submitted in response to this notice will be considered during development of EIA's policy for revisions of the WNGSR. The comments will also become a matter of public record.

After EIA has completed development of the WNGSR revision policy, a **Federal Register** notice will be issued announcing the policy.

Statutory Authority: Section 52 of the Federal Energy Administration Act (Pub. L. No. 93–275, 15 U.S.C. 790a).

Issued in Washington, DC, January 3, 2005.

Jay H. Casselberry,

Agency Clearance Officer, Energy Information Administration.

[FR Doc. 05–333 Filed 1–6–05; 8:45 am]

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DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EC05–28–000, et al.]

Mesquite Investors, L.L.C., et al.; Electric Rate and Corporate Filings

December 30, 2004.

The following filings have been made with the Commission. The filings are listed in ascending order within each docket classification.

1. Mesquite Investors, L.L.C., Cedar Brakes I, L.L.C., Cedar Brakes II, L.L.C., El Paso Marketing, L.P., Okwari CB Holdings LP, and Constellation Energy Commodities Group, Inc.

[Docket No. EC05–28–000]

Take notice that on December 23, 2004, Mesquite Investors, L.L.C. (Mesquite), Cedar Brakes I, L.L.C. (CB I), Cedar Brakes II, L.L.C. (CB II), El Paso Marketing, L.P. (El Paso Marketing), Okwari CB Holdings LP (Okwari CB) and Constellation Energy Commodities Group, Inc. (CCG) (jointly, Applicants) filed with the Federal Energy Regulatory Commission an application pursuant to Section 203 of the Federal Power Act requesting that the Commission authorize: (i) The transfer of all of Mesquite's membership interests in CB I and CB II to Okwari CB; (ii) the subsequent sale and transfer of up to 51 percent of the membership interests thus obtained by Okwari CB to as yet unidentified purchasers; and (iii) the assignment of power purchase agreements from El Paso Marketing to CCG. Applicants requested privileged treatment for certain exhibits pursuant to 18 CFR 33.9 and 388.112. Applicants also requested expedited consideration of this Application.

Comment Date: 5 p.m. Eastern Time on January 13, 2005.

2. Detroit Edison Company, DTE Energy Trading, Inc., DTE Edison America, Inc., DTE Energy Marketing Inc., DTE Georgetown L.P., DTE River Rouge No. 1, L.L.C. and Crete Energy Venture, L.L.C.

[Docket Nos. ER97–324–007, ER97–3834–012, ER98–3026–008, ER99–3368–004, ER00–1746–002, ER00–1816–003 and ER02–963–004]

Take notice that on December 23, 2004, The Detroit Edison Company, DTE Energy Trading, Inc., DTE Edison America, Inc., DTE Energy Marketing, Inc., DTE Georgetown, L.P., DTE River Rouge No. 1, L.L.C., and Crete Energy Venture, L.L.C. (collectively, the DTE Parties) tendered for filing a joint market power update analysis in compliance with the Commission's order in Acadia Power Partners, L.L.C., 107 FERC ¶ 61,168 (2004).

The DTE Parties state that copies of the filing were served on parties on the official service lists in the above-captioned proceedings.

Comment Date: 5 p.m. Eastern Time on January 13, 2005.

3. Cleo Power LLC, Cleco Marketing & Trading LLC, Cleco Evangeline LLC and Perryville Energy Partners, LLC.

[Docket Nos. ER99–3855–003, ER99–2300–005, ER99–2928–002 and ER02–1406–004]

Take notice that on December 22, 2004, Cleco Power LLC, Cleco Evangeline LLC, and Perryville Energy Partners, LLC submitted generation market power screens and related analyses.

Comment Date: 5 p.m. Eastern Time on January 12, 2005.

4. Black Hills Colorado, LLC, Black Hills Wyoming, Inc., Black Hills Pepperell Power Associates, Inc., Black Hills Power, Inc., Fountain Valley Power, LLC, Harbor Cogeneration Company, LLC and Las Vegas Cogeneration II, LLC

[Docket Nos. ER00–1952–002, ER03–802–002, ER96–1635–009, ER99–2287–002, ER01–1784–005, ER99–1248–004 and ER03–222–004]

Take notice that on December 23, 2004, Black Hills Colorado, LLC, Black Hills Wyoming, Inc., Black Hills Pepperell Power Associates, Inc., Black Hills Power, Inc., Fountain Valley Power, LLC, Harbor Cogeneration Company, LLC, and Las Vegas Cogeneration II, LLC, filed with the Commission updated market power analyses.

Comment Date: 5 p.m. Eastern Time on January 13, 2005.

5. Pinnacle West Capital Corporation, Arizona Public Service Company, Pinnacle West Energy Corporation and APS Energy Services Company, Inc.

[Docket Nos. ER00–2268–008, ER99–4124–006, ER00–3312–007 and ER99–4122–009]

Take notice that on December 23, 2004, the Pinnacle West Capital Corporation (PWCC), the Arizona Public Service Company (APS), the Pinnacle West Energy Corporation (PWEC) and APS Energy Services Company, Inc. (APSES) (collectively, the Pinnacle West Companies), submitted a compliance filing pursuant to the Commission's order issued December 20, 2004 in Docket No. ER00–2268–005, *et al.*, FERC ¶ 61,295 (2004).

Comment Date: 5 p.m. Eastern Time on January 13, 2005.

6. Entergy Services, Inc.,

[Docket No. ER04–35–003]

Take notice that on December 22, 2004, Entergy Services, Inc., on behalf of the Entergy Operating Companies, Entergy Arkansas, Inc., Entergy Gulf States, Inc., Entergy Louisiana, Inc., Entergy Mississippi, Inc., and Entergy New Orleans, Inc., tendered its compliance filing in response to the Commission's order in Entergy Services, Inc., 109 FERC ¶ 61,216 (2004).

Comment Date: 5 p.m. Eastern Time on January 12, 2005.

7. Southern California Edison Company

[Docket No. ER04–435–006]

Take notice that on December 23, 2004, Southern California Edison Company (SCE) tendered for filing revisions to its Wholesale Distribution Access Tariff (WDAT), FERC Electric Tariff, First Revised Volume No. 5, in compliance with the Commission's Order issued September 22, 2004 in Docket Nos. ER04–435–002 and ER04–435–004, 108 FERC ¶ 61,301.

SCE states that copies of this filing were served on parties on the official service list in the above-captioned proceeding.

Comment Date: 5 p.m. Eastern Time on January 13, 2005.

8. PJM Interconnection, L.L.C.

[Docket No. ER04–474–003]

Take notice that on December 22, 2004, PJM Interconnection, L.L.C. (PJM) submitted a substitute interconnection service agreement among PJM, Industrial Power Generating Corporation, and Monongahela Power Company, The Potomac Edison Company, and West Penn Power Company, all doing business as Allegheny Power consistent with *PJM Interconnection, L.L.C.*, 109 FERC ¶ 61,030 (2004), issued on October 7, 2004 in Docket Nos. ER04–474–000 and ER04–474–001.

PJM states that copies of the filing were served on parties on the official service list in the above-captioned proceeding.

Comment Date: 5 p.m. Eastern Time on January 12, 2005.

9. Midwest Independent Transmission System Operator, Inc. and Public Utilities With Grandfathered Agreements in the Midwest ISO Region

[Docket Nos. ER04–691–014 and EL04–104–013]

Take notice that on December 22, 2004, the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) submitted proposed revisions to the Midwest ISO's Open Access Transmission and Energy Markets Tariff (EMT), FERC Electric Tariff, Volume No. 1, and supplementary information and explanations concerning certain matters, in order to make typographical corrections and clarifying changes to the EMT.

The Midwest ISO has requested waiver of the service requirements set

forth in 18 CFR 385.2010. The Midwest ISO states it has electronically served a copy of this filing, with attachments, upon all Midwest ISO Members, Member representatives of Transmission Owners and Non-Transmission Owners, the Midwest ISO Advisory Committee participants, as well as all state commissions within the region. Midwest ISO further states that in addition, the filing has been electronically posted on the Midwest ISO's Web site at *www.midwestiso.org* under the heading ''Filings to FERC'' for other interested parties in this matter. The Midwest ISO will provide hard copies to any interested parties upon request.

Comment Date: 5 p.m. Eastern Time on January 12, 2005.

10. CalPeak Power—Border, LLC, CalPeak Power—Enterprise, LLC and CalPeak Power—Vaca Dixon, LLC

[Docket Nos. ER05–302–001, ER05–303–001 and ER05–304–001]

Take notice that on December 22, 2004 CalPeak Power—Border, LLC (Border), CalPeak Power—Enterprise, LLC (Enterprise) and CalPeak Power—Vaca Dixon, LLC (Vaca Dixon) (collectively, CalPeak Entities), submitted for filing corrections to certain terms contained in schedules to the reliability must-run service agreements between Border and the California Independent System Operator Corporation (ISO), Enterprise and the ISO, and Vaca Dixon and the ISO, originally filed on December 6, 2004. CalPeak Entities request an effective date of January 1, 2005.

CalPeak Entities state that copies of the filing were served upon the ISO, San Diego Gas & Electric Company, Pacific Gas & Electric Company, the California Public Utilities Commission and the California Electricity Oversight Board.

Comment Date: 5 p.m. Eastern Time on January 12, 2005.

11. Michigan Electric Transmission Company, LLC

[Docket No. ER05–364–000]

Take notice that on December 21, 2004, Michigan Electric Transmission Company, LLC (METC) submitted an executed Cost Reimbursement Agreement between METC and Michigan Public Power Agency, an executed Cost Reimbursement Agreement between METC and Michigan South Central Power Agency, and an executed Cost Reimbursement Agreement between METC and Wolverine Power Supply Cooperative, Inc.

Comment Date: 5 p.m. Eastern Time on January 11, 2005.

12. Arroyo Energy LP

[Docket No. ER05–375–000]

Take notice that on December 21, 2004, as amended on December 23, 2004, Arroyo Energy LP (Arroyo) filed a notice of succession to notify the Commission that, as a result of a name change, Arroyo Energy LP has succeeded to the Rate Schedule FERC No. 1 of BS Energy LP.

Comment Date: 5 p.m. Eastern Time on January 13, 2005.

13. Southern California Edison Company

[Docket No. ER05–376–000]

Take notice that on December 23, 2004, Southern California Edison Company (SCE) submitted for filing a Service Agreement for Wholesale Distribution Service (WDAT Service Agreement), Service Agreement No. 133 under the Wholesale Distribution Access Tariff, FERC Electric Tariff, First Revised Volume No. 5, between SCE and the Metropolitan Water District of Southern California (MWD). The purpose of the WDAT Service Agreement is to specify the terms and conditions under which SCE will provide Wholesale Distribution Service from MWD's Small Hydro Facilities to the California Independent System Operator Controlled Grid.

SCE states that copies of the filing were served upon the Public Utilities Commission of the State of California and MWD.

Comment Date: 5 p.m. Eastern Time on January 13, 2005.

14. MidAmerican Energy Company

[Docket No. ER05–377–000]

Take notice that on December 23, 2004, MidAmerican Energy Company (MidAmerican), filed with the Commission a Network Integration Transmission Service Agreement and a Network Operating Agreement between MidAmerican Energy Company and the City of Buffalo, Iowa (Buffalo). MidAmerican requests an effective date of January 1, 2005, for these Agreements.

MidAmerican states it has served a copy of the filing on Buffalo, the Iowa Utilities Board, the Illinois Commerce Commission and the South Dakota Public Utilities Commission.

Comment Date: 5 p.m. Eastern Time on January 13, 2005.

15. Pacific Gas and Electric Company

[Docket No. ER05–378–000]

Take notice that on December 23, 2004, Pacific Gas and Electric Company (PG&E) submitted its Transmission Owner Tariff for the Transmission Access Charge Balancing Account. PG&E requests an effective date of April 1, 2005.

PG&E states that copies of the filing were served upon the California Public Utilities Commission.

Comment Date: 5 p.m. Eastern Time on January 13, 2005.

16. Southern California Edison Company

[Docket No. ER05–380–000]

Take notice that on December 23, 2004, Southern California Edison Company (SCE) submitted a Letter Agreement between SCE and the Southern California Water Company (SCWC). SCE states that the purpose of the Letter Agreement is to provide an interim arrangement pursuant to which SCE will commence the engineering, design and procurement of equipment and material for, and construction of certain additional facilities, as described in Exhibit A of the Letter Agreement, required in order for SCWC's generation plant to operate in parallel with SCE's electric system.

SCE states that copies of the filing were served upon the Public Utilities Commission of the State of California and SCWC.

Comment Date: 5 p.m. Eastern Time on January 13, 2005.

17. California Independent System

[Docket No. ER05–381–000 Operator Corporation]

Take notice that on December 23, 2004, the California Independent System Operator Corporation (ISO) tendered for filing revisions to the Transmission Control Agreement (TCA) for acceptance by the Commission. The ISO states that the purpose of the revisions are to: (1) Identify the transmission interests (*i.e.*, the transmission facilities and Entitlements) that the City of Pasadena, California (Pasadena) will be turning over to the ISO's Operational Control, by including those interests in a new Appendix A to the TCA, (2) identify the Encumbrances associated with those interests, by listing the Encumbrances in a new Appendix B to the TCA; and (3) identify the persons to contact at Pasadena for notice purposes by expanding Appendix F to the TCA. The ISO requests an effective date of January 1, 2005.

The ISO states that this filing has been served upon the Public Utilities Commission of the State of California; the California Energy Commission; the California Electricity Oversight Board; Pacific Gas and Electric Company; San Diego Gas & Electric Company; Southern California Edison Company; the Cities of Anaheim, Azusa, Banning,

and Riverside, California (the Southern Cities); the City of Vernon, California; Trans-Elect NTD Path 15, LLC; Western Area Power Administration—Sierra Nevada Region; Pasadena; and all parties with effective Scheduling Coordinator Agreements under the ISO Tariff. The ISO states it has posted this filing on the ISO Home Page.

Comment Date: 5 p.m. Eastern Time on January 13, 2005.

18. Southern California Edison Company

[Docket No. ER05–382–000]

Take notice that on December 23, 2004, Southern California Edison Company (SCE) submitted for filing a Service Agreement for Wholesale Distribution Service (WDAT Service Agreement), Service Agreement No. 134 under the Wholesale Distribution Access Tariff, FERC Electric Tariff, First Revised Volume No. 5, between SCE and The Metropolitan Water District of Southern California (MWD). SCE states that the purpose of the WDAT Service Agreement is to specify the terms and conditions under which SCE will provide Wholesale Distribution Service from MWD's Etiwanda Power Plant to the California Independent System Operator Controlled Grid.

SCE states that copies of the filing were served upon the Public Utilities Commission of the State of California and MWD.

Comment Date: 5 p.m. Eastern Time on January 13, 2005.

19. Port Washington Generating Station LLC

[Docket No. ER05–383–000]

Take notice that on December 23, 2004, Port Washington Generating Station LLC (PWGS) submitted for filing under section 205 of the Federal Power Act, a Power Purchase Agreement providing for sales of test power between PWGS and Wisconsin Electric Power Company. PWGS states that the test power provides the terms and conditions pursuant to which, prior to the commencement of commercial operations, PWGS will sell test power from its Port Washington Unit 1 facility to Wisconsin Electric.

PWGS states that copies of the filing were served upon the Public Service Commission of Wisconsin.

Comment Date: 5 p.m. Eastern Time on January 13, 2005.

20. Southern California Edison Company

[Docket No. ER05–384–000]

Take notice, that on December 23, 2004, Southern California Edison Company (SCE) tendered for filing notice of cancellation of its First Revised Rate Schedule FERC No. 292 and First Revised Rate Schedule FERC No. 318. SCE requests an effective date of January 1, 2005.

SCE states that copies of this filing were served upon the Public Utilities Commission of the State of California and the Metropolitan Water District of Southern California and Pacific Gas and Electric Company.

Comment Date: 5 p.m. Eastern Time on January 13, 2005.

Standard Paragraph

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. 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 parties to 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.

Linda Mitry,

Deputy Secretary.

[FR Doc. E5–27 Filed 1–6–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EC05–29–000, et al.]

PNM Resources, Inc., et al.; Electric Rate and Corporate Filings

December 29, 2004.

The following filings have been made with the Commission. The filings are listed in ascending order within each docket classification.

1. PNM Resources, Inc., SW Acquisition, L.P., TNP Enterprises, Inc., Texas-New Mexico Power Company

[Docket EC05–29–000]

Take notice that on December 23, 2004, PNM Resources, Inc. (PNM Resources), SW Acquisition, L.P. (SW Acquisition), TNP Enterprises, Inc. (TNP Enterprises), and Texas-New Mexico Power Company (TNMP) tendered for filing an application pursuant to section 203 of the Federal Power Act requesting all necessary Commission authorizations related to the sale by SW Acquisition to PNM Resources of 100 percent of the outstanding common shares of TNP Enterprises, the direct parent of, among other entities, TNMP.

Comment Date: 5 p.m. Eastern Time on January 28, 2005.

2. Calpine Bethpage 3, LLC

[Docket No. EG05–26–000]

Take notice that on December 22, 2004, Calpine Bethpage 3, LLC (Applicant), c/o Calpine Corporation, Two Atlantic Avenue, Third Floor, Boston, MA 02110, filed with the Commission an application for determination of exempt wholesale generator status pursuant to part 365 of the Commission's regulations.

Applicant, a Delaware limited liability company, proposes to operate a 79.9 megawatt natural gas-fired combined cycle electric generating facility located in the Town of Oyster Bay, Nassau County, New York.

Applicant states that copies of the application were served upon the United States Securities and Exchange Commission and New York State Public Service Commission.

Comment Date: 5 p.m. Eastern Time on January 12, 2005.

3. Bethpage Energy Center

[Docket No. EG05–27–000]

Take notice that on December 22, 2004, Bethpage Energy Center 3, LLC (Applicant), c/o Calpine Corporation, Two Atlantic Avenue, Third Floor,

Boston, MA 02110, filed with the Commission an application for determination of exempt wholesale generator status pursuant to part 365 of the Commission's regulations.

Applicant, a Delaware limited liability company, proposes to own a 79.9 megawatt natural gas-fired combined cycle electric generating facility located in the Town of Oyster Bay, Nassau County, New York.

Applicant further states that copies of the application were served upon the United States Securities and Exchange Commission and New York State Public Service Commission.

Comment Date: 5 p.m. Eastern Time on January 12, 2005.

4. Southern Company Services, Inc.

[Docket No. ER02–851–018]

Take notice that on December 22, 2004, Southern Company Services, Inc., acting on behalf of Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, and Savannah Electric and Power Company (Southern Companies), made a filing in connection with their payment of refunds on charges for transmission service taken under Southern Companies' Open Access Transmission Tariff consistent with certain commitments to this effect in previous filings with the Commission.

Southern Companies state that a copy of the filing has been served on all customers affected by the charge adjustments as well as all parties to FERC Docket No. ER02–851.

Comment Date: 5 p.m. Eastern Time on January 12, 2005.

5. MGE Power West Campus LLC

[Docket No. ER05–233–001]

Take notice that on December 22, 2004, MGE Power West Campus LLC (West Campus) filed additional information regarding its Power Purchase Agreement Providing for Sales of Test Power between West Campus and Madison Gas and Electric Company filed on November 18, 2004 in Docket No. ER05–233–000.

West Campus states that copies of the filing were served upon the Public Service Commission of Wisconsin.

Comment Date: 5 p.m. Eastern Time on January 7, 2005.

6. Pacific Gas and Electric Company

[Docket No. ER05–367–000]

Take notice that on December 22, 2004, Pacific Gas and Electric Company (PG&E) submitted a revised Grid Management Charge Pass-Through Tariff (GMC–PTT). PG&E states that this filing seeks to recover the costs proposed in the California Independent System Operator Corporation's (California ISO) GMC filing in Docket No. ER05–346–000 on December 15, 2004. PG&E requests an effective date of January 1, 2005.

PG&E states that copies of this filing have been served upon the California Public Utilities Commission, the California ISO and all affected customers.

Comment Date: 5 p.m. Eastern Time on January 12, 2005.

7. American Transmission Company LLC, Midwest Independent Transmission System Operator, Inc.

[Docket No. ER05–368–000]

Take notice that on December 22, 2004, American Transmission Company LLC, by its corporate manager, ATC Management Inc. (collectively, ATCLLC) and the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) tendered for filing proposed changes to its Open Access Transmission Tariff, FERC Electric Tariff, Second Revised Volume No. 1, to revise its formula rate to reflect changes to certain rate calculations applicable to ATCLLC rate zone (Zone 1). ATCLLC and the Midwest ISO request waiver of the Commission's notice requirements to allow the proposed changes to be made effective on January 1, 2005.

ATCLLC and the Midwest ISO seek waiver of the Commission's regulations, 18 CFR 385.2010 (2000) with respect to service on all required parties. The Midwest ISO states it has posted this filing on its Internet site at *http://www.midwestiso.org*, and the Midwest ISO or ATCLLC will provide hard copies to any interested parties upon request.

Comment Date: 5 p.m. Eastern Time on January 12, 2005.

8. Connexus Energy

[Docket No. ER05–369–000]

Take notice that on December 22, 2004, Connexus Energy submitted revised sheets to Connexus Energy's Electric Rate Schedule FERC No. 1. Connexus Energy states that the revised sheets effect rate changes under Connexus Energy's contract with Elk River Municipal Utilities. Connexus Energy requests waiver of the Commission's notice requirement to allow a January 1, 2005 effective date.

Connexus Energy states that a copy of the filing was served upon Elk River Municipal Utilities.

Comment Date: 5 p.m. Eastern Time on January 12, 2005.

9. California Independent System Operator Corporation

[Docket No. ER05–370–000]

Take notice that on December 22, 2004, the California Independent System Operator Corporation (ISO) submitted an informational filing in accordance with Article IX, section B of the Stipulation and Agreement approved by the Commission on May 28, 1999, California Independent System Operator Corp., 87 FERC ¶ 61,250 (1999) (Stipulation and Agreement). ISO states that this provision requires the ISO to provide on a confidential basis to the Commission: (1) Information regarding any notice from an RMR Unit requesting a change of Condition; (2) the date the chosen Condition will begin; and (3) if the change is from Condition 2, the applicable level of Fixed Option Payment. ISO further states as required by the provision, it has provided notice of the changes of condition described in the informational filing (subject to the applicable Non-Disclosure and Confidentiality Agreement in the RMR Contract) to the designated RMR contact persons at the California Public Utilities Commission, the California Electricity Oversight Board, the applicable Responsible Utilities, and the relevant RMR Owners.

Comment Date: 5 p.m. Eastern Time on January 12, 2005.

10. California Independent System Operator Corporation

[Docket No. ER05–372–000]

Take notice that on December 22, 2004, the California Independent System Operator Corporation (ISO) submitted an informational filing as to the ISO's revised transmission Access Charge rates for the period of December 22, 2004 through December 31, 2004 to implement the addition of the Path 15 Upgrade project to the ISO Controlled Grid, and Trans-Elect NTD Path 15, LLC and the Western Area Power Administration—Sierra Nevada Region as Participating TOs.

The ISO states that this filing has been served upon the Public Utilities Commission of the State of California, the California Energy Commission, the California Electricity Oversight Board, the Participating Transmission Owners, and upon all parties with effective Scheduling Coordinator Service Agreements under the ISO Tariff. The ISO states that it is posting the filing on the ISO Home Page.

Comment Date: 5 p.m. Eastern Time on January 12, 2005.

11. Reliant Energy Etiwanda, Inc.

[Docket No. ER05–373–000]

Take notice that on December 22, 2004, Reliant Energy Etiwanda. Inc. (Etiwanda) tendered for filing a letter agreement (Waiver Letter) setting forth certain waivers that affect its Rate Schedule FERC No. 2, Must-Run Service Agreement. Etiwanda states that the Waiver Letter waives certain provisions of the Must-Run Service Agreement in light of the Etiwanda's execution of a multi-year tolling agreement with Southern California Edison Company to commence January 1, 2005. Etiwanda requests that this filing be made effective January 1, 2005.

Etiwanda states that this filing has been served upon the CAISO, the California Public Utilities Commission, the California Electricity Oversight Board and Southern California Edison Company.

Comment Date: 5 p.m. Eastern Time on January 12, 2005.

12. ISO New England Inc., Bangor Hydro-Electric Company, Central Maine Power Company, NSTAR Electric & Gas Corporation, on Behalf of Its Affiliates Boston Edison Company, Commonwealth Electric Company, Cambridge Electric Light Company, and Canal Electric Company, New England Power Company, Northeast Utilities Service Company, on Behalf of Its Operating Company Affiliates The Connecticut Light and Power Company, Western Massachusetts Electric Company, Public Service Company of New Hampshire and Holyoke Water Power Company, The United Illuminating Company, Fitchburg Gas and Electric Light Company, Unitil Energy Systems, Inc., Vermont Electric Power Company, Central Vermont Public Service Corporation, Green Mountain Power Corporation, Vermont Electric Cooperative, Florida Power & Light Company—New England Division

[Docket No. ER05–374–000]

Take notice that on December 22, 2004, ISO New England Inc. (the ISO) and Bangor Hydro-Electric Company; Central Maine Power Company; NSTAR Electric & Gas Corporation, on behalf of its affiliates Boston Edison Company, Commonwealth Electric Company, Cambridge Electric Light Company, and Canal Electric Company; New England Power Company; Northeast Utilities Service Company, on behalf of its operating company affiliates The Connecticut Light and Power Company, Western Massachusetts Electric Company, Public Service Company of New Hampshire and Holyoke Power and Electric Company, and Holyoke Water Power Company; The United Illuminating Company; Fitchburg Gas and Electric Light Company; Unitil Energy Systems, Inc.; Vermont Electric Power Company; Central Vermont Public Service Corporation; Green Mountain Power Corporation and Vermont Electric Cooperative (collectively, the ''New England TOs'') and Florida Power & Light Company—New England Division, (collectively with the ISO and the New England TOs, the ''Filing Parties'') submitted, pursuant to section 205 of the Federal Power Act: (1) Revisions to the Transmission, Markets and Services Tariff of the ISO, as the regional transmission organization for New England pursuant to the Filing Parties' RTO proposal that was filed with the Commission on October 31, 2003 and conditionally accepted by the Commission on March 24, 2004 and with respect to which, inter alia, the Commission conditionally approved a settlement agreement on November 3, 2004; (2) revisions to the Transmission Operating Agreement among the ISO, the New England TOs, and other Participating Transmission Owners; and (3) revisions to the Rate Design and Funds Disbursement Agreement among the Participating Transmission Owners. Other documents are filed for informational purposes.

Comment Date: 5 p.m. Eastern Time on January 12, 2005.

Standard Paragraph

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. 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 parties to 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 email *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Linda Mitry,

Deputy Secretary.

[FR Doc. E5–29 Filed 1–6–05; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–6659–3]

Environmental Impact Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information (202) 564–7167 or *http://www.epa.gov/compliance/nepa/.*

Weekly receipt of Environmental Impact Statements filed December 27, 2004 through December 30, 2004 pursuant to 40 CFR 1506.9.

EIS No. 040603, Final EIS, NPS, TX, Rio Grande Wild and Scenic River General Management Plan, Implementation, Big Bend National Park, Brewster and Terrell Counties, TX, Wait Period Ends: February 7, 2005, Contact: Mathew Safford (303) 969–2898.

EIS No. 040604, Draft EIS, UAF, NM, New Mexico Training Initiative, Proposal to Modify the Training Airspace New Cannon Air Force Base (AFB), NM, Comment Period Ends: February 22, 2005, Contact: Brenda Cook (505) 784–4131.

Amended Notices

EIS No. 040598, Final EIS, AFS, ID, Caribou Sheep Allotment Management Plan Revision, Authorize Continue Livestock Grazing, Caribou-Targhee National Forest, Palisades Ranger District, Bonneville County, ID, Wait Period Ends: January 31, 2005, Contact: Greg Hanson (208) 523–1412. Revision of FR Notice Published on 12/30/2004: CEQ wait period ending 1/30/2005 corrected to 1/31/2005.

EIS No. 040599, Final Supplement, FTA, NY, Erie Canal Harbor Project (formerly known as the Buffalo Inner Harbor Development Project) Updated Information on the Original Project, City of Buffalo, Erie County, NY, Wait

Period Ends: January 31, 2005, Contact: Irwin Kessman (212) 668–2170. Revision of FR Notice Published on 12/30/2004: CEQ wait period ending 1/30/05 corrected to 1/31/2005.

EIS No. 040601, Final EIS, NRS, Programmatic EIS—Emergency Watershed Protection Program, Improvements and Expansion, To Preserve Life and Property Threatened by Disaster-Caused Erosion and Flooding, U.S. 50 States and Territories except Coastal Area, Wait Period Ends: January 31, 2005, Contact: Victor Cole (202) 690–4575. Revision of FR Notice published on 12/30/2004: CEQ wait period ending 1/30/2005 corrected to 1/31/2005.

Dated: January 5, 2005.

Robert W. Hargrove,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 05–340 Filed 1–6–05; 8:45 am]

BILLING CODE 6560–U–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–6659–4]

Environmental Impact Statements and Regulations; Availability of EPA Comments

Availability of EPA comments prepared pursuant to the Environmental Review Process (ERP), under Section 309 of the Clean Air Act and Section 102(2)(c) of the National Environmental Policy Act, as amended. Requests for copies of EPA comments can be directed to the Office of Federal Activities at (202) 564–7167.

An explanation of the ratings assigned to draft environmental impact statements (EISs) was published in FR dated April 02, 2004 (69 FR 17403).

Draft EISs

ERP No. D–AFS–J65421–00 Rating EC1, Grizzly Bear Conservation for the Greater Yellowstone Area National Forests, Implementation, Amend Six Forest Plans: Beaverhead-Deerlodge National Forest, Bridger-Teton National Forest, Caribou-Targhee National Forest, Custer National Forest, Gallatin National Forest and Shoshone National Forest, MT, WY and ID.

Summary: EPA expressed environmental concerns that the preferred alternative did not include protection measures to reduce conflicts between grizzly bears and other Forest uses and to enhance food security and habitat protections included in other alternatives. EPA believes these measures would improve water quality, fish and wildlife, and other natural resources and should be considered in the Final EIS.

ERP No. D–AFS–J65423–UT Rating EC2, Reissuance of 10-Year Term Grazing Permits to Continue Authorize Grazing on Eight Cattle Allotments, Permit Reissuance, Fishlake National Forest, Beaver Mountain Tushar Range, Millard, Piute, Garfield, Beaver and Iron Counties, UT.

Summary: EPA expressed environmental concerns with potential adverse impacts to aquatic resources, water quality, and wildlife habitats as well as soil erosion from continued grazing as proposed in the Draft EIS. The Final EIS should consider greater use of upland areas, include specific guidelines and measures for future adaptive management processes and ensure resources for education, enforcement of permit standards, mitigation and monitoring.

ERP No. D–AFS–J65427–WY Rating EC2, Cottonwood II Vegetation Management Project, Proposal to Implement Vegetation Management in the North and South Cottonwood Creek Drainages, Bridger-Teton National Forest, Big Piney Ranger District, Sublette County, WY.

Summary: EPA has environmental concerns about potential adverse impacts to water quality, aquatic habitat and wildlife resources, soil condition and impacts to fish and wildlife, especially sensitive species. In addition, the Final EIS should include the value of recreation and impacts to recreation related business to assess the full range of potential socio-economic impacts.

ERP No. D–AFS–J65429–CO Rating EC2, Village at Wolf Creek Project, Application for Transportation and Utility Systems and Facilities, Proposed Development and Use of Roads and Utility Corridors Crossing, National Forest System Lands to Access 287.5 Acres of Private Property Land, Mineral County, CO.

Summary: EPA expressed environmental concerns with potential adverse impacts to wetlands, water quality and quantity, aquatic habitat, air quality and wildlife, (including lynx and Rio Grande Cut Throat Trout). The Final EIS should include an analysis and quantification of indirect impacts, including impacts from reasonably foreseeable actions and mitigation measures.

ERP No. D–AFS–J65430–MT Rating EC2, McSutten Decision Area, Implementation of Harvest and Associated Activities, Prescribed Burning, and Road Management, Kootenai National Forest, Rexford Ranger District, Lincoln County, MT.

Summary: EPA supports the project purpose and need, but expressed environmental concerns regarding proposed timber harvests on sensitive soils and potential water quality impacts.

ERP No. DS–AFS–J02027–UT Rating EC2, Table Top Exploratory Oil and Gas Wells, New Information from the Approval 1994 Final EIS, Wasatch-Cache National Forest, Evanston Ranger District, Summit County, UT.

Summary: EPA expressed concerns about the lack of detail given in the mitigation plans to protect the lynx. The Final EIS should include mitigation measures to reduce potential adverse air impacts from flaring during periods with atmospheric inversions.

Final EISs

ERP No. F–AFS–H65021–MO East Fredericktown Project, To Restore Shortleaf Pine, Improve Forest Health, Treat Affected Stands and Recover Valuable Timber Products, Mark Twain National Forest, Potosi/Fredericktown Ranger District, Bollinger, Madison, St. Francois and Ste. Genevieve Counties, MO.

Summary: The Final EIS adequately addressed EPA's issues raised in the comments on the Draft EIS.

ERP No. F–AFS–J65415–MT Robert-Wedge Post-Fire Project, Salvage Trees and Rehabilitate Lands, Flathead National Forest, Glacier View Ranger District, Flathead County, MT.

Summary: EPA is concerned that logging in areas of high burn severity may result in detrimental soil and water quality effects, and increased erosion and sediment production and supports the use of less damaging logging techniques. EPA also expressed environmental concerns regarding road management activities.

ERP No. F–AFS–J65420–SD Southeast Geographic Area Rangeland Management on National Forest System Lands of the Buffalo Gap National Grassland, To Implement Best Management Grazing Practices, Buffalo Gap National Grassland, Falls River Ranger District, Fall River County, SD.

Summary: EPA's main concerns relate to continuing adverse impacts from livestock grazing to: (1) Streams, riparian zones, and wetlands; (2) fecal coliform and other bacteria, sediment, and other impacts that are impairing beneficial uses for warmwater fish and other aquatic life; and (3) the need for better riparian protections to manage livestock activities that cause adverse impacts to fish and other aquatic life and their habitats.

ERP No. F–AFS–J65422–MT West Side Reservoir Post-Fire Project, Proposed Implementation of Timber Salvage and Access Management Treatments, Flathead National Forest, Hungry Horse and Spotted Bear Ranger Districts, Flathead County, MT.

Summary: EPA supports less damaging logging methods proposed and project modifications to reduce potential adverse effects. However, EPA is still concerned that post-fire logging may impact soils, water quality, and wildlife habitat (particularly habitat of the threatened grizzly bear).

ERP No. F–AFS–L65456–AK Resurrection Creek Stream and Riparian Restoration Project, Proposes to Accelerate the Recovery of Riparian Areas, Fish and Wildlife Habitat, Chugach National Forest, Seward Ranger District, Kenai Peninsula Borough, AK.

Summary: No formal comment letter was sent to the preparing agency.

ERP No. F–AFS–L65457–OR Crooked River National Grassland Vegetation Management/Grazing, Vegetation Treatments and Grazing Disposition, Ochoco National Forest, Jefferson County, OR.

Summary: EPA expressed lack of objections and supports the USFS efforts to work with watershed councils and ODEQ to develop Water Quality Management Plans for the streams within the Grasslands which do not meet ambient water quality standards.

Dated: January 4, 2005.

Robert W. Hargrove,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 05–345 Filed 1–6–05; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[OPP–2005–0002; FRL–7694–3]

Cyprodinil; Notice of Filing a Pesticide Petition to Establish a Tolerance for a Certain Pesticide Chemical in or on Food

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the initial filing of a pesticide petition proposing the establishment of regulations for residues of a certain pesticide chemical in or on various food commodities.

DATES: Comments, identified by docket identification (ID) number [OPP–2005–0002, must be received on or before February 7, 2005.

ADDRESSES: Comments may be submitted electronically, by mail, or through hand delivery/courier. Follow the detailed instructions as provided in Unit I. of the **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Sidney C. Jackson, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–7610; e-mail address: *jackson.sidney@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

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

- Crop production (NAICS 111)
- Animal production (NAICS 112)
- Food manufacturing (NAICS 311)
- Pesticide manufacturing (NAICS 32532)

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

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

1. *Docket.* EPA has established an official public docket for this action under docket ID number OPP–2005–0002. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1801 S. Bell St., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

2. *Electronic access.* You may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr/*.

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

Certain types of information will not be placed in the EPA Dockets. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. To the extent feasible, publicly available docket materials will be made available in EPA's electronic public docket. When a document is selected from the index list in EPA Dockets, the system will identify whether the document is available for viewing in EPA's electronic public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B. EPA intends to work towards providing electronic access to all of the publicly available docket materials through EPA's electronic public docket.

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

entire printed comment, including the copyrighted material, will be available in the public docket.

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to EPA's electronic public docket. Public comments that are mailed or delivered to the docket will be scanned and placed in EPA's electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in EPA's electronic public docket along with a brief description written by the docket staff.

C. How and To Whom Do I Submit Comments?

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket ID number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked ''late.'' EPA is not required to consider these late comments. If you wish to submit CBI or information that is otherwise protected by statute, please follow the instructions in Unit I.D. Do not use EPA Dockets or e-mail to submit CBI or information protected by statute.

1. *Electronically*. If you submit an electronic comment as prescribed in this unit, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also include this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

i. *EPA Dockets*. Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EPA Dockets at *http://www.epa.gov/edocket/*, and follow the online instructions for submitting comments. Once in the system, select ''search,'' and then key in docket ID number OPP–2005–0002. The system is an ''anonymous access'' system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

ii. *E-mail*. Comments may be sent by e-mail to opp-docket@epa.gov, Attention: Docket ID Number OPP–2005–0002. In contrast to EPA's electronic public docket, EPA's e-mail system is not an ''anonymous access'' system. If you send an e-mail comment directly to the docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

iii. *Disk or CD ROM*. You may submit comments on a disk or CD ROM that you mail to the mailing address identified in Unit I.C.2. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

2. *By mail*. Send your comments to: Public Information and Records Integrity Branch (PIRIB) (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001, Attention: Docket ID Number OPP–2005–0002.

3. *By hand delivery or courier*. Deliver your comments to: Public Information and Records Integrity Branch (PIRIB), Office of Pesticide Programs (OPP), Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1801 S. Bell St., Arlington, VA, Attention: Docket ID Number OPP–2005–0002. Such deliveries are only accepted during the docket's normal hours of operation as identified in Unit I.B.1.

D. How Should I Submit CBI to the Agency?

Do not submit information that you consider to be CBI electronically through EPA's electronic public docket or by e-mail. You may claim information that you submit to EPA as CBI by marking any part or all of that information as CBI (if you submit CBI on disk or CD ROM, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

In addition to one complete version of the comment that includes any information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket and EPA's electronic public docket. If you submit the copy that does not contain CBI on disk or CD ROM, mark the outside of the disk or CD ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and EPA's electronic public docket without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

E. What Should I Consider as I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.

2. Describe any assumptions that you used.

3. Provide copies of any technical information and/or data you used that support your views.

4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.

5. Provide specific examples to illustrate your concerns.

6. Make sure to submit your comments by the deadline in this notice.

7. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

II. What Action is the Agency Taking?

EPA has received a pesticide petition as follows proposing the establishment and/or amendment of regulations for residues of a certain pesticide chemical in or on various food commodities under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a. EPA has determined that this petition contains data or information regarding the elements set forth in FFDCA section 408(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data support granting of the petition. Additional data may be needed before EPA rules on the petition.

List of Subjects

Environmental protection, Agricultural commodities, Feed additives, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: December 22, 2004.

Betty Shackleford,

Acting Director, Registration Division, Office of Pesticide Programs.

Summary of Petition

The petitioner summary of the pesticide petition is printed below as required by FFDCA section 408(d)(3). The summary of the petition was prepared by the petitioner and represents the view of the petitioner. The petition summary announces the availability of a description of the analytical methods available to EPA for the detection and measurement of the pesticide chemical residues or an explanation of why no such method is needed.

Interregional Research Project Number 4 (IR-4)

PP 8E5012

EPA has received a pesticide petition, PP 8E5012, from the IR 4, 681 U.S. Highway #1 South, North Brunswick, NJ 08902 proposing, pursuant to section 408(d) of the FFDCA, 21 U.S.C. 346a(d), to amend 40 CFR 180.532 by extending the time-limited tolerances to December 31, 2007, for residues of the fungicide, cyprodinil, 4-cyclopropyl-6-methyl-N-phenyl-2-pyrimidinamine in or on the raw agricultural commodities onion, dry bulb at 0.60 part per million (ppm); onion, green at 4.0 ppm; and strawberry at 5.0 ppm. EPA has determined that the petition contains data or information regarding the elements set forth in section 408(d)(2) of the FFDCA; however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data support granting of the petition. Additional data may be needed before EPA rules on the petition. Syngenta Crop Protection, Inc., Greensboro, NC 27409 is the manufacturer of the chemical pesticide, cyprodinil. Syngenta Crop Protection, Inc., prepared and submitted the following summary of information, data, and arguments in support of the pesticide petitions. This summary does not necessarily reflect the findings of EPA.

EPA issued a final rule under section 408(d) of the FFDCA, 21 U.S.C. 346a(d), on June 22, 2001, (FRL–6778–7), announcing the establishment of time-limited pesticide tolerances in conjunction to the original pesticide petition (PP 8E5012) which expired December 31, 2003. These tolerances were time-limited because the Agency lacked residue data on onion, dry bulb, onion, green and strawberry. IR-4 requested an extension of these time limited tolerances to allow extra time to generate the field residue data. In the **Federal Register** of December 31, 2003, (68 FR 75438); OPP–2003–0394; (FRL–7337–5) these time-limited tolerances were extended with an expiration date of December 31, 2004. All residue data have been submitted by IR-4. Further the Agency concluded field accumulation in rotational crops study for the CGA-249287, NO-422054, CGA-263208, and CGA-232449 metabolites; and confirmatory data from an acute oral toxicity study and Ames assay for the CGA-249287 and NO-422054 metabolites were required; all these data have been submitted by Syngenta Crop Protection. EPA has been unable to complete the reviews of these data prior to the December 31, 2004 expiration date. This time-limited tolerance extension will permit the Agency to complete the review of these data. Previously EPA evaluated the available cyprodinil data and considered their validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children. The nature of the toxic effects caused by cyprodinil are adequately understood and support the proposed extension of these time-limited tolerances.

A. Residue Chemistry

1. *Plant metabolism.* The metabolism of cyprodinil is adequately understood for the purpose of the proposed tolerances.

2. *Analytical method.* Syngenta Crop Protection has developed and validated analytical methodology for enforcement purposes. This method (Syngenta Crop Protection Method AG-631B) has passed an Agency petition method validation for several commodities and is currently the enforcement method for cyprodinil. An extensive database of method validation data using this method on various crop commodities is available.

3. *Magnitude of residues.* Complete residue data to support the requested tolerances for strawberry; onion, dry bulb; and onion, green have been submitted. The requested tolerances are adequately supported.

B. Toxicological Profile

An assessment of toxic effects caused by cyprodinil is discussed in Unit III.A. and Unit III.B. of the **Federal Register** dated June 22, 2001 (66 FR 33478) (FRL–6778–7).

1. *Animal metabolism.* The metabolism of cyprodinil in rats is adequately understood.

2. *Metabolite toxicology.* The residues of concern for tolerance setting purposes is the parent compound. Based on structural similarities to genotoxic nucleotide analogs, there was concern that the pryimidine metabolites (CGA-249287, NOA-422054) may be more toxic than the parent compound. However, EPA's review indicates similar results in an acute oral and mutagenicity studies with both the parent compound and the CGA-249287 metabolite. EPA concluded that the toxicity of the CGA-249287 and NOA-422054 metabolites is no greater than that of the parent, conditional on submission and review of confirmatory data of an acute oral toxicity study and bacterial reverse mutation assay for the NOA-422054 metabolite. Although the metabolites CGA-232449 and CGA-263208 were determined to be of potential toxicological concern, there are not expected to be more toxic than cyprodinil *per se*.

3. *Endocrine disruption.* Cyprodinil does not belong to a class of chemicals known or suspected of having adverse effects on the endocrine system. Developmental toxicity studies in rats and rabbits and a reproduction study in rats gave no indication that cyprodinil might have any effects on endocrine function related to development and reproduction. The chronic studies also showed no evidence of a long-term effect related to the endocrine system.

C. Aggregate Exposure

1. *Dietary exposure.* A Tier III acute and chronic dietary exposure evaluation was made using the Dietary Exposure Evaluation Model (DEEM™), version 7.87 from Exponent. Empirically derived processing studies for apple juice (0.39X), apple pomace (5.22X), grape juice (0.29X), dried prunes (2.05X) and lychee fruit peeling factor (0.0092X) were used in these assessments. The apple juice processing factor was used as a surrogate for pear juice and all other processing factors used DEEM™ defaults. All consumption data for these assessments were taken from the USDA's Continuing Survey of Food Intake by individuals (CSFII) with the 1994–96 consumption database and the Supplemental CSFII children's survey (1998) consumption database. These

exposure assessments include all registered uses. Secondary residues in animal commodities were estimated based on theoretical worst-case, yet nutritionally adequate animal diets and transfer information from feeding studies.

i. *Food*. For the purposes of assessing the potential dietary exposure under the proposed tolerances, Syngenta Crop Protection has estimated aggregate exposure from all crops for which tolerances are established or proposed. These assessments utilized residue data from field trials where cyprodinil was applied at the maximum intended use rate and samples were harvested at the minimum pre-harvest interval (PHI) to obtain maximum residues. Percent of crop treated values were estimated based upon economic, pest and competitive pressures. The values used in these assessments were: (Almond, pome fruit, stone fruit and grape), 100%; onion, 9%, strawberry, 42%, watercress, 95%; berries, 13%, (pistachio and herbs), 80%; (crop group 5A and 5B; carrot; turnip, greens; lychee; longan; and Spanish lime), 10%.

ii. *Acute exposure*. The acute dietary risk assessment was performed for the females 13–49 years old population subgroup only, since no toxicological endpoint of concern was identified for the other population subgroups. An acute reference dose (aRfD) of 1.5 milligrams/kilograms (mg/kg)-body weight (bw)/day for the females 13–49 years subpopulation only was based on a no observable adverse effect level (NOAEL) of 150 mg/kg-bw/day based on a rabbit developmental study and an uncertainty factor of 100X. No additional FQPA safety factor was applied. For the purpose of the aggregate risk assessment, the exposure value was expressed in terms of a margin of exposure (MOE), which was calculated by dividing the NOAEL by the exposure. In addition, exposure was expressed as a percent of the acute reference dose (%aRfD). Acute exposure to the females 13–49 years subpopulation resulted in a MOE of 899 (1.1% of the acute RfD of 1.5 mg/kg-bw/day). Since the benchmark MOE for this assessment was 100 and since EPA generally has no concern for exposures above the benchmark MOE, Syngenta Crop Protection believes that there is a reasonable certainty that no harm will result from the acute dietary (food) exposures arising from the current and proposed uses for cyprodinil.

iii. *Chronic exposure*. The chronic reference dose (cRfD) for cyprodinil is 0.03 mg/kg-bw/day and is based on a chronic rat study with a NOAEL of 2.7 mg/kg-bw/day and an uncertainly factor of 100X. No additional FQPA safety factor was applied. The cyprodinil Tier III chronic dietary exposure assessment was based upon residue field trial results. For the purpose of the aggregate risk assessment, the exposure values were expressed in terms of margin of exposure (MOE), which was calculated by dividing the NOAEL by the exposure for each population subgroup. In addition, exposure was expressed as a percent of the chronic reference dose (%RfD). Chronic exposure to the most sensitive sub-population (children 1 and 2 years old) resulted in a MOE of 1,074 (8.4% of the chronic RfD of 0.03 mg/kg-bw/day). Since the benchmark MOE for this assessment was 100 and since EPA generally has no concern for exposures resulting in an MOE above the benchmark MOE, Syngenta Crop Protection believes that there is a reasonable certainty that no harm will result from the chronic dietary (food) exposures arising from the current and proposed uses for cyprodinil.

2. *Drinking water*. Another potential source of exposure of the general population to residues of cyprodinil are residues in drinking water. The degradation of cyprodinil is microbially mediated with an aerobic soil metabolism half-life of less than 46 days. Cyprodinil Kocs vary from 1550 to 2030 and cyprodinil exhibits a strong binding affinity for soil. Cyprodinil is stable to hydrolysis but degrades rapidly under photolytic conditions. Estimated Environmental Concentrations (EECs) of cyprodinil in drinking water were determined by EPA. The EPA ground water model, Screening Concentrations in Groundwater (SCI-GROW) was used to determine acute and chronic estimated environmental concentrations in ground water and the Agency's surface water model, Pesticide Root Zone Model/Exposure Analysis Modeling System (PRZM/EXAMS), was used to determine acute and chronic estimated environmental concentrations in surface water. Based on the model outputs, the estimated environmental concentrations (EECs) for cyprodinil (plus the CGA-249287 metabolite) are 0.16 parts per billion (ppb) for acute and chronic exposure to ground water and 32.9 ppb and 8.1 ppb for acute and chronic exposure, respectively, to surface water. The Acute Drinking Water Level of Comparison (DWLOC) was calculated based on an acute Population Adjusted Dose (aPAD) of 1.5 mg/kg/day. For the acute assessment, the females (13–49 years) subpopulation generated an acute DWLOC of 44,500 ppb. The acute DWLOC of 44,500 ppb is considerably higher than the acute EEC of 32.9 ppb. Chronic DWLOCs were calculated based on a chronic Population Adjusted Dose (cPAD) of 0.03 mg/kg/day. The children 1–2 years old subpopulation generated the lowest chronic DWLOC of 275 ppb. Thus, the chronic DWLOC of 275 ppb is considerably higher than the chronic EEC of 8.1 ppb.

3. *Non-dietary exposure*. There is a potential residential post-application exposure to adults and children entering residential areas treated with cyprodinil. Since the Agency did not select a short-term endpoint for dermal exposure, only intermediate dermal exposures were considered. Based on the residential use pattern, no long-term post-application residential exposure is expected.

4. *Chronic aggregate exposure*. Based on the completeness and reliability of the toxicity data supporting these petitions, Syngenta Crop Protection believes that there is a reasonable certainty that no harm will result from aggregate exposure to residues arising from all current and proposed cyprodinil uses, including anticipated dietary exposure from food, water, and all other types of non-occupational exposures.

D. Cumulative Effects

Cumulative exposure to substances with a common mechanism of toxicity. Section 408(b)(2)(D)(v) requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.'' EPA does not have, at this time, available data to determine whether cyprodinil has a common mechanism of toxicity with other substances or how to include this pesticide in a cumulative risk assessment. For the purposes of this tolerance action, the EPA has not assumed that cyprodinil has a common mechanism of toxicity with other substances.

E. Safety Determination

The chronic dietary exposure analysis (food only) indicated that exposure from all established and proposed cyprodinil uses is 8.4% of the chronic RfD of 0.03 mg/kg-bw/day for the most sensitive subpopulation, children 1 and 2 years old. Estimated concentrations of cyprodinil residues in surface and ground water are below the calculated acute DWLOC. The children 1 and 2 years old subpopulation has the lowest

chronic DWLOC of approximately 275 ppb, which is considerably higher than the chronic EEC of 8 ppb.

The acute dietary exposure analysis (food only) showed that for female 13–49 years old, exposure from all established and proposed cyprodinil uses would be 1.1% of the acute RfD of 1.5 mg/kg-bw/day. Acute DWLOCs were calculated based on an acute Populated Adjusted Dose (aPAD) of 1.5 mg/kg/day. The females (13–49 years old) subpopulation generated an acute DWLOC of approximately 44,500 ppb. The acute EEC of 33 ppb is considerably less than 44,500 ppb. Therefore, the chronic and aggregate risk from cyprodinil residues in food and drinking water would not be expected to exceed the EPA's level of concern.

Syngenta Crop Protection has considered the potential aggregate exposure from food, water and non-occupational exposure routes and concluded that aggregate exposure is not expected to exceed 100% of the chronic reference dose and that there is a reasonable certainty that no harm will result to infants and children from the aggregate exposure to cyprodinil.

F. International Tolerances

There are no Codex maximum residue levels established for cyprodinil.

[FR Doc. 05–343 Filed 1–6–05; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7858–4]

Air Quality Criteria Document for Lead; Draft Project Work Plan

AGENCY: Environmental Protection Agency.

ACTION: Notice of public comment period.

SUMMARY: The U.S. Environmental Protection Agency (EPA) Office of Research and Development's National Center for Environmental Assessment (NCEA) is reviewing and, as appropriate, revising the EPA document, Air Quality Criteria for Lead, EPA–600/8–83/028aF–dF, published in June 1986, and the associated supplement (EPA–600/8–89/049F) published in 1990. Interested parties are invited to comment on a draft of EPA's Project Work Plan for updating the lead document.

DATES: The 30-day period for submission of public comments on the draft Project Work Plan begins January 7, 2005, and ends February 7, 2005.

ADDRESSES: The draft plan will be available from NCEA by January 7, 2005. Internet users will be able to download a copy of the draft plan from the NCEA home page. The URL is *http://www.epa.gov/ncea/*. Contact Ms. Diane Ray by phone (919) 541–3637, fax (919) 541–1818, or e-mail (*ray.diane@epa.gov*) to request hard copies of this plan. Please provide the document's title, Project Work Plan for Air Quality Criteria for Lead, as well as your name and address, to facilitate processing of your request. Public comments on the draft plan may be submitted electronically, by mail, by facsimile, or by hand delivery/courier. Please follow the detailed instructions as provided in the section of this notice entitled **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: For details on the period for submission of public comments, contact the Office of Environmental Information Docket; telephone: (202) 566–1752; facsimile: (202) 566–1753; or e-mail: *ORD.Docket@epa.gov*.

For technical information, contact Robert Elias, Ph.D., NCEA, facsimile: (919) 541–1818 or e-mail: *elias.robert@epa.gov*.

SUPPLEMENTARY INFORMATION: Section 108(a) of the Clean Air Act directs the Administrator to identify certain pollutants which ''may reasonably be anticipated to endanger public health and welfare'' and to issue air quality criteria for them. These air quality criteria are to ''accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of [a] pollutant in the ambient air * * *.'' Under section 109 of the Act, EPA is then to establish National Ambient Air Quality Standards (NAAQS) for each pollutant for which EPA has issued criteria. Section 109(d) of the Act subsequently requires periodic review and, if appropriate, revision of existing air quality criteria to reflect advances in scientific knowledge on the effects of the pollutant on public health and welfare. EPA is also to revise the NAAQS, if appropriate, based on the revised criteria.

Lead is one of six ''criteria'' pollutants for which EPA has established air quality criteria and NAAQS. On November 9, 2004 (69 FR 64926), EPA formally initiated its current review of the criteria and NAAQS for lead, requesting the submission of recent scientific information on specified topics. One of the next steps in this process is to prepare a project work plan for the review and, if appropriate, revision of the existing Air Quality Criteria Document (AQCD) for lead and provide for public review of a draft of the plan.

Accordingly, this notice announces the availability of a draft of EPA's Project Work Plan for Revised Air Quality Criteria for Lead, NCEA–R–1465, prepared by NCEA. The purpose of the Project Work Plan is to describe the managerial procedures for reviewing and, as appropriate, revising EPA's Air Quality Criteria for Lead, EPA–600/8–83/028aF–dF, published in June 1986, and the associated supplement (EPA–600/8–89/049F) published in 1990. The draft plan will also be reviewed by the Clean Air Scientific Advisory Committee (CASAC) of EPA's Science Advisory Board and will be revised in light of CASAC's review and comments received from the general public. Information on the date and location of the CASAC public review meeting will be published in a future **Federal Register** notice. The plan may be modified and amended from time to time, as necessary, to reflect actual project requirements and progress. Accordingly, any proposed schedules and outlines, or any lists of technical coordinator assignments, authors, or reviewers are subject to change. As indicated above, the draft plan will be available by January 7, 2005.

EPA has established an official public docket for information pertaining to the revision of the Lead AQCD, Docket ID No. ORD–2004–0018. The official public docket is the collection of materials, excluding Confidential Business Information (CBI) or other information whose disclosure is restricted by statute, that is available for public viewing at the Office of Environmental Information (OEI) Docket in the Headquarters EPA Docket Center, EPA West Building, Room B102, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OEI Docket is (202) 566–1752; facsimile: (202) 566–1753; or e-mail: *ORD.Docket@epa.gov.*

An electronic version of the official public docket is available through EPA's electronic public docket and comment system, E-Docket. You may use E-Docket at *http://www.epa.gov/edocket/* to submit or view public comments, to access the index listing of the contents of the official public docket, and to view those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in

the appropriate docket identification number.

Certain types of information will not be placed in E-Docket. Information claimed as CBI and other information with disclosure restricted by statute, also not included in the official public docket, will not be available for public viewing in E-Docket. Copyrighted material also will not be placed in E-Docket but will be referenced there and available as printed material in the official public docket.

Persons submitting public comments should note that EPA's policy makes the information available as received and at no charge for public viewing at the EPA Docket Center or in E-Docket. This policy applies to information submitted electronically or in paper, except where restricted by copyright, CBI, or statute.

Unless restricted as above, public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to E-Docket. Physical objects will be photographed, where practical, and the photograph will be placed in E-Docket along with a brief description written by the docket staff.

You may submit public comments electronically, by mail, by facsimile, or by hand delivery/courier. To ensure proper receipt by EPA, include the appropriate docket identification number with your submission. Please adhere to the specified submitting period. Public comments received or submitted past the close date will be marked ''late'' and may only be considered if time permits.

If you submit public comments electronically, EPA recommends that you include your name, mailing address, and an e-mail address or other details for contacting you. Also include these contact details on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the person submitting the public comments and allows EPA to contact you in case the Agency cannot read what you submit due to technical difficulties or needs to clarify issues raised by what you submit. If EPA cannot read what you submit due to technical difficulties and cannot contact you for clarification, it may delay or prohibit the Agency's consideration of the public comments.

To access EPA's electronic public docket from the EPA Internet Home Page, select ''Information Sources,'' ''Dockets,'' and ''EPA Dockets.'' Once in the system, select ''search,'' and key in Docket ID No. ORD–2004–0018. The system is an ''anonymous access'' system, which means EPA will not know your identity, e-mail address, or other contact details if you are merely viewing the information.

Public comments may be sent by electronic mail (e-mail) to *ORD.Docket@epa.gov,* Attention Docket ID No. ORD–2004–0018. In contrast to EPA's electronic public docket, EPA's e-mail system is *not* an ''anonymous access'' system. If you send an e-mail directly to the docket without going through EPA's E-Docket, EPA's e-mail system automatically captures your e-mail address, and it becomes part of the information in the official public docket and is made available in EPA's E-Docket.

You may submit public comments on a disk or CD ROM mailed to the OEI Docket mailing address. Files will be accepted in WordPerfect, Word, or ASCII file format. Avoid the use of special characters and any form of encryption.

If you provide public comments in writing, please submit one unbound original, with pages numbered consecutively, and three copies. For attachments, provide an index, number pages consecutively with the main text, and submit an unbound original and three copies.

Dated: December 22, 2004.

Peter W. Preuss,

Director, National Center for Environmental Assessment.

[FR Doc. 05–347 Filed 1–6–05; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7858–8]

Notice of Guidance Issuance: Direct Implementation Tribal Cooperative Agreements (DITCAs) Guidance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The U.S. Environmental Protection Agency finalized the Direct Implementation Tribal Cooperative Agreements (DITCAs) Guidance on November 24, 2004. A copy appears below. The purpose of this guidance is to describe the concept of DITCAs and their use by EPA when performing direct implementation activities in Indian country. EPA believes that the DITCA authority makes available an important tool for tribes who wish to work with EPA in the implementation of environmental programs in Indian country by allowing tribes to be involved in assisting EPA as EPA implements federal programs for tribes. DITCAs are intended to provide a method to accomplish program implementation that is in addition to the Federal delegation of authority method, also referred to as the ''treatment in a manner similar to states'' or ''TAS'' approach to implementation. The degree of tribal involvement in assisting with EPA's direct implementation is flexible depending upon the tribe's interest and ability in carrying out specific work.

FOR FURTHER INFORMATION CONTACT: Jeff Besougloff, U.S. Environmental Protection Agency, EPA East Building (MC 4104M), 1200 Pennsylvania Avenue, NW, Washington, DC 20460. Telephone: (202) 564–0292. Facsimile Number: (202) 564–0298. E-mail: *besougloff.jeff@epa.gov.Information* is also available on EPA's American Indian Environmental Office Web site: *http://www.epa.gov/indian/.*

Dated: December 23, 2004.

Benjamin H. Grumbles,

Assistant Administrator, Office of Water.

SUPPLEMENTARY INFORMATION:

Guidelines for Direct Implementation Tribal Cooperative Agreements (DITCAs) November 2004

I. Summary

This document replaces the ''Guidelines for Direct Implementation Tribal Cooperative Agreements (DITCAs) for Fiscal Year 2001'' (FY 2001 Guidance) for awarding Direct Implementation Tribal Cooperative Agreements (DITCAs) to assist EPA in directly implementing federal environmental programs for Indian tribes. The most substantial clarifications and changes to the FY 2001 Guidance are:

(1) Clarification of the kinds of activities eligible for funding under the DITCA statutory authority (*see* Section VI), and

(2) Recommendation to consult with the following offices to insure successful DITCA development:

- American Indian Environmental Office (AIEO)
- Grants Administration Division (GAD)
- Office of General Counsel (OGC)
- Office of Regional Counsel (ORC)
- Office of Enforcement and Compliance (OECA) for DITCAs with enforcement or compliance components
- Relevant regional and/or program offices

II. Statutory Authority

The statutory authority for DITCAs was included in the Consolidated

Appropriations Act, 2004, Pub. L. 108–199 (2004), which provided:

> For fiscal year 2004, notwithstanding 31 U.S.C. 6303(1) and 6305(1), the Administrator of the Environmental Protection Agency, in carrying out the Agency's function to implement directly Federal environmental programs required or authorized by law in the absence of an acceptable tribal program, may award cooperative agreements to federally-recognized Indian tribes or Intertribal consortia, if authorized by their member tribes, to assist the Administrator in implementing Federal environmental programs for Indian tribes required or authorized by law, except that no such cooperative agreements may be awarded from funds designated for State financial assistance agreements.
>
> Consolidated Appropriations Act, 2004, Pub. L. 108–199 (2004).

The current statutory authority for DITCAs is controlled by the Continuing Resolution for Fiscal Year 2005, Pub. L. 108–309 (2004), in effect until November 20, 2004, which adopts the FY2004 statutory language on DITCAs.

Bills regarding continuing appropriations for FY 2005 in the U.S. House of Representatives (H.J. Res. 107) and the U.S. Senate (S. 2825) would adopt the existing statutory language on DITCAs.

These guidelines will continue to be applicable as written. In the event the DITCA statutory language is modified or omitted, EPA will consider appropriate responses. Contact AIEO at (202) 564–0303 regarding future developments.

III. Applicable Regulations and OMB Cost Circular

The regulations that govern the award and administration of DITCAs, including the requirements for the development of work plans, are the ''Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments'' set forth at 40 CFR part 31. The regulations at 40 CFR part 31 apply to the award and administration of tribal cooperative agreements awarded to any intertribal consortium, including intertribal consortia recognized as non-profit organizations. Allowable costs under DITCAs are governed by OMB Circular A–87.

DITCA documentation should specifically indicate that the activities to be carried out by a tribe or intertribal consortium are consistent with environmental program regulations governing the implementation of Federal environmental programs. For example, if a DITCA is awarded to a tribe to assist EPA in implementing a Federal public water supply program under the Safe Drinking Water Act, National Pollutant Discharge Elimination System permitting under the Clean Water Act, or a Federal Implementation Plan under the Clean Air Act, then the DITCA should indicate that the activities to be carried out under the DITCA work plan are consistent with the regulations governing those Federal programs.

IV. Delegation of Authority and Approval Requirements

The authority to approve DITCAs is delegated to Assistant Administrators and Regional Administrators under a one-time delegation through 9/30/05. A permanent delegation is being completed. It is recommended that the program and regional offices contemplating DITCAs consult with the following offices, as appropriate, throughout the process of development and finalization of the DITCA:

- American Indian Environmental Office (AIEO).
- Grants Administration Division (GAD).
- Office of General Counsel (OGC).
- Office of Regional Counsel (ORC).
- Office of Enforcement and Compliance (OECA) for DITCAs with enforcement or compliance components.
- Relevant regional and/or program offices.

V. Eligible Recipients

DITCAs may be awarded to: (1) federally recognized Indian tribes and (2) intertribal consortia consistent with applicable provisions. In order for an intertribal consortium to be eligible to receive cooperative agreements under this authority, an intertribal consortium should be consistent with the provisions in 40 CFR part 35.

VI. Eligible Activities

As noted in Section II, the annual DITCA statutory authority states that EPA may award cooperative agreements to assist EPA ''in implementing Federal environmental programs for Indian Tribes required or authorized by law. * * *'' The 2001 Guidance stated that DITCAs would be awarded only for Federal programs required by law in the absence of an acceptable tribal program. Provisions within some Federal environmental laws clearly require EPA to implement programs where a tribe is unwilling or unable. Other laws, however, are less clear as to whether EPA is required to directly implement a program in the absence of an acceptable tribal program. In that context, EPA will look at the statute to determine if, in the State context, EPA would be required to directly implement the program. If so, EPA is authorized to award a DITCA to fund activities for those environmental programs.

Thus, EPA may award DITCAs to fund activities for environmental programs that meet either one of the following criteria: (1) Federal programs under environmental laws that EPA is clearly required to directly implement in the tribal context; or (2) Federal programs under environmental laws that in the State context EPA is required to directly implement in the absence of an acceptable State program.

For example, activities under the following programs may be eligible for DITCA funding:

- Water quality standards promulgation and review and the National Pollutant Discharge Elimination System permit program under the Clean Water Act.
- Implementation plan development and the Title V permit program under the Clean Air Act.
- The Public Water System program and the Underground Injection Control program under the Safe Drinking Water Act.
- The Underground Storage Tank program and the Subtitle C permit program under the Resource Conservation and Recovery Act.
- The Certification and Training program for pesticide applicators under the Federal Insecticide, Fungicide, and Rodenticide Act.
- The Lead-Based Paint program under the Toxic Substances Control Act.

Due to resource and funding limitations, EPA must work closely with tribes to identify those direct implementation activities where there is a joint tribal and EPA priority for program implementation.

VII. Limitations

There are several limitations on DITCA awards. Among them are:

- The statutory authority for DITCAs is found in appropriations acts. In the event the appropriation authority is extended by continuing resolution(s), the DITCA authority will also be extended.
- The project period of the DITCA may extend beyond the period of the appropriations act under which it was created, but all funds must be awarded prior to the expiration of the appropriations act authorizing the DITCA.
- DITCA funded personnel may not perform inherently Federal functions.
- EPA personnel can provide assistance to DITCA representatives based on the written DITCA work plan which may include daily direction. EPA cannot treat DITCA representatives as

EPA employees by participating in hiring, disciplining, or firing decisions.

• DITCA funded personnel cannot operate vehicles which are either owned or leased by the Federal government.

Information sharing and two-way communication between the tribe and EPA are key to a successful DITCA. EPA and the tribe should negotiate and complete a workplan prior to the awarding of the DITCA. The workplan should clearly delineates the status, roles and responsibilities of the respective parties. It must also characterize and quantify the environmental and public health benefits (*i.e.*, outputs and, to the maximum extent practicable, outcomes) to be gained from the DITCA's activities, in compliance with the EPA Order on Environmental Results Under Assistance Agreements which will go into effect in January 2005. The consulting offices listed in this guidance can assist with all these issues.

VIII. Available Funding Sources

To this point, no funds are appropriated specifically for DITCAs. Funding is available from two existing sources, subject to applicable limitations contained in the applicable appropriation act:

• STAG monies appropriated for tribal program grants [1] and,

• EPM funds available for direct implementation activities.

Either source of funding may be used for any of the eligible activities described in section VI.

DITCAs can be funded by reprogramming subject to the usual restrictions and procedures governing this action with the exception of the following situations:

• DITCAs for Title V permitting may be funded only with funds appropriated to EPA for Federal CAA Title V work, and

• The statutory authority for DITCAs expressly prohibits using funds designated for State financial assistance agreements.

The prohibition on using two general appropriations for the same activity—commonly referred to as the ''pick and stick'' rule—applies.

[1] The term ''tribal program grants'' as used in this document refers only to funds for tribal grants within the statutory earmark in the STAG account ''for grants * * * for multi-media or single media pollution prevention, control and abatement and related activities.'' Pub. L. 107–73, 115 Stat. 686 (2001). It does not refer to funds for other tribal grants included in other earmarks in the STAG account.

IX. Award Process (Including Proper Citation; Definition of Cooperative Agreements; Relationship to MOAs, etc.)

Each DITCA should cite only the statutory authority for the applicable fiscal year. Do not also use the citation for the relevant program's grant authority.

DITCAs are awarded and administered as ''cooperative agreements'' under the Federal Grant and Cooperative Agreement Act (FGCAA) and are subject to all applicable Agency assistance policies. Because the statutory authority for DITCAs is for cooperative agreements and not grants, there must be substantial Federal involvement in the performance of each DITCA project. (*See* EPA Order 5700.1 for a description of ''substantial Federal involvement.'').

Since DITCAs are authorized by statute and are only available to tribes and eligible intertribal consortia, they are exempt from competition under section 6(c)(2) of EPA Order 5700.5, Policy for Competition in Assistance Agreements. Application of the competition policy is discretionary, not mandatory. EPA will review on an annual basis the extent to which regional and program offices apply the competition policy with regard to DITCAs to consider in the future whether the policy should or should not be applied on a consistent basis across the Agency.

A Memoranda of Agreement (MOAs), or other preliminary documentation, is not a prerequisite to a DITCA and cannot be used to transfer funds. DITCAs are awarded using the standard grant/cooperative agreement application and award forms. However, the DITCA's workplan must characterize and quantify the environmental and public health benefits (*i.e.*, outputs and, to the maximum extent practicable, outcomes) to be gained from the DITCA's activities, in compliance with the EPA Order on Environmental Results Under Assistance Agreements which will go into effect in January 2005.

X. Status of Individuals Carrying Out Direct Implementation Activities

It is important that all parties understand the status of the individuals carrying out EPA's direct implementation activities under these cooperative agreements. It is recommended that the status of such individuals be clearly stated in the work plan to accompany the DITCA. These individuals are employees of the DITCA recipient (a tribe or intertribal consortium) or its contractor. They are not EPA employees, nor are they EPA contractors by virtue of being a DITCA recipient. These individuals may not be treated or present themselves to third parties as Federal government employees or Federal contractors based on their status as employees of DITCA recipients.

[FR Doc. 05–348 Filed 1–6–05; 8:45 am]
BILLING CODE 6560–50–P

EXECUTIVE OFFICE OF THE PRESIDENT

Office of National Drug Control Policy

Drug-Free Communities Support Program National Evaluation; Proposed Information Collection; Notice of 60-Day Public Comment Period

AGENCY: Executive Office of the President, Office of National Drug Control Policy.

ACTION: Notice of 60-day public comment period.

SUMMARY: In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Executive Office of the President, Office of National Drug Control Policy, Drug Free Communities Support Program is publishing the following summary of proposed information 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 program'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.

Executive Office of the President, Office of National Drug Control Policy is requesting OMB review and approval of this information collection. Written comments and/or recommendations will be accepted from the public if received by the individuals designated below within 60 days from the date of publication.

Type of Information Collection Request: New collection;

Title: Drug-Free Communities (DFC) Support Program National Evaluation;

Use: The DFC Support Program is an integral component of the National Drug

Control Strategy and a requirement of Healthy People 2010 supporting the President's pledge to reduce America's drug use by 25 percent in five years through building community capacity to prevent substance abuse among our nation's youth. The DFC has two primary goals: (1) Reduce substance abuse among youth by addressing local risk and protective factors to minimize the likelihood of subsequent substance abuse in the community; and (2) support community anti-drug coalitions in becoming self-sufficient by establishing, strengthening, and fostering collaboration among public and private nonprofit agencies, as well as federal, state, local, and tribal governments to prevent and reduce substance abuse.

A National Evaluation of the DFC Support Program commenced in September 2004 to assess the program's implementation and effectiveness. The major purpose of the DFC Support Program National Evaluation is to design and implement a rigorous evaluation and to support an effective grant monitoring and tracking system.

The National Evaluation will make use of three separate collection instruments to gather information. The Monitoring and Tracking Questionnaire will serve as a quarterly report for the DFC grantees, and will provide information for both ONDCP and the National Evaluation. The Evaluation Questionnaire will be used on an annual basis and will answer evaluation questions that are not appropriate for the Monitoring and Tracking instrument. The Typology Classification Questionnaire will be used on an annual basis to classify respondents into a coalition typology developed by the evaluation contractor.

Frequency: Quarterly and annually;

Affected Public: Anti-Drug Coalitions;

Type of Respondents: Directors of Anti-Drug Coalitions or their designees;

Estimated annual burden is as follows:

Type of respondents	Estimated number of respondents	Estimated number of responses per respondent	Average burden per response (in hours)	Total annual burden (in hours)
Instrument: Monitoring and Tracking Questionnaire (Quarterly Report)				
DFC Grantee Program Directors	714	4	1.5	4284
Instrument: Evaluation Questionnaire				
DFC Grantee Program Directors	1	1.0	714	
Instrument: Typology Classification Questionnaire				
DFC Grantee Program Directors	714	1	1.5	1071
Total				6069

The only cost to respondents is time they spend completing the questionnaire(s). Data collected from grantees will be made available to them for planning, implimentation, and evaluation purposes. There are no Capital Costs to report. There are no Operating or Maintenance Costs to report.

Request for Comments: Written comments and/or recommendations from the public and affected entities are invited on one or more of the following points: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the DFC program, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information those who are able to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comment Deadline: Comments regarding these proposed information collections must be mailed and/or faxed to the designee listed below, within 60-days of the date of this publication: Executive Office of the President, Office of National Drug Control Policy, Drug Free Communities Support Program, Attention: Keri-Lyn Coleman, MSW, Acting DFCSP Administrator, Washington, DC 20503. Fax number: 202–395–6641.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed information collections or to obtain a copy of the information collection plans and/or instruments, contact Keri-Lyn Coleman, MSW, Acting DFCSP Administrator, Executive Office of the President, Office of National Drug Control Policy, Washington DC 20503, or call non-toll free number 202–395–6762 or e-mail your request to: *Keri-Lyn_S._Coleman@ondcp.eop.gov.*

Dated: January 3, 2005.

Norman R. Deck,

Assistant Deputy Director, Office of National Drug Control Policy.

[FR Doc. 05–323 Filed 1–6–05; 8:45 am]

BILLING CODE 3180–02–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Determination of Insufficient Assets To Satisfy All Claims of Financial Institution in Receivership

ACTION: Notice.

SUMMARY: The Federal Deposit Insurance Corporation (FDIC) has determined that the proceeds that can be realized from the liquidation of assets of the receivership listed in **SUPPLEMENTARY INFORMATION** are insufficient to wholly satisfy the priority claims of depositors against the receivership estate. Therefore, upon satisfaction of secured claims, depositor claims, and claims which have priority over depositors under applicable law, no amount will remain or will be recovered sufficient to allow a dividend,

distribution, or payment to any creditor of lesser priority, including but not limited to claims of general creditors. Any such claims are hereby determined to be worthless.

FOR FURTHER INFORMATION CONTACT: Thomas Bolt, Counsel, Legal Division, FDIC, 550 17th Street, NW., Room H–11052, Washington, DC 20429. Telephone: (202) 736–0168.

SUPPLEMENTARY INFORMATION: Financial Institution in Receivership Determined To Have Insufficient Assets to Satisfy All Claims, FIN 4662, Pulaski Savings Bank, Philadelphia, Pennsylvania.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. E5–31 Filed 1–6–05; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL HOUSING FINANCE BOARD

[No. 2004–N–13]

Notice of Annual Adjustments

AGENCY: Federal Housing Finance Board.

ACTION: Notice.

SUMMARY: The Federal Housing Finance Board (Finance Board) has adjusted the cap on average total assets that defines a ''Community Financial Institution'' (CFI) and the limits on annual compensation for Federal Home Loan Bank (Bank) directors based on the annual percentage increase in the Consumer Price Index for all urban consumers (CPI–U), as published by the U.S. Department of Labor (DOL). The Finance Board also has made similar adjustments to the maximum dollar limits on certain allocations by a Bank of its annual required Affordable Housing Program (AHP) contributions.

FOR FURTHER INFORMATION CONTACT: Scott L. Smith, Associate Director, by telephone at (202) 408–2991 or by electronic mail at *smiths@fhfb.gov*, or Mark Edward Stover, Senior Economist, by telephone at (202) 408–2828 or by electronic mail at *stoverm@fhfb.gov.* Send regular mail to the Federal Housing Finance Board, Office of Supervision, Regulations and Research, 1777 F Street, NW., Washington, DC 20006.

SUPPLEMENTARY INFORMATION: The Bank Act and Finance Board regulations require publication of annual adjustments to the following dollar amounts, based on any increase in the CPI–U, as published by the DOL:

- The cap on average total assets that defines a CFI (CFI Asset Cap). *See* 12 U.S.C. 1422(13) and 12 CFR 925.1.
- The limits on annual compensation for Bank directors. *See* 12 U.S.C. 1427(i)(2) and 12 CFR 918.3(a).
- Maximum dollar limits allocations by a Bank of its annual required AHP contributions towards homeownership set-aside programs and an additional homeownership set-aside program assisting first-time homebuyers, and from its annual required AHP contribution for the subsequent year to the current year's competitive application program. *See* 12 CFR 951.3(a)(1)–(2).

These annual adjustments, which are effective January 1, 2005, are based on the percentage increase in the CPI–U from November 2003 to November 2004. The CPI–U increased 3.5 percent from November 2003 to November 2004.

The Finance Board uses data from November rather than waiting for the December data, which is published in mid-January, in order to provide notice to the Banks as close to the January 1st effective date as possible. This is consistent with the practice of other Federal agencies that rely on other than December data when calculating annual inflation adjustments so they can announce their adjustments prior to the effective date of January 1. The Finance Board also uses data that has not been seasonally adjusted. The DOL encourages the use of CPI–U data that has not been seasonally adjusted in ''escalation agreements'' because seasonal factors are updated annually and seasonally adjusted data are subject to revision for up to five years following the original release. Unadjusted data are not routinely subject to revision, and previously published unadjusted data are corrected only when significant calculation errors are discovered.

Based on the 3.5 percent increase in the CPI–U, the Finance Board has made the following adjustments, effective January 1, 2005:

- *CFI Asset Cap.* The CFI Asset Cap increased to $567 million (2004 limit was $548 million). The Finance Board arrived at the adjusted limit of $567 million by rounding to the nearest million.[1]
- *Bank Director Compensation.* The annual compensation limits for Bank directors increased for a chairperson to $28,364 (2004 limit was $27,405), for a vice-chairperson to $22,692 (2004 limit was $21,924), and for all other board members to $17,019 (2004 limit was $16,443). The Finance Board arrived at these adjusted annual compensation limits by rounding to the nearest dollar.[1]
- *AHP.* The limit on contributions towards homeownership set-aside programs increased to $3.2 million (2004 limit was $3.1 million). The limit on contributions towards an additional first-time homebuyer set-aside program remains at $1.6 million. The limit on allocations from a Bank's annual required AHP contribution for the subsequent year to the current year's competitive application program increased to $3.2 million (2004 limit was $3.1 million). The limits on allocations from AHP contributions are rounded to the nearest $100,000.[1]

Dated: December 30, 2004.

By the Federal Housing Finance Board.

Ronald A. Rosenfeld,

Chairman.

[FR Doc. 05–305 Filed 1–6–05; 8:45 am]

BILLING CODE 6725–01–P

OFFICE OF GOVERNMENT ETHICS

Proposed Collection; Comment Request for Unmodified Qualified Trust Model Certificates and Model Trust Documents

AGENCY: Office of Government Ethics (OGE).

ACTION: Notice.

SUMMARY: After this first round notice and public comment period, OGE plans to submit the executive branch qualified trust model certificates and model trust documents to the Office of Management and Budget (OMB) for two-year extension of approval under the Paperwork Reduction Act. In all, a total of twelve OGE model certificates and model documents for qualified trusts are involved. OGE is proposing no changes to these forms.

DATES: Comments by the public and agencies on this proposed information collection extension are invited and should be received by March 23, 2005.

ADDRESSES: Comments should be sent to: Mary T. Donovan, Office of Administration and Information Management, U.S. Office of Government Ethics, Suite 500, 1201 New York Avenue, NW., Washington, DC 20005–3917. Comments may also be sent electronically to OGE's E-mail address at *usoge@oge.gov* (for E-mail messages, the subject line should include the following reference—''Qualified trust

[1] Since the calculations are based on cumulative CPI–U changes applied to the limits as they first appeared in Finance Board regulations, the changes are not distorted over time by rounding.

model certificates and model trust documents paperwork comment'').

FOR FURTHER INFORMATION CONTACT: Ms. Donovan at the U.S. Office of Government Ethics; telephone: 202–482–9232; TDD: 202–482–9293; FAX: 202–482–9237. A copy of the model certificates and model documents for qualified trusts may be obtained, without charge, by contacting Ms. Donovan.

SUPPLEMENTARY INFORMATION: The Office of Government Ethics is planning to submit, after this first round notice and comment period, all twelve qualified trust certificates and model documents described below (all of which are included under OMB paperwork control number 3209–0007) for a two-year extension of approval by OMB under the Paperwork Reduction Act (44 U.S.C. chapter 35). At that time, OGE will publish a second paperwork notice in the **Federal Register** to inform the public and the agencies. The current paperwork approval for the model certificates and model trust documents is scheduled to expire at the end of March 2005. OGE is proposing no changes to the twelve qualified trust certificates and model documents at this time. In late 2006, OGE anticipates modifying some or all of these information collections by rewriting them in plain English in order to make them easier to understand.

OGE is the supervising ethics office for the executive branch of the Federal Government under the Ethics in Government Act of 1978 (Ethics Act). Presidential nominees to executive branch positions subject to Senate confirmation and any other executive branch officials may seek OGE approval for Ethics Act qualified blind or diversified trusts to be used to avoid conflicts of interest.

OGE is the sponsoring agency for the model certificates and model trust documents for qualified blind and diversified trusts of executive branch officials set up under section 102(f) of the Ethics Act, 5 U.S.C. app. § 102(f), and OGE's implementing financial disclosure regulations at subpart D of 5 CFR part 2634. The various model certificates and model trust documents are utilized by OGE and settlors, trustees and other fiduciaries in establishing and administering these qualified trusts.

There are two categories of information collection requirements which OGE plans to submit, each with its own related reporting model certificates or model trust documents which are subject to paperwork review and approval by OMB. The OGE regulatory citations for these two categories, together with identification of the forms used for their implementation, are as follows:

i. Qualified trust certifications—5 CFR 2634.401(d)(2), 2634.403(b)(11), 2634.404(c)(11), 2634.406(a)(3) & (b), 2634.408, 2634.409 and appendixes A & B to part 2634 (the two implementing forms, the Certificate of Independence and Certificate of Compliance, are codified respectively in the cited appendixes; see also the Privacy Act and Paperwork Reduction Act notices thereto in appendix C); and

ii. Qualified trust communications and model provisions and agreements—5 CFR 2634.401(c)(1)(i) & (d)(2), 2634.403(b), 2634.404(c), 2634.408 and 2634.409 (the ten implementing forms are the: (A) Blind Trust Communications (Expedited Procedure for Securing Approval of Proposed Communications); (B) Model Qualified Blind Trust Provisions; (C) Model Qualified Diversified Trust Provisions; (D) Model Qualified Blind Trust Provisions (For Use in the Case of Multiple Fiduciaries); (E) Model Qualified Blind Trust Provisions (For Use in the Case of an Irrevocable Pre-Existing Trust); (F) Model Qualified Diversified Trust Provisions (Hybrid Version); (G) Model Qualified Diversified Trust Provisions (For Use in the Case of Multiple Fiduciaries); (H) Model Qualified Diversified Trust Provisions (For Use in the Case of an Irrevocable Pre-Existing Trust); (I) Model Confidentiality Agreement Provisions (For Use in the Case of a Privately Owned Business); and (J) Model Confidentiality Agreement Provisions (For Use in the Case of Investment Management Activities)).

The communications formats and the confidentiality agreements (items ii (A), (I) and (J) above) would not be available to the public because they contain sensitive, confidential information. All the other completed model trust certificates and model trust documents (except for any trust provisions that relate to the testamentary disposition of trust assets) are publicly available based upon a proper Ethics Act request (by filling out an OGE Form 201 access form).

The total annual public reporting burden represents the time involved for completing qualified trust certificates and model trust documents which are processed by OGE. The burden is based on the amount of time imposed on private citizens. Virtually all filers/document users are private trust administrators and other private representatives who help to set up and maintain the qualified blind and diversified trusts. The detailed paperwork estimates below for the various trust certificates and model trust documents are based on OGE's experience with administration of the qualified trust program.

i. *Trust Certificates:*

A. *Certificate of Independence:* Total filers (executive branch): 5; Private citizen filers (100%): 5; OGE-processed certificates (private citizens): 5; private citizen burden hours (20 minutes/certificate): 2.

B. *Certificate of Compliance:* Total filers (executive branch): 10; Private citizen filers (100%): 10; OGE-processed certificates (private citizens): 10; private citizen burden hours (20 minutes/certificate): 3; and

ii. *Model Qualified Trust Documents:*

A. *Blind Trust Communications:* Total Users (executive branch): 5; Private citizen users (100%): 5; OGE-processed documents (private citizens): 25 (based on an average of five communications per user, per year); private citizen burden hours (20 minutes/communication): 8.

B. *Model Qualified Blind Trust:* Total Users (executive branch): 2; Private citizen users (100%): 2; OGE-processed models (private citizens): 2; private citizen burden hours (100 hours/model): 200.

C. *Model Qualified Diversified Trust:* Total users (executive branch): 1; Private citizen users (100%): 1; OGE-processed models (private citizens): 1; private citizen burden hours (100 hours/model): 100.

D.–H. Of the five remaining model qualified trust documents: Total users (executive branch): 2; Private citizen users (100%): 2; OGE-processed models (private citizens): 2; private citizen burden hours (100 hours/model): 200.

I.–J. Of the two model confidentiality agreements: Total users (executive branch): 1; Private citizen users (100%): 1; OGE-processed agreements (private citizens): 1; private citizen burden hours (50 hours/agreement): 50.

Based on these estimates, the total number of forms expected annually at OGE is 46, with a cumulative total of 563 burden hours. This is a decrease of 248 forms and 3,222 hours from the prior three-year period.

Public comment is invited on each aspect of the model qualified trust certificates and model trust documents, and underlying regulatory provisions, as set forth in this notice, including specific views on the need for and practical utility of this set of collections of information, the accuracy of OGE's burden estimate, the potential for enhancement of quality, utility and clarity of the information collected, and

the minimization of burden (including the use of information technology).

Comments received in response to this notice will be summarized for, and may be included with, the OGE request for extension of the OMB paperwork approval for the set of the various existing qualified trust model certificates, the model communications package, and the model trust documents. The comments will also become a matter of public record.

Approved: December 22, 2004.

Marilyn L. Glynn,

Acting Director, Office of Government Ethics.

[FR Doc. 05–308 Filed 1–6–05; 8:45 am]

BILLING CODE 6345–02–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–209 and CMS–10008]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare & Medicaid Services (CMS) 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.

1. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Laboratory Personnel Report (Clinical Laboratory Improvement Amendments of 1988 (CLIA)) and Supporting Regulations in 42 CFR 493.1357, 493.1363, 493.1405, 493.1406, 493.1411, 493.1417, 493.1423, 493.1443, 493.1449, 493.1455, 493.1461, 493.1462, 493.1469, 493.1483, 493.1489, and 493.1491; *Use:* This form is used by the State agency to determine a laboratory's compliance with personnel qualifications under CLIA. This information is needed for a laboratory's certification and recertification; *Form Number:* CMS–209 (OMB#: 0938–0151); *Frequency:* Biennially; *Affected Public:* Business or other for-profit, Not-for-profit institutions, Federal Government, and State, Local or Tribal Government; *Number of Respondents:* 21,000; *Total Annual Responses:* 10,500; *Total Annual Hours:* 5,250.

2. *Type of Information Collection:* Revision of a currently approved collection; *Title of Information Collection:* Process and Information Required to Determine Eligibility of Drugs, Biologicals, and Radio-pharmaceutical Agents for Transitional Pass-Through Provisions Under the Hospital Outpatient Prospective Payment System (OPPS) and Supporting Regulations in 42 CFR, Section 419.43; *Use:* Section 1833(t)(6) of the Social Security Act provides for temporary additional payments or ''transitional pass-through payments'' for certain drugs and biological agents. Interested parties such as hospitals, pharmaceutical companies, and physicians can apply for transitional pass-through payment for drugs and biologicals used with services covered under the OPPS. CMS uses this information to determine if the criteria for making a transitional pass-through payment are met and if an interim HCPCS code for a new drug or biological is necessary. The revisions made to this collection include the addition of Section 303 of the MMA. This new section establishes the use of the average sales price (ASP) methodology for payments; *Form Number:* CMS–1008 (OMB# 0938–0802); *Frequency:* On occasion; *Affected Public:* Business or other for-profit and Not-for-profit institutions; *Number of Respondents:* 58; *Total Annual Responses:* 58; *Total Annual Hours:* 203.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS' Web Site address at *http://www.cms.hhs.gov/regulations/pra/*, or E-mail your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov*, or call the Reports Clearance Office on (410) 786–1326.

Written comments and recommendations for the proposed information collections must be mailed within 60 days of this notice directly to the CMS Paperwork Reduction Act Reports Clearance Officer designated at the address below: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: Melissa Musotto, Room C5–14–03, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

Dated: December 29, 2004.

John P. Burke, III,

CMS Paperwork Reduction Act Reports Clearance Officer, Officer of Strategic Operations and Regulatory Affairs, Regulations Development Group.

[FR Doc. 05–311 Filed 1–6–05; 8:45 am]

BILLING CODE 4120–03–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–R–268]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare & Medicaid Services (CMS), 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 function: (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: Extension of a currently approved collection; *Title of Information Collection:* Survey Tool for Medicare.gov Web site; *Form No.:* CMS–R–268 (OMB# 0938–0756); *Use:* CMS developed a survey tool using MSInteractive to obtain feedback from users accessing medicare.gov Web site to guide future improvements. The Web site was produced in concert with the administration's goal of providing better customer service to all our constituents. The underlying principle of the site is to have a single modified Internet

presence for the Agency that contains authoritative, accurate, and up-to-date Medicare information regarding our programs, benefits, regulations and access to services; *Frequency:* On Occasion; *Affected Public:* Individuals or Households and Business or other for-profit; *Number of Respondents:* 7,000; *Total Annual Responses:* 7,000; *Total Annual Hours:* 583.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS Web Site address at *http://www.cms.hhs.gov/regulations/pra/,* or E-mail your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov,* or call the Reports Clearance Office on (410) 786–1326.

Written comments and recommendations for the proposed information collections must be mailed within 30 days of this notice directly to the OMB desk officer: OMB Human Resources and Housing Branch, Attention: Christopher Martin, New Executive Office Building, Room 10235, Washington, DC 20503.

Dated: December 29, 2004.

John P. Burke, III,

CMS Paperwork Reduction Act Reports Clearance Officer, Office of Strategic Operations and Regulatory Affairs, Regulations Development Group.

[FR Doc. 05–312 Filed 1–6–05; 8:45 am]

BILLING CODE 4120–02–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2004N–0332]

Agency Information Collection Activities; Announcement of Office of Management and Budget Approval; Medical Devices; Third Party Review Under the Food and Drug Administration Modernization Act

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a collection of information entitled ''Medical Devices; Third Party Review Under the Food and Drug Administration Modernization Act'' 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 November 10, 2004 (69 FR 65201), 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 0910–0375. 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 30, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 05–317 Filed 1–6–05; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institutes of Dental & Craniofacial Research; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of a meeting of the National Advisory Dental and Craniofacial Research Council.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and/or contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications and/or contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Dental and Craniofacial Research Council.

Date: January 28, 2005.

Open: 8:30 a.m. to 12:30 p.m.

Agenda: Director's Report, Budget Report.

Place: National Institutes of Health, Natcher Building, 45 Center Drive, Bethesda, MD 20892.

Closed: 1:30 p.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications and/or proposals.

Place: National Institutes of Health, Natcher Building, 45 Center Drive, Bethesda, MD 20892.

Contact Person: Norman S. Braveman, Assistant to the Director, NIH–NIDCR, Building 31, Rm. 5B55, Bethesda, MD 20892. 301–594–2089, *norman.braveman@nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Information is also available on the Institute's/Center's home page: *http://www.nidcr.nih.gov/about,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.121, Oral Diseases and Disorders Research, National Institutes of Health, HHS.)

Dated: December 30, 2004

Anna Snouffer,

Acting Director, Office of Federal Advisory Committee Policy.

[FR Doc. 05–319 Filed 1–6–05; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Dental & Craniofacial Research; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Dental and Craniofacial Research Special Emphasis Panel, 05–27, PAR03–043, NIDCR Clinical Pilot Data Grants.

Date: February 1, 2005.

Time: 10 a.m. to 11 a.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Natcher Building, 45 Center Drive, Bethesda, MD 20892. (Telephone conference call.)

Contact Person: Rebecca Roper, MS, MPH, Scientific Review Administrator, Scientific Review Branch, Division of Extramural Research, National Inst of Dental & Craniofacial Research, National Institutes of Health, 45 Center Dr., room 4AN32E, Bethesda, MD 20892. 301 451–5096.

Name of Committee: National Institute of Dental and Craniofacial Research Special Emphasis Panel, 05–31, Review of R21s.

Date: February 4, 2005.

Time: 2 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Natcher Building, 45 Center Drive, Bethesda, MD 20892. (Telephone conference call.)

Contact Person: Rebecca Roper, MS, MPH, Scientific Review Administrator, Scientific Review Branch, Division of Extramural Research, National Inst of Dental & Craniofacial Research, National Institutes of Health, 45 Center Dr., room 4AN32E, Bethesda, MD 20892. 301 451–5096.

(Catalogue of Federal Domestic Assistance Program Nos. 93.121, Oral Diseases, and Disorders Research, National Institutes of Health, HHS.)

Dated: December 30, 2004.

Anna Snouffer,

Deputy Director, Office of Federal Advisory Committee Policy.

[FR Doc. 05–320 Filed 1–6–05; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HOMELAND SECURITY

[USCG–2004–19842]

Ballast Water Management for Vessels Entering the Great Lakes That Declare No Ballast Onboard

AGENCY: Coast Guard, DHS.

ACTION: Notice of public meeting; request for comments.

SUMMARY: The Coast Guard seeks consultation with all interested and affected parties in identifying ballast water management strategies for vessels entering the Great Lakes that declare no ballast onboard (NOBOB). Our goal for these strategies is to prevent the introduction and spread of nonindigenous species via NOBOBs. To aid in the development of ballast water management strategies for NOBOBs, the Coast Guard will also hold a public meeting in order to expand the opportunity for the public to comment. We encourage all interested and/or affected stakeholders to submit comments and to attend the public meeting.

DATES: The public meeting will be held at the following date and city:

• Cleveland, OH, May 9, 2005, from 9 a.m. to 4 p.m. and from 5 p.m. to 7 p.m.

Comments and related material must reach the Docket Management Facility on or before May 9, 2005.

ADDRESSES: The Coast Guard will hold the public meeting at the following address:

• Cleveland, OH, Anthony J. Celebreeze Federal Building, 1240 E. 9th Street, Cleveland, OH, 44419, 1–216–902–6020.

You may also submit your comments and related material by only one of the following means:

(1) By mail to the Docket Management Facility (USCG–2004–19842), U.S. Department of Transportation, room PL–401, 400 Seventh Street SW., Washington, DC 20590–0001.

(2) By delivery to room PL–401 on the Plaza level of the Nassif Building, 400 Seventh Street SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

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

(4) Electronically through the Web site for the Docket Management System at *http://dms.dot.gov*.

In choosing among these means, please give due regard to the recent difficulties and delays associated with the delivery of mail through the U.S. Postal Service to Federal facilities. Delivery methods 2–4 of those listed above are the preferred methods because security measures taken by the U.S. Postal Service and Coast Guard mail reception facilities may seriously damage or render unreadable comments sent via regular mail.

The Docket Management Facility maintains the public docket for this rulemaking. Comments and material received from the public, as well as documents mentioned in this notice as being available in the docket, will become part of this docket and will be available for inspection or copying at room PL–401 on the Plaza level of the Nassif Building, 400 Seventh Street SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also find this docket at the following Web site address: *http://dms.dot.gov*.

Electronic forms of all comments received into any of our dockets can be searched by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor unit, etc.) and is open to the public without restriction. You may review the Department of Transportation'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/*.

FOR FURTHER INFORMATION CONTACT: For information concerning this notice and the public meeting, call Mr. Bivan Patnaik, Project Manager, Environmental Standards Division, U.S. Coast Guard, telephone 202–267–1744 or via e-mail *bpatnaik@comdt.uscg.mil*. If you have any questions on viewing or submitting material to the docket, call Ms. Andrea M. Jenkins, Program Manager, Docket Operations, Department of Transportation, telephone 202–366–0271.

SUPPLEMENTARY INFORMATION:

Request for Comments

The Coast Guard encourages interested persons to submit written data, views, or comments. Persons submitting comments should please include their name and address and identify the docket number (USCG–2004–19842). You may submit your comments and material by mail, hand delivery, fax, or electronic means to the Docket Management Facility at the address under **ADDRESSES**; but please submit your comments and material by only one means. If you submit them by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know they were received, please enclose a stamped, self-addressed postcard or envelope.

Information on Services for Individuals With Disabilities

If you plan to attend the public meeting and require special assistance, such as sign language interpretation or other reasonable accommodations, please contact us as indicated in **FOR FURTHER INFORMATION CONTACT**.

Public Meetings

The Coast Guard encourages interested and affected stakeholders to attend the public meeting and provide oral or written comments. The meeting is open to the public. Please note that the public meeting may close early if all business is finished. If you are unable to attend, you may submit comments to the Docket Management Facility at the address under **ADDRESSES** by May 9, 2005.

Regulatory History

The Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990, as

reauthorized and amended by the National Invasive Species Act of 1996, authorizes the Coast Guard to develop regulations to prevent the introduction of nonindigenous species (NIS) via ballast water discharges. The Coast Guard recently promulgated regulations in the **Federal Register** on June 14, 2004, entitled, ''Penalties for Non-submission of Ballast Water Management Reports'' (68 FR 32864) and on July 28, 2004, entitled ''Mandatory Ballast Water Management for U.S. Waters'' (69 FR 44952). In doing so, the Great Lakes Ballast Water Management Program that became effective on May 10, 1993 (58 FR 18330), has remained unchanged, with the exception that all vessels equipped with ballast water tanks that enter the Great Lakes must now submit their ballast water reporting forms as of August 13, 2004 (68 FR 32864).

Description of Issue

Only vessels carrying pumpable ballast water that enter the Great Lakes after operating outside the U.S. Exclusive Economic Zone are required to comply with the Great Lakes ballast water management requirements found in 33 CFR part 151, subpart C. As a large number of vessels that call on the Great Lakes arrive with No Ballast on Board (NOBOB), they are not required to comply with these requirements. However, NOBOBs have the potential to carry NIS in their empty tanks via residual ballast water and/or accumulated sediments. Once NOBOBs enter the Great Lakes and take up ballast water, this water may mix with the residual water and sediments and if discharged into the Great Lakes, may provide a mechanism for NIS to enter the Great Lakes. Therefore, the Coast Guard is seeking the public's assistance in developing management strategies to address the invasion risks posed by NOBOBs.

The Coast Guard will use information gathered from this notice to develop a comprehensive program to reduce the threat of introducing NIS into the Great Lakes via NOBOBs. The identification of strategies to address invasion risks from residual ballast water and sediments must take into account vessel safety and stability, the full range of vessel types entering the Great Lakes, costs associated with implementing strategy options, and the need to evaluate the effectiveness of these strategies in actually preventing the introduction of NIS into the Great Lakes. The development of management strategies to prevent NIS introduction from NOBOBs presents a complex challenge and requires close collaboration between government agencies, the scientific community, the shipping industry, and a wide range of stakeholders.

Dated: January 3, 2005.

Joseph J. Angelo,

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

[FR Doc. 05–378 Filed 1–6–05; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[CGD05–04–201]

Notice, Request for Comments; Letter of Recommendation, LNG Crown Landing LLC, Logan Township, Gloucester County, NJ—New Meeting Location

AGENCY: Coast Guard, DHS.

ACTION: Notice of public meeting; request for comments; new meeting location.

SUMMARY: The location of the public meeting scheduled for Tuesday, January 11, 2005, announced in a notice we published in the **Federal Register** on December 3, 2004 (69 FR 70271), has been changed. The new meeting location is: The Sheraton Suites Philadelphia Airport, 4101 B Island Ave, Philadelphia, Pennsylvania, approximately 1.5 miles from the original site. Information concerning this change along with directions will be provided at the original meeting location, and the meeting will begin at 3:30 p.m. and conclude at 7:30 p.m., to allow attendees who have not received this notice time to travel to the new location.

DATES: The public meeting will be held January 11, 2005, from 3:30 p.m. to 7:30 p.m.

ADDRESSES: The public meeting will be held at the Sheraton Suites Philadelphia Airport, 4101 B Island Ave, Philadelphia, Pennsylvania.

FOR FURTHER INFORMATION CONTACT: If you have questions on this notice, contact Lieutenant Commander Timothy Meyers at Coast Guard Marine Safety Office/Group Philadelphia, PA, by one of the methods listed below:

(1) Phone at (215) 271–4860.

(2) E-mail at *TMEYERS@msogruphila.uscg.mil.*

(3) Fax to (215) 271–4903.

Dated: January 5, 2005.

Jonathan D. Sarubbi,

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

[FR Doc. 05–436 Filed 1–5–05; 1:36 pm]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Extension of a Currently Approved Information Collection; Comment Request

ACTION: 30-Day Notice of Information Collection Under Review: Request to Enforce Affidavit of Financial Support and Intent to Petition for Custody for Public Law 97–359 Amerasian, Form I–363.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection was previously published in the **Federal Register** on September 29, 2004 at 69 FR 58177, allowed for a 60-day public comment period. The USCIS did not receive any comments on this information collection during that period.

The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted until February 7, 2005. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and suggestions from the public and affected agencies concerning the collection of information should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated,

electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of Information Collection:* Extension of currently approved collection.

(2) *Title of the Form/Collection:* Request to Enforce Affidavit of Financial Support and Intent to Petition for Custody for Public Law 97–359 Amerasian.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I–363. U.S. Citizenship and Immigration and Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or Households. This form is used by the USCIS to determine whether an Affidavit of Financial Support and Intent to Petition for Legal Custody require enforcement.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 50 responses at 30 minutes (0.5 hours) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 25 annual burden hours.

If you have comments, suggestions, or need a copy of the information collection instrument, please contact Richard A. Sloan, Director, Regulatory Management Division, U.S. Citizenship and Immigration Services, 111 Massachusetts Avenue, NW., Washington, DC 20529; (202) 272–8377.

Dated: January 3, 2005.

Stephen R. Tarragon,

Acting Director, Regulatory Management Division, U.S. Citizenship and Immigration Services.

[FR Doc. 05–302 Filed 1–6–05; 8:45 am]

BILLING CODE 4410–10–M

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[CIS No. 2337–04]

RIN 1615–ZA15

Extension of the Designation of Temporary Protected Status for El Salvador; Automatic Extension of Employment Authorization Documentation for El Salvador TPS Beneficiaries

AGENCY: U.S. Citizenship and Immigration Services, DHS.

ACTION: Notice.

SUMMARY: The Temporary Protected Status designation for El Salvador will expire on March 9, 2005. This notice extends the designation of El Salvador for 18 months, until September 9, 2006, and sets forth procedures necessary for nationals of El Salvador (or aliens having no nationality who last habitually resided in El Salvador) with TPS to re-register and to apply for an extension of their employment authorization documents (EADs) for the additional 18-month period. Re-registration is limited to persons who registered under the initial designation announced on March 9, 2001 or who filed their first application for TPS under the late initial registration provisions at 8 CFR 244.2(f)(2) and also timely re-registered under each subsequent extension of the designation. Eligible aliens also must have maintained continuous physical presence in the United States since March 9, 2001, and continuous residence in the United States since February 13, 2001. Certain nationals of El Salvador (or aliens having no nationality who last habitually resided in El Salvador) who have not previously applied for temporary protected status may be eligible to apply under the late initial registration provisions.

Given the large number of Salvadorans affected by this notice, the Department of Homeland Security recognizes that many re-registrants may not receive their new employment authorization documents until after their current documents expire on March 9, 2005. Accordingly, this notice automatically extends the validity of employment authorization documents issued under the temporary protected status designation of El Salvador for 6 months, until September 9, 2005, and explains how temporary protected status beneficiaries and their employers may determine which employment authorization documents are automatically extended.

EFFECTIVE DATES: The extension of temporary protected status for El Salvador is effective March 9, 2005, and will remain in effect until September 9, 2006. The 60-day re-registration period begins January 7, 2005, and will remain in effect until March 8, 2005.

FOR FURTHER INFORMATION CONTACT: Colleen Cook, Residence and Status Services, Office of Programs and Regulations Development, U.S. Citizenship and Immigration Services, Department of Homeland Security, 111 Massachusetts Avenue, NW., 3rd Floor, Washington, DC 20529, telephone (202) 514–4754.

SUPPLEMENTARY INFORMATION:

Abbreviations and Terms Used in This Document.

Act—Immigration and Nationality Act
DHS—Department of Homeland Security
DOS—Department of State
EAD—employment authorization document
INS—Immigration and Naturalization Service
RIC—Resource Information Center
TPS—temporary protected status
USCIS—U.S. Citizenship and Immigration Services

What Authority Does the Secretary of DHS Have To Extend the Designation of TPS for El Salvador?

On March 1, 2003, the functions of the Immigration and Naturalization Service (INS) transferred from the Department of Justice (DOJ) to the Department of Homeland Security (DHS) pursuant to the Homeland Security Act of 2002, Public Law 107–296. The responsibilities for administering temporary protected status (TPS) held by the former INS were transferred to U.S. Citizenship and Immigration Services (USCIS).

Under section 244 of the Immigration and Nationality Act (Act), 8 U.S.C. 1254a, the Secretary of DHS, after consultation with appropriate agencies of the Government, is authorized to designate a foreign state (or part thereof) for TPS. 8 U.S.C. 1254a(b)(1). The Secretary of DHS may then grant TPS to eligible nationals of that foreign state (or aliens having no nationality who last habitually resided in that state). 8 U.S.C. 1254a(a)(1).

At least 60 days before the expiration of the TPS designation or any extension thereof, section 244(b)(3)(A) of the Act requires the Secretary of DHS to review, after consultation with appropriate agencies of the Government, the

conditions in a foreign state designated for TPS to determine whether the conditions for a TPS designation continue to be met and, if so, the length of an extension of the TPS designation. 8 U.S.C. 1254a(b)(3)(A). If the Secretary of DHS determines that the foreign state no longer meets the conditions for TPS designation, he shall terminate the designation, as provided in section 244(b)(3)(B) of the Act. 8 U.S.C. 1254a(b)(3)(B). Finally, if the Secretary of DHS does not determine that a foreign state (or part thereof) no longer meets the conditions for designation at least 60 days before the designation is due to end, section 244(b)(3)(C) of the Act provides for an automatic extension of TPS for an additional period of 6 months (or, in the discretion of the Secretary of DHS, a period of 12 or 18 months). 8 U.S.C. 1254a(b)(3)(C).

Why did the Secretary of DHS decide to extend the TPS designation for El Salvador?

On March 9, 2001, a notice was published in the **Federal Register** at 66 FR 14214, designating El Salvador for TPS due to the devastation resulting from a series of severe earthquakes. The designation of El Salvador for TPS subsequently has been extended twice, with notice of such determinations published in the **Federal Register** (67 FR 46000; 68 FR 42071). The most recent extension became effective on September 9, 2003, and is due to end on March 9, 2005.

Over the past year, DHS and the Department of State (DOS) have continued to review conditions in El Salvador. Due to ongoing reconstruction of infrastructure and housing damaged by the earthquakes, the Secretary of DHS has determined that an 18-month extension of the TPS designation is warranted because El Salvador remains unable, temporarily, to adequately handle the return of its nationals. 8 U.S.C. 1254a(b)(1)(B). On October 15, 2004, DOS submitted a memorandum to USCIS recommending the extension of TPS for El Salvador (the DOS Recommendation).

DOS notes that the 2001 earthquakes damaged or destroyed over 300,000 houses in El Salvador leaving more than 1.5 million people, a quarter of the country's population, without adequate housing. According to a report in October 2004 from the USCIS Resource Information Center (RIC Report), El Salvador's Vice-Ministry of Housing reported in July 2004 that 102,000 houses had been rebuilt or were under construction. *Id.* Construction of another 11,500 houses is due to begin soon. *Id.* DOS estimates that almost 50% of the people who lost housing during the earthquakes are still without permanent shelter. (DOS Recommendation).

The earthquakes also severely damaged or destroyed over 35% of the nation's schools. (RIC Report). Significant progress has been made in school reconstruction. *Id.* El Salvador's Ministry of Education reported in February 2004 that five percent of the schools damaged by the earthquakes still needed to be rebuilt. *Id.* Nevertheless, over 250 schools still require repair at a cost of approximately $21.7 million. (DOS Recommendation).

The pace of reconstruction of health infrastructure has been slower. The earthquakes caused severe damage to 55% of the nation's health infrastructure. (RIC Report). While the Government of El Salvador has made significant progress in the reconstruction of health centers, virtually no progress has been made in the reconstruction of hospitals. (DOS Recommendation). A World Bank loan for the reconstruction of hospitals was made available in 2004. *Id.* The Government of El Salvador expects to complete hospital reconstruction in 2007. *Id.,* (RIC Report).

Based upon this review, the Secretary of DHS, after consultation with appropriate Government agencies, finds that the conditions that prompted the designation of El Salvador for TPS continue to be met. 8 U.S.C. 1254a(b)(3)(A). There continues to be a substantial, but temporary, disruption in living conditions in El Salvador as the result of an environmental disaster, and El Salvador remains unable, temporarily to handle adequately the return of its nationals. 8 U.S.C. 1254a(b)(1)(B). On the basis of these findings, the Secretary of DHS concludes that the TPS designation for El Salvador should be extended for an additional 18-month period. 8 U.S.C. 1254a(b)(3)(C).

If I currently have benefits through the TPS designation of El Salvador, should I re-register for TPS?

Yes. If you already have received benefits through the TPS designation of El Salvador, your benefits will expire on March 9, 2005. Accordingly, individual TPS beneficiaries must comply with the re-registration requirements described below in order to maintain TPS benefits through September 9, 2006. TPS benefits include temporary protection against removal from the United States, as well as employment authorization, during the TPS designation period. 8 U.S.C. 1254a(a)(1).

If I am currently registered for TPS, how do I re-register under the extension?

All persons previously granted TPS under the designation of El Salvador who wish to maintain such status must re-register under the extension by filing the following: (1) Form I–821, Application for Temporary Protected Status, without fee; (2) Form I–765, Application for Employment Authorization (see the chart below to determine whether you must submit the one hundred and seventy-five dollar ($175) filing fee with Form I–765); and (3) a biometric service fee of seventy dollars ($70) if you are 14 or older, or if you are under 14 and requesting an employment authorization document (EAD). The biometric service fee will not be waived. 8 CFR 103.2(e)(4)(i), (iii). Unlike previous registration periods, TPS applicants need not submit photographs with the TPS application because a photograph will be taken when the alien appears at an Application Support Center (ASC) for collection of biometrics. Aliens who have previously registered for TPS but whose applications remain pending should follow these instructions if they wish to renew their TPS benefits.

An application submitted without the required fees will be returned to the applicant. Please note that Form I–821 has been revised and the new form has a Revision Date of 11/5/04. The previous revision of Form I–821, with Revision Date 7/30/04, will be accepted through January 3, 2005. Applicants submitting the earlier revision of Form I–821 should submit their application materials as outlined in this **Federal Register** notice. After January 3, 2005, only the new form with Revision Date 11/05/04 will be accepted. Submissions of older versions of Form I–821 will be rejected. Unlike previous registration periods, all applications for re-registration and late-initial registration are to be submitted, with applicable fees, to the USCIS Lockbox in Chicago, Illinois as outlined in this **Federal Register** notice, during the 60-day re-registration period that begins January 7, 2005, and ends March 8, 2005. An interim EAD will not be issued unless the Form I–765, as part of the TPS registration package, has been pending with USCIS more than 90 days after all requested initial evidence has been received, including collection of the applicant's biometrics at an ASC. *See* 8 CFR 103.2(b)(10)(ii) and 8 CFR 274a.13(d).

Where can I obtain a copy of the new Form I–821 dated 11/5/04?

TPS forms are available from the toll-free USCIS Forms line, 1–800–870–3676, from your local USCIS district office, or from the USCIS Web site: *http://uscis.gov.*

Who must submit the $175 filing fee for the Form I–765?

Although all re-registrants must submit the Form I–765, those re-registrants and aliens renewing an EAD, regardless of age, must submit the $175 filing fee or a properly documented fee waiver request pursuant to 8 CFR 244.20. Persons between the ages of 14 and 65 (inclusive) filing under the late initial registration provisions who are requesting an EAD must also submit the $175 fee or a fee waiver request pursuant to 8 CFR 244.20. Aliens who are submitting Form I–765 only for data-gathering purposes (as explained in the chart below) are not required to submit a $175 filing fee, nor are they required to submit a fee waiver request.

If:	Then:
You are re-registering for or renewing a TPS-related EAD, regardless of your age.	You must complete and file the Form I–765, Application for Employment Authorization, with the $175 fee or a fee waiver request in accordance with 8 CFR 244.20.
You are not requesting an EAD	You must complete and file Form I–765 (for data-gathering purposes only) with no fee.[1]
You are applying for a TPS-related EAD under the late initial registration provisions *and* are under age 14 or over age 65.	You must complete and file Form I–765 (for data-gathering purposes only) with no fee.

[1] An applicant who does not want an EAD does not need to submit the $175 fee, but must complete and submit Form I–765 for data-gathering purposes.

Who must submit the $70 biometric service fee?

All aliens 14 years of age and older who are re-registering for TPS, renewing temporary treatment benefits, or late initial registering must submit the $70 biometric service fee. In addition, any applicant under the age of 14 choosing to apply for an EAD must submit the $70 biometric service fee, as a photograph, signature, and fingerprint are required to produce the EAD. The biometric service fee will not be waived. 8 CFR 103.2(e)(4)(i), (iii).

Where should an applicant submit his or her application to re-register, late initial register, or renew temporary treatment benefits?

If you are re-registering and have previously filed with the Vermont Service Center, the Form I–821, Form I–765, fees, and all supporting documentation should be filed at the USCIS Chicago Lockbox at: U.S. Citizenship and Immigration Services, P.O. Box 6943, Chicago, IL 60680–6943.

Or, for non-United States Postal Service (USPS) deliveries: U.S. Citizenship and Immigration Services, Attn: TPS/VSC, 427 S. LaSalle—3rd Floor, Chicago, IL 60605.

If you are re-registering and have previously filed with either the California Service Center, Texas Service Center, or Nebraska Service Center or if you are filing a late initial registration, the Form I–821, Form I–765, fees, and all supporting documentation should be filed at the USCIS Chicago Lockbox at: U.S. Citizenship and Immigration Services, Attn: TPS El Salvador, P.O. Box 87583, Chicago, IL 60680–0583.

Or, for non-United States Postal Service (USPS) deliveries: U.S. Citizenship and Immigration Services, Attn: TPS El Salvador, 427 S. LaSalle—3rd Floor, Chicago, IL 60605.

Please note that this is not the location where you have submitted your forms during previous re-registration periods. Also, there are two different P.O. Boxes listed. Failure to use the appropriate P.O. Box may delay processing your TPS application. Aliens re-registering or late initial registering for TPS under the designation of El Salvador should not send their TPS forms and fees directly to a USCIS Service Center or district office. Failure to follow these instructions may delay processing of your TPS application.

Aliens re-registering for TPS under the designation of El Salvador during the re-registration period from January 7, 2005, to March 8, 2005, may file the Form I–821, I–765 and fees electronically by using E-filing at the USCIS Web site, *www.uscis.gov.* In order to properly re-register using E-filing, aliens must start the electronic filing with Form I–821, and the system will then link the alien to Form I–765 once Form I–821 is complete. Aliens re-registering for TPS after March 8, 2005, or aliens late initial registering may not file electronically, and must send their application materials to the USCIS Chicago Lockbox. Failure to follow these instructions may result in an incomplete filing and delay processing of your TPS application.

Who is eligible to receive an automatic extension of his or her EAD from March 9, 2005 to September 9, 2005?

To receive an automatic extension of his or her EAD, an individual must be a national of El Salvador (or an alien having no nationality who last habitually resided in El Salvador) who has applied for and received an EAD under the TPS designation of El Salvador and who has not had TPS withdrawn or denied. This automatic extension is limited to EADs issued on either Form I–766, Employment Authorization Document, or Form I–688B, Employment Authorization Card, bearing an expiration date of March 9, 2005. The EAD must also be either (1) a Form I–766 bearing the notation ''A–12'' or ''C–19'' on the face of the card under ''Category'' or (2) a Form I–688B bearing the notation ''274a.12(a)(12)'' or ''274a.12(c)(19)'' on the face of the card under ''Provision of Law.''

What documents may a qualified individual show to his or her employer as proof of employment authorization and identity when completing Form I–9, Employment Eligibility Verification?

For completion of the Form I–9 at the time of hire or re-verification, qualified individuals who have received a 6 month extension of their EADs by virtue of this **Federal Register** notice may present to their employer a TPS-based EAD as proof of identity and employment authorization until September 9, 2005. To minimize confusion over this extension at the time of hire or re-verification, qualified individuals may also present to their employer a copy of this **Federal Register** notice regarding the automatic extension of employment authorization documentation to September 9, 2005. In the alternative, any legally acceptable document or combination of documents listed in List A, List B, or List C of the

Form I–9 may be presented as proof of identity and employment eligibility; it is the choice of the employee.

How may employers determine whether an EAD has been automatically extended through September 9, 2005 and is therefore acceptable for completion of the Form I–9?

For purposes of verifying identity and employment eligibility or re-verifying employment eligibility on the Form I–9 until September 9, 2005, employers of Salvadoran TPS beneficiaries whose EADs have been automatically extended by this notice must accept such EAD if presented. An EAD that has been automatically extended by this notice to September 9, 2005 will actually contain an expiration date of March 9, 2005, and must be either (1) a Form I–766 bearing the notation ''A–12'' or ''C–19'' on the face of the card under ''Category,'' or (2) a Form I–688B bearing the notation ''274a.12(a)(12)'' or ''274a.12(c)(19)'' on the face of the card under ''Provision of Law.'' New EADs or extension stickers showing the September 9, 2005 expiration date will not be issued.

Employers should not request proof of Salvadoran citizenship. Unless put on notice that an employee is unauthorized to work, employers presented with an EAD that has been extended pursuant to this **Federal Register** notice, if it appears to be genuine and appears to relate to the employee, should accept the EAD as a valid ''List A'' document and should not ask for additional Form I–9 documentation. This action by the Secretary of DHS through this **Federal Register** notice does not affect the right of an employee to present any legally acceptable document as proof of identity and eligibility for employment.

Employers are reminded that the laws prohibiting unfair immigration-related employment practices remain in full force and that this notice does not supersede or in any way limit applicable employment verification rules and policy guidance. For questions, employers may call the USCIS Office of Business Liaison Employer Hotline at 1–800–357–2099 to speak to a USCIS representative. Also, employers may call the U.S. Department of Justice Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC) Employer Hotline at 1–800–255–8155 or 1–800–362–2735 (TDD). Employees or applicants may call the OSC Employee Hotline at 1–800–255–7688 or 1–800–237–2515 (TDD) for information regarding the automatic extension. Additional information is available on the OSC Web site at *http://www.usdoj.gov/crt/osc/index.html.*

Does TPS lead to lawful permanent residence?

No. TPS is a temporary benefit that does not lead to lawful permanent residence or by itself confer any other immigration status. 8 U.S.C. 1254a(e), (f)(1), (h). When a country's TPS designation is terminated, TPS beneficiaries will maintain the same immigration status they held prior to TPS (unless that status has since expired or been terminated), or any other status they may have acquired while registered for TPS. Accordingly, if an alien held no lawful immigration status prior to being granted TPS and did not obtain any other status during the TPS period, he or she will revert to unlawful status upon the termination of the TPS designation. Once the Secretary determines that a TPS designation should be terminated, aliens who had TPS under that designation are expected to plan for their departure from the United States and may wish to apply for immigration benefits for which they may be eligible.

May I apply for another immigration benefit while registered for TPS?

Yes. Registration for TPS does not prevent you from applying for another non-immigrant status, from filing for adjustment of status based on an immigrant petition, or from applying for any other immigration benefit or protection. 8 U.S.C. 1254a(a)(5). For the purposes of change of nonimmigrant status and adjustment of status, an alien is considered as being in, and maintaining, lawful status as a nonimmigrant during the period in which the alien is granted TPS. 8 U.S.C. 1254a(f)(4).

How does an application for TPS affect my application for asylum or other immigration benefits?

An application for TPS does not affect an application for asylum or any other immigration benefit. Denial of an application for asylum or any other immigration benefit does not affect an applicant's TPS eligibility, although the grounds for denying one form of relief may also be grounds for denying TPS. For example, a person who has been convicted of a particularly serious crime is not eligible for asylum or TPS. 8 U.S.C. 1158(b)(2)(A)(ii); 8 U.S.C. 1254a(c)(2)(B)(ii).

Does this extension allow nationals of El Salvador (or aliens having no nationality who last habitually resided in El Salvador) who entered the United States after February 13, 2001, to file for TPS?

No. This is a notice of an extension of the TPS designation of El Salvador, not a notice re-designating El Salvador for TPS. An extension of a TPS designation does not change the required dates of continuous residence and continuous physical presence in the United States. This extension does not expand TPS availability to those beyond the current TPS eligibility requirements for El Salvador. To be eligible for benefits under this extension, nationals of El Salvador (or aliens having no nationality who last habitually resided in El Salvador) must have continuously resided in the United States since February 13, 2001, and been continuously physically present in the United States since March 9, 2001, the date of the initial designation of TPS for El Salvador.

Are certain aliens ineligible for TPS?

Yes. There are certain criminal and terrorism-related inadmissibility grounds that render an alien ineligible for TPS. 8 U.S.C. 1254a(c)(2)(A)(iii). Further, aliens who have been convicted of any felony, or two or more misdemeanors, committed in the United States are ineligible for TPS under section 244(c)(2)(B) of the Act, 8 U.S.C. 1254a(c)(2)(B), as are aliens described in the bars to asylum in section 208(b)(2)(A) of the Act, 8 U.S.C. 1158(b)(2)(A).

What is late initial registration?

Some persons may be eligible for late initial registration under 8 U.S.C. 1254a(c)(1)(A)(iv) and 8 CFR 244.2(f)(2) and (g). To apply for late initial registration an applicant must:

(1) Be a national of El Salvador (or alien who has no nationality and who last habitually resided in El Salvador);

(2) Have continuously resided in the United States since February 13, 2001;

(3) Have been continuously physically present in the United States since March 9, 2001; and

(4) Be both admissible as an immigrant, except as provided under section 244(c)(2)(A) of the Act, and not ineligible under section 244(c)(2)(B) of the Act.

Additionally, the applicant must be able to demonstrate that during the initial registration period (from March 9, 2001 to September 9, 2002), he or she:

(1) Was a nonimmigrant or had been granted voluntary departure or any relief from removal;

(2) Had an application for change of status, adjustment of status, asylum, voluntary departure, or any relief from removal or change of status pending or subject to further review or appeal;

(3) Was a parolee or had a pending request for reparole; or

(4) Is the spouse or child of an alien currently eligible to be a TPS registrant.

An applicant for late initial registration must file an application for late registration no later than 60 days after the expiration or termination of the conditions described above. 8 CFR 244.2(g). All late initial registration applications for TPS pursuant to the TPS extension of El Salvador should be submitted to the USCIS Chicago Lockbox.

What happens when this extension of TPS expires on September 9, 2006?

At least 60 days before this extension of TPS designation for El Salvador expires on September 9, 2006, the Secretary of DHS, after consultation with appropriate agencies of the Government, will review conditions in El Salvador and determine whether the conditions for TPS designation continue to be met at that time, or whether the TPS designation should be terminated. 8 U.S.C. 1254a(b)(3). Notice of that determination, including the basis for the determination, will be published in the **Federal Register.**

Notice of Extension of Designation of TPS for El Salvador

By the authority vested in DHS under sections 244(b)(1)(B), (b)(3)(A), and (b)(3)(C) of the Act, DHS has determined, after consultation with the appropriate Government agencies, that the conditions that prompted designation of El Salvador for TPS continue to be met. Accordingly, DHS orders as follows:

(1) The designation of El Salvador under section 244(b)(1)(B) of the Act is extended for an additional 18-month period from March 9, 2005, to September 9, 2006. 8 U.S.C. 1254a(b)(3)(C).

(2) There are approximately 248,282 nationals of El Salvador (or aliens having no nationality who last habitually resided in El Salvador) who have been granted TPS and who are eligible for re-registration.

(3) To maintain TPS, a national of El Salvador (or an alien having no nationality who last habitually resided in El Salvador) who was granted TPS during the initial designation period (or through late initial registration) and who re-registered during the subsequent extensions of this designation, must re-register for TPS during the 60-day re-registration period from January 7, 2005, until March 8, 2005.

(4) To re-register, the alien must file the following: (1) Form I–821, Application for Temporary Protected Status, without fee; (2) Form I–765, Application for Employment Authorization; and (3) a biometric services fee of seventy dollars ($70) if the alien is age 14 or older, or if the alien is under age 14 and requesting an employment authorization document. Applications submitted without the required fees will be returned to the applicant. If the alien requests an EAD, he or she must submit one hundred and seventy-five dollars ($175) or a properly documented fee waiver request, pursuant to 8 CFR 244.20, with the Form I–765. An alien who does not request employment authorization must still file Form I–765 along with Form I–821, but he or she is not required to submit the fee or a fee waiver request for filing Form I–765. Failure to re-register without good cause will result in the withdrawal of TPS. 8 U.S.C. 1254a(c)(3)(C). Aliens who have previously registered for TPS but whose applications remain pending should follow these instructions to renew temporary treatment benefits. Some persons who had not previously applied for TPS may be eligible for late initial registration under 8 CFR 244.2.

(5) At least 60 days before this extension ends on September 9, 2006, the Secretary of DHS, after consultation with appropriate agencies of the Government, will review the designation of El Salvador for TPS and determine whether the conditions for designation continue to be met. 8 U.S.C. 1254a(b)(3)(A). Notice of that determination, including the basis for the determination, will be published in the **Federal Register.** *Id.*

(6) Information concerning the extension of designation of El Salvador for TPS will be available at local USCIS offices upon publication of this notice and on the USCIS Web site at *http://uscis.gov.*

Dated: December 29, 2004.

Tom Ridge,

Secretary of Homeland Security.

[FR Doc. 05–441 Filed 1–6–05; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4980–N–01]

Federal Property Suitable as Facilities To Assist the Homeless

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: This Notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for possible use to assist the homeless.

EFFECTIVE DATE: January 7, 2005.

FOR FURTHER INFORMATION CONTACT: Kathy Ezzell, Department of Housing and Urban Development, Room 7262, 451 Seventh Street SW., Washington, DC 20410; telephone (202) 708–1234; TTY number for the hearing- and speech-impaired (202) 708–2565, (these telephone numbers are not toll-free), or call the toll-free Title V information line at 1–800–927–7588.

SUPPLEMENTARY INFORMATION: In accordance with the December 12, 1988 court order in *National Coalition for the Homeless* v. *Veterans Administration*, No. 88–2503–OG (D.D.C.), HUD publishes a Notice, on a weekly basis, identifying unutilized, underutilized, excess and surplus Federal buildings and real property that HUD has reviewed for suitability for use to assist the homeless. Today's Notice is for the purpose of announcing that no additional properties have been determined suitable or unsuitable this week.

Dated: December 29, 2004.

Mark R. Johnston,

Director, Office of Special Needs Assistance Programs.

[FR Doc. 05–92 Filed 1–6–05; 8:45 am]

BILLING CODE 4210–29–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4837–D–56]

Redelegation of Authority Regarding Local Public Housing Hub Directors/ Public Housing Program Center Coordinators

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Notice of redelegation of authority.

SUMMARY: In this notice, the Assistant Secretary for Public and Indian Housing

redelegates to the local Public Housing Hub Directors/Public Housing Program Center Coordinators the authority to review and approve designated housing renewals pursuant to section 7 of the United States Housing Act of 1937.

HUD has not delegated authority for approval of new designated housing plans.

EFFECTIVE DATE: December 23, 2004.

FOR FURTHER INFORMATION CONTACT: Pat Arnaudo, Office of Public Housing Occupancy and Management, Department of Housing and Urban Development, Room 4222, 451 Seventh Street, SW., Washington, DC 20410–5000; telephone (202) 708–0744 (this is not a toll-free number). Hearing or speech impaired individuals may access this number via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

For General Information Pertaining to Designated Housing Renewals Contact: Your Local Public Housing Hub Director/Public Housing Program Center Coordinator. A list of HUD's Local Public Housing Hub Director/Public Housing Program Center Coordinator can be found on the HUD Web site at *http://www.hud.gov/offices/pih/about/field_office.cfm.*

HUD has not delegated authority for approval of new designated housing plans. Therefore, the Public Housing Agency (PHA) must continue to send the plan to HUD in Washington, DC, for review and approval or disapproval. The address is HUD, Office of Public and Indian Housing, Public Housing Management and Occupancy Division, Room 4222, 451 Seventh Street, SW. Washington, DC 20410–5000.

SUPPLEMENTARY INFORMATION: A PHA must submit a designated plan for HUD's approval in order to designate a project for elderly families only or for persons with disabilities only in accordance with Section 7 of the U.S. Housing Act of 1937. All designations are in effect for five years from the date of HUD's notification of approval of the plan. Renewal of plans beyond the five years will be granted in two-year increments.

On September 16, 2003 (68 FR 54240), the Secretary delegated to the Assistant Secretary for Public and Indian Housing (PIH) authority to administer the Department's programs related to public housing.

Section A. Authority Redelegated

The Assistant Secretary for PIH redelegates to the local Public Housing Hub Directors/Public Housing Program Center Coordinators the authority to conduct all activity related to the renewal of Designated Housing Plans.

Section B. Authority Excepted

The authority redelegated under Section A does not include the authority to waive regulations.

Section C. Authority To Further Redelegate

The authority in Section A may not be further redelegated.

Authority: Section 7(d) of the Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

Dated: December 23, 2004.

Michael Liu,

Assistant Secretary for Public and Indian Housing.

[FR Doc. 05–315 Filed 1–6–05; 8:45 am]

BILLING CODE 4210–33–P

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 February 7, 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: The Field Museum of Natural History, Chicago, IL, PRT–096771.

The applicant requests a permit to import biological samples taken from cheetah (*Acinonyx jubatus*) in the wild by the Kenya Wildlife Service for the purpose of scientific research for genetic and immunological analysis. This notification covers activities to be conducted by the applicant over a five-year period.

Applicant: The Los Angeles Zoo & Botanical Garden, Los Angeles, CA, PRT–097156.

The applicant requests a permit to import one male and one female brush-tailed bettong (*Bettongia penincillata*) from Zoo Duisburg AG, Germany for the purpose of enhancement of the survival of the species.

Applicant: David B. Landers, Pacific Palisades, CA, PRT–096680.

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: Michael E. Williams, Choreau, MT, PRT–088718.

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: Gary M. Story, Edmond, OK, PRT–096542.

The applicant requests a permit to import the sport-hunted trophy of two 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: Gracia P. Gonzalez Porter, Takoma Park, MD, PRT–095827.

The applicant requests a permit to import tissue samples collected from wild and/or captive American river turtles (*Dermatemys mawaii*) for the purpose of scientific research. This notification covers activities to be conducted by the applicant over a five-year period.

Endangered Marine Mammals

The public is invited to comment on the following application for a permit to

conduct certain activities with endangered marine mammals. The application was submitted to satisfy requirements 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.*), and the regulations governing endangered species (50 CFR part 17) and/or 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: Smithsonian Marine Station at Fort Pierce, Fort Pierce, FL, PRT–096527.

The applicant requests a permit to acquire blood samples and whisker clippings from two captive-held Florida manatees (*Trichechus manatus latirostris*) for the purpose of scientific research. This notification covers activities to be conducted by the applicant over a one-year period.

Concurrent with the publication of this notice in the **Federal Register**, the Division of Management Authority is forwarding copies of the above applications to the Marine Mammal Commission and the Committee of Scientific Advisors for their review.

Dated: December 17, 2004.

Lisa J. Lierheimer,

Senior Permit Biologist, Branch of Permits, Division of Management Authority.

[FR Doc. 05–299 Filed 1–6–05; 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.*), 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 No.	Applicant	Receipt of application **Federal Register** notice	Permit issuance date
082594	Los Angeles Zoo	69 FR 33651; June 16, 2004	November 19, 2004.
094332	Arizona State University	69 FR 61261; October 15, 2004	November 29, 2004.
093991	Scott L. Sutherland	69 FR 65213; November 10, 2004	December 9, 2004.
094213	Gordon L. Blaser	69 FR 65213; November 10, 2004	December 9, 2004.

Endangered Marine Mammals and Marine Mammals

Permit No.	Applicant	Receipt of application **Federal Register** notice	Permit issuance date
092677	Gregory S. Williamson	69 FR 55445; September 14, 2004	December 7, 2004.

Dated: December 24, 2004.

Monica Farris,

Senior Permit Biologist, Branch of Permits, Division of Management Authority.

[FR Doc. 05–300 Filed 1–6–05; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Endangered Species Recovery Permit Applications

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of permit applications.

SUMMARY: The following applicants have applied for a scientific research permit to conduct certain activities with endangered species pursuant to section 10(a)(1)(A) of the Endangered Species Act (16 U.S.C. 1531 *et seq.*). The U.S. Fish and Wildlife Service (Awe'') solicits review and comment from the public, and from local, State and Federal agencies on the following permit requests.

DATES: Comments on these permit applications must be received on or before February 7, 2005.

ADDRESSES: Written data or comments should be submitted to the U.S. Fish and Wildlife Service, Chief, Endangered Species, Ecological Services, 911 NE. 11th Avenue, Portland, Oregon 97232–4181 (fax: 503–231–6243). Please refer to the respective permit number for each application when submitting comments. All comments received, including names and addresses, will become part of the official administrative record and may be made available to the public.

FOR FURTHER INFORMATION CONTACT: 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 the address above (telephone: 503–231–2063). Please refer to the respective permit number for each application when requesting copies of documents.

SUPPLEMENTARY INFORMATION:

Permit No. TE–094808

Applicant: Department of Marine and Wildlife Resources, Pago Pago, American Samoa. The applicant requests a permit to take (capture, tag, collect biological samples, and salvage) the hawksbill turtle (*Eretmochelys imbricata*) in conjunction with nest monitoring and scientific research on and near the islands of American Samoa for the purpose of enhancing its survival.

Permit No. TE–096741

Applicant: Pacific Naval Facilities Engineering Command.

The applicant requests a permit to take remove/reduce to possession (collect) *Abutilon menziesii* (ko'oloa'oula), *Abutilon sandwicense* (no common name), *Achyranthes splendens* var. *rotundata* (round-leaved chaff-flower), *Alectryon macrococcus* var. *macrococcus* (mahoe), *Bonamia menziesii* (no common name), *Chamaesyce kuwaleana* ('akoko), *Chamaesysce skottsbergii* var. *kalaeloana* ('Ewa Plains 'akoko), *Cyperus trachysanthos* (pu'uke'a), *Flueggea neowawraea* (mehamehame), *Hedyotis parvula* (no common name), *Lepidium arbuscula* ('anaunau), *Lipochaeta lobtata* var. *leptophylla* (nehe), *Lobelia niihauensis* (no common name), *Marsilea villosa* (ihi'ihi), *Neraudia angulata* (no common name), *Nototrichium humile* (kulu'i), *Schiedea hookeri* (no common name), and *Viola chamissoniana* ssp. *chamissoniana* (pamakani) in conjunction with propagation activities on the Island of Oahu, Hawaii, for the purpose of enhancing their survival.

We solicit public review and comment on this recovery permit application.

Dated: December 8, 2004.

David J. Wesley,

Acting Regional Director, Region 1, U.S. Fish and Wildlife Service.

[FR Doc. 05–337 Filed 1–6–05; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Environmental Analysis and Notice of Public Scoping Meeting Related to the San Luis Valley Regional Habitat Conservation Plan

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of intent; notice of public scoping meeting.

SUMMARY: Pursuant to the National Environmental Policy Act (NEPA) the U.S. Fish and Wildlife Service (Service) advises the public that we intend to gather information necessary to prepare a NEPA document and determine whether to prepare an Environmental Assessment (EA) or Environmental Impact Statement (EIS) for a proposed habitat conservation plan (HCP) that is being prepared by the Rio Grande Water Conservation District (District) on behalf of Alamosa, Conejos, Costilla, Rio Grande, and Saguache Counties (five counties). The proposed HCP is being prepared in support of an application for an incidental take permit (ITP) pursuant to section 10(a)(1)(B) of the Endangered Species Act of 1973, as amended (ESA). The District intends to apply for an ITP, through development and implementation of the San Luis Valley Regional Habitat Conservation Plan (HCP), as required by the ESA. The HCP will provide measures to minimize and mitigate the impacts of the proposed actions, which might result in take of federally listed species.

We provide this notice to:

(1) Advise other Federal and State agencies, affected tribes, and the public of our intent to prepare a NEPA document;

(2) Announce the initiation of a public scoping period; and

(3) Obtain suggestions and information on the scope of issues and alternatives to be considered in the scoping process.

DATES: Oral and written comments will be accepted at a public scoping meeting held on Thursday, January 13, 2005, from 6:30 to 8:30 p.m. Written comments from all interested parties must be postmarked by January 28, 2005.

ADDRESSES: The public meeting will be held at the Alamosa County Courthouse at 702 4th Street in Alamosa, Colorado. Information, written comments, or questions related to the preparation of the EA or EIS and the NEPA process should be submitted to Mr. Allan Pfister, Western Colorado Supervisor, U.S. Fish and Wildlife Service, 764 Horizon Drive, Building B, Grand Junction, Colorado 81506–3946; or FAX (970) 245–6933.

FOR FURTHER INFORMATION CONTACT: Terry Ireland at the above Grand Junction address, or at (970) 243–2778.

SUPPLEMENTARY INFORMATION:

Reasonable Accommodation

Persons needing reasonable accommodations in order to attend and participate in the public meeting should contact Terry Ireland of the Grand Junction Field Office at (970) 243–2778 as soon as possible. In order to allow sufficient time to process requests, please call no later than 1 week before the public meeting. Information regarding this proposed action is available in alternative formats upon request.

Background

Federal agencies are required to conduct NEPA (42 U.S.C. 4321, *et seq.*) analyses of their proposed actions to determine if the actions may affect the human environment. The Service anticipates that the District will request an ITP. Therefore, we are seeking public input on the scope of NEPA analysis required, including the range of reasonable alternatives and the associated impacts of those alternatives.

Section 9 of the ESA and its implementing Federal regulations prohibit ''take'' of species listed as threatened and endangered. Take is defined under the ESA to include actions that harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct (16 U.S.C. 1538). Harm includes significant habitat modifications or degradation where it actually kills or injures wildlife by significantly impairing behavioral patterns such as breeding, feeding, or sheltering (50 CFR 17.3(c)). Under limited circumstances, the Service may issue permits to take listed species incidental to, and not the purpose of, carrying out otherwise lawful activities. Section 10(a)(1)(B) of the ESA and regulations at 50 CFR 17.32 contain provisions for issuing ITPs to non-Federal entities for the take of listed species, provided the Service determines the following criteria are met:

1. The taking will be incidental;

2. The applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such take;

3. The applicant will develop an HCP and ensure that adequate funding for the HCP will be provided;

4. The take will not appreciably reduce the likelihood of the survival

and recovery of the species in the wild; and

5. Any other measures that the Service may require as being necessary or appropriate for the purposes of the HCP to be met.

The Habitat Conservation Plan

The District is administering development of a regional HCP on behalf of the five counties that comprise the San Luis Valley—Alamosa, Conejos, Costilla, Rio Grande, and Saguache Counties. Within the San Luis Valley, certain agricultural and other economic activities could inadvertently harm the endangered southwestern willow flycatcher (*Epidonax traillii extimus*) (flycatcher) and other listed bird species, and would be subject to regulation by the Service if there were a Federal nexus or take involved in the activity. These activities include operation, maintenance, and construction of diversions, ditches, canals, roads, bridges and utility lines; livestock grazing and agricultural practices; tamarisk and noxious weed control; and floodplain maintenance near towns and cities. Rather than seek ESA compliance for these activities on a case-by-case basis, the District will prepare a single, regional conservation plan that will be more efficient and effective in providing for the long-term protection and conservation of the flycatcher and other listed bird species and their habitat while allowing for the continuation of agricultural and other economic activities in the San Luis Valley.

The District intends to apply for an incidental take permit for the flycatcher, bald eagle (*Halieeatus leucocephalus*), and yellow-billed cuckoo (*Coccyzus americanus*). The District also may seek to cover other rare and/or sensitive species that may be affected by the identified activities in the San Luis Valley. The ITP would become effective for unlisted species, such as the yellow-billed cuckoo, that are adequately covered by the HCP upon listing of such species as threatened or endangered by the Service. Other species for which the District is not seeking permit coverage also may benefit from the conservation measures provided in the HCP.

After receipt of the District's permit application and draft HCP, the Service will publish a notice of availability and request for comment. The draft HCP is planned for release in July 2005.

Environmental Review

The Service and the District are proposing to conduct an environmental review of the proposed issuance of an ITP and the associated proposed HCP and to prepare an environmental document to assess potential impacts related to the ecosystem and the human environment. The District will administer development and coordinate implementation of the HCP, as required by section 10(a)(1)(B) of the ESA. The HCP will provide measures to minimize and mitigate the impacts of the proposed take of listed species and reduce impacts to the habitat upon which they depend.

The environmental review will consider the proposed action, no action (*i.e.,* no permit issuance), a reasonable range of alternatives, and the associated impacts of each alternative. A detailed description of the proposed action and alternatives (including no action) will be included in the environmental document. We anticipate that several alternatives will be developed, which may vary by the level of impacts caused by the proposed activities, their specific locations, and the conservation measures involved.

The NEPA document will identify potentially significant direct, indirect, and cumulative impacts on biological resources, land use, air quality, water quality, water resources, economics, and other environmental issues that could occur with the implementation of the Service's proposed actions and alternatives. For all potentially significant impacts, the NEPA document will identify avoidance, minimization, and mitigation measures to reduce these impacts where feasible, to a level below significance.

The Service will conduct the proposed environmental review in accordance with the requirements of NEPA, its implementing regulations, other appropriate Federal laws and regulations, and policies and procedures of the Service for compliance with those regulations. We are publishing this notice in accordance with section 1501.7 of the NEPA regulations to obtain suggestions and information from other agencies and the public on the scope of issues and alternatives to be addressed in the environmental document. The primary purpose of the scoping process is to identify, rather than to debate, significant issues related to the proposed action. We invite comments and suggestions from all interested parties to ensure that a reasonable range of alternatives is addressed and that all potentially significant issues are identified. All comments received, including names and addresses, will become part of the official administrative record and may be made available to the public. We will fully consider all comments received during the comment period.

Dated: December 16, 2004.

Richard A. Coleman,

Acting Deputy Regional Director, Denver, Colorado.

[FR Doc. 05–324 Filed 1–6–05; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Forest County Potawatomi Community—Sale and Consumption of Alcoholic Beverages

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: This notice publishes the Forest County Potawatomi Community Liquor Control Ordinance. The Ordinance regulates and controls the possession, sale and consumption of liquor within the Forest County Potawatomi Community. The land is located on trust land and this Ordinance allows for the possession and sale of alcoholic beverages within the Forest County Potawatomi Community and will increase the ability of the tribal government to control the Community's liquor distribution and possession, and at the same time will provide an important source of revenue for the continued operation and strengthening of the tribal government and the delivery of tribal services.

DATES: *Effective Date:* This Act is effective on January 7, 2005.

FOR FURTHER INFORMATION CONTACT: De Springer, Regional Tribal Operations Officer, Bureau of Indian Affairs, Midwest Regional Office, Bishop Henry Whipple Federal Building, One Federal Drive, Room 550, Ft. Snelling, MN 55111, Phone (612) 713–4400, ext 1125, Fax (612) 713–4401; or Ralph Gonzales, Office of Tribal Services, 1951 Constitution Avenue, NW., MS–320–SIB, Washington, DC 20240; Telephone (202) 513–7629.

SUPPLEMENTARY INFORMATION: Pursuant to the Act of August 15, 1953, Public Law 83–277, 67 Stat. 586, 18 U.S.C. 1161, as interpreted by the Supreme Court in *Rice* v. *Rehner*, 463 U.S. 713 (1983), the Secretary of the Interior shall certify and publish in the **Federal Register** notice of adopted liquor ordinances for the purpose of regulating liquor transactions in Indian country. The Forest County Potawatomi Community adopted its Ordinance by Resolution No. GC 004–91 on December 14, 1991. The purpose of this Ordinance is to govern the sale, possession and

distribution of alcohol within the Forest County Potawatomi Community.

This notice is published in accordance with the authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs.

I certify that this Liquor Ordinance, of the Forest County Potawatomi Community, was duly adopted by Resolution No. GC 004–91 on December 14, 1991.

Dated: December 23, 2004.

David W. Anderson,

Assistant Secretary—Indian Affairs.

The Forest County Potawatomi Community Liquor Ordinance reads as follows:

Liquor Ordinance
Adopted 12/14/91

Liquor Control Ordinance

Forest County Potawatomi Community of Wisconsin

Whereas, Public Law 277, 83rd Congress, 1st Session, approved August 15, 1953 and codified at sec. 1161 of Title 18, United States Code, provides that Sections 1154, 1156, 3113, 3488, 3618 of Title 18 of the United States Code shall not apply within any area that is not Indian Country, nor to any act or transaction within any area of Indian Country, provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the Tribe having jurisdiction over such area of Indian Country, certified by the Secretary of the Interior, and published in the **Federal Register**; and

Whereas, it is the desire of the General Council of the Forest County Potawatomi Community of Wisconsin to adopt a Liquor Control Ordinance in the Indian Country that lies within the jurisdiction of the Community, and

Whereas, the General Council of the Forest County Potawatomi Community of Wisconsin has the authority to adopt ordinances regulating liquor in the Indian Country that lies within the jurisdiction of the Community, by virtue of the provisions of Article IV, section 1(d) of the Constitution of the Forest County Potawatomi Community of Wisconsin, adopted June 5, 1982;

Now therefore be it resolved that the General Council of the Forest County Potawatomi Community of Wisconsin authorizes the issuance of licenses for on-premises sale of alcohol beverages within the Indian Country that lies within the jurisdiction of the Community, provided:

1. Licenses

A. Licenses for the sale of alcohol beverages may be issued only for sale of such beverages on the premises of businesses owned and regulated by the Forest County Potawatomi Community.

B. Licenses issued to businesses owned by the Forest County Potawatomi Community for the sale of alcohol shall be issued by the Executive Council of the Community, upon receipt by the Executive Council of a proper application containing the following information:

(1) The name of the entity that regulates the Community business at which the sale of alcohol beverages would take place. Such entity shall be the license applicant. No individual or private entity may apply for or receive a license under this Ordinance.

(2) A copy of the Community ordinance or resolution under which the applicant entity is organized.

(3) A description of the land or building owned by the Community and regulated by the applicant entity at which the applicant entity wishes to sell alcohol beverages.

(4) A statement that the applicant entity will conform to all requirements of applicable Tribal, State and Federal law, as they relate to the purchase and sale of alcohol beverages.

C. Upon receipt of a proper application under this Ordinance, licenses for sale of alcohol beverages may be issued by the Executive Council of the Community to a Tribal entity of the Community if the Executive Council finds, in its sound discretion, on the basis of the facts disclosed by the application and by such additional information as the Executive Council may deem relevant, that such issuance is in the interest of the Community.

D. Licenses for the sale of alcohol beverages issued by the Executive Council shall contain the following requirements:

(1) Each license shall require its holder to conform its operations to the laws of the Community, the State of Wisconsin and the United States of America.

(2) No license shall be effective for a term of more than one year from the date of its issuance, and each renewal thereof shall be subject to the same procedures that apply to the initial issuance of a license.

(3) Each license shall explicitly state that its continued validity is dependent upon the compliance of its holder with all the provisions of this Ordinance and other applicable law.

E. The Executive Council of the Community shall have the authority to suspend or revoke any license issued under this Ordinance, under the following procedures:

(1) Upon receiving information suggesting that the holder of a license under this Ordinance may have violated the terms of the license or applicable law, the Executive Council shall give the license holder written notice that the Executive Council intends to suspend or revoke the holder's license. Such notice shall be sent by certified mail, return receipt requested, to the agent of the license holder and shall specify the grounds for the proposed suspension or revocation.

(2) Any license holder who receives a notice of a proposed suspension or revocation may request a hearing by the Executive Council, by sending a written request therefor, certified mail, return receipt requested, to the Chairman of the Forest County Potawatomi Community, at the Community's Tribal Center, within seven (7) days of the license holder's receipt of the notice.

(3) Upon receipt of a request for a hearing under this Ordinance, the Executive Council shall set a date for a hearing, which shall be not later than thirty days from the date of the receipt of the hearing request.

(4) At a hearing held under this Ordinance, the holder of a license under this Ordinance shall be permitted to present evidence with respect to the holder's compliance with the terms of its license and applicable law. In reaching its decision, the Executive Council may consider such evidence, together with all other evidence it deems relevant. Following a hearing, if in the judgment of the Executive Council the license holder has not complied with the terms of its license and applicable law, the Executive Council shall suspend or revoke its license; and if in the judgment of the Executive Council the terms of the license and applicable law have been complied with, the proceedings shall be dismissed. In either case, the decision of the Executive Council shall be final.

F. The Executive Council of the Forest County Potawatomi Community may reject any application for a license, or for a renewal of a license, under this Ordinance, if the applicant previously has committed acts which have resulted in the suspension or revocation of a license under this Ordinance.

2. Agent

Any tribally owned entity licensed under this Ordinance shall appoint, subject to the approval and confirmation of the Tribal Executive Council, an agent who shall have full authority and control of the premises and of the conduct of all business on the premises relative to alcohol beverages. This person shall also be the person designated by Wis. Stats. sec. 125.04(6) requiring the appointment of agents.

3. Authority of the Tribal Executive Council

A. The Tribal Executive Council, or any individual member thereof or any person acting with prior written authorization of the Tribal Executive Council may enter any premises licensed under this ordinance at any time to observe the activities taking place.

B. Written authorization may be enacted at a closed session of the Tribal Executive Council and remain confidential until any report made by such person is before the Tribal Executive Council for action or until such person seeks to gain access to the premises of any Tribally licensed facility during normal closed hours in which case it shall be presented to the Manager on duty at the time, and said Manager shall immediately admit the person to the premises.

C. Tribal Executive Council members do not need such written authorization and may enter any Tribally licensed facility at any time upon identifying themselves if such admission is sought during normal closed hours.

4. Separate Licenses for Each Facility

Each tribally owned entity licensed under this Ordinance shall be required to file a separate application and hold a separate license for each facility it operates.

5. Transfer of Licenses Prohibited

No license issued under this Ordinance may be transferred to any other entity or person.

6. State Law Applicable

The Forest County Potawatomi Community recognizes the applicability of general State law governing the sales of alcohol beverages.

7. State Law Adopted

The Forest County Potawatomi Community hereby adopts for purpose of Tribal enforcement against any entity licensed by the Tribe under this Ordinance that following provisions of Chapter 125 of the Wisconsin Statutes, as modified below:

125.02 Definitions. Except as otherwise provided, in this Ordinance:

125.02(1) ''Alcohol beverages'' means fermented malt beverages and intoxicating liquor. Wine defined below is included in this definition.

125.02(6) ''Fermented malt beverage'' means any beverage made by the alcohol fermentation of an infusion in potable water of barley malt and hops, with or without unmalted grains or decorticated and degerminated grains or sugar containing 0.5% or more alcohol by volume.

125.02(8) ''Intoxicating liquor'' means all ardent, spirituous, distilled or vinous liquors, liquids or compounds, whether medicated, proprietary, patented or not, and by whatever named called, containing 0.5% or more of alcohol by volume, which are beverages, but does not include ''fermented malt beverages'.

125.02(8m) ''Legal drinking age'' means 21 years of age.

125.02(14) ''Person'' means a natural person, sole proprietorship, partnership, corporation or association.

125.02(14m) ''Premises'' means the area described in a license.

125.02(17) ''Regulation'' means any rule adopted by the Tribal Executive Council or Ordinance adopted by the Tribal General Council.

125.02(20) ''Sell'', ''sold'', ''sale'' or ''selling'' means any transfer of alcohol beverages with consideration or any transfer without consideration if knowingly made for purposes of evading the law relating to the sale of alcohol beverages or any shift, devise, scheme or transaction for obtaining alcohol beverages, including the solicitation of orders for, or the sale for future delivery of, alcohol beverages.

125.02(20m) ''Underage person'' means a person who has not attained the legal drinking age.

125.02(22) ''Wine'' means products obtained from the normal alcohol fermentation of the juice or must of sound, ripe grapes, other fruits or other agricultural products, imitation wine, compounds sold as wine, vermouth, cider, perry, mead and sake, if such products contain 0.5% or more of alcohol by volume.

125.04(1) General licensing requirements. No person may sell, manufacture, rectify, brew or engage in any other activity for which this Ordinance provides a license without holding an appropriate license issued under this Ordinance.

125.04(2) Licenses issued in violation of this Ordinance. No license may be issued to any person except as provided in this Ordinance. Any license issued in violation of this ordinance is void.

125.04(10) License framed and posted. (a) Frame. Licenses for the sale of alcohol beverages, shall be enclosed in a frame having a transparent front which allows the license to be clearly read. (b) Display. All licenses shall be conspicuously displayed for public inspection at all times in the room or place where the activity subject to licensure is carried on.

125.07 Underage and intoxicated persons; presence on licensed premises; possession; penalties.

125.07(1) Restrictions.

1. No person may procure for, sell, dispense or give away any alcohol beverages to any underage person not accompanied by his or her parent, guardian or spouse who has attained the legal drinking age.

2. No licensee may sell, vend, deal or traffic in alcohol beverages to or with any underage person not accompanied by his or her parent, guardian or spouse who has attained the legal drinking age.

3. No adult may knowingly permit or fail to take action to prevent the illegal consumption of alcohol beverages by an underage person on premises owned by the adult or under the adult's control.

4. No adult may intentionally encourage or contribute to a violation of this section.

125.07(2) Sales of alcohol to intoxicated persons. Restrictions. 1. No person may procure for, sell, dispense or give away alcohol beverages to a person who is intoxicated. 2. No licensee or may sell, vend, deal or traffic in alcohol beverages to or with a person who is intoxicated.

125.07(3) Presence in places of sale; penalty. An underage person not accompanied by his or her parent, guardian or spouse who has attained the legal drinking age may not enter, knowingly attempt to enter or be on any premises for which a license for the retail sale of alcohol beverages has been issued.

125.085 Proof of age.

(1) Definition. In this section, ''official identification card'' means a valid operator's license issued under chapter 343 of the Wisconsin Statutes that contains the photograph of the holder, an identification card issued under section 343.50 or an identification card issued under section 125.08, of the statutes.

(2) Use. No card other than the identification card authorized under this section may be recognized as an official identification card in premises licensed under this ordinance.

8. Closing Hours

Every entity licensed by the Forest County Potawatomi Community shall observe the closing hours established by Wisconsin Statutes governing the type of State license which is similar to the Tribal license which the entity holds. Failure to do so shall be the basis for the revocation of licenses issued by the Tribal Executive Council.

[FR Doc. 05–321 Filed 1–6–05; 8:45 am]

BILLING CODE 4310–4J–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Kickapoo Tribe of Oklahoma—Liquor and Beer Ordinance

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: This notice publishes the Kickapoo Tribe of Oklahoma Liquor and Beer Ordinance. The Ordinance regulates and controls the possession, sale and consumption of liquor within the Kickapoo Tribe of Oklahoma Indian Country. The land is located on trust land and this Ordinance allows for the possession and sale of alcoholic beverages within the Kickapoo Tribe of Oklahoma's Indian Country and will increase the ability of the tribal government to control the tribe's liquor distribution and possession, and at the same time will provide an important source of revenue for the continued operation and strengthening of the tribal government and the delivery of tribal services.

DATES: *Effective Date:* This Act is effective on January 7, 2005.

FOR FURTHER INFORMATION CONTACT: Terry Bruner, Community Services Officer, Southern Plains Regional Office, Bureau of Indian Affairs, WCK Office Complex, P.O. Box 368, Anadarko, OK 73005, Phone: (405) 247–1668; Fax: (405) 247–5611 or 247–9240; or Ralph Gonzales, Office of Tribal Services, Bureau of Indian Affairs 1951 Constitution Avenue, NW., Mail Stop 320–SIB, Washington, DC 20240; Telephone (202) 513–7629.

SUPPLEMENTARY INFORMATION: Pursuant to the Act of August 15, 1953, Public Law 83–277, 67 Stat. 586, 18 U.S.C. 1161, as interpreted by the Supreme Court in *Rice* v. *Rehner,* 463 U.S. 713 (1983), the Secretary of the Interior shall certify and publish in the **Federal Register** notice of adopted liquor ordinances for the purpose of regulating liquor transactions in Indian country. The Kickapoo Council adopted its Liquor and Beer Ordinance by Resolution No. 02–78 on October 11, 2002. The purpose of this Ordinance is to govern the sale, possession and distribution of alcohol within the Kickapoo Tribe of Oklahoma Indian Country.

This notice is published in accordance with the authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs.

I certify that the Council of the Kickapoo Tribe of Oklahoma adopted its Liquor and Beer Ordinance by

Resolution No. 02–78 on October 11, 2002.

Dated: December 23, 2004.

David W. Anderson,

Assistant Secretary—Indian Affairs.

The Kickapoo Tribe of Oklahoma's Liquor and Beer Ordinance reads as follows:

Kickapoo Tribe of Oklahoma Liquor and Beer Ordinance

Be it Enacted by the Council of the Kickapoo Tribe of Oklahoma the Kickapoo Tribe of Oklahoma Liquor and Beer Ordinance of 2002:

Section 1. Title and Purpose

This title shall be known as the Kickapoo Tribe of Oklahoma Liquor and Beer Ordinance (''Ordinance''). This law is enacted to regulate the sale and distribution of liquor and beer products on all properties under the jurisdiction of the Kickapoo Tribe of Oklahoma, and to generate revenue to fund needed tribal programs and services.

Section 2. Authority

This Ordinance is enacted pursuant to Article XV—Tribal Legislation of the Constitution and By-Laws of the Kickapoo Tribe of Oklahoma and the Congressional Act of August 15, 1953 (Pub. L. 83–277, 67 Stat. 588, 18 U.S.C. Section 1161).

Section 3. Definitions

Unless otherwise required by the context, the following words and phrases shall have the designated meanings:

(a) ''Nation'' or ''Tribe'' shall mean the Kickapoo Tribe of Oklahoma.

(b) ''Business Committee'' shall mean the Kickapoo Tribe of Oklahoma Business Committee as constituted by Article V, Section 1, of the Kickapoo Tribe of Oklahoma Constitution and By-Laws.

(c) ''Commission'' shall mean the Kickapoo Tribe of Oklahoma Liquor and Beer Control Commission established pursuant to Section 201 of this Ordinance.

(d) ''Kickapoo Tribe of Oklahoma Indian Country'' shall mean Indian Country as defined by 18 U.S.C. Section 1151 subject to the jurisdiction of the Kickapoo Tribe of Oklahoma, including but not limited to, any lands and waters held in Federal trust by the United States Federal government within the jurisdiction of the Kickapoo Tribe of Oklahoma.

(e) ''Sale'' shall mean the transfer, exchange or barter, in any or by any means whatsoever, for a consideration, by any person, association, partnership, or corporation, of liquor or beer products.

(f) ''Wholesale Price'' shall mean the established price for which liquor and beer products are sold to the Kickapoo Tribe of Oklahoma or any Operator by the manufacturer or distributor or other reduction.

(g) ''Alcohol'' is that substance known as ethyl alcohol, hydrated oxide of ethyl, or spirit of wine, which is produced by the fermentation or distillation of grain, starch, molasses, or sugar, or other substances including all dilutions and mixtures of this substance.

(h) ''Liquor'' shall mean the four varieties of liquor, commonly referred to as alcohol, spirits, wine, and beer in excess of 5 percent of alcohol, and all fermented, spirituous, vinous or malt liquor or any other intoxicating liquid, solid, semi-solid or other substance patented or not, containing alcohol, spirits, wine, or beer, in excess of 5 percent of alcohol, and is intended for oral consumption.

(i) ''Beer'' shall mean any beverage obtained by the alcohol fermentation of an infusion or decoction of pure hops, or pure extract of hops, malt, and sugar in pure water containing not more than 5 percent of alcohol by weight.

(j) ''Liquor Outlet'' shall mean a tribal licensed retail sale business selling liquor within the Kickapoo Tribe of Oklahoma Indian Country, including all related and associated facilities under the control of the Licensee. Moreover, where a Licensee's business is carried on as part of the operation of an entertainment or recreation facility, the ''Liquor Outlet'' shall be deemed to include the entertainment or recreation facility and associated areas.

(k) ''Beer Outlet'' shall remain a tribal licensed retail sale business selling beer within the Kickapoo Tribe of Oklahoma Indian Country, including all related and associated facilities under the control of the Licensee. Moreover, where a Licensee's business is carried on as part of the operation of an entertainment or recreation facility, the ''Beer Outlet'' shall be deemed to include the entire entertainment or recreation facility and associated areas.

(l) ''Operator'' or ''Licensee'' shall mean any person twenty-one (21) years of age or older, properly licensed by the Tribe to operate a liquor and/or beer outlet.

Chapter One—Prohibition and Conformity with the Laws of the State of Oklahoma

Section 101. General Prohibition

It shall be unlawful to buy, sell, give away, consume, furnish, or possess any liquor or beer or product containing alcohol for ingestion by human beings, or to appear or be found in a place where liquor or beer are sold and/or consumed except as allowed by the Kickapoo Tribe of Oklahoma Liquor and Beer Ordinance and regulations promulgated thereunder.

Section 102. Possession for Personal Use

Possession of liquor or beer for personal use by persons over the age of twenty-one (21) years shall, unless otherwise prohibited by Federal law or Tribal law or regulation, be lawful within the Kickapoo Tribe of Oklahoma Indian Country, so long as such liquor or beer was lawfully purchased from an establishment duly licensed to sell such beverages, whether on or off the Kickapoo Tribe of Oklahoma Indian Country and consumed within a private residence or location, or at a location or facility specifically licensed for the public consumption of liquor or beer.

Section 103. Conformity with the Laws of the State of Oklahoma

Federal law prohibits the introduction, possession and sale of liquor in Indian Country (18 U.S.C. Section 1154 and other statutes), except when same is in conformity both with the laws of the State and Tribe (18 U.S.C. Section 1161). As such, compliance with this Ordinance shall be in addition to, and not a substitute for, compliance with the laws of the State of Oklahoma. Operators acting pursuant to this ordinance shall comply with the State of Oklahoma liquor and beer laws to the extent required by 18 U.S.C. Section 1161. However, the Kickapoo Tribe of Oklahoma shall have the fullest jurisdiction allowed under Federal law over the sale of liquor and beer products, and related products or activities, within the boundaries of the Kickapoo Tribe of Oklahoma.

Chapter Two—Licensing

Section 201. Licensing of Liquor and Beer Outlets

The Business Committee of the Kickapoo Tribe of Oklahoma shall appoint three (3) qualified persons to serve as the Kickapoo Tribe of Oklahoma Liquor and Beer Commission. The initial Liquor and Beer Control Commission will have the Chairman to serve a term of three (3) years, the Vice-Chairman a term two (2) years, and the Secretary/Treasurer to serve a term of one (1) year. After the initial terms have expired each position will then serve a term of three (3) years each. The appointments and/or removal of any of the Commissioners shall be discretionary with the Business Committee. The Commission is empowered to:

(a) Administer this Ordinance by exercising general control, management, and supervision of all liquor and beer sales, places of sales and sales outlets as well as exercising all powers necessary

to accomplish the purposes of this Ordinance.

(b) Adopt and enforce rules and regulations in furtherance of the purposes of this Ordinance and in the performance of its administrative functions.

Section 202. Application for Liquor and Beer Outlet Licenses

(a) Application. Any person twenty-one (21) years of age or older, may apply to the Commission for a liquor and/or beer outlet license.

(b) Licensing Requirements. The person applying for such permit must make a showing once a year and must satisfy the Commission that:

(1) He/she is a person of good moral character;

(2) He/she has never been convicted of violating any of the laws prohibiting the traffic in any spirituous, vinous, fermented or malt liquors, or of any of the gambling laws of the Tribe, State of Oklahoma, or any other Tribe or any State of the United States, within three (3) years immediately preceding the date of his/her petition;

(3) He/she has never violated the laws commonly called the ''prohibition laws'';

(4) He/she has not had any permit or license to sell non-intoxicating liquors revoked by any governmental authority within the previous twelve (12) months.

(c) Processing of Application. The Commission's Secretary shall receive and process applications and be the official representative of the Tribe and Commission in matters relating to receipt of applications, liquor and beer excise tax collections, and related matters. If the Commission or its authorized representative is satisfied that the applicant is suitable and a responsible person, the Commission, or its authorized representative may issue a license for the sale of liquor and/or beer products.

(d) Application fee. Each application shall be accompanied by an application fee to be set by regulation of the Commission.

(e) Discretionary Licensing. Nothing herein shall be deemed to create a duty or requirement to issue a license. Issuance of a license is discretionary upon the Commission's determination of the best interests of the Kickapoo Tribe of Oklahoma, and the license grants a privilege, but not a property right, to sell liquor and/or beer within the jurisdiction of the Kickapoo Tribe of Oklahoma.

Section 203. Liquor and Beer Outlet Licenses

(a) Upon approval of an application, the Commission shall issue the applicant a liquor and/or beer outlet license, valid for one (1) year from the date of issuance, which shall entitle the Operator to establish and maintain only the type of outlet being permitted. This license shall not be transferable. The Licensee must properly and publicly display the license in the place of business. It shall be renewable at the discretion of the Commission by the submission of the Licensee of a subsequent application form and payment of application fee as provided in Section 202(d).

Section 204. Other Business by Operator

An Operator may conduct another business simultaneously with managing a liquor and/or beer outlet; PROVIDED, if such other business is in any manner affiliated or related to the liquor and/or beer outlet it must be approved by majority vote of the Commission prior to initiation. Said other business may be conducted on the same premise as a liquor and/or beer outlet, but the Operator shall be required to maintain separate books of account for the other business.

Section 205. Revocation of Operator's License

(a) Failure of an Operator to abide by the requirements of this Ordinance and any additional regulations or requirements imposed by the Commission will constitute grounds for revocation of the Operator's license as well as enforcement of the penalties provided in Section 601 of this Ordinance.

(b) Upon determining that any person licensed by the Kickapoo Tribe of Oklahoma to sell liquor and/or beer is, for any reason, no longer qualified to hold such license or reasonably appears to have violated any terms of the license or tribal regulations, including failure to pay taxes when due and owing, or have been found by any forum of competent jurisdiction, including the Commission, to have violated the terms of a tribal or state license or of any provision of this Ordinance, the Chairperson of the Commission shall immediately serve written notice upon the Licensee that he/she show cause within ten (10) days why his or her license should not be revoked or restricted. The notice shall state the grounds relied upon for the proposed revocation or restriction.

(c) If the Licensee fails to respond to the notice within ten (10) days of service, the Chairperson may issue an order revoking the license as the Chairperson deems appropriate, effective immediately. The Licensee may, within the ten (10) day period, file with the Office of the Chairperson, or the Secretary of the Business Committee, a written response and request for hearing before the Commission.

(d) At the hearing, the Licensee may present evidence and argument directed at the issue of whether or not the asserted grounds for the proposed revocation or restriction are in fact true, and whether such grounds justify the revocation or modifications of the license. The Tribe may present other evidence as it deems appropriate.

(e) The Commission after considering all of the evidence and arguments, shall issue a written decision either upholding the license, revoking the license or imposing some lessor penalty (such as temporary suspension or fine), and such decision shall be final and conclusive with regard to the Commission.

(f) The Commission's final decision, upon posting a bond with the Tribal District Court sufficient to cover the Commission's final hearing assessment or ruling, may be appealed by the Licensee to the Tribal District Court of the Kickapoo Tribe of Oklahoma. Any findings of fact of the Commission are conclusive upon the Tribal District Court unless clearly contrary to law. The purposes of the Tribal District Court review are not to substitute the Court's finding of facts or opinion for the Commission's, but to guarantee due process of law. If the Tribal District Court should rule for the appealing party, the Tribal District Court may order a new hearing giving such guidance for the conduct of such as it deems necessary for a fair hearing. In the event the appealing party losses before the Tribal District Court they may exercise such appeal rights as available before the Tribal Supreme Court. No damage or monies may be awarded against the Commission, its members, nor the Tribe, and its agents, officers, and/or employees in such an action.

Section 206. Discretionary Refusal

The Commission may refuse to grant a license for the sale of liquor and/or beer if the Commission has reasonable cause to believe that:

(a) The proximity of the outlet will have a detrimental effect upon any social or governmental institution as established by the Kickapoo Council or Business Committee; or

(b) Any residential area; or

(c) There is any other reason as provided by tribal law, ordinance, or regulation; or

(d) The license required by this Ordinance has been obtained by fraud or misrepresentation, the Commission, upon proof that such license was so obtained, shall, upon hearing had, revoke the same, and all funds paid therefor shall be forfeited.

Chapter Three—Liquor and Beer Sales and Transportation

Section 301. Sales by Liquor and Beer Wholesalers and Transport of Liquors and Beers Upon Kickapoo Tribe of Oklahoma Indian Country

(a) Right of Commissioners to Scrutinize Suppliers. The Operator of any licensed outlet shall keep the Commission informed, in writing, of the identity of the suppliers and/or wholesalers who supply or are expected to supply liquor and/or beer stocks to the outlet(s). The Commission may, at its discretion, limit or prohibit the purchases of said stock from a supplier or wholesaler for the following reasons: non-payment of Tribal taxes, bad business practices; or sale of unhealthy supplies. A ten (10) day notice of stopping purchases (''Stop Purchase Order'') will be given by the Commission whenever purchases from a supplier are to be discontinued unless there is a health emergency, in which case the Stop Purchase Order may take effect immediately.

(b) Freedom of Information from Suppliers. Operators shall in their purchase of stock and in their business relations with suppliers cooperate with and assist the free flow of information and data to the Commission from suppliers relating to the sales and business arrangements between suppliers and Operators. The Commission may, at its discretion, require the receipts from the suppliers of all invoices, bills of lading, billings or documentary receipts of sales to the Operators. All records shall be kept according to Section 302(g) of this Ordinance.

Section 302. Sales by Retail Operators

(a) Commission Regulations. The Commission shall adopt regulations which shall supplement these laws and facilitate their enforcement. These regulations shall include prohibitions on sales to minors, where liquor and/or beer may be consumed, persons not allowed to purchase liquor and/or beer, hours and days when outlets may be open for business, and other appropriate matters and controls.

(b) Sales to Minors. No person shall give, sell, or otherwise supply any liquor and/or beer to any person under the age of twenty one (21) years of age either for his or her own use or for the use of any other person.

(c) Consumption of Liquor and/or Beer upon Licensed Premises. No Operator shall permit any person to open or consume liquor or beer on his or her premises or any premises adjacent thereto and in his or her control until the Commission allows the consumption of liquor and/or beer and identifies where liquor and/or beer may be consumed on the Kickapoo Tribe of Oklahoma Indian Country.

(d) Conduct on Licensed Premises.

(1) No Operator shall be disorderly, boisterous, or intoxicated on the licensed premises or on any public premises adjacent thereto which are under his or her control, nor shall he or she permit any disorderly, boisterous, or intoxicated person to be thereon; nor shall he or she use or allow the use of profane or vulgar language thereon.

(2) No Operator shall permit suggestive, lewd, or obscene conduct or acts on his or her premises. For the purpose of this section, suggestive, lewd, or obscene acts or conduct shall be those acts or conduct identified as such by the laws of the Tribe and/or the State of Oklahoma.

(e) Employment of Minors. No person under the age of twenty-one (21) years of age shall be employed in any service in connection with the sale or handling of liquor, or beer, either on a paid or voluntary basis.

(f) Operator's Premises Open to Commission Inspection. The premises of all Operators, including vehicles used in connection with liquor and/or beer sales, shall be open during business hours and at all reasonable times to inspection by the Commission or its designated representatives.

(g) Operator's Records. The originals or copies of all sales slips, invoices, and other memoranda covering all purchases of liquor and/or beer by Operators shall be kept on file in the retail premises of the Operator purchasing the sale at least five (5) years after each purchase, and shall be filed separately and kept apart from all other records, and as nearly as possible, shall be filed in consecutive order and each month's records kept separate so as to render the same readily available for inspection and checking. All canceled checks, bank statements and books of accounting covering or involving the purchase of liquor and/or beer, and all memoranda, if any, showing payment of money for liquor and/or beer other than by check, shall be likewise preserved for availability for inspection and checking.

(h) Records Confidential. All records of the Commission showing the purchase of liquor by any individual or group shall be confidential and shall not be inspected except by members of the Commission, or its authorized representative.

Section 303. Transportation Through the Reservation Not Affected

Nothing herein shall pertain to the otherwise lawful transportation of liquor or beer through the Kickapoo Tribe of Oklahoma Indian Country by persons remaining upon public highways and where such beverages are not delivered or sold or offered for sale to anyone within the Kickapoo Tribe of Oklahoma Indian Country.

Chapter Four—Taxation and Audits

Section 401. Excise Tax Imposed Upon Distribution of Liquor and/or Beer and Use of Such Tax

(a) General Taxation Authority. The Commission shall have the authority, provided by Tribal law, to assess and collect tax on sales of liquor and beer products to the consumer or purchaser. This tax shall be collected and paid to the Commission upon all liquor and/or beer products sold within the jurisdiction of the Tribe. The Kickapoo Council does establish such a rate of five percent (5%), and may establish differing rates for any given class of merchandise, which shall be paid prior to the time of retail sale and delivery thereof.

(b) Added to Retail Price. An excise tax, to be set by the Kickapoo Council, on the wholesale price shall be added to the retail selling price of liquor and/or beer products to be sold to the ultimate consumer or purchaser in the three and one-half percent (3½%). All taxes paid pursuant to this Ordinance shall be conclusively presumed to be direct taxes on the retail consumer pre-collected for the purposes of convenience and facility.

(c) Within seventy-two (72) hours after receipt of any liquor and/or beer by any wholesaler or retailer subject to this Ordinance, a Tribal tax stamp shall be securely affixed thereto denoting the Tribal tax thereon. Retailers or sellers of liquor and/or beer within the Tribe's jurisdiction may buy and sell or have in their possession only liquor and/or beer which have the Tribal tax stamp affixed to each package.

(d) Use of Tax Revenue. The revenue generated by the excise levied hereunder shall be used exclusively for the establishment and maintenance of

drug and alcohol prevention and treatment programs within the Indian Country of the Kickapoo Tribe of Oklahoma.

Section 402. Audits and Inspections

(a) All of the books and other business records of the outlet shall be available for inspection and audit by the Commission, or its authorized representative, during normal business hours and at all other reasonable times, as may be requested by the Commission.

(b) Bond for Excise Tax. The excise tax together with reports on forms to be supplied by the Commission shall be remitted to the Commission on a monthly basis unless otherwise specified in writing by the Commission. The Operator shall furnish a satisfactory bond to the Commission in an amount to be specified by the Commission guaranteeing his or her payment of excise taxes.

Chapter Five—Liability, Insurance, and Sovereign Immunity

Section 501. Liability for Bills

The Kickapoo Tribe of Oklahoma and the Commission shall have no legal responsibility for any unpaid bills owed by a liquor and/or beer outlet to a wholesaler supplier or any other person.

Section 502. Tribal Liability and Credit

(a) Unless explicitly authorized by Tribal statute or regulation, Operators are forbidden to represent or give the impression to any supplier or person with whom he or she does business that he or she is an official representative of the Tribe or the Commission authorized to pledge tribal credit or financial responsibility for any of the expenses of his or her business operation. The Operator shall hold the Tribe harmless from all claims and liability of whatever nature. The Commission shall revoke an Operator's outlet license(s) if said outlet(s) is not operated in a businesslike manner or if it does not remain financially solvent or does not pay its operating expenses and bills before they become delinquent.

(b) Insurance. The Operator shall maintain at his or her own expense adequate insurance covering liability, fire, theft, vandalism, and other insurable risks. The Commission may establish as a condition of any license, the required insurance limits and any additional coverage deemed advisable, proof of which shall be filed with the Commission.

Section 503. Sovereign Immunity Preserved

Nothing in this statute shall be construed as a waiver or limitation of the sovereign immunity of the Kickapoo Tribe of Oklahoma, or its agencies, nor their officers or employees. To the fullest extent possible the Kickapoo Tribe of Oklahoma expressly retains its Tribal sovereign immunity for the purposes of enactment of this Ordinance.

Chapter Six—Violations and Penalties

Section 601. Violations and Penalties

(a) Any person who violates this Ordinance or elicits, encourages, directs or causes to be violated this Ordinance, or laws in support of this Ordinance, or regulations of the Commission shall be guilty of an offense and subject to fine. Failure to have a current, valid or proper license shall not constitute a defense to an alleged violation of the licensing laws and/or regulations. The judicial system of the Kickapoo Tribe of Oklahoma shall have exclusive jurisdiction over such proceeding(s).

(1) Any person convicted of committing any violation of this Ordinance shall be subject to punishment of up to one (1) year imprisonment and/or a fine not to exceed Five Thousand Dollars ($5,000.00).

(2) Additionally, any person upon committing any violation of any provision of this Ordinance may be subject to civil action for trespass, and upon having been determined by the judicial system of the Kickapoo Tribe of Oklahoma to have committed the violation, shall be found to have trespassed upon lands of the Kickapoo Tribe of Oklahoma, and shall be assessed such damages as the judicial system of the Kickapoo Tribe of Oklahoma deems appropriate in the circumstances.

(3) Any person suspected of having violated any provision of this Ordinance shall, in addition to any other penalty imposed hereunder, be required to surrender any liquor and/or beer in person's possession to the officer making the compliant. The surrendered beverages, if previously unopened, shall only be returned upon a finding of the Tribal judicial system, after trial, or proper judicial proceeding, that the individual committed no violation of this Ordinance.

(4) Any Operator who violates the provisions set forth herein shall forfeit all of the remaining stock in the outlet(s). The Commission shall be empowered to seize forfeited products.

(5) Any stock, goods, or other items subject to this Ordinance that have not been registered, licensed, or taxes paid shall be contraband and subject to immediate confiscation by the Commission or its employees or agents, PROVIDED, that within fifteen (15) days of the seizure the Commission shall cause to be filed an action against such property alleging the reason for the seizure or confiscation, and upon proof, the Kickapoo Tribe of Oklahoma judicial system shall order the property forfeited and vested with the Kickapoo Tribe of Oklahoma.

Chapter Seven—Miscellaneous Provisions

Section 701. Severability

If any provision of this Ordinance in its application to any person or circumstance is held invalid, the remainder of this Ordinance and its application to other persons or circumstances is not affected.

Section 702. Repealer

Upon enactment by the Kickapoo Council any and all previous Liquor and Beer Ordinance(s) of the Kickapoo Tribe of Oklahoma are hereby repealed and this Ordinance as enacted shall have the full force and effect as Tribal law.

Section 703. Effective Date

This Ordinance shall become effective upon publication of the Secretary of the Interior's certification notice in the **Federal Register**.

[FR Doc. 05–322 Filed 1–6–05; 8:45 am]

BILLING CODE 4310–4J–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY–920–1320–EL, WYW160394]

Notice of Intent To Prepare an Environmental Impact Statement, Pit 14 Lease by Application, Sweetwater County, WY

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Intent (NOI) to prepare an Environmental Impact Statement (EIS), to initiate scoping for a coal lease application received from Black Butte Coal Company for Federal coal in the decertified Green River/Hamms Fork Coal Production Region, Wyoming. The EIS may result in amendment of the Green River Resource Management Plan. If analysis shows that a plan amendment is necessary, the Green River Resource Management Plan may be amended.

SUMMARY: The Bureau of Land Management (BLM) received a competitive coal lease application from Black Butte Coal Company (BBCC) for a maintenance tract adjacent to its

existing Black Butte Mine in Sweetwater County, Wyoming. A maintenance tract is a parcel of land containing coal reserves nominated for leasing that may be used to extend an existing mine. This tract, assigned case number WYW160394, is called the Pit 14 Tract and was applied for as a lease by application (LBA) under the provisions of 43 Code of Federal Regulations 3425.

Consistent with regulations pertaining to National Environmental Policy Act (NEPA), the BLM must prepare an environmental document prior to allowing the coal lease to be sold. Under the provisions of Section 102(2)(c) of NEPA, the BLM announces its intentions to prepare an EIS and to solicit public comments regarding issues and resource information.

Consistent with regulations found at 43 CFR 3425, this NOI also serves to notify the public that a coal lease is under consideration.

DATES: The scoping period for the Pit 14 LBA will begin with publication of this notice in the **Federal Register**. The BLM can best utilize public input if comments and resource information are submitted within 30 days of publication of this notice in the **Federal Register**. On January 26, 2005, an open house will be held between 4 p.m. and 5:30 p.m., and a scoping meeting at 7 p.m., at the Rock Springs Field Office, 280 Highway 191 North, Rock Springs, Wyoming.

ADDRESSES: Please submit written comments to the Rock Springs Field Office, Attn: Teri Deakins, 280 Highway 191 North, Rock Springs, Wyoming 82901. Fax comments to 307–352–0328, or e-mail them to *teri_deakins@blm.gov*. Please indicate Pit 14 LBA in the subject line.

FOR FURTHER INFORMATION CONTACT: Teri Deakins, Project Manager, may be reached at 307–352–0211. For information specific to coal or coal operations, Jeff Clawson may be contacted at 307–352–0323.

SUPPLEMENTARY INFORMATION: On March 24, 2004, BBCC filed a coal lease application for a maintenance tract containing approximately 20 million tons of in-place Federal coal within a tract of approximately 1,399.48 acres. This tract, case number WYW160394, is called the Pit 14 Tract and affects the following lands in Sweetwater County:

T. 17 N., R. 101 W., 6th P.M., Wyoming

Sec. 2: Lots 3, 4, SW¼NW¼;
Sec. 4: Lots 1, 2, S½NE¼, SE¼NW¼, NE¼SW¼, S½SW¼, SE¼;
Sec. 10: NW¼, N½SW¼;
T. 18 N., R. 101 W., 6th P.M., Wyoming
Sec. 34: E½, E½NW¼, SW¼.

Containing 1,399.48 acres more or less.

The Pit 14 Tract is located within ''checkerboard,'' or mixed Federal and private surface ownership. The Pit 14 project area is 33% Federal surface and mineral estate. As part of the coal leasing process, BLM will evaluate the tract configuration and may decide to add or subtract Federal coal to avoid bypassing coal, to facilitate maximum economic recovery, or to increase competition.

The Black Butte Coal Mine is adjacent to the LBA area and BBCC proposes to mine the tract as a maintenance tract for the Black Butte Mine. BBCC has an approved mining and reclamation plan from the Wyoming Department of Environmental Quality (WDEQ), Land Quality Division. The mine also has an approved air quality permit from the WDEQ, Air Quality Division to mine up to 7 million tons of coal per year. BBCC is currently mining from existing Federal, private, and state leases at a rate of 3 to 4 million tons per year.

The Office of Surface Mining Reclamation and Enforcement (OSMRE) will be a cooperating agency during preparation of the EIS. If the Pit 14 LBA Tract is leased to the applicant, the new lease must be incorporated into the existing mining plan for the adjacent mine. Before the Federal coal can be mined, the Secretary of the Interior must approve the revised mining plan. The OSMRE is the Federal agency that would be responsible for recommending approval, approval with conditions, or disapproval of the revised mining plan to the Secretary should the tract be leased.

Through BLM's initial scoping of BBCC's proposal, at least one key issue has been identified: The potential conflict between coal mining and oil and gas development within the lease tract. Other issues tentatively identified include air quality; biological issues, including potential impacts to big game crucial winter range and sage-grouse nesting habitat; vegetation, including plant species that BLM has identified as sensitive; nearby on-going shallow gas exploration and development projects; socio-economic impacts; cumulative impacts; and water quality.

If you have specific issues or other concerns that BLM should consider during the NEPA process, please identify them in writing. You may send comments to the BLM by mail, facsimile, or electronic mail. Comments may also be hand-delivered to the Rock Springs Field Office or submitted at the public meeting. To receive full consideration, please submit comments on or before February 4, 2005. All comments, including the names and street addresses of respondents, will be available for public review at the address listed above during regular business hours (7:45 a.m.–4:30 p.m.), Monday through Friday, except holidays.

Your response is important and will be considered in the environmental analysis process. If you do respond, we will keep you informed of the availability of environmental documents that address impacts that occur from this proposal. Please note that comments and information submitted regarding this project including names, e-mail addresses, and street addresses of the respondents will be available for public review and disclosure at the above address. Individual respondents may request confidentiality. If you wish to withhold your name, e-mail address, or street address from public review or from disclosure under the Freedom of Information Act, you must state this prominently at the beginning of your written comment. Such requests will be honored to the extent allowed by the law. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public inspection in their entirety.

Alan Rabinoff,

Acting State Director.

[FR Doc. 05–330 Filed 1–6–05; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[NM110–1430–ET; NMNM 94904]

Public Land Order No. 7622; Partial Revocation of Public Land Order No. 7291; New Mexico

AGENCY: Bureau of Land Management, Interior.

ACTION: Public land order.

SUMMARY: This order partially revokes Public Land Order No. 7291 insofar as it affects 514.15 acres of public lands and 428.30 acres of federally reserved mineral interest underlying private surface estate withdrawn to protect an area having potential for the development of humate.

EFFECTIVE DATE: February 7, 2005.

FOR FURTHER INFORMATION CONTACT: Debby Lucero, BLM Albuquerque Field Office, 435 Montano NE, Albuquerque, New Mexico 87107, (505) 761–8700.

SUPPLEMENTAL INFORMATION: The partial revocation is needed to reinstate a

mining claim located on the subject lands and settle ongoing litigation.

Order

By virtue of the authority vested in the Secretary of the Interior by section 204 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714 (2000), it is ordered as follows:

1. Public Land Order No. 7291, is hereby revoked insofar as it affects the following described public lands withdrawn to protect an area having potential for development of humate:

New Mexico Principal Meridian

T. 19 N., R. 1 W.,
Sec. 4, lots 1 and 3, S½NE¼, SE¼NW¼, E½SW¼, and SE¼.

The areas described aggregate 514.30 acres in Sandoval County.

2. Public Land Order No. 7291, is hereby revoked insofar as it affects the federally reserved mineral interests in the following described lands withdrawn to protect an area having potential for development of humate:

New Mexico Principal Meridian

T. 19 N., R. 1 W.,
Sec. 4, lot 2;
Sec. 9, E½, and E½W½.

The areas described aggregate 428.30 acres in Sandoval County.

3. At 10 a.m. on February 7, 2005, the lands described in paragraph 1 will be opened to the operation of the public land laws generally, subject to valid existing rights, the provisions of existing withdrawals, other segregations of record, and the requirements of applicable law. All valid applications received at or prior to 10 a.m. on February 7, 2005, shall be considered as simultaneously filed at that time. Those received thereafter shall be considered in the order of filing.

4. At 10 a.m. on February 7, 2005, the lands described in paragraphs 1 and 2 will be opened to location and entry under the United States mining laws, subject to valid existing rights, the provisions of existing withdrawals, other segregations of record, and the requirements of applicable law. Appropriation of any of the lands described in this order under the general mining laws prior to the date and time of restoration is unauthorized. Any such attempted appropriation, including attempted adverse possession under 30 U.S.C. 38 (2000), shall vest no rights against the United States. Acts required to establish a location and to initiate a right of possession are governed by State law where not in conflict with Federal law. The Bureau of Land Management will not intervene in disputes between rival locators over possessory rights since Congress has provided for such determinations in local courts.

Dated: December 20, 2004.

Rebecca W. Watson,

Assistant Secretary—Land and Minerals Management.

[FR Doc. 05–326 Filed 1–6–05; 8:45 am]

BILLING CODE 4310–FB–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY–920–1050–ET; WYW 87111]

Public Land Order No. 7621; Extension of Public Land Order No. 6597; Wyoming

AGENCY: Bureau of Land Management, Interior.

ACTION: Public land order.

SUMMARY: This order extends Public Land Order No. 6597 for an additional 20-year period. This extension is necessary to continue the protection of the White Mountain Petroglyphs Site in Sweetwater County.

EFFECTIVE DATE: March 26, 2005.

FOR FURTHER INFORMATION CONTACT: Janet Booth, BLM Wyoming State Office, 5353 N. Yellowstone Road, P.O. Box 1828, Cheyenne, Wyoming 82003, 307–775–6124.

Order

By virtue of the authority vested in the Secretary of the Interior by section 204 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714 (2000), it is ordered as follows:

1. Public Land Order No. 6597 (50 FR 11865, March 26, 1985), which withdrew 20 acres of public land from surface entry and mining to protect the Bureau of Land Management White Mountain Petroglyphs Site, is hereby extended for an additional 20-year period.

2. Public Land Order No. 6597 will expire on March 25, 2025, unless, as a result of a review conducted prior to the expiration date pursuant to section 204(f) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714(f) (2000), the Secretary determines that the withdrawal shall be extended.

Dated: December 20, 2004.

Rebecca W. Watson,

Assistant Secretary—Land and Minerals Management.

[FR Doc. 05–327 Filed 1–6–05; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY–920–1430–ET; WYW 88021]

Public Land Order No. 7623; Extension of Public Land Order No. 6581; Wyoming

AGENCY: Bureau of Land Management, Interior.

ACTION: Public land order.

SUMMARY: This order extends Public Land Order No. 6581 for an additional 20-year period. This extension is necessary to continue protection of the equity of the Department of Housing and Urban Development in a public housing facility.

EFFECTIVE DATE: January 9, 2005.

FOR FURTHER INFORMATION CONTACT: Janet Booth, BLM Wyoming State Office, 5353 N. Yellowstone Road, P.O. Box 1828, Cheyenne, Wyoming 82003, 307–775–6124.

Order

By virtue of the authority vested in the Secretary of the Interior by section 204 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714 (2000), it is ordered as follows:

1. Public Land Order No. 6581 (50 FR 1055, January 9, 1985), which withdrew 5.55 acres of land from settlement, sale, location, or entry under the public land laws, but not the mining laws, to protect the equity of the Department of Housing and Urban Development, is hereby extended for an additional 20-year period.

2. Public Land Order No. 6581 will expire on January 8, 2025, unless, as a result of a review conducted prior to the expiration date pursuant to section 204(f) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714(f) (2000), the Secretary determines that the withdrawal shall be extended.

Dated: December 20, 2004.

Rebecca W. Watson,

Assistant Secretary—Land and Minerals Management.

[FR Doc. 05–329 Filed 1–6–05; 8:45 am]

BILLING CODE 4210–33–P

DEPARTMENT OF THE INTERIOR

National Park Service

Aztec Ruins National Monument, New Mexico

AGENCY: National Park Service, Department of the Interior.

ACTION: Notice of availability.

SUMMARY: Pursuant to Section 9.52(b) of Title 36 of the Code of Federal Regulations, the National Park Service announces the availability of a Plan of Operations to continue operating the Fee 4–A and Fee 9Y natural gas wells by XTO Energy, within Aztec Ruins National Monument. An Environmental Assessment is also available.

DATES: The NPS will accept comments from the public on the documents up to 30 days after publication of this notice.

ADDRESSES: The documents are available for public review in the office of the Superintendent, Aztec Ruins National Monument, 84 County Road 2900, Aztec, New Mexico 87410; and copies are available, for a duplication fee.

FOR FURTHER INFORMATION CONTACT: Theresa Nichols, Chief of Resources Management, Aztec Ruins National Monument, telephone: (505) 334–6174, ext. 23, or e-mail at *Terry_nichols@nps.gov*.

SUPPLEMENTARY INFORMATION: You may submit comments by mailing or hand-delivering them to the park at the address provided above, or electronically filing them to the e-mail address provided above. Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home address from the record, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold from the record 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. 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.

Dennis Carruth,

Superintendent, Aztec Ruins National Monument.

[FR Doc. 05–352 Filed 1–6–05; 8:45 am]

BILLING CODE 4312–ET–P

DEPARTMENT OF THE INTERIOR

National Park Service

Delaware Water Gap National Recreation Area Citizen Advisory Commission Meeting

AGENCY: National Park Service; Interior.

ACTION: Notice of public meetings.

SUMMARY: This notice announces three public meetings of the Delaware Water Gap National Recreation Area Citizen Advisory Commission. Notice of these meetings is required under the Federal Advisory Committee Act, as amended (5 U.S.C. App.2).

DATES: Saturday, March 12, 2005, at 9 a.m. Snow date: Saturday, March 19, 2005 at 9 a.m.

ADDRESSES: Sandyston Township Building, Layton, New Jersey 07851.

The agenda will include reports from Citizen Advisory Commission members including Commission committees such as Recruitment, Natural Resources, Inter-Governmental, Cultural Resources, By-Laws, Special Projects, and Public Visitation and Tourism. Superintendent John J. Donahue will give a report on various park issues, including cultural resources, natural resources, construction projects, and partnership ventures. The agenda is set up to invite the public to bring issues of interest before the Commission. This meeting will be immediately followed by the Commission's annual meeting and election of officers.

DATES: Saturday, March 12, 2005, at 9 a.m. Snow date: Saturday, March 19, 2005 at 9 a.m.

ADDRESSES: Sandyston Township Building, Layton, New Jersey 07851.

The agenda will include the election of Commission officers for the 2005–2006 term.

DATES: Thursday, May 5, 2005, at 7 p.m.

ADDRESSES: Northampton County 911 Center, Gracedale, Nazareth, Pennsylvania 18064.

The agenda will include reports from Citizen Advisory Commission members including Commission committees such as Recruitment, Natural Resources, Inter-Governmental Cultural Resources, Special Projects, and Public Visitation and Tourism. Superintendent John J. Donahue will give a report on various park issues, including cultural resources, natural resources, construction projects, and partnership ventures. The agenda is set up to invite the public to bring issues of interest before the Commission.

FOR FURTHER INFORMATION, CONTACT: Superintendent John J. Donahue, (570) 588–2418.

SUPPLEMENTARY INFORMATION: The Delaware Water Gap National Recreation Area Citizen Advisory Commission was established by Public Law 100–573 to advise the Secretary of the Interior and the United States Congress on matters pertaining to the management and operation of the Delaware Water Gap National Recreation Area, as well as on other matters affecting the recreation area and its surrounding communities.

Dated: December 6, 2004.

John J. Donahue,

Superintendent.

[FR Doc. 05–355 Filed 1–6–05; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

Golden Gate National Recreation Area Notice of Public Meetings For Calendar Year 2005

Notice is hereby given that public meetings of the Golden Gate National Recreation Area will be scheduled quarterly for calendar year 2005 to hear presentations on issues related to management of the Golden Gate National Recreation Area. These public meetings are scheduled for the following dates at San Francisco and at locations yet to be determined in San Mateo County and Marin County, California:

Tuesday, January 18—San Francisco, CA
Tuesday, April 19—Location TBA
Tuesday, July 19—Location TBA
Tuesday, October 18—Location TBA, or
Tuesday, November 15—Location TBA

All public meetings will be held at 7 p.m. at GGNRA Part Headquarters, Building 201, Fort Mason, Bay and Franklin Streets, San Francisco, except those which will be held at 7 p.m. at locations to be announced (TBA) in San Mateo County and Marin County, California. Information confirming the time and location of all public meetings or cancellations of any meetings can be received by calling the Office of the Public Affairs at (415) 561–4733 or (415) 561–4730.

Anticipated possible agenda items at meetings during calendar year 2005 may include:

- Updates on the Negotiated Rulemaking Process (Reg-Neg) for dog management and concurrent NEPA process
- Updates on Planning Issues for Fort Baker
- Doyle Drive Planning Update
- Updated on Marin Comprehensive Transportation Management Planning
- Reports on Water Transportation Planning to Park Sites
- Update on Golden Gate Bridge Seismic Upgrade Project and Park Impacts

• Update on the Trails Forever Initiative
• Reports on GGNRA education programs
• Update on Crissy Field projects
• Updates on the Sutro Design Plan, including transportation issues and planning for the Merrie Way Visitor Center
• Update Reports on Fort Mason Center Pier One and Pier 3 Seismic Work
• Updates on Site Stewardship Program
• Golden Gate National Parks Conservancy annual briefing
• Redwood Creek Watershed Planning
• Reports on Alcatraz Historic Preservation and Safety Construction Phase II
• Update on park expansion legislation
• Update on transfer of properties within GGNRA boundary to NPS management
• Issues affecting San Mateo County national park lands, including updates on the Jefferson-Martin 230kV Transmission Line and Mori Point Restoration
• Update reports on ''Park Partner'' programs, including the California Marine Mammal Center Improvements
• Updates on Fort Mason Reuse projects and Upper Fort Mason planning
• Update on internal scoping for the park General Management Plan (GMP)

These meetings will also contain Superintendent's Report on timely park issues and events and will be led by a facilitator. Specific final agendas for these meetings will be made available to the public at least 15 days prior to each meeting and can be received by contacting the Office of the Staff Assistant, Golden Gate National Recreation Area, Building 201, Fort Mason, San Francisco, California 94123 or by calling (415) 561–4733. They are also noticed on the Golden Gate National Recreation Area Web site *http://nps.gov/goga* under the section ''Public Meetings''.

All meetings are open to the public. They will be recorded for documentation and transcribed for dissemination. Sign language interpreters are available by request at least one week prior to a meeting. The TDD phone number for these requests is (415) 556–2766. A verbatim transcript will be available three weeks after each meeting. For copies of the agendas contact the Office of the Staff Assistant, Golden Gate National Recreation Area, Building 201, Fort Mason, San Francisco, California 94123.

Dated: December 21, 2004.

Rich Weideman,

Acting General Superintendent, Golden Gate National Recreation Area.

[FR Doc. 05–353 Filed 1–6–05; 8:45 am]

BILLING CODE 4312–FN–M

DEPARTMENT OF THE INTERIOR

National Park Service

Kaloko-Honokohau National Historical Park Advisory Commission; Notice of Meeting

Notice is hereby given in accordance with the Federal Advisory Committee Act that a meeting of the Na Hoapili O Kaloko Honokohau, Kaloko-Honokohau National Historical Park Advisory Commission will be held at 9 a.m., January 22, 2005 at the Makaha Resort Hotel, Waianae, Hawaii.

The agenda will include Planning and Development of the Live-In Cultural Center, and Review of Draft Wayside Exhibits for the park.

The meeting is open to the public. The hotel is accessible to persons with disabilities. Disabled persons requiring special assistance should contact the Superintendent at (808) 329–6881 ext. 7, 7 days prior to the meeting.

Minutes will be recorded for documentation and transcribed for dissemination. Minutes of the meeting will be available to the public after approval of the full Advisory Commission. Transcripts will be available after 30 days of the meeting.

For copies of the minutes, contact Kaloko-Honokohau National Historical Park at (808) 329–6881.

Dated: December 15, 2004.

Geraldine K. Bell,

Superintendent, Kaloko-Honokohau National Historical Park.

[FR Doc. 05–354 Filed 1–6–05; 8:45 am]

BILLING CODE 4312–GH–M

DEPARTMENT OF THE INTERIOR

National Park Service

National Register of Historic Places; Notification of Pending Nominations

Nominations for the following properties being considered for listing in the National Register were received by the National Park Service before December 18, 2004. Pursuant to section 60.13 of 36 CFR part 60 written comments concerning the significance of these properties under the National Register criteria for evaluation may be forwarded by United States Postal Service, to the National Register of Historic Places, National Park Service, 1849 C St. NW., 2280, Washington, DC 20240; by all other carriers, National Register of Historic Places, National Park Service, 1201 Eye St. NW., 8th floor, Washington, DC 20005; or by fax, (202) 371–6447. Written or faxed comments should be submitted by January 24, 2005.

Carol D. Shull,

Keeper of the National Register of Historic Places.

COLORADO

Boulder County

McKenzie Well, Near Independence Rd. and CO 119, Boulder, 04001553

Denver County

McClintock Building, (Downtown Denver MPS), 1550–58 California St./622–40 16th St., Denver, 04001554

Telephone Building, (Downtown Denver MPS), 931 14th St., Denver, 04001555

Connecticut

Fairfield County

Hodgson, Richard and Geraldine, House, 881 Ponus Ridge Rd., New Canaan, 04001549

New Haven County

Mory's, 306 York St., New Haven, 04001552

New London County

Central Vermont Railroad Pier, State Pier Rd., New London, 04001551

GEORGIA

Carroll County

Lawler Hosiery Mill, 301 Bradley St., Carrollton, 04001558

Dooly County

Vienna Historic District, (Georgia County Courthouses TR (AD)), Roughly centered on the downtown commercial district and includes residential areas and the rail line, Vienna, 04001557

MISSOURI

Moniteau County

High Point Historic District, 61235–61243 MO C, High Point, 04001561

St. Louis Independent City

Buster Brown Blue Ribbon Shoe Factory, 1526 N. Jefferson Ave., St. Louis (Independent City), 04001560

Ford Apartments, 1405 Pine St., St. Louis (Independent City), 04001562

Sanford Avenue Historic District, 1000 blk. Sanford Ave., St. Louis (Independent City), 04001559

SOUTH CAROLINA

Lee County

Dennis High School, (African-American Primary and Secondary School Buildings MPS), 410 W. Cedar Ln., Bishopville, 04001565

Pickens County

Smith, J. Warren, House, 21 N. Palmetto St., Liberty, 04001564

Spartanburg County

First Presbyterian Church of Woodruff, 300 W. Georgia St., Woodruff, 04001563

UTAH

Salt Lake County

Landenberger, John C. and Mary, House, 58 N. Virginia St., Salt Lake City, 04001567

Murray Downtown Residential Historic District, (Murray City, Utah MPS), Roughly bounded by 4800 South, Clark St., Vine St. and Center St., Murray, 04001566

WASHINGTON

Washington County

Forest Grove, 1200 GA 242/Riddleville Rd., Sandersville, 04001556

[FR Doc. 05–349 Filed 1–6–05; 8:45 am]

BILLING CODE 4312–51–P

DEPARTMENT OF THE INTERIOR

National Park Service

National Register of Historic Places; Notification of Pending Nominations

Nominations for the following properties being considered for listing in the National Register were received by the National Park Service before December 25, 2004. Pursuant to section 60.13 of 36 CFR Part 60 written comments concerning the significance of these properties under the National Register criteria for evaluation may be forwarded by United States Postal Service, to the National Register of Historic Places, National Park Service, 1849 C St. NW., 2280, Washington, DC 20240; by all other carriers, National Register of Historic Places, National Park Service, 1201 Eye St. NW., 8th floor, Washington DC 20005; or by fax, 202–371–6447. Written or faxed comments should be submitted by January 24, 2005.

Carol D. Shull,

Keeper of the National Register of Historic Places.

ALASKA

Southeast Fairbanks Borough-Census Area, Slana Roadhouse, Mile 1, Nebesna Rd., Slana, 04001569

Wrangell-Peterburg Borough-Census Area, Cape Decision Light Station, (Light Stations of the United States MPS), SW extremity of Kuiu Island, N of the jct of Chatham and Sumner Straits, approx. 63 mi. S of Sitka, Sitka, 04001568

CONNECTICUT

Hartford County

Avon Center Historic District, Roughly along Old Farm Rd., Farrington Valley Greenway, Ct 44 and Mt. View Ave., Avon, 04001570

FLORIDA

Palm Beach County

Palm Beach Town Hall, 360 South County Rd., Palm Beach, 04001571

MASSACHUSETTS

Middlesex County

Old Town Hall, 10 Kendal Rd., Tynsborough, 04001574

Suffolk County

Morton Street, Metropolitan Park System of Greater Boston, (Metropolitan Park System of Greater Boston MPS), Morton St., Boston, 04001572

Neponset Valley Parkway, Metropolitan Park System of Greater Boston, (Metropolitan Park System of Greater Boston MPS), Neponset Valley Parkway, Boston, 04001573

MICHIGAN

Houghton County

Laurium Historic District, Roughly bounded by Calumet, Stable, N. Florida, and Isle Royale Sts., Laurium, 04001578

Leelanau County

Core, William and Margaret McFarland, Farm, 5946 S. Center Hwy; 5856 S. Lake Leelanau Dr., Bingham Township, 04001579

Wayne County

Cass Park Historic District, Temple, Ledyard, and 2nd at Cass Park, Detroit, 04001580

Denby, Edwin, High School, 12800 Kelly Rd., Detroit, 04001581

Detroit Club, 712 Cass Ave., Detroit, 04001577

MISSOURI

Greene County

Wilhoit, E.M., Building, (Springfield, Missouri MPS (Additional Documentation)) 300–330 E. Pershing St., Springfield, 04001576

Scott County

Commerce City Hall, Village Square bordered by Tywappity, Cape Girardeau, Spring and Washington, Commerce, 04001575

NEW MEXICO

Otero County

St. Joseph Apace Mission Church, 626 Mission Trail, Mescalero, 04001588

NORTH CAROLINA

Northampton County

Mason—Hardee—Capel House, NC 1308, 0.8 mi. W of NC 1307, Garysburg, 04001587

Robeson County

Rowland Main Street Historic District, Roughly bounded by the 100 and 200 blks of W. Main St., 100 blk of E. Main St., and Hickory and E and W Railroad Sts., Rowland, 04001582

Stokes County

Christ Episcopal Church, 412 Summit Ave., Walnut Cove, 04001586

Vance County

West End School, 1000 S. Chestnut St., Henderson, 04001585

Wake County

Washington Graded and High School, 1000 Fayetteville St., Raleigh, 04001584

Watauga County

Valle Crucis Historic District, Along NC 194 and NC 1112, Valle Crucis, 04001600

Wayne County

Borden Manufacturing Company, 800 and 801 N. William St., Goldsboro, 04001583

RHODE ISLAND

Providence County

Elmgrove Gardens Historic District, Rochambeau, Morris and Cole Aves. and Fosdyke and Woodbury Sts., Providence, 04001589

SOUTH CAROLINA

Richland County

Olympia Mill, 500 Heyward St., Colimbia, 04001590

Spartanburg County

Shiloh Methodist Church, Blackstock Rd., Inman, 04001591

VIRGINIA

Bristol Independent City, Douglass School, 711 Oakview Ave., Bristol (Independent City), 04001592

WASHINGTON

Whatcom County

Morse Hardware Company Building, 1023–1025 N. State St., Bellingham, 04001594

Sanitary Meat Market, (Commercial Buildings of the Central Business District of Bellingham, Washington MPS) 1015–1019 N. State St., Bellingham, 04001593

WEST VIRGINIA

Lewis County

Jackson's Mill State 4–H Camp Historic District, 160 Jackson Mill Rd., Weston, 04001598

Weston Downtown Residential Historic District, Portions of Main, Center, and Court Aves, East First, East Third, East Fourth, East Fifth and East Sixth Sts., Weston, 04001596

Monongalia County

Greenmont Historic District, Roughly bounded by Arlington, Front, Conn, White Ave., Posten Ave., Kingwood St., and Decker Ave., Morgantown, 04001597

Randolph County

Elkins Milling Company, 2½ Railroad Ave., Elkins, 04001595

[FR Doc. 05–350 Filed 1–6–05; 8:45 am]

BILLING CODE 4312–51–P

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Intent to Repatriate Cultural Items: American Museum of Natural History, New York, NY; Republication

Editorial Note: Federal Register Notice document 04–28004 was published originally in the **Federal Register** of Wednesday, December 22, 2004 at 69 FR 76778. The document published was a duplicate of document 04–28001. The corrected document is published in its entirety.

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3005, of the intent to repatriate cultural items in the possession of the American Museum of Natural History, New York, NY, that meet the definition of ''sacred objects'' under 25 U.S.C. 3001.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of these cultural items. The National Park Service is not responsible for the determinations in this notice.

The 9 cultural items are 3 inscribed birch bark rolls, 2 rattles, 1 beaded ceremonial bag, 1 fawn skin bag, 1 food fungus, and 1 black dye.

The Mide bark song roll is oblong with rounded ends and measures 45 x 8 x 0.5 cm. The Mide bark roll is rectangular, measuring 34 x 24 x 5 cm and is inscribed with the figure of a man. The medicine bark roll is rectangular and measures 36 x 26 x 2 cm. The birchbark rattle has a cylindrical head painted with a blue stripe that is attached to a wooden handle. The doctor's rattle consists of a circular wooden frame covered with hide. The ceremonial bag is a bandolier-type bag beaded in a floral motif and has a fringed bottom. The base of the shoulder strap also contains the beaded image of a man and two horses. The fawn skin bag is used to hold wild rice. The fungus is a black food fungus. The black dye has been identified by a Bois Forte representative as vermilion.

In 1903, William Jones acquired the cultural items from the Bois Forte Indian Reservation in Minnesota during an American Museum of Natural History funded expedition. The Museum accessioned the cultural items into its collection the same year.

The cultural affiliation of the cultural items is Bois Forte (Nett Lake) Band of the Minnesota Chippewa Tribe as indicated by Museum records and by consultation evidence presented by the Bois Forte (Nett Lake) Band of the Minnesota Chippewa, Minnesota. Museum records indicate that the cultural items are Ojibway and that they were acquired from the Bois Forte Indian Reservation in Minnesota.

Officials of the American Museum of Natural History have determined that, pursuant to 25 U.S.C. 3001, (3)(C), the cultural items are specific ceremonial objects needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents. Officials of the American Museum of Natural History also have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the sacred objects and the Bois Forte (Nett Lake) Band of the Minnesota Chippewa Tribe, Minnesota.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with these sacred objects should contact Nell Murphy, Director of Cultural Resources, American Museum of Natural History, Central Park West at 79th Street, New York, NY 10024, telephone (212) 769-5837, before January 21, 2005. Repatriation of the sacred objects to the Bois Forte (Nett Lake) Band of the Minnesota Chippewa Tribe, Minnesota may proceed after that date if no additional claimants come forward.

The American Museum of Natural History is responsible for notifying Bois Forte (Nett Lake) Band of the Minnesota Chippewa, Minnesota, and the Minnesota Chippewa Tribe, Minnesota that this notice has been published.

Dated: November 16, 2004.

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. R4–28004 Filed 1–6–05; 8:45 am]

BILLING CODE 1501–01–D

DEPARTMENT OF THE INTERIOR

National Park Service

AGENCY: National Park Service, Interior.

ACTION: Notice of availability of the Draft Site Progress Report to the World Heritage Committee, Yellowstone National Park.

SUMMARY: Pursuant to the Decision adopted by the 27th Session of the World Heritage Committee (Document: WHC–03/27.COM/7A.12) accepted by the United States Government, the National Park Service (NPS) announces the publication for comment of a Draft Site Progress Report to the World Heritage Committee for Yellowstone National Park, Wyoming, Idaho and Montana.

DATES: There will be a 30-day public review period for comments on this document. Comments must be received on or before February 7, 2005.

ADDRESSES: The Draft Site Report is included in the supplementary information section of this notice. Copies are also available by writing to Suzanne Lewis, Superintendent, Yellowstone National Park, Post Office Box 168, Yellowstone National Park, WY 82190–0168; by telephoning (307) 344–2002; by sending an e-mail message to *yell_world_heritage@nps.gov*; or by picking up a copy in person at the park's headquarters in Mammoth Hot Springs, Wyoming 82190. The document is also posted on the park's Web site at *http://www.nps.gov/yell/publications/worldheritage/*.

FOR FURTHER INFORMATION CONTACT: Suzanne Lewis, Superintendent, Yellowstone National Park, Post Office Box 168, Yellowstone National Park, WY 82190–0168, or by calling (307) 344–2002.

SUPPLEMENTARY INFORMATION:

A. The World Heritage Committee Decision

In 1995, the World Heritage Committee, with the agreement of the United States, placed Yellowstone National Park, a designated World Heritage site, on its List of World Heritage in Danger in response to specific threats it identified to the outstanding universal value of the park. At its 27th Session in July 2003, the Committee decided to remove the park from the Danger List. The decision (27 COM 7A.12) is conveyed below:

The World Heritage Committee,

1. *Notes* the detailed report by the State Party provided on April 17, 2003;

2. *Urges* the State Party to continue to report on Yellowstone's snowmobile phase-out and other efforts to ensure that winter travel facilities respect the protection of the Park, its visitors, and its wildlife;

3. *Recommends* that the State Party continue its efforts in ensuring the McLaren Mine tailings are not contaminating the property;

4. *Recognizes* the progress made in addressing all the key issues that led to Danger Listing of the property in 1995 and considers that the reasons for retaining the property on this List no longer exist;

5. *Congratulates* the State Party for the considerable efforts and suggests to use this as a model case for promoting success stories of the World Heritage Convention and for international co-operation with other States Parties facing similar problems in World Heritage properties;

6. *Decides* to remove the property from the List of World Heritage in Danger.

7. *Invites* the State Party:

(a) to continue its commitment to address the issues that have concerned the Committee in the past;

(b) to provide to the World Heritage Centre by 1 February 2005, existing recovery plans setting out targets and indicators for the 6 remaining long-term management issues (mining activities outside the park, threats to bison, threats to cutthroat trout, water quality issues, road impacts, visitor use impacts);

(c) to continue to report to the Committee on the condition of the original threats and the progress made towards resolving these issues until such time that the Committee decides that the reports are no longer needed. These reports shall include public input, including—but not limited to—independent experts, NGOs, and other key stakeholders.

B. The NPS's Draft Site Report

In accordance with the Committee's request included in its decision to remove the park from the Danger List, the NPS has prepared a Site Report to continue to provide information to the World Heritage Committee on the original threats and the progress made towards resolving these issues. The Site Report provides a synopsis of the current status of the six specific threats outlined in 7(b) of the Committee's decision. The full text of the draft Site Report is as follows.

Yellowstone National Park Report to the World Heritage Committee; Status of Key Issues, January 2005

Introduction

Yellowstone National Park (Yellowstone) was inscribed as a World Heritage Site in 1978. Yellowstone National Park was inscribed as a World Heritage Site in Danger on December 5, 1995. In their report, the World Heritage Committee (WHC) cited specific threats and dangers that were already affecting, were beginning to affect, or had potential to seriously derogate the outstanding universal value for which Yellowstone was established as the nation's first national park, and one of the first World Heritage Sites. In July 2003, the WHC congratulated the park for ''the considerable efforts'' that went into ''the progress made in addressing all the key issues that led to Danger Listing of the site * * *'' and considers ''* * *the reasons for retaining the site on this List no longer exist.'' As a consequence, Yellowstone National Park was removed from the list of World Heritage Sites in Danger.

However, the WHC invited Yellowstone to (1) continue its commitment to address the original issues; (2) provide the WHC recovery plans regarding those issues; (3) continue to provide progress reports to WHC on the original threats and to provide opportunities for the public and interested NGOs to comment on the progress reports.

In keeping with the WHC's request, this document is the second progress report, and includes plans and actions currently planned or underway, that specifically seek to redress the 1995 threats and dangers to the outstanding universal value.

See: *http://www.nps.gov/yell/index.htm* and *http://www.nps.gov/yell/publications/worldheritage/*.

In all resource cases described below, Yellowstone is guided first by the relevant statutory laws of the United States emphasizing parks such as the Yellowstone Organic Act (16 U.S.C. 21–22), NPS Organic Act (16 U.S.C. 1 *et seq.*), General Authorities Act (16 U.S.C. 1a–1), National Parks and Recreation Act (16 U.S.C. 1a–7), the ''Redwood Act'' (16 U.S.C. 1a–1), and the National Parks Omnibus Management Act (16 U.S.C. 5901 *et seq.*). In addition, other national statutes in part dwell on parks such as the Clean Air Act (42 U.S.C. 7401 *et seq.*), Federal Water Pollution Control Act (33 U.S.C. 1251 *et seq.*), Wilderness Act (16 U.S.C. 1131 *et seq.*), National Environmental Policy Act (42 U.S.C. 4332 *et seq.*), Endangered Species Act (7 U.S.C. 136 as amended), Geothermal Steam Act (30 U.S.C. 1001 *et seq.*), Antiquities Act (16 U.S.C. 431 *et seq.*), Historic Sites Act (49 Stat. 666), National Historic Preservation Act (80 Stat. 915 as amended), Archaeological and Historic Preservation Act (88 Stat. 174), are examples among many others.

Any of these statutes can be retrieved from: *http://data2.itc.nps.gov/npspolicy/getlaws.cfm*.

In many instances, Presidential Executive Orders and ''Rules,'' or Regulatory Law, are more specific and focused than statutes and serve as detailed operating principles for the national parks.

For Executive Orders see: *www.gpoaccess.gov/fr/index.html*.

For the Code of Federal Regulations see: *http://data2.itc.nps.gov/npspolicy/getlaws.cfm*. *www.gpoaccess.gov*.

Finally, relevant governance for National Park Service (NPS) activities that are the most detailed are the NPS Management Policies and Director's Orders that are available and can be readily located at: *http://data2.itc.nps.gov/npspolicy/getlaws.cfm*.

Progress on 1995 Threats

Mining Activities

Threat in 1995: The New World Mine was a major Crown Butte Mines, Inc. proposal to reopen an older mining area on patented and U.S. Forest Service lands to new gold and silver harvest. The site was adjacent to the Absaroka-Beartooth Wilderness area (Gallatin National Forest) and Yellowstone National Park and was perceived to be a major threat to the resources of the National Forest Wilderness and Yellowstone National Park.

Outcome: The U.S. government and Crown Butte Mines, Inc. signed an agreement in 1996 to refrain from mining these lands, and the Congress appropriated $65 million for the acquisition of lands and interests, including cleanup of toxic overburden and tailings left over from a century of previous mining activity.

Status: The new mining proposal was shelved and most of the property was transferred to public domain. Cleanup of toxic materials from past mining started in 2000 and is expected to take 7 years, but post-project maintenance will be funded in perpetuity. One such site, the McLaren mine tailings, was left out of the cleanup agreement and, while the tailings (which are outside the Yellowstone) have stabilized and water quality inside the park has improved, the Yellowstone continues efforts to have them removed and the site restored.

Plans/Actions: See: *http://www.nps.gov/yell/stateofthepark.htm*. *http://www.fs.fed.us/r1/gallatin*. *http://www.maximtechnologies.com/newworld*.

Threats to Bison

Threat in 1995: Yellowstone bison, some of which are infected with *Brucella abortus*, the agent that causes the disease Brucellosis, occasionally roam outside park boundaries. These bison may potentially transmit *Brucella* to livestock grazing outside the park which could jeopardize the ''Brucellosis Free'' status of states bordering Yellowstone. As such, the states view the presence of *Brucella* in park wildlife as a significant economic threat to the livestock industry. Occasionally, animals migrate out of the park and some are destroyed, especially when bison population numbers are high and the winters are severe.

Outcome: In 2000, Yellowstone National Park, State of Montana, U.S. Forest Service, USDA Plant and Animal Health Inspection Service cosigned a joint bison management

plan that agreed to conserve bison populations yet manage the risk of transmission from bison to cattle within the State of Montana. This is a long-term plan that should manage risks in the short- and medium-term, but set the stage for future discussions about eradication of the disease. It is also an incremental plan that becomes more wildlife-friendly and yet lowers transmission risk to cattle with each incremental success.

Status: This carefully crafted consensus-based plan has been successfully implemented for 4 years. While many people in the conservation community do not support the plan, in the last four years the core Yellowstone bison population has been sustained at or above ~3000 animals, which is considered a high population level. In addition, the plan addresses each of the major issues regarding the risk of brucellosis transmission from bison to livestock. For the first time ever, non-infected bison captured at the boundary in the winter of 2003–2004, were vaccinated against the disease and released back into Yellowstone instead of being destroyed. An Environmental Impact Study concerning the remote vaccination of herds within Yellowstone was officially begun in 2004, and includes substantial regional public involvement. Discussions and research continue to consider ways to eventually eliminate brucellosis from wildlife in the Greater Yellowstone Area while maintaining wild and free ranging wildlife herds.

Plans/Actions: See:

http://www.nps.gov/yell/technical/planning/index.htm.
http://www.nps.gov/yell/publications/index.htm.
http://www.nps.gov/yell/technical/planning/bison/index.htm.

Threats to Cutthroat Trout

Threats in 1995: In 1994, voracious, predatory, non-native lake trout were discovered in Yellowstone Lake threatening the existence of the rare, endemic Yellowstone cutthroat trout, plus 42 other native birds and mammals that more or less depend on cutthroat trout for survival. It could also potentially destroy a sport fishery that once had a $36 million annual value.

Outcome: Fish experts have concluded that the risk of functional extinction of the native trout was real, substantial, and urgent, but that no technology is known to completely eradicate lake trout from the lake. The best that could be hoped for was long-term suppression of lake trout, through the annual deployment of ''industrial-strength gillnetting.'' This partial solution was implemented by NPS beginning in 1995, targeting the lake trout that are thought to have been in the lake and reproducing for about 20 years. A no-limit, no-live-release regulation on lake trout for sport anglers was also put into effect.

Status: The gillnetting fishing effort has increased each year and has resulted in the destruction of over 100,000 adult and juvenile lake trout. Catch-per-unit-effort (CPUE) has declined considerably from the high in 1998 and has generally continued to decline annually since that time, which suggests the program has measurably reduced the population in 2003 and 2004, and if the CPUE continues to decline it also signals an indication that the population is collapsing.

Plans/Actions: In addition to annual refinements in gillnetting technology to improve take-efficiency, nighttime electrofishing over lake trout spawning beds was attempted for the first time with encouraging success, perhaps opening a new, independent method of efficient harvest. Discussions on methods of destroying fertilized eggs and larval fish in lake bottom rubble are at an early stage of discussion and may lead to additional measures of control.

See:

http://www.nps.gov/yell/stateofthepark.htm.
http://www.nps.gov/yell/publications/index.htm.
http://www.nps.gov/yell/publications/index.htm.
http://www.nps.gov/yell/planvisit/todo/fishing/fishreports.htm.
http://www.nps.gov/yell/tours/thismonth/aug2004/fish/index.htm (video clips).

Water Quality Issues

Threats in 1995: Yellowstone National Park hosts almost 5 million human use days annually. Old, outdated waste treatment plants, lift stations, and underground lines, and older single wall fuel tanks were causing an unacceptable level of accidental overflows, ruptures, and spills affecting soils, ground and surface waters degrading localized wild lands. In 1995, the failing wastewater treatment plant at Norris Village was closed upon recommendations of the U.S. Public Health Service.

Outcome: In the past five years Congress has appropriated $22 million for water and sewage projects and special monies to replace all single wall fuel tanks. These projects have reduced the backlog in the arena by approximately 30%.

Status: All of the park's fuel storage tanks have been replaced with new double-walled liquid tanks or replaced with more environmentally friendly propane gas tanks. A new wastewater plant has been constructed at Old Faithful, the closed Norris system is being replaced now, and the Madison system is being designed. Older or problematic lift stations, lines, grease traps have been replaced at many locations in the park. A backlog of deteriorated smaller wastewater facilities remain and aged (pre-1966) distribution systems in Yellowstone and will be replaced or updated in the future as funds are available.

Plans/Actions: See:

http://www.nps.gov/yell/stateofthepark.htm.
http://www.nps.gov/yell/publications/pdfs/strategicplan.pdf.
http://www.nps.gov/yell/technical/planning/index.htm.

Road Impacts

Threats in 1995: Yellowstone's road system was never designed for the volume, size, and weight of vehicles that travel through the park today. The park maintains 478 miles of roads of which 310 are paved and considered primary roads for the public. The remaining 156 miles are paved or gravel secondary roads for service and/or light public use. Road engineers, maintenance workers, and virtually all the visiting public considered the condition of the road system in 1995 deplorable.

Outcome: In partnership with the Federal Highway Administration, Yellowstone has an integrated, methodical and long-term program to improve the fabric of the park's roads and lessen unsafe conditions and unsatisfactory experiences for visitors, and prevention of resource degradation. An annual funded program of complete bed and/or surface replacement is expected to continue through 2017 although the Transportation Bill that has funded reconstruction expired in 2003 and a new Bill has not yet been authorized.

Status: Much has been accomplished since 1995 upgrading the existing road system, but it is a slow process because of the short summer construction season and the reality that reconstruction must be reasonably compatible with summer visitors. As noted above, the current program will be carried out annually through the year 2017, if the Transportation Bill is reauthorized, after-which the structural deficiencies should be corrected. The park also issued its Business Plan in 2003, which is its statement of operational needs for the next 5 years. In that plan, deficiencies in cyclical maintenance of roads are articulated and, if the park has authorized cyclical maintenance funding, this would keep the new, rebuilt roads in top, non-deteriorating condition.

Plans/Actions: See:

http://www.nps.gov/yell/stateofthepark.htm.
http://www.nps.gov/yell/businessplan/index.htm.
http://www.nps.gov/yell/technical/planning/index.htm.

Visitor Use Impacts

Threats in 1995: Increasing visitor pressures on the natural and cultural resources of the park have been of concern to managers for many years. Recently, the park has hosted about 3 million visitors per year, which represents roughly 5 million visitor-use days annually. The quality of a visitor's Yellowstone experience in terms of sights, sounds and smells has also been extensively debated. Concerns have been raised most strongly regarding winter use in the park, although peak summer season crowding has been an issue for some. The number of visitors in the park, whether summer or winter, is a contentious subject with the U.S. public, who are divided among those who believe the park is overused, or that use is about right, or that the park could handle more visitors. The NPS Mission is to conserve the natural and cultural resources and to provide for the public enjoyment of the same in such manner as will leave them unimpaired for future generations.

Outcome: Winter use has been very controversial starting with a decision in 2000 to ban snowmobiles and replace them with snow coaches. Litigation and decisions by two different Federal judges have affected the decisionmaking process. Most recently, the 2000 decision was vacated by a Federal judge. The NPS has just published a final rule for a Temporary Winter Use Plan that substantially reduces the daily maximum

number of snowmobiles from historic highs (720 compared to 1,650 per peak day), requires the use of best available technology, which will reduce emissions (by 90%) and noise, and require all travel groups to be accompanied by guide to reduce wildlife conflicts.

Status: The NPS believes the most recent decision addresses winter use-related issues and the park's goals of protecting park resources, protecting employee and visitor health and safety, and improving the quality of the visitor experience. The NPS also believes the final rule for a Temporary Winter Use Plan honors the rulings of both Federal judges and is hopeful that legal challenges will not disrupt the implementation of the interim plan. A provision in the recently signed appropriations law guarantees that the interim plan will be in effect for at least the 2004–05 winter season. The NPS will be developing a new Environmental Impact Statement to address the long term winter use issue and that process is expected to take several years to complete.

Spring, summer, and fall visitation continues to be below the high level measured in 1995, and visitor growth appears to have diminished as an issue in the eyes of many. Separately, the park has focused on development of partnerships to encourage more sustainability in visitor use. Several partnerships encourage use of alternate fuels for transportation and facilities or highlight hybrid automobiles for transportation. Another partnership is working to reduce solid waste, foster recycling, and grow into large-scale composting of organic materials. These partnerships should help the park and adjacent communities foster a region-wide approach serving visitors more efficiently and with less resource consumption in the future.

Plans/Actions: See:

http://www.nps.gov/yell/stateofthepark.htm.
http://www.nps.gov/yell/technical/planning/winteruse/plan/index.htm.

C. Public Comment Solicitation

Persons wishing to comment may do so by any one of several methods. They may mail comments to Suzanne Lewis, Superintendent, Yellowstone National Park, PO Box 168, Yellowstone National Park, WY 82190–0168. They also may comment via e-mail to *yell_world_heritage@nps.gov* (include name and return address in the e-mail message). Finally, they may hand-deliver comments to park headquarters in Mammoth Hot Springs, Wyoming 82190.

The NPS practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request we withhold their home address from the record, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold from the record a respondent's identify, 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.

Dated: January 3, 2005.

Paul Hoffman,

Deputy Assistant Secretary, Fish and Wildlife and Parks.

[FR Doc. 05–351 Filed 1–6–05; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF LABOR

Employment and Training Administration

Information Regarding the Relocation of Foreign Labor Certification Staff in the Atlanta and Chicago Regional Offices to the Atlanta and Chicago National Processing Centers

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice.

SUMMARY: The Employment and Training Administration (ETA) of the Department of Labor (Department or DOL) is issuing this Notice to announce that DOL has moved its foreign labor certification field staff in the Atlanta and Chicago Regional Offices to the new Atlanta and Chicago National Processing Centers. This Notice provides the public in the Atlanta and Chicago regions with contact information regarding these two new processing centers. All foreign labor certification processing activities previously conducted in the Atlanta and Chicago Regional Offices will now be assumed by the corresponding Atlanta or Chicago National Processing Centers.

The regulation to implement the re-engineered permanent labor certification program was published in the **Federal Register** on December 27, 2004. The National Processing Centers will continue current functions on an interim basis and ETA will provide additional guidance as to the handling of cases which will be filed under the new rule as well as backlogged permanent labor certification cases.

Employers in the Atlanta and Chicago regions requesting H–2A workers should simultaneously submit H–2A applications to their appropriate State Workforce Agency (SWA) and respective National Processing Center. These H–2A applications should no longer be submitted to ETA's Atlanta or Chicago Regional Offices. Employers in the Atlanta and Chicago regions requesting either permanent or H–2B workers should continue, until ETA publishes future guidance on this issue, to file permanent and H–2B applications with the appropriate SWA.

FOR FURTHER INFORMATION CONTACT: William Carlson, Chief, 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).

SUPPLEMENTARY INFORMATION: The two National Processing Centers opened as of December 13, 2004, and assumed, on an interim basis, responsibility for processing Applications for Alien Employment Certification (ETA Form 750) for permanent employment, and H–2A, and H–2B applications previously processed by ETA's Atlanta and Chicago Regional Offices. The two new National Processing Centers will handle permanent labor certification cases to be filed under the soon-to-be effective regulation implementing the new permanent labor certification program.

As recently announced, ETA has issued a new form to be used when filing applications under the H–1B and H–1B1 programs. Please see 69 FR 69412 published on November 29, 2004, for additional details. The mailing address and fax number for H–1B and H–1B1 case processing operations remain the same. The H–1B and H–1B1 address and fax number are: ETA Application Processing Center, P.O. Box 13640, Philadelphia, PA 19101, Fax: (800) 397–0478.

ADDRESSES: The following new addresses, phone numbers, and fax numbers should be used by employers and by SWAs for either inquiries or for the forwarding of application materials, as appropriate. *Please note:* for all application materials, inquiries, and other correspondence sent to either the Atlanta or Chicago National processing Center, envelopes should be clearly marked according to the appropriate program type, *i.e.,* permanent, H–2A, or H–2B.

Atlanta Processing Center Address: U.S. Department of Labor Employment and Training Administration, Foreign Labor Certification National Processing Center, Harris Tower, 233 Peachtree Street, Suite 410, Atlanta, Georgia 30303, Phone: (404) 893–0101, Fax: (404) 893–4642.

Chicago Processing Center Address: U.S. Department of Labor Employment and Training Administration, Foreign Labor Certification National Processing Center, 844 North Rush Street, 12th Floor, Chicago, Illinois 60611, Phone: (312) 886–8000, Fax: (312) 886–1688.

Signed in Washington, DC, this 3rd day of January, 2005.

Emily Stover DeRocco,

Assistant Secretary, Employment and Training Administration.

[FR Doc. 05–332 Filed 1–6–05; 8:45 am]

BILLING CODE 4510–30–M

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: Housing Occupancy Certificate—Migrant and Seasonal Agricultural Worker Protection Act (WH–520). A copy of the proposed information collection request can be obtained by contacting the office listed below in the **ADDRESSES** section of this Notice.

DATES: Written comments must be submitted to the office listed in the addresses section below on or before March 8, 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

Section 203(b)(1) of the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), 29 U.S.C. 1801, *et seq.*, and Regulation 29 CFR 500.135(b) provide that any person who owns or controls a facility or real property to be used for housing migrant agricultural workers shall not permit such housing to be occupied by any worker unless a copy of the certificate of occupancy from the state, local, or federal agency that conducted the housing safety and health inspection is posted at the site of the facility or real property. Form WH–520 is both an information gathering form and the certificate of occupancy that the Wage and Hour Division (WHD) of the Employment Standards Administration (ESA) of the U.S. Department of Labor (DOL) issues when it is the federal agency conducting the safety and health inspection. 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 Wage and Hour Division seeks the approval of the extension of this information collection in order to inspect and certify a migrant housing facility as meeting applicable safety and health standards under the law.

Type of Review: Extension.

Agency: Employment Standards Administration.

Title: Housing Occupancy Certificate—Migrant and Seasonal Agricultural Worker Protection Act.

OMB Number: 1215–0158.

Agency Number: WH–520.

Affected Public: Farms; Individuals or households; Business or other for-profit.

Total Respondents: 300.

Total Annual Responses: 300.

Estimated Time per Response: 3 minutes.

Reporting: 1 minute (Recordkeeping burden for posting and filing).

Estimated Total Burden Hours: 20.

Frequency: On occasion.

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: January 3, 2005.

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. 05–331 Filed 1–6–05; 8:45 am]

BILLING CODE 4510–CN–P

DEPARTMENT OF LABOR

Employment Standards Administration; Wage and Hour Division

Minimum Wages for Federal and Federally Assisted Construction; General Wage Determination Decisions

General wage determination decisions of the Secretary of Labor are issued in accordance with applicable law and are based on the information obtained by the Department of Labor from its study of local wage conditions and data made available from other sources. They specify the basic hourly wage rates and fringe benefits which are determined to be prevailing for the described classes of laborers and mechanics employed on construction projects of a similar character and in the localities specified therein.

The determinations in these decisions of prevailing rates and fringe benefits have been made in accordance with 29 CFR part 1, by authority of the Secretary of Labor pursuant to the provisions of the Davis-Bacon Act of March 3, 1931, as amended (46 Stat. 1494, as amended, 40 U.S.C. 276a) and of other Federal statutes referred to in 29 CFR part 1, Appendix, as well as such additional statutes as may from time to time be enacted containing provisions for the payment of wages determined to be

prevailing by the Secretary of Labor in accordance with the Davis-Bacon Act. The prevailing rates and fringe benefits determined in these decisions shall, in accordance with the provisions of the foregoing statutes, constitute the minimum wages payable on Federal and federally assisted construction projects to laborers and mechanics of the specified classes engaged on contract work of the character and in the localities described therein.

Good cause is hereby found for not utilizing notice and public comment procedure thereon prior to the issuance of these determinations as prescribed in 5 U.S.C. 553 and not providing for delay in the effective date as prescribed in that section, because the necessity to issue current construction industry wage determinations frequently and in large volume causes procedures to be impractical and contrary to the public interest.

General wage determination decisions, and modifications and supersedes decisions thereto, contain no expiration dates and are effective from their date of notice in the **Federal Register**; or on the date written notice is received by the agency, whichever is earlier. These decisions are to be used in accordance with the provisions of 29 CFR parts 1 and 5. Accordingly, the applicable decision, together with any modifications issued, must be made a part of every contract for performance of the described work within the geographic area indicated as required by an applicable Federal prevailing wage law and 29 CFR part 5. The wage rates and fringe benefits, notice of which is published herein, and which are contained in the Government Printing Office (GPO) document entitled ''General Wage Determinations Issued Under The Davis-Bacon And Related Acts,'' shall be the minimum paid by contractors and subcontractors to laborers and mechanics.

Any person, organization, or governmental agency having an interest in the rates determined as prevailing is encouraged to submit wage rate and fringe benefit information for consideration by the Department. Further information and self-explanatory forms for the purpose of submitting this data may be obtained by writing to the U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, Division of Wage Determinations, 200 Constitution Avenue, NW., Room S–3014, Washington, DC 20210.

Modification to General Wage Determination Decisions

The number of the decisions listed to the Government Printing Office document entitled ''General Wage Determinations Issued Under the Davis-Bacon and Related Acts'' being modified are listed by Volume and State. Dates of publication in the **Federal Register** are in parentheses following the decisions being modified.

Volume I

New Jersey
NJ030002 (Jun. 13, 2003)
Rhode Island
RI030001 (Jun. 13, 2003)

Volume II

Pennsylvania
PA030033 (Jun. 13, 2003)

Volume III

None

Volume IV

None

Volume V

None

Volume VI

Colorado
CO030001 (Jun. 13, 2003)
CO030002 (Jun. 13, 2003)
CO030003 (Jun. 13, 2003)
CO030004 (Jun. 13, 2003)
CO030005 (Jun. 13, 2003)
CO030006 (Jun. 13, 2003)
CO030007 (Jun. 13, 2003)
CO030008 (Jun. 13, 2003)
CO030009 (Jun. 13, 2003)
CO030010 (Jun. 13, 2003)
CO030011 (Jun. 13, 2003)
CO030016 (Jun. 13, 2003)
CO030017 (Jun. 13, 2003)

Volume II

None

General Wage Determination Publication

General wage determinations issued under the Davis-Bacon and related Acts, including those noted above, may be found in the Government Printing Office (GPO) document entitled ''General Wage Determinations Issued Under the Davis-Bacon And Related Acts''. This publication is available at each of the 50 Regional Government Depository Libraries and many of the 1,400 Government Depository Libraries across the country.

General wage determinations issued under the Davis-Bacon and related Acts are available electronically at no cost on the Government Printing Office site at *www.access.gpo.gov/davisbacon.* They are also available electronically by subscription to the Davis-Bacon Online Service (*http://davisbacon.fedworld.gov*) of the National Technical Information Service (NTIS) of the U.S. Department of Commerce at 1–800–363–2068. This subscription offers value-added features such as electronic delivery of modified wage decisions directly to the user's desktop, the ability to access prior wage decisions issued during the year, extensive Help desk Support, etc.

Hard-copy subscriptions may be purchased from: Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, (202) 512–1800.

When ordering hard-copy subscription(s), be sure to specify the State(s) of interest, since subscriptions may be ordered for any or all of the six separate Volumes, arranged by State. Subscriptions include an annual edition (issued in January or February) which includes all current general wage determinations for the States covered by each volume. Throughout the remainder of the year, regular weekly updates will be distributed to subscribers.

Signed at Washington, DC, this 29th Day of December, 2004.

Terry Sullivan,

Acting Chief, Branch of Construction Wage Determinations.

[FR Doc. 05–98 Filed 1–6–05; 8:45 am]

BILLING CODE 4510–27–M

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 05–001]

NASA Earth Science and Applications From Space Strategic Roadmap Committee; Meeting

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Public Law 92–463, as amended, the National Aeronautics and Space Administration announces a forthcoming meeting of the NASA Earth Science and Applications from Space Strategic Roadmap Committee.

DATES: Wednesday, January 26, 2005, 8 a.m. to 5 p.m.; and Thursday, January 27, 2005, 8 a.m. to 5 p.m., Pacific standard time.

ADDRESSES: Scripps Institution of Oceanography, 8620 Discovery Way, La Jolla, CA 92037–0210.

—The meeting room number will be posted at the Director's Office at the Scripps Institution of Oceanography, UC San Diego. Directions to the

Director's Office can be found at *http://www.sio.ucsd.edu/about/directory/map_of.cfm*, or call the Director's Office at (858) 534–2827.

—Directions and parking information are available through the Scripps Institution Web page at URL *http://sio.ucsd.edu/*.

FOR FURTHER INFORMATION CONTACT: Gordon Johnston, Science Mission Directorate, National Aeronautics and Space Administration, Washington, DC 20546 at (202) 358–4685.

SUPPLEMENTARY INFORMATION: The meeting will be open to the public up to the capacity of the room. Attendees will be requested to sign a register.

The agenda for the meeting includes the following topics:

Challenges and opportunities in Earth science and applications from space.

Vision of the future for Earth science and applications from space.

Critical issues and objectives for Earth science and applications from space.

It is imperative that the meeting be held on this date to accommodate the scheduling priorities of the key participants.

Dated: December 29, 2004.

P. Diane Rausch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 05–368 Filed 1–6–05; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice.

SUMMARY: NARA is giving public notice that the agency proposes to request use of a voluntary survey of visitors to the Public Vaults, which is part of the National Archives Experience in Washington, DC. The information will be used to determine how the various components of the Public Vaults affect visitors' level of satisfaction with the Public Vaults and how effectively the venue communicates that records matter. The information will support adjustments in this offering that will improve the overall visitor experience. The public is invited to comment on the proposed information collection pursuant to the Paperwork Reduction Act of 1995.

DATES: Written comments must be received on or before March 8, 2005 to be assured of consideration.

ADDRESSES: Comments should be sent to: Paperwork Reduction Act Comments (NHP), Room 4400, National Archives and Records Administration, 8601 Adelphi Rd., College Park, MD 20740–6001; or faxed to (301) 837–3213; or electronically mailed to *tamee.fechhelm@nara.gov.*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the proposed information collection and supporting statement should be directed to Tamee Fechhelm at telephone number (301) 837–1694, or fax number (301) 837–3213.

SUPPLEMENTARY INFORMATION: Pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13), NARA invites the general public and other Federal agencies to comment on proposed information collections. The comments and suggestions should address one or more of the following points: (a) Whether the proposed information collection is necessary for the proper performance of the functions of NARA; (b) the accuracy of NARA's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including the use of information technology; and (e) whether small businesses are affected by this collection. The comments that are submitted will be summarized and included in the NARA request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this notice, NARA is soliciting comments concerning the following information collection:

Title: Public Vaults Survey.

OMB number: 3095–00XX.

Agency form number: N/A.

Type of review: Regular.

Affected public: Individuals who visit the Public Vaults in Washington, DC.

Estimated number of respondents: 1,050.

Estimated time per response: 10 minutes.

Frequency of response: On occasion (when an individual visits the Public Vaults in Washington, DC).

Estimated total annual burden hours: 175 hours.

Abstract: The information collection is prescribed by EO 12862 issued September 11, 1993, which requires Federal agencies to survey their customers concerning customer service. The general purpose of this voluntary data collection is to (1) provide baseline data concerning the effectiveness of the Public Vaults and its several exhibits in enhancing visitors' understanding that records matter, (2) measure customer satisfaction with the Public Vaults, and (3) identify additional opportunities for improving the customers' experience.

Dated: December 29, 2004.

L. Reynolds Cahoon,

Assistant Archivist for Human Resources and Information Services.

[FR Doc. 05–339 Filed 1–6–05; 8:45 am]

BILLING CODE 7515–01–P

NATIONAL SCIENCE FOUNDATION

NSF–NASA Astronomy and Astrophysics Advisory Committee #13883; Notice of Meeting, Correction

This notice serves to correct the dates of the December 17, 2004 Notice of Meeting announcing a meeting on January 18–19, 2005. There will not be a meeting January 18–19, 2005. Please see correct information below.

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following NSF–NASA Astronomy and Astrophysics Advisory Committee (#13883) meeting:

Date and Time: February 15–16, 2005, 8 a.m.–5 p.m.

Place: National Science Foundation, Room 1235, 4201 Wilson Blvd., Arlington, VA, 22230.

Type of Meeting: Open.

Contact Person: Dr. G. Wayne Van Citters, Director, Division of Astronomical Sciences, Suite 1045, National Science Foundation, 4201 Wilson Blvd., Arlington, VA 22230. Telephone: 703–292–4908.

Purpose of Meeting: To provide advice and recommendations to the National Science Foundation (NSF) and the National Aeronautics and Space Administration (NASA) on issues within the field of astronomy and astrophysics that are of mutual interest and concern to the two agencies.

Agenda: To hear presentations of current programming by representatives from NSF, NASA and other agencies relevant to astronomy and astrophysics; to discuss current and potential areas of cooperation between the agencies; to formulate recommendations for continued and new areas of cooperation and mechanisms for achieving them.

Dated: January 4, 2005.

Susanne E. Bolton,

Committee Management Officer.

[FR Doc. 05–365 Filed 1–6–04; 8:45 am]

BILLING CODE 7555–01–M

RAILROAD RETIREMENT BOARD

Proposed Collection; Comment Request

Summary: In accordance with the requirement of Section 3506 (c)(2)(A) of the Paperwork Reduction Act of 1995 which provides opportunity for public comment on new or revised data collections, the Railroad Retirement Board (RRB) will publish periodic summaries of proposed data collections.

Comments are invited on: (a) Whether the proposed information collection is necessary for the proper performance of the functions of the agency, including whether the information has practical utility; (b) the accuracy of the RRB's estimate of the burden of the collection of the information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden related to the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Title and Purpose of information collection: Supplemental Information on Accident and Insurance; OMB 3220–0036.

Under section 12(o) of the Railroad Unemployment Insurance Act (RUIA), the Railroad Retirement Board is entitled to reimbursement of the sickness benefits paid to a railroad employee if the employee receives a sum or damages for the same infirmity for which the benefits are paid. Section 2(f) of the RUIA requires employers to reimburse the RRB for days in which salary, wages, pay for time lost or other remuneration is later determined to be payable. Reimbursements under section 2(f) generally result from the award of pay for time lost or the payment of guaranteed wages. The RUIA prescribes that the amount of benefits paid be deducted and held by the employer in a special fund for reimbursement to the RRB.

The RRB currently utilizes Form(s) SI–1c, (Supplemental Information on Accident and Insurance), SI–5 (Report of Payments to Employee Claiming Sickness Benefits Under the RUIA), ID–3s (Request for Lien Information), ID–3s–1, (Lien Information Under Section 12(o) of the RUIA), ID–3u (Request for Section 2(f) Information), ID–30k (Form Letter Asking Claimant for Additional Information on Injury or Illness), and ID–30k–1 (Request for Supplemental Information on Injury or Illness-3rd Party), to obtain the necessary information from claimants and railroad employers. The RRB proposes a minor change to Form ID–3s to add an ''information only'', column. Completion is required to obtain benefits. One response is requested of each respondent.

ESTIMATE OF ANNUAL RESPONDENT BURDEN

[The estimated annual respondent burden for this collection is as follows]

Form #(s)	Annual responses	Time (min)	Burden (hrs)
SI–1c	1,000	5	93
SI–5	2,500	5	208
ID–3s	18,500	3	925
ID–3s.1	500	3	25
ID–3u	1,500	3	75
ID–30k	2,000	5	208
ID–30k.1	2,500	5	167
Total	28,500	.....	1,691

Additional Information or Comments: To request more information or to obtain a copy of the information collection justification, forms, and/or supporting material, please call the RRB Clearance Officer at (312) 751–3363 or *Charles.Mierzwa@RRB.gov*. Comments regarding the information collection should be addressed to Ronald J. Hodapp, Railroad Retirement Board, 844 N. Rush Street, Chicago, Illinois 60611–2092 or *Ronald.Hodapp@RRB.gov*. Written comments should be received within 60 days of this notice.

Charles Mierzwa,

Clearance Officer.

[FR Doc. 05–313 Filed 1–6–05; 8:45 am]

BILLING CODE 7905–01–U

RAILROAD RETIREMENT BOARD

Agency Forms Submitted for OMB Review

Summary: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Railroad Retirement Board (RRB) has submitted the following proposal(s) for the collection of information to the Office of Management and Budget for review and approval.

Summary of Proposal(s):

(1) *Collection title:* Sick Pay and Miscellaneous Payments Report.

(2) *Form(s) submitted:* BA–10.

(3) *OMB Number:* 3220–0175.

(4) *Expiration date of current OMB clearance:* 02/28/2005.

(5) *Type of request:* Extension of a currently approved collection.

(6) *Respondents:* Business or other for-profit.

(7) *Estimated annual number of respondents:* 239.

(8) *Total annual responses:* 239.

(9) *Total annual reporting hours:* 219.

(10) *Collection description:* The Railroad Retirement Solvency Act of 1983 added Section 1(h)(8) to the Railroad Retirement Act expanding the definition of compensation for purposes of computing the Tier I portion of an annuity to include sickness payments and certain payments other than sick pay which are considered compensation within the meaning of Section 1(h)(8). The collection obtains the sick pay and other types of payments considered compensation within the meaning of Section 1(h)(8).

Additional Information or Comments: Copies of the forms and supporting documents can be obtained from Charles Mierzwa, the agency clearance officer (312–751–3363) or *Charles.Mierzwa@rrb.gov*.

Comments regarding the information collection should be addressed to Ronald J. Hodapp, Railroad Retirement

Board, 844 North Rush Street, Chicago, Illinois, 60611–2092 or *Ronald.Hodapp@rrb.gov* and to the OMB Desk Officer for the RRB, at the Office of Management and Budget, Room 10230, New Executive Office Building, Washington, DC 20503.

Charles Mierzwa,

Clearance Officer.

[FR Doc. 05–314 Filed 1–6–05; 8:45 am]

BILLING CODE 7905–01–U

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC–26716; File No. 812–13109]

Principal Life Insurance Company, *et al.;* Notice of Application

January 3, 2005.

AGENCY: Securities and Exchange Commission (''SEC'' or ''Commission'').

ACTION: Notice of application for an order under Section 6(c) of the Investment Company Act of 1940, as amended (the ''Act'') granting exemptions from the provisions of Sections 2(a)(32), 22(c) and 27(i)(2)(A) of the Act and Rule 22c–1 thereunder.

Applicants: Principal Life Insurance Company (''Principal Life''), Principal Life Insurance Company Separate Account B (the ''Account''), and Princor Financial Services Corporation (''Princor'') (collectively ''Applicants'').

SUMMARY: Applicants seek an order to permit, under specified circumstances, the recovery of certain credits previously applied to purchase payments made under: (i) Certain deferred variable annuity contracts, described herein, that Principal Life issues through the Account (the contracts, including certain data pages and endorsements, are collectively referred to as the ''Contracts''), and (ii) contracts that Principal Life may issue in the future through the Account, any of its other existing separate accounts, or any separate accounts that it may establish in the future (collectively, ''Future Accounts''), which contracts are substantially similar in all material respects to the Contracts (the ''Future Contracts''). Applicants also request that the order being sought extend to any other broker-dealer controlling, controlled by, or under common control with Principal Life, whether existing or created in the future, that serves as a distributor or principal underwriter of the Contracts or any Future Contracts offered through the Account or any Future Accounts (collectively, ''Affiliated Broker-Dealers'').

DATES: *Filing Date:* The application was filed on July 16, 2004, and amended on October 18, 2004.

Hearing or Notification of Hearing: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Secretary of the Commission and serving Applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on January 31, 2005, and should be accompanied by proof of service on Applicants in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the requester's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Secretary of the Commission.

ADDRESSES: Secretary, SEC, 450 5th Street, NW., Washington, DC 20549–0609. Applicants, c/o Principal Financial Group, 711 High Street, Des Moines, Iowa 50392.

FOR FURTHER INFORMATION CONTACT: Rebecca A. Marquigny, Senior Counsel, or Zandra Y. Bailes, Branch Chief, Office of Insurance Products, Division of Investment Management, at (202) 942–0670.

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee from the SEC's Public Reference Branch, 450 Fifth Street, NW., Washington, DC 20549 (tel. (202) 942–8090).

Applicants' Representations

1. Principal Life was organized under the laws of Iowa in 1879. It is authorized to transact life insurance and annuity business in 50 states and the District of Columbia. Principal Life is a stock life insurance company and a wholly owned subsidiary of Principal Financial Group Inc.

2. The Account was established in 1970 by Principal Life as a separate account under Iowa law and is registered with the Commission as a unit investment trust under the Act (File No. 811–02091). The Account funds the benefits available under the Contracts and other variable annuity contracts issued by Principal Life. The offering of the Contracts by Principal Life is registered under the Securities Act of 1933 (the ''1933 Act'') (File No. 333–116220). That portion of the assets of the Account that is equal to the reserves and other contract liabilities with respect to the Account is not chargeable with liabilities arising out of any other business of Principal Life. Any income, gains or losses, realized or unrealized, from assets allocated to the Account are, in accordance with the various contracts, credited to or charged against the Account without regard to other income, gains or losses of Principal Life.

3. Princor is an Iowa corporation controlled by Principal Financial Group, Inc., and is the principal underwriter of the Contracts. Princor is registered as a broker-dealer under the Securities Exchange Act of 1934, as amended, and is a member of NASD, Inc. Sales of the Contracts are made by registered representatives of broker-dealers authorized by Princor to sell the Contracts. Such registered representatives are also licensed insurance agents of Principal Life.

4. The Contracts are flexible purchase payment individual deferred combination fixed and variable annuity contracts. The Contracts may be issued either as tax-qualified contracts (''qualified Contracts'') or as non-tax-qualified contracts (''non-qualified Contracts'').

5. The minimum initial purchase payment is $5,000 for non-qualified Contracts and $2,000 for qualified Contracts. The minimum subsequent purchase payment is $500. Lesser minimums may apply in the case of certain retirement plans or payroll deduction or automated investment programs. Principal Life may limit total Contract purchase payments to $2,000,000.

6. At the time of issuance, a Contract owner may elect to purchase the Premium Payment Credit Rider (''Credit Rider''). If the Credit Rider is elected, Principal Life will add a 5% payment enhancement or credit to the owner's Contract upon receipt of each purchase payment from the Contract owner during the first contract year (the ''Credit''). After the first contract year, additional purchase payments will not receive a Credit. Principal Life will fund Credits from its general account assets and will allocate Credits among investment options (excluding certain fixed benefit options used for dollar cost averaging) in the same proportion as the applicable purchase payment. Principal Life will recover Credits (i) if the Contract owner returns the Contract for a refund during the ''free look'' period, and (ii) if the Contract owner elects to receive annuity payments prior to the third contract anniversary. Principal Life will not seek to recover any Credit in connection with partial withdrawals or surrenders of a Contract.

7. The free look period is the 10-day period (or such longer period required by a state) during which a Contract

owner may return a Contract after it has been delivered. Upon such return, the Contract owner generally will receive a full refund of the accumulated value of the Contract, less the amount of the Credits. The Contract owner will retain any net earnings attributable to the Credits or, if there has been a net decline in the value of the Credits, will bear the loss from such decline. Where applicable state law requires that the full amount of the purchase payment be refunded, the Contract owner will receive the greater of that amount or the Contract value less, in either case, the amount of the Credits.

8. The Contracts provide for the return of the Credit if the owner elects to receive annuity payments before the end of the third Contract year. The Contract owner will retain any net earnings attributable to the Credits or, if there has been a net decline in the value of the Credits, will bear the loss from the decline.

9. The Credits to be recovered will be taken from the sub-accounts under the Contract in which the Credits are invested in the same proportion that the accumulated value based on such sub-accounts bears to the accumulated value of the Contract. The recovery will be effected by redeeming the number of units from each sub-account that are necessary to fund that sub-account's share of the recovery. The number of units to be redeemed in each sub-account will be calculated based on the unit value for each sub-account determined at the time the withdrawal to recover the Credit is made. In the case of early annuitization, the withdrawal is made on the annuitization date, which is the date the accumulated value is applied to make annuity payments.

10. Contract owners may allocate their purchase payments among a fixed account, two different fixed, dollar cost averaging options (which will not be available to Contract owners who elect the Credit Rider), and a number of sub-accounts of the Account. Each sub-account invests in shares of a corresponding portfolio of an underlying mutual fund (''Underlying Fund''). Principal Life may, subject to compliance with applicable law, add other sub-accounts, eliminate or combine existing sub-accounts or transfer assets in one sub-account to another sub-account established by Principal Life.

11. The Contracts provide for the following charges: (i) A withdrawal or contingent deferred sales charge (''CDSC'') as a percentage of amounts withdrawn attributable to purchase payments that have been in the Contract less than seven complete contract years, with the applicable percentage charge declining from a maximum of 6% for withdrawals attributable to purchase payments that have been in the Contract for completed contract years zero, one and two to 0.0% for contract year seven and thereafter; [1] (ii) an annual contract fee that is the lesser of $30 or 2% of the accumulated value (which may be waived under certain circumstances); (iii) a daily mortality and expense risk charge in an amount equal on an annual basis to 1.25% of the value of each variable investment option, deducted from each sub-account; and (iv) any applicable state or local premium taxes up to 3.5%, depending on the Contract owner's state of residence or the state in which the Contract was sold. Principal Life may impose a daily administrative charge in an amount not to exceed on an annual basis 0.15% of the value of each variable investment option, deducted from each sub-account. Principal Life imposes additional charges for an enhanced death benefit and other benefits provided by rider. It also reserves the right to impose a transaction fee for unscheduled withdrawals exceeding 12 in a contract year and a transfer fee for each unscheduled transfer. In addition, the Underlying Funds impose management, distribution and administrative fees which vary depending upon which Underlying Funds are selected. There is no withdrawal charge or CDSC made in connection with the annuitization of the Contract.[2]

12. If the Credit Rider is elected, the Contracts will provide for a higher CDSC, namely, a percentage of amounts withdrawn attributable to purchase payments that have been in the Contract less than nine complete contract years, with the applicable percentage charge declining from a maximum of 8% for withdrawals attributable to purchase payments that have been in the Contract for completed contract years zero and one, to 0.0% for contract year nine and thereafter.[3] In addition to the charges enumerated above, the Credit Rider provides for a charge payable for the first 8 contract years, in an amount equal on an annual basis to 0.60% of the value of each variable investment option, deducted from each sub-account.

13. Because of the higher charges applicable to a Contract with the Credit Rider, the prospectus description of the Rider will include a statement to the effect that the amount of the Credits may be more than offset by the fees and charges associated with the Credit Rider. The prospectus also will state that there may be circumstances in which a Contract owner may be worse off for having the Credit Rider because of the higher charges. In addition, the prospectus will state that a purchaser of a Contract will be worse off with the Credit Rider if, at the time of recapture of the Credit, the Contract has experienced a negative investment performance. This is because the Credit recovered by Principal Life will not reflect the adverse performance attributable to the Credit, as a result of which the Contract value will be less than the value it would otherwise have been had the Credit not been made.

Applicants' Legal Analysis

1. Section 6(c) of the Act authorizes the Commission to exempt any person, security or transaction, or any class or classes of persons, securities or transactions from the provisions of the Act and the rules promulgated thereunder if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Applicants request that the Commission, pursuant to Section 6(c) of the Act, grant the exemptions requested below with respect to the Contracts, and any Future Contracts funded by the Account or Future Accounts, that are issued by Principal Life and underwritten or distributed by Princor or Affiliated Broker-Dealers. Applicants undertake that Future Contracts will be substantially similar in all material respects to the Contracts. Applicants believe that the requested exemptions are appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policies and provisions of the Act.

2. Applicants previously have received exemptive relief to permit,

[1] With respect to the seven-year withdrawal charge schedule, the CDSC is 6% for years zero, 1 and 2, 5% for year 3, 4% for year 4, 3% for year 5, 2% for year 6, and 0.0% for any year thereafter. There is never a withdrawal charge with respect to earnings accumulated in a Contract, certain other ''free withdrawal'' amounts or purchase payments that have been in the Contract for more than seven complete contract years.

[2] The CDSC is not applied against Credits which, for this purpose, are considered investment earnings, not purchase payments.

[3] 3 With respect to the nine-year withdrawal charge schedule, the CDSC is 8% for years zero and one, 7% for year 2, 6% for year 3, 5% for year 4, 4% for year 5, 3% for year 6, 2% for year 7, 1% for year 8, and 0.0% for any year thereafter. There is never a withdrawal charge with respect to earnings accumulated in a Contract, certain other ''free withdrawal'' amounts or purchase payments that have been in the Contract more than nine complete contract years.

with respect to an earlier class of contracts, the recapture of a credit in connection with exercise of a free look right.[4] That order encompassed relief for ''future contracts,'' contracts substantially similar in all material respects to the earlier class of contracts. Applicants assert that the Contracts described in the current application and amended application differ from the prior class of contracts by providing more investment options and certain enhanced guaranteed benefits available by rider. In addition to the Credit Rider, the new class of Contracts may also be combined with the Investment Protector Plus Rider or the Enhanced Death Benefit Rider, options not available to the old class of contracts.[5] Because of the substantial differences between the old class of contracts and the new class of Contracts (depending on the riders selected for the new class), Applicants represent that they do not believe the new Contracts fall within the scope of ''future contracts'' as contemplated under the prior order granting relief to recapture a credit. Consequently, Applicants are seeking the relief set forth below.

3. Applicants seek exemption pursuant to Section 6(c) from Sections 2(a)(32), 22(c), and 27(i)(2)(A) of the Act and Rule 22c–1 thereunder to the extent deemed necessary to permit Principal Life to recover Credits previously applied to purchase payments under the Contracts or Future Contracts if a Contract owner returns the Contract or Future Contract for a refund during the free look period or annuitizes the Contract prior to the end of the third contract year. The Commission previously has granted similar exemptive relief to permit the recovery of certain bonus credit amounts previously credited.

4. Subsection (i) of Section 27 of the Act provides that Section 27 does not apply to any registered separate account funding variable insurance contracts, or to the sponsoring insurance company and principal underwriter of such account, except as provided in paragraph (2) of the subsection. Paragraph (2) provides that it shall be unlawful for such a separate account or sponsoring insurance company to sell a contract funded by the registered separate account unless such contract is a redeemable security. Section 2(a)(32) defines a ''redeemable security'' as any security, other than short-term paper, under the terms of which the holder, upon presentation to the issuer, is entitled to receive approximately his or her proportionate share of the issuer's current net assets, or the cash equivalent thereof.

5. Applicants submit that the recovery of Credits in the circumstances set forth in the application does not deprive a Contract owner of his or her proportionate share of the issuer's current net assets. Applicants state that a Contract owner's interest in the Credits allocated to the accumulated value of his or her Contract is not fully vested until after the end of the third contract year. Applicants submit that until this period has expired and the Credits have fully vested, Principal Life retains the rights and interests described herein. Therefore, Applicants represent that when Principal Life recovers any Credits, it is merely retrieving its own assets; the Contract owner is not deprived of a proportionate share of the Account's assets because the Contract owner's interest in such Credit has not vested in all respects.

6. Under the Credit Rider, Principal Life provides Credits from its general account on a guaranteed basis. Applicants assert that in undertaking this financial obligation, Principal Life contemplates that a Contract owner will retain a Contract over an extended period, consistent with the long-term nature of the Contracts. Applicants assert that Principal Life designed its product so that it would recover its costs (including the Credit) over an anticipated duration while a Contract is in force. Applicants further assert that permitting a Contract owner to retain Credits upon an early annuitization could serve to encourage such annuitizations and the series of early withdrawals associated therewith in a manner inconsistent with the durations assumed in the design of the Contract. In addition, Applicants submit that permitting a Contract owner to retain Credits upon the exercise of the free look return could encourage the purchase of Contracts for a quick profit rather than with the intention of making a long-term investment.

7. Applicants submit that the exemptive relief requested is consistent with and serves the stated purpose of the National Securities Markets Improvement Act of 1996 (''NSMIA'') in amending the Act to ''provide more effective and less burdensome regulation.'' Sections 26(e) and 27(i) were added to the Act to implement the purposes of NSMIA and Congressional intent. Applicants assert that the application of Credits to purchase payments under the Contracts should not raise any questions as to Principal Life's compliance with the provisions of Section 27(i). However, Applicants represent that to avoid any uncertainty as to full compliance with the Act, they request an exemption from Sections 2(a)(32) and 27(i)(2)(A) of the Act, to the extent deemed necessary, to permit the recovery of Credits under the circumstances described in the application with respect to Contracts and Future Contracts, without the loss of relief from Section 27 provided by Section 27(i).

8. Section 22(c) of the Act authorizes the Commission to make rules and regulations applicable to registered investment companies and to principal underwriters of, and dealers in, the redeemable securities of any registered investment company to accomplish the same purposes as contemplated by Section 22(a). Rule 22c–1 thereunder prohibits a registered investment company issuing a redeemable security, a person designated in such issuer's prospectus as authorized to consummate transactions in any such security, and a principal underwriter of, or dealer in, such security, from selling, redeeming, or repurchasing any such security except at a price based on the current net asset value of such security which is next computed after receipt of a tender of such security for redemption or of an order to purchase or sell such security. Principal Life's recovery of Credits as described herein might arguably be viewed as involving the redemption of redeemable securities for a price other than one based on the current net asset value. Applicants believe that the recovery of Credits does not violate Section 22(c) and Rule 22c–1. Applicants assert that such recovery does not involve either of the harms that Rule 22c–1 was intended to eliminate or reduce, namely: (i) The dilution of the value of outstanding redeemable securities of registered investment companies through their sale at a price below net asset value or repurchase at a price above it, and (ii) other unfair results, including speculative trading practices. These harms resulted from the practice of basing the price of a mutual fund share on the net asset value per share determined as of the close of the market on the previous day. Such backward pricing allowed investors to

[4] *Principal Life Insurance Company, et al.*, Investment Company Act Release Nos. 24725 (Nov. 2, 2000) (Notice) and 24752 (Nov. 28, 2000) (Order) (SEC File No. 812–12136).

[5] The Investment Protector Plus Rider provides a guaranteed minimum withdrawal benefit regardless of the Contract's surrender value, subject to various conditions including a bar on the use of certain sub-accounts. The Enhanced Death Benefit Rider provides an optional death benefit that pays the greater of the standard death benefit (determined in the same manner as under the old class of contracts) or a death benefit that has as a floor premiums paid plus interest at 5% per annum with an adjustment for partial withdrawals.

take advantage of increases or decreases in net asset value that were not yet reflected in the price, thereby diluting the value of outstanding fund shares.

9. Applicants submit that the recovery of Credits as described in the application and amended application does not pose such a threat of dilution. In effecting such recoveries, Principal Life will redeem accumulation units from the sub-accounts in which premiums have been invested on the basis of the net asset value determined at the time the withdrawal to recover the Credit is made. Under these circumstances, in Applicants' view, the recovery of the Credits does not involve dilution. Applicants also submit that the second harm that Rule 22c–1 was designed to address, namely speculative trading practices calculated to take advantage of backward pricing, will not occur as a result of the recovery of the Credits. Applicants argue that because neither of the harms that Rule 22c–1 was meant to address are found in the recovery of Credits, Rule 22c–1 and Section 22(c) should not be construed as applicable thereto. However, Applicants submit that to avoid any uncertainty in this regard, they request an exemption from the provisions of Section 22(c) and Rule 22c–1 to the extent deemed necessary to permit them to recover Credits under the Contracts and Future Contracts as described in the application and amended application.

10. Applicants submit that their request for an order that applies to Future Accounts and Future Contracts that are substantially similar in all material respects to the Contracts and underwritten or distributed by Princor or Affiliated Broker-Dealers is appropriate in the public interest. Applicants assert that such an order would promote competitiveness in the variable annuity market by eliminating the need to file redundant exemptive applications, thereby reducing administrative expenses and maximizing the efficient use of Applicants' resources. Applicants state that investors will not receive any benefit or additional protection if Applicants are required repeatedly to seek exemptive relief presenting no issue under the Act that has not already been addressed. Having Applicants file additional applications would impair Applicants' ability to effectively take advantage of business opportunities as they arise. Applicants undertake that Future Contracts funded by the Account or Future Accounts which seek to rely on the order issued pursuant to the application will be substantially similar in all material respects to the Contracts.

Conclusion: Section 6(c) of the Act, in pertinent part, provides that the Commission, by order upon application, may 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 the Act, or any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Applicants submit, for the reasons stated above, that their exemptive request meets the standards set out in Section 6(c) of the Act and that an order should, therefore, be granted.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E5–18 Filed 1–6–05; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50953; File No. SR-Amex-2004–104]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto by the American Stock Exchange LLC Relating to Regulation SHO

December 30, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 13, 2004, the American Stock Exchange LLC (''Amex'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in items I and II below, which items have been prepared by the Exchange. On December 22, 2004, the Exchange filed Amendment No. 1 to the proposed rule change.[3] The Amex has filed the proposal as a ''non-controversial'' rule change pursuant to section 19(b)(3)(A) of the Act [4] and Rule 19b–4(f)(6) thereunder,[5] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Amex proposes to amend Rules 7, 27, 108, 111, 118, 205, 208, 590, 783, 784 and 957 and eliminate obsolete Rules 792, 794 and 795 to conform its rules to the requirements of Regulation SHO [6] under the Act. The text of the proposed rule change is available for viewing at the places specified in item IV below.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in item IV below. The Amex 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Commission has adopted Regulation SHO under the Act, thereby establishing new requirements relating to short sales.[7] Among other things, Regulation SHO (i) requires broker-dealers to mark sales of all equity securities as ''long,'' ''short'' or ''short exempt,'' specifying the standards for each, (ii) provides for the establishment of a pilot program under which short sales in specific securities will take

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Amendment No. 1 to the proposed rule change (December 22, 2004). Amendment No. 1 replaced the Exchange's original filing in its entirety.

[4] 15 U.S.C. 78s(b)(3)(A).

[5] 17 CFR 240.19b–4(f)(6). For the purposes of determining the effective date and calculating the sixty-day period within which the Commission may summarily abrogate the proposed rule change under Section 19(b)(3)(C) of the Act, the Commission considers that period to commence on December 22, 2004, the date that the Exchange filed Amendment No. 1 to the proposed rule change. *See* 15 U.S.C. 78s(b)(3)(C).

[6] *See* Securities Exchange Act Release No. 50103 (July 28, 2004), 69 FR 48008 (August 6, 2004) (the ''Adopting Release''), and accompanying orders: Securities Exchange Act Release No. 50104 (July 28, 2004), 69 FR 48032 (August 6, 2004) (the ''Pilot Order''), and Securities Exchange Act Release No. 50747 (November 29, 2004), 69 FR 70480 (December 6, 2004) (the ''Second Pilot Order''). The Adopting Release, the Pilot Order and the Second Pilot Order are hereinafter collectively referred to as ''Regulation SHO.''

[7] *See* the Adopting Release.

place without application of the ''tick'' test or any other price test, (iii) requires short sellers in all equity securities to locate securities to borrow before selling, and (iv) imposes additional delivery requirements on broker-dealers for securities in which a substantial number of failures to deliver have occurred.[8] The Commission has requested each SRO to review its rules and submit rule filings where necessary to conform its rules to the requirements of Regulation SHO. In order to accomplish this objective, the Exchange proposes to amend the following rules. The Exchange believes that these proposed rule changes are non-controversial and, in a number of instances, simply consist of incorporating by reference Regulation SHO or certain of its provisions or adding appropriate provisions to address the new ''short exempt'' order marking requirement. The operative date of the proposed rule change will be January 3, 2005, which is the operative date of the applicable provisions of Regulation SHO.

Rule 7. Short Sales

Rule 7 is the Exchange's primary rule that applies an Exchange-based ''tick'' test to short sales effected on the Exchange. The Exchange proposes to amend Rule 7 to incorporate by reference all appropriate exceptions and exemptions provided by the Commission, including those under Regulation SHO and any Commission orders issued pursuant thereto, such as the exemption for Exchange-listed securities designated as part of the Regulation SHO pilot program.[9] Commentary .01 to Rule 7 currently reproduces the complete text of the Commission's short sale regulation, Rule 10a-1,[10] for the convenience of members and member organizations. Rather than add the new text of Regulation SHO to this already lengthy Commentary, the Exchange proposes simply to reference Rule 10a-1 and Regulation SHO (including any Commission orders issued pursuant to Regulation SHO) in Commentary .01 and take this opportunity to condense the Rule by deleting the text of Rule 10a-1. The Exchange believes this is appropriate, given the opportunities that exist today for members to access the text of the Commission's rules electronically if necessary. Including the text of the Commission's regulation in the Exchange's Commentary is unusual, and it has the additional disadvantage of requiring the Exchange to submit a rule filing each time there is a change in the Commission's rule.

Rule 27. Allocations Committee

Paragraph (f) of Rule 27 specifies situations under which the Exchange's Allocation Committee shall be convened to reallocate securities from one specialist to another. Paragraphs (g) and (h) of the Rule outline the procedures for the reallocation. Rule 203(b)(3) of Regulation SHO imposes a buy-in requirement with respect to certain ''threshold securities'' that have extended delivery failures, and there is also a pre-borrowing requirement for additional short sales of a ''threshold security'' if the buy-in is not completed within the time period specified in Regulation SHO.[11] These provisions of Regulation SHO do not provide for a specialist/market maker exception.[12] Consequently, the Exchange proposes to modify paragraphs (f) and (h) of Rule 27 to provide for a reallocation in the event that a specialist in a stock, ETF or other security becomes subject to a pre-borrowing requirement on short sales with respect to one of its specialty securities or, in the case of an options specialist, with respect to the underlying security, and for the restoration of the security to the original specialist if that specialist is no longer subject to a pre-borrowing requirement.

Rule 108. Priority and Parity at Openings

Rule 111. Commentary .04. Restrictions on Registered Traders

Rule 118. Trading in Nasdaq National Market Securities

Rule 205. Manner of Executing Odd-Lot Orders

Rule 208. Bunching of Odd-Lot Orders

Rule 590. Part 1 General Rule Violations

Rule 957. Accounts, Orders and Records of Registered Traders, Specialists and Associated Persons

The foregoing rules all require very minor and obvious changes to conform to Regulation SHO. Several of these changes involve the addition of provisions related to ''short exempt'' orders. In the case of Rule 118, a provision involving odd-lot orders in Nasdaq National Market securities that allows such orders to be marked ''short'' is being revised because it would directly conflict with the provision of Regulation SHO requiring orders that are exempt from the ''tick'' test to be marked ''short exempt.'' [13] In the case of Rule 957, a reference to Rule 200 of Regulation SHO will be substituted for a reference to Rule 3b–3 under the Act (which is being eliminated).

Rule 783. Normal Buy-Ins

Rule 784. Mandatory Closing of Fails

Rule 783 provides the procedures for normal buy-ins of securities traded on the Exchange, and Rule 784 provides the procedures for the mandatory closing of fails for Exchange-traded securities. The time periods and certain other provisions in these two Rules (such as the ability of a Floor Official to defer the execution of a normal buy-in under Rule 783 and the ability of the Exchange to temporarily suspend the mandatory closing in Rule 784 under unusual circumstances) are incompatible with the buy-in requirements for ''threshold securities'' under Regulation SHO. Consequently, the Exchange proposes to incorporate by reference the provisions of Regulation SHO into these two Rules where appropriate, making it explicit that Regulation SHO governs in the event of a conflict.

Rule 792. Securities Transferring Out of Town

Rule 794. ''Buy-Ins'' on Securities Located Out of Town

Rule 795. ''Buy-Ins'' Where Securities in Transfer

Rules 792, 794 and 795 all contain buy-in provisions that, as with Rules 783 and 784, may be in conflict with the buy-in provisions of Regulation SHO under certain circumstances. However, rather than modify each of these rules through incorporation by reference of the provisions of Regulation SHO, as proposed above for Rules 783 and 784, the Exchange has determined that these three rules are obsolete and no longer in use, and we instead propose that these rules be eliminated in their entirety.

2. Statutory Basis

The proposed rule change 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 in that it is designed to prevent fraudulent and manipulative acts and practices and to promote just and equitable principles of trade.

[8] *Id.*

[9] *See* the Pilot Order and the Second Pilot Order.

[10] *See* 17 CFR 240.10a-1.

[11] *See* the Adopting Release.

[12] *Id.*

[13] *Id.*

[14] 15 U.S.C. 78f(b).

[15] 15 U.S.C. 78f(b)(5).

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change, as amended, has been filed by the Exchange pursuant to section 19(b)(3)(A) of the Act [16] and subparagraph (f)(6) of Rule 19b–4 thereunder.[17] The Exchange requests that the Commission waive the 5-day notice and 30-day pre-operative requirements contained in Rule 19b–4(f)(6)(iii) [18] because the proposed rule change does not (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; or (iii) become operative for 30 days from the date on which it was filed, or such shorter time frame as the Commission may designate. The Exchange believes that good cause exists to grant such waivers because of the importance of short sale regulation to the protection of investors. The Exchange will implement the proposed rule change immediately so that they will be in effect on the operative date of the applicable provisions of Regulation SHO.

The Commission believes that waiving the 5-day notice and 30-day pre-operative delay is consistent with the protection of investors and the public interest. The Commission notes that proposed rule change being made herein simply conforms the Exchange's rules to the requirements of Regulation SHO under the Act. No new rules, policies or procedures are being proposed other than as required by Regulation SHO. The Commission believes that accelerating the operative date of the proposed rule change does not raise any new regulatory issues, significantly affect the protection of investors or the public interest, or impose any significant burden on competition. For these reasons, the Commission designates the proposed rule change as effective and operative immediately.

At any time within 60 days of the filing of such proposed rule change pursuant to section 19(b)(3)(A) of the Act, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. 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–Amex–2004–104 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–Amex–2004–104. 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 Amex. 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–Amex–2004–104 and should be submitted on or before January 28, 2005.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[19]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E5–20 Filed 1–6–05; 8:45 am]

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[16] 15 U.S.C. 78s(b)(3)(A).

[17] 17 CFR 240.19b–4(f)(6).

[18] 17 CFR 240.19b–4(f)(6)(iii).

[19] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50952; File No. SR-CHX–2004–42]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Chicago Stock Exchange, Incorporated Relating to Short Sales of Securities

December 30, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 21, 2004, the Chicago Stock Exchange, Incorporated (''CHX'' or ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'' or the ''SEC'') the proposed rule change as described in items I and II below, which Items have been prepared by the CHX. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The CHX proposes to amend its rules to eliminate and modify provisions relating to short sales of securities, where those provisions are inconsistent with, or different from, the requirements of Regulation SHO.[3] The text of the proposed rule change is available for viewing at the places specified in item IV below.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Release No. 34–50103, File No. S7–23–03, 69 FR 48008 (August 6, 2004) (the ''Adopting Release''), and accompanying orders: Release No. 34–50104 (July 28, 2004), 69 FR 48032 (August 6, 2004) and Release No. 34–50747 (November 29, 2004), 69 FR 70480 (December 6, 2004).

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 CHX included statements concerning the purpose of and basis for the proposed rule changes and discussed any comments it received regarding the proposal. The text of these statements may be examined at the places specified in item IV below. The CHX 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 Changes

1. Purpose

The Commission has adopted new Regulation SHO, which provides new comprehensive regulation of short sales.[4] Among other things, this new series of rules provides new definitions, sets out uniform locate and delivery requirements for broker-dealers and establishes a procedure to allow the Commission to suspend temporarily the operation of the current ''tick'' test or short sale price test for specified securities.[5]

Because of the new comprehensive regulation provided by Regulation SHO, the Exchange believes that it is important to delete, from its rules, provisions that regulate the short selling of securities.[6] Specifically, the Exchange seeks to delete, from its rules: (1) Sections (b) and (c) of Article IX, Rule 17 (relating to locate and delivery requirements and the ''bona fide'' market making exemption from the short sale rule); and (2) Rules 11 and 12 of Article XXI (relating to long sales and mandatory stock borrowing). By deleting these rules, the Exchange seeks to ensure that its regulation of short sales is not inconsistent with, or different from, the provisions of Regulation SHO. Indeed, these rule changes would leave one primary provision relating to short sales in the Exchange's own rules—a provision that requires members to effect short sales in accordance with the SEC's short sale rules.[7]

2. Statutory Basis

The CHX believes the proposal is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of section 6(b) of the Act.[8] In particular, the proposed changes are consistent with section 6(b)(5) of the Act, because they would promote just and equitable principles of trade, remove impediments to, and perfect the mechanism of, a free and open market and a national market system, and, in general, protect investors and the public interest by providing for a uniform set of rules to regulate the short selling of securities.

B. Self-Regulatory Organization's Statement of Burden on Competition

The Exchange does not believe that the proposed rule changes will impose any inappropriate burden on competition with respect to the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments Regarding the Proposed Rule Changes Received From Members, Participants or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Changes and Timing for Commission Action

The foregoing proposed rule change has been filed with the CHX pursuant to section 19(b)(3)(A) of the Act[9] and subparagraph (f)(6) of Rule 19b–4 thereunder.[10] The CHX requests that the Commission waive both the 5-day notice and the 30-day pre-operative requirements contained in Rule 19b–4(f)(6)(iii).[11] The CHX has designated the proposed rule change as one that: (i) Does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) does not become operative for 30 days from the date it was filed, or such shorter time as the Commission may designate. The CHX believes good cause exists to grant such waivers because of the importance of short sale regulation to the protection of investors. The CHX will implement the foregoing proposed rule change immediately.

The Commission believes that waiving the 5-day notice and the 30-day pre-operative delay is consistent with the protection of investors and the public interest. The Commission believes that accelerating the operative date does not raise any new regulatory issues, significantly affect the protection of investors or the public interest or impose any significant burden on competition. For these reasons, the Commission designates the proposed rule change as effective and operative immediately.

At any time within 60 days of the filing of a rule change pursuant to section 19(b)(3)(A) of the Act, the Commission may summarily abrogate the rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposal is consistent with the Act. 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 No. SR–CHX–2004–42 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File No. SR–CHX–2004–42. 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

[4] *See* the Adopting Release.

[5] *See* Rule 200 (definitions); Rule 203 (uniform locate and delivery requirements) and Rule 202T (allowing the suspension of short sale rules in specified securities) set forth in the Adopting Release.

[6] The Exchange has not sought to amend the substantive requirements of a provision relating to short sales of odd-lots, except to add an interpretation confirming that the rule does not apply when the SEC has suspended the application of the rule as permitted by Regulation SHO. In the coming months, the Exchange plans to study the scope of this rule and to determine what changes, if any, should be made to its requirements.

[7] The Exchange seeks to amend the current rule text of this provision to specifically refer to Regulation SHO. *See* Article IX, Rule 17(a).

[8] 15 U.S.C. 78(f)(b).

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6).

[11] Under subparagraph (f)(6)(iii) of Rule 19b–4, the proposal may not become operative for 30 days after the date of its filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, and the self-regulatory organization must file notice of its intent to file the proposed rule change at least five business days beforehand. See 17 CFR 240.19b–4(f)(6)(iii).

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 changes 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, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of the CHX. 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 No. SR–CHX–2004–42 and should be submitted on or before January 28, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[12]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E5–22 Filed 1–6–05; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50955; File No. SR–FICC–2004–05]

Self-Regulatory Organizations; Fixed Income Clearing Corporation; Order Granting Approval of a Proposed Rule Change To Amend Rules Relating to the Participants Fund Deposit Requirements of Its Mortgage-Backed Securities Division

January 3, 2005.

I. Introduction

On March 3, 2004, the Fixed Income Clearing Corporation (''FICC'') filed with the Securities and Exchange Commission (''Commission'') and on March 11, 2004, amended proposed rule change File No. SR–FICC–2004–05 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'').[1] Notice of the proposed rule change was published in the **Federal Register** on November 22, 2004.[2] No comment letters were received. For the reasons discussed below, the Commission is now granting approval of the proposed rule change.

II. Description

The proposed rule change amends the rules of FICC's Mortgage-Backed Securities Division (''MBSD'') to eliminate the basic deposit component of the Participants Fund deposit requirement for participants that are registered with the Commission as registered investment companies (''RICs'') pursuant to the Investment Company Act of 1940.[3]

In 2003, FICC received a no-action letter[4] from the Commission's Division of Investment Management (''IM'') stating that IM would not recommend to the Commission enforcement action under Section 17(f) of the Investment Company Act of 1940 against any RIC or its custodian if the RIC or its custodian placed the RIC's cash and/or securities in the custody of the MBSD for purposes of meeting the Participants Fund requirements imposed by the MBSD. IM's no-action letter was based upon the fact that the main portions of the MBSD's Participants Fund, the ''minimum market margin differential deposit'' and the ''market margin differential deposit,'' are intended to benefit the non-defaulting participants of the MBSD because these portions are intended to provide assurances that each participant's contributions to the Participants Fund will be adequate to satisfy all open commitments recorded with the MBSD. In contrast, the remaining portion of the Participants Fund, the ''basic deposit,'' is designed to protect FICC by ensuring that each participant's fees owing to the MBSD will be paid if the participant is unable to meet such fee obligations.

In granting no-action relief to FICC, IM staff relied upon FICC's representation that RICs would be exempt from the basic deposit requirement. FICC determined that this representation would not subject it to undue risk because the basic deposit is a relatively minimal amount and because this exemption affects very few participants.[5] The management of FICC returned the basic deposits posted by its RIC clearing members under perceived authority given to it under Article IV, Rule 1, Section 3 of its Rules. FICC nonetheless believes it would be prudent to expressly state in the MBSD Rules that RICs are exempt from the basic deposit requirement.[6]

III. Discussion

Section 17A(b)(3)(F) of the Act requires among other things that the rules of a clearing agency be designed to assure the safeguarding of securities and funds in its custody or control or for which it is responsible.[7] The Commission finds that FICC's proposed rule change is consistent with this requirement because by exempting RICs from its basic deposit requirement, FICC is enabling RICs to become participants while still doing so in a manner that allows FICC to safeguard the securities and funds in its custody or control or for which it is responsible.

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act and in particular Section 17A of the Act and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[8] that the proposed rule change (File No. SR–FICC–2004–05) be and hereby is approved.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[9]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E5–32 Filed 1–6–05; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50949; File No. SR–NSCC–2004–10]

Self-Regulatory Organizations; National Securities Clearing Corporation; Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Change Relating to Regulatory Reporting Transmission Agreements With Self-Regulatory Organizations

December 30, 2004

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on

[12] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] Securities Exchange Act Release No. 50665 (November 15, 2004), 69 FR 67972.

[3] 15 U.S.C. 80a–1.

[4] No-Action Letter under the Investment Company Act of 1940—Section 17(f) and Rule 17f–4, to Fixed Income Clearing Corporation (March 13, 2003).

[5] Currently, the basic deposit is determined semiannually and is the greater of (a) $1,000 or (b) the participant's average monthly bill (per account) with a maximum of $10,000. The MBSD currently has only two RIC clearing members.

[6] FICC will also state in the MBSD's Schedule of Charges that the basic deposit does not apply to RICs.

[7] 15 U.S.C. 78q–1(b)(3)(F).

[8] 15 U.S.C. 78s(b)(2).

[9] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

December 16, 2004, National Securities Clearing Corporation (''NSCC'') filed with the Securities and Exchange Commission (''Commission'') and on December 27, 2004, amended the proposed rule change as described in Items I, II, and III below, which items have been prepared primarily by NSCC. The Commission is publishing this notice and order to solicit comments on the proposed rule change from interested persons and to grant accelerated approval of the proposed rule change.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change would permit NSCC to provide one or more data transmission services to permit members and others to meet regulatory reporting requirements imposed by self-regulatory organizations.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NSCC 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. NSCC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.[2]

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

Since 1995, NSCC has provided, as an accommodation to its members, a service which permits its members to submit trade data for forwarding to the Municipal Securities Rulemaking Board (''MSRB'') in order to permit its members to meet MSRB regulatory requirements. To date, NSCC's rules have been silent with respect to the service. The MSRB has asked NSCC to expand the service and to provide qualifying non-members with the ability to be able to submit data to NSCC for forwarding to the MSRB to meet regulatory requirements.

With the introduction of a service for non-members of NSCC, NSCC believes that it is important to clarify in its rules that NSCC is providing these services on a non-exclusive basis as an accommodation to the industry to alleviate costs. As such, NSCC is proposing to add new Rule 63 that would cover the existing service, the requested expansion of the service, and any other similar service requested of NSCC by any other self-regulatory organization.[3]

NSCC believes that the proposed rule change is consistent with the requirements of Section 17A of the Act and the rules and regulations thereunder because it sets forth the terms that will govern arrangements whereby NSCC enters into an agreement with a self-regulatory organization to facilitate regulatory reporting by industry participants to meet requirements imposed by self-regulatory organizations. As such, the proposed rule change is designed to (i) promote the prompt and accurate clearance and settlement of securities transactions, (ii) protect investors and the public interest, and (iii) assure the safeguarding of securities and funds for which NSCC is in control.

(B) Self-Regulatory Organization's Statement on Burden on Competition

NSCC does not believe that the proposed rule change would have any impact or impose any burden on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments relating to the proposed rule change have not yet been solicited or received. NSCC will notify the Commission of any written comments received by NSCC.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Section 17A(b)(3)(F) of the Act requires, among other things, that the rules of a clearing agency be designed to assure the safeguarding of securities and funds which are in its custody or control or for which it is responsible.[4] The proposed rule change, by clarifying the rights and obligations of NSCC and the users of any of its regulatory reporting data transmission services, is designed to protect NSCC and its members from any unnecessary financial risks. Accordingly, the proposed rule change should help to assure the safeguarding of securities and funds which are in NSCC's custody or control or for which it is responsible.

NSCC has requested that the Commission find good cause for approving the proposed rule change prior to the thirtieth day after publication of the notice of filing. The Commission recently approved two proposed rule changes filed by the MSRB that permit the MSRB to require dealers to submit transaction reports within 15 minutes of the time of trade.[5] This requirement will become effective in January 2005 and will be facilitated by NSCC. The Commission finds good cause for approving the proposed rule change prior to the thirtieth day after publication because by so approving NSCC will be able to provide data transaction trade submission services to non-members of NSCC by the MSRB's January 2005 implementation date.

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–NSCC–2004–10 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–NSCC–2004–10. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your

[2] The Commission has modified the text of the summaries.

[3] Rule 63, SRO Regulatory Reporting, reads as follows:

The Corporation may provide one or more data transmission services to permit members and others to meet regulatory reporting requirements imposed by self-regulatory organizations, as defined in the Securities Exchange Act of 1934. To the extent that members or others use any such service they shall be bound by the terms of any agreement between the Corporation and any self-regulatory organization with respect to each such service. Entities which are not members shall be required to enter into such agreements as determined by the Corporation in order to use such services.

[4] 15 U.S.C. 78q–1(b)(3)(F).

[5] Securities Exchange Act Release Nos. 50294 (August 31, 2004), 69 FR 54170 (September 7, 2004) (Order approving a proposed rule change relating to amendments to the MSRB's Rule G–12(f) on Automated Comparison and G–14 on Transaction Reporting and relating to the implementation of a facility for real-time transaction reporting and price dissemination) and 50820 (December 8, 2004), 69 FR 74553 (December 14, 2004) [File No. SR–MSRB–2004–06] (Order approving a proposed rule change to create a real-time transaction price service and to propose an annual subscription fee).

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 NSCC and on NSCC's Web site at *http://www.nscc.com.* 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–NSCC–2004–10 and should be submitted on or before January 28, 2005.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[6]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E5–19 Filed 1–6–05; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50942; File No. SR–NYSE–2004–63]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment Nos. 1 and 2 Thereto by the New York Stock Exchange, Inc. To Amend Exchange Rules Relating to the Return of Membership Certificates, Notice and Return of Exchange-Issued Identification Cards, and Minor Violations of Rules

December 29, 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 November 1, 2004, the New York Stock Exchange, Inc. (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. On December 15, 2004, the Exchange filed Amendment No. 1 to the proposed rule change.[3] On December 23, 2004, the Exchange filed Amendment No. 2 to the proposed rule change.[4] 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: (1) Delete the requirement in NYSE Rule 343(d) to return certificates of membership upon termination of customer offices or status as a member organization; (2) add NYSE Rule 35.80 to require members and member organizations to notify the Exchange's Security Office and surrender Exchange-issued identification cards within 24 hours of all employee terminations, re-assignments to non-Floor duties, or cancellations of such identification cards; (3) rescind NYSE Rule 412(g), which currently allows the Exchange to impose fees of up to $100 per securities account per day for violations of NYSE Rule 412; and (4) enable violations of proposed new NYSE Rule 35.80 to be administered through the Exchange's minor rule violation plan (NYSE Rule 476A).

The text of the proposed amendments is set forth below. Brackets indicate deletions; italics indicate additions.

* * * * *

Rule 343

Offices—Sole Tenancy, Hours, Display of Membership Certificates

(a) to (c) unchanged

(d) Members and member organizations maintaining customers' offices are required to display in each such office a certificate of membership provided by the Exchange. Such certificate shall be at all times the property of the Exchange[, and every such certificate shall be returned upon termination of the office or of the status as a member organization].

* * * * *

Rule 35

Floor Employees To Be Registered

No employee of a member or member organization shall be admitted to the Floor unless he is registered with, qualified by and approved by the Exchange, and upon compliance of both the employer and employee with such requirements as the Exchange may determine.

Supplementary Material

(Rule 35.10 through 35.70 unchanged)

.80 Notifications to Security Office and Return of Exchange-Issued Identification Cards

In the event of:

(1) A Floor member's or employee's termination, or

(2) Cancellation of a member's or employee's Exchange-issued identification card prior to expiration, or

(3) A member or member organization's re-assignment of a Floor member or employee to non-Floor functions

Members and member organizations must notify the Exchange's Security Office of the termination, cancellation, or re-assignment, and must surrender the member's or employee's Exchange-issued identification card to the Exchange's Security Office, within 24 hours of the termination, cancellation, or re-assignment.

* * * * *

Rule 412

Customer Account Transfer Contracts

(a) to (f) unchanged

[(g) Unless an exemption has been granted pursuant to paragraph (f) of this rule, the Exchange may impose upon a member organization a fee of up to $100 per securities account for each day such member organization fails to adhere to the time frames or procedures required by this rule and related published interpretations.]

* * * * *

Rule 476A

Imposition of Fines for Minor Violation(s) of Rules

(a) to (e) unchanged.

[6] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Form 19b–4 dated December 15, 2004 (''Amendment No. 1''). In Amendment No 1, the Exchange included current rule text that was omitted from the original rule filing and made technical changes to the rule text. Amendment No. 1 replaced the original filing in its entirety.

[4] *See* Partial Amendment dated December 23, 2004 (''Amendment No. 2''). In Amendment No. 2, the Exchange: (i) Submitted the proposed rule text changes in an Exhibit 4, which was inadvertently omitted from Amendment No. 1; (ii) changed ''reassignment'' to ''re-assignment'' in proposed NYSE Rule 35.80(3); and (iii) corrected typographical errors made in the original rule filing and Amendment No. 1 with respect to current rule text.

Supplementary Material: List of Exchange Rule Violations and Fines Applicable Thereto Pursuant to Rule 476A

- Rule 15 (ITS and Pre-Opening Applications) and Rule 15A (ITS ''Trade-Throughs'' and ''Locked-Markets'' and ITS Block Trade Policy)
- Rule 35 requirement that employees of members and member organizations be registered with, qualified by, and approved by the Exchange before being admitted to the Trading Floor.
- *Failure to notify the Exchange's Security Office and surrender Exchange-issued identification cards within 24 hours of Floor members' or employees' termination or re-assignment, or cancellation of such identification cards, as required by Rule 35.80*

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Proposed Amendment to NYSE Rule 343(d)

NYSE Rule 343 lists certain procedures that must be followed to, among other things, avoid confusion regarding the Membership affiliation of persons conducting a securities or commodities business with the public. NYSE Rule 343(d) requires a member or member organization that maintains a customer office to display in such office a certificate of membership provided by the Exchange, and requires such certificate to be returned to the Exchange upon termination of the office or the organization's membership status. In practice, these certificates are frequently not returned, and the Exchange believes that the consequences of disregarding this provision of the rule have been negligible. The Exchange believes that rules that are widely violated and not enforced detract from the integrity of all Exchange rules, and the difficulty of enforcing the requirement that certificates be returned outweighs any minimal benefit of its enforcement. Therefore, the Exchange proposes to eliminate in NYSE Rule 343(d) the requirement to return a certificate of membership upon termination of the customer office or the organization's membership status.

Proposed Amendment to NYSE Rule 35 (Adding NYSE Rule 35.80)

The Exchange's Floor Official Manual requires the membership to notify the Security Office of the Exchange within 24 hours of a Floor member's or employee's termination, and to surrender such member's or employee's Exchange-issued identification card to the Security Office within five business days of termination, or upon the cancellation of the member's or employee's card prior to expiration. A member's or member organization's reassignment of a Floor member or employee to non-Floor functions is also subject to these requirements.[5]

The Exchange believes that the increase in potential security risks since September 11, 2001, necessitates shortening the time allowed for surrendering Exchange-issued identification cards from five days to one day. Codifying the aforementioned requirements in the Exchange's rules would enable the Exchange to enforce those requirements. Thus, the Exchange proposes in proposed NYSE Rule 35.80 to require a member or member organization to notify the Exchange's Security Office, and surrender any Exchange-issued identification card, within 24 hours of a Floor member or employee termination or re-assignment to non-Floor functions, or cancellation of a member's or employee's Exchange-issued identification card prior to expiration.

Proposed Amendment to NYSE Rule 476A

NYSE Rule 476A provides that the Exchange, subject to specified requirements, may impose a fine, not to exceed $5,000, on any member, member organization, allied member, approved person, or registered or non-registered employee of a member or member organization for a minor violation of specified Exchange rules. The purpose of the NYSE Rule 476A procedure is to provide a meaningful sanction for a rule violation when the initiation of full disciplinary proceedings under NYSE Rule 476 is not warranted by the minor nature of the violation, or when the violation calls for a stronger regulatory response than an admonition letter would convey. NYSE Rule 476A preserves due process rights, identifies those rule violations that may be the subject of summary fines, and includes a schedule of fines.

In SR–NYSE–84–27,[6] which initially set forth the provisions and procedures of NYSE Rule 476A, the Exchange indicated that it would amend the list of rules from time to time, as it considered appropriate, in order to phase-in the implementation of Rule 476A as experience with it was gained. Because of the possible range of severity of a member's or member organization's failure to notify the Exchange's Security Office and surrender an Exchange-issued identification card within 24 hours of a Floor member's or employee's termination or re-assignment to non-Floor functions or cancellation of such identification card, as required by proposed NYSE Rule 35.80, an amendment to NYSE Rule 476A would allow the Exchange to sanction the members' and member organizations' less serious instances of delinquency pursuant to the minor violation fine provisions of NYSE Rule 476A. The Exchange believes that the addition of proposed NYSE Rule 35.80 to the list of rule violations in NYSE Rule 476A would not compromise the Exchange's ability to bring appropriate formal disciplinary actions for more serious violations of NYSE Rule 35.80.

Proposed Amendment to NYSE Rule 412 (Rescinding NYSE Rule 412(g))

NYSE Rule 412 mandates several time frames and procedures that must be followed when transferring customer accounts between member organizations. NYSE Rule 412(g) currently allows the Exchange to impose upon a member organization a fee of up to $100 per securities account for each day the organization fails to adhere to the requirements of NYSE Rule 412. NYSE Rule 476A also provides for the imposition of minor fines for such violations.

The Exchange's Special Review of the Consistency of Informal Disciplinary Actions recommended the establishment of guidelines to clearly indicate which NYSE Rule 412 violations should be penalized pursuant to NYSE Rule 412(g) and which should be sanctioned by the imposition of

[5] Telephone conversation between Ronald Rubin, Senior Special Counsel, NYSE, and Kim Allen, Attorney, Division of Market Regulation (''Division''), Commission, on December 28, 2004.

[6] *See* Securities Exchange Act Release No. 21688 (January 25, 1985), 50 FR 5025 (February 5, 1985) (SR–NYSE–84–27).

minor fines pursuant to NYSE Rule 476A.[7]

NYSE Rule 412(g) was proposed in 1984, prior to the adoption of NYSE Rule 476A in March 1985.[8] Once NYSE Rule 476A became operative, the Exchange had another effective method of enforcing NYSE Rule 412, and the sanctions of NYSE Rule 412(g) became superfluous. Historically, the Exchange's practice in most, if not all, cases of minor violations of NYSE Rule 412 has been to assess summary fines under NYSE Rule 476A rather than fees under NYSE Rule 412(g). Therefore, rather than establish guidelines for choosing between NYSE Rule 476A and NYSE Rule 412(g), the Exchange believes it would be more appropriate to simply rescind NYSE Rule 412(g) and continue to sanction violations of NYSE Rule 412 through the assessment of fines pursuant to NYSE Rule 476A.

2. Statutory Basis

The Exchange believes that the proposal, as amended, is consistent with Section 6(b) of the Act[9] in general, and Section 6(b)(5) of the Act[10] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade and, in general, to protect investors and the public interest by making the Exchange's rules more consistent with membership and Exchange practices and strengthening the Exchange's security procedures. The Exchange also believes that the proposed rule change is consistent with Section 6(b)(6)[11] of the Act, which requires the rules of the Exchange to provide for its members and persons associated with its members to be appropriately disciplined for violations of those rules through fitting sanctions, including the imposition of fines.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange believes that the proposal would not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

[7] Rule 476A provides for individuals to be fined $1,000 for first-time offenses, $2,500 for second-time offenses, and $5,000 for subsequent offenses, and for member organizations to be fined $2,500 for first-time offenses and $5,000 for subsequent offenses.

[8] The amendment adding NYSE Rule 412(g) was adopted in November 1985. Telephone conversation between Ronald Rubin, Senior Special Counsel, NYSE, and Kim Allen, Attorney, Division, Commission, on December 28, 2004.

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(5).

[11] 15 U.S.C. 78f(b)(6).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which the Exchange consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. 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 e-mail to *rule-comments@sec.gov.* Please include File Number SR–NYSE–2004–63 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–2004–63. 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, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing will also 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–2004–63 and should be submitted by January 28, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[12]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E5–21 Filed 1–6–05; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50951; File No. SR–OCC–2004–22]

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to Clearing Fees for Securities Option Contracts

December 30, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on December 10, 2004, The Options Clearing Corporation (''OCC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change described in Items I, II, and III below, which items have been prepared primarily by OCC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested parties.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The purpose of the proposed rule change is to continue the effectiveness of fee reductions specified in OCC rule filing SR–OCC–2004–12 until further action by OCC's Board of Directors.[2]

[12] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] Securities Exchange Act Release No. 50080 (July 30, 2004), 69 FR 45873.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, OCC 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. OCC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.[3]

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The purpose of this rule change is to continue in effect the July 1, 2004, reduction in clearing fees for securities option contracts until OCC's Board of Directors determines otherwise. As a result, effective January 1, 2005, OCC's clearing fees will continue to be as follows:

Contracts per trade	Per contract fee effective January 1, 2005
0–500	$0.07
501–1000	0.06
1,001–2,000	0.05
>2,000	(1)95.00

[1] Capped.

The continued fee reduction recognizes the strong volume in securities options in 2004. OCC believes that this fee reduction will financially benefit clearing members and other market participants without adversely affecting OCC's ability to meet its expenses and maintain an acceptable level of retained earnings.

OCC believes that the proposed rule change is consistent with the requirements of Section 17A of the Act[4] and the rules and regulations thereunder applicable to OCC because it allows for the equitable allocation of reasonable dues, fees, and other charges among OCC's members.

(B) Self-Regulatory Organization's Statement on Burden on Competition

OCC does not believe that the proposed rule change would impose any burden on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were not and are not intended to be solicited with respect to the proposed rule change, and none have been received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective upon filing pursuant to Section 19(b)(3)(A)(ii) of the Act[5] and Rule 19b–4(f)(2)[6] thereunder because the proposed rule establishes or changes a due fee, or other charge. At any time within sixty days of the filing of such rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. 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–OCC–2004–22 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–OCC–2004–22. 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 OCC and on OCC's Web site at *http://www.optionsclearing.com*. 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–OCC–2004–22 and should be submitted on or before January 28, 2005.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[7]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E5–23 Filed 1–6–05; 8:45 am]

BILLING CODE 8010–01–P

[3] The Commission has modified the text of the summaries prepared by OCC.

[4] 15 U.S.C. 78q–1.

[5] 15 U.S.C. 78s(b)(3)(A)(ii).

[6] 17 CFR 240.19b–4(f)(2).

[7] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50948; File No. SR–PCX–2004–128]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Pacific Exchange, Inc. Relating to the Phase-In of PCX Plus

December 29, 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 December 29, 2004, the Pacific Exchange, Inc. (''PCX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the PCX. 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

PCX proposes to amend PCX Rule 6.90, governing PCX Plus, in order to

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

extend the system phase-in period from December 31, 2004 until March 31, 2005. Below is the text of the proposed rule change. Proposed new language is *italicized*; proposed deletions are bracketed.

* * * * *

Rules of the Board of Governors of the Pacific Exchange, Inc.

* * * * *

Rule 6—Options Trading

* * * * *

PCX Plus

Rule 6.90(a)—No Change.

(b) System Phase-In and Applicability of the Rules. The PCX estimates that the rules applicable to PCX Plus will be implemented gradually on an issue-by-issue basis beginning October 6, 2003, and will become completely operative and applicable to all options issues by [December 31, 2004] *March 31, 2005*. At that time, the rules relating to PCX Plus will supersede existing rule that are inapplicable to the new trading environment.

(c)—(h)—No change.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the PCX included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The PCX has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend PCX Rule 6.90 governing the PCX Plus system [3] phase-in date. PCX Plus is the Exchange's electronic order delivery, execution and reporting system for designated option issues through which orders and Quotes with Size [4] are consolidated for execution and/or display. The trading system includes an electronic communications network that enables registered Market Makers to enter orders/Quotes with Size and execute transactions from remote locations or the trading floor. As proposed, the Exchange seeks to extend the date by which it expects to have PCX Plus completely operative and applicable to all options issues from December 31, 2004 until March 31, 2005. The Exchange represents that this extension is warranted to afford the PCX sufficient time to address any capacity issues the system may have as a result of phasing in issues currently traded on the Exchange and adding new issues to be traded on the Exchange.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[5] in general, and furthers the objectives of Section 6(b)(5),[6] in particular, in that it is designed to facilitate transactions in securities, to promote just and equitable principles of trade, to enhance competition and to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments on the proposed rule change were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act [7] and subparagraph (f)(3) of Rule 19b–4 [8] thereunder because it is concerned solely with the administration of the Exchange. At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. 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–PCX–2004–128 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–PCX–2004–128. 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 Exchange. 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–PCX–2004–128 and should be submitted on or before January 28, 2005.

[3] Securities Exchange Act Release No. 47838 (May 13, 2003), 68 FR 27129 (May 19, 2003) (Order Approving Proposal for PCX Plus).

[4] *See* PCX Rule 6.1(b)(33) (definition of Quotes with Size).

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(5).

[7] 15 U.S.C. 78s(b)(3)(A)(iii).

[8] 17 CFR 240.19b–4(f)(3).

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[9]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E5–26 Filed 1–6–05; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50947; File No. SR–Phlx–2004–82]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment 1 Thereto by the Philadelphia Stock Exchange, Inc. Relating to Short Sales

December 29, 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 3, 2004, the Philadelphia Stock Exchange, Inc. (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III, below, which items have been prepared by the Phlx. On December 28, 2004, the Phlx filed Amendment No. 1 to the proposed rule change.[3] The proposed rule change, as amended, was filed by the Phlx as a non-controversial filing under Rule 19b–4(f)(6) of the Act.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Phlx, pursuant to Section 19(b)(1) and Rule 19b–4 thereunder,[5] proposes to amend Exchange Rules: 455, Short Sales; 203, Agreement of Specialists; 225, Odd-Lot Orders in Securities Which the Exchange Is the Primary Market; 785, Automated Submission of Trading Data; and 786, Periodic Reports. The text of amended Exchange Rules 455, 203, 225, 785 and 786 is set forth below. New text is italicized; deleted text is bracketed.

* * * * *

Rule 455. Short Sales

No member or member organization shall effect a sell order or sale of any security unless such sell order or sale is effected in compliance with Securities and Exchange Commission Rule 10a–1 promulgated under the Securities Exchange Act of 1934.

[(a)(1) Except as provided in subsection (d) hereof, no member or member organization shall for his or its own account or for the account of any other person, effect on the Exchange a short sale of any security for which traders are reported pursuant to a consolidated transaction reporting system operated in accordance with a plan declared effective under Securities Exchange Act Rule 17a–15 (a ''consolidated system'') (i) below the price at which the last sale thereof, regular way, was reported in such consolidated system, or (ii) at the last sale price unless such price is above the next preceding different price at which a sale of such security, regular way, was reported in such consolidated system.

(2) Except as provided in subsection (d) hereof, no member or member organization shall for his or its own account, or for the account of any other person, effect on the Exchange a short sale of any security not covered by paragraph (1) of this subsection (i) below the price at which the last sale of such security, regular way, was effected on the Exchange, or (ii) at the last sale price unless such price is above the next preceding different price at which a sale of such security, regular way, was effected on the Exchange.

(3) Notwithstanding paragraph (1) of this subsection (a), the Floor Procedure Committee, in its discretion, may determine that it is necessary or appropriate in the public interest or for the protection of investors that short sales in any security for which trades are reported in a consolidated system be subject to the rule set forth in paragraph (2) hereof. Following any such designation of any such security by the Floor Procedure Committee, compliance with the terms of paragraph (2) shall constitute compliance with this subsection (a).

Marked ''Long'' or ''Short''

(b) No member or member organization of the Exchange shall, by the use of any facility of the Exchange, execute any sell order unless such order is marked either ''long'' or ''short''.

Marking Orders

(c) No member or member organization of the Exchange shall mark a sell order ''long'' unless (1) the security to be delivered after sale is carried in the account for which the sale is to be effected, or (2) such member or member organization is informed that the seller owns the security ordered to be sold, and as soon as is possible without undue inconvenience or expense, will deliver the security owned to the account for which the sale is to be effected.

Exceptions

(d) The provisions of subsection (a) hereof shall not apply to:

(1) Any sale by any person, for an account in which he has an interest, if such person owns the security sold and intends to deliver such security as soon as possible without undue inconvenience or expense;

(2) Any member or member organization in respect of a sale, for an account in which it has no interest, pursuant to an order to sell which is marked ''long'';

(3) Any sale of a security for which trades are reported in a consolidated system (except a sale to a stabilizing bid complying with Securities Exchange Act Rule 10b–7) by a specialist in such security for its own account (i) effected at a price equal to or above the last sale reported for such security in such consolidated system; or (ii) effected at a price equal to the most recent offer communicated for the security 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, this exemption shall not be available for securities covered by paragraph (3) of subsection (a) hereof.

(4) Any sale by a specialist to offset odd lot orders of customers;

(5) Any sale by a specialist to liquidate a long position which is less than a round lot, provided such sale does not change the position of such specialist by more than the unit of trading;

(6) Any sale of a security for which trades are not reported in a consolidated system (except a sale to a stabilizing bid complying with Securities Exchange Act Rule 10b–7) effected with the approval of the Exchange which is necessary to equalize the price of such security on the Exchange with the current price of such security on another national securities exchange which is the principal exchange market for such security;

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[9] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Amendment No. 1 to the proposed rule change (December 28, 2004). Amendment No. 1 replaced the Exchange's original filing in its entirety.

[4] 17 CFR 240.19b4(f)(6). For purposes of determining the effective date and calculating the sixty-day period within which the Commission may summarily abrogate the proposed rule change under Section 19(b)(3)(C) of the Act, the Commission considers that period to commence on December 28, 2004, the date the Exchange filed Amendment No. 1. *See* 15 U.S.C. 78s(b)(3)(C).

[5] 17 CFR 240.19b–4.

(7) Any sale of a security for a special arbitrage account by a person who then owns another security by virtue of which he is, or presently will be, entitled to acquire an equivalent number of securities of the same class as the securities sold, provided such sale, or the purchase which such sale offsets, is effected for the bona fide purpose of profiting from a current difference between the price of the security sold and the security owned and that such right of acquisition was originally attached to or represented by another security or was issued to all the holders of any class of securities of the issuer;

(8) Any sales of a security on the Exchange effected for a special international arbitrage account for the bona fide purpose of profiting from a current difference between the price of such security on a securities market not within or subject to the jurisdiction of the United States and on the Exchange provided the seller at the time of such sale knows or, by virtue of information currently received, has reasonable grounds to believe that an offer enabling him to cover such sale is then available to him in such foreign securities market and intends to accept such offer immediately;

(9) Any sale of a security effected in accordance with a special offering plan declared effective by the Securities and Exchange Commission pursuant to paragraph (d) of Securities Exchange Act Rule 10b–2; or

(10) Any sale by an underwriter, or any member of a syndicate or group participating in the distribution of a security, in connection with an over-allotment of securities, or any lay-off sale by such a person in connection with a distribution of securities through rights pursuant to Securities and Exchange Act Rule 10b–8 or a standby underwriting commitment.

(11) Any sale of a security for which, trades are reported in a consolidated system (except a sale to a stabilizing bid complying with Securities Exchange Act Rule 10b–7) 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 the Exchange 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; provided however, this exemption shall not be available for securities covered by paragraph (3) of subsection (a) hereof.

For the purpose of paragraph (8) of this subsection (d) a depository receipt for a security shall be deemed to be the same security as the security represented by such receipt.

(12) Any sale by any person in Nasdaq/NM securities as defined in Securities Exchange Act Rule 11Aa3–1 except for those Nasdaq/NM securities for which transaction reports are collected, processed, and made available pursuant to the plan originally submitted to the Securities and Exchange Commission pursuant to Securities Exchange Act Rule 17a–15 (subsequently amended and redesignated as Securities Exchange Act Rule 11Aa3–1), which plan was declared effective as of May 17, 1974.

* * * Supplementary Material

.01 This Rule 455 shall not prohibit any transaction or transactions which the Commission, upon written request or upon its motion, exempts, either unconditionally or on specified terms and conditions.]

Rule 203. Agreement of Specialists

(a)–(d) No change.

(e)(i) At an opening, all market orders, (whether entrusted to or left with the specialist or represented by a broker or brokers in the Trading Crowd) including at the opening market orders, shall have precedence over limit orders and shall be executed at one price.

(ii) In connection with an opening:

(A) A limited price order to buy which is at a higher price than the price at which the security is to be opened, and a limited price order to sell which is at a lower price than the price at which the security is to be opened, are to be treated as market orders.

(B) A market order to sell short is not to be treated as other market orders, but is to be treated as a limited price order to sell at the price of the first permissible short sale. A limited price order to sell short which is at a lower price than the price at which the security is to be opened, is to be treated as a limited price order to sell at the price of the first permissible short sale. Such orders are to be treated as market orders only if the opening price is higher than the first permissible short sale price. *This subsection (B) does not apply to market orders or limited price orders that are marked ''sell short exempt''.*

Rule 225. Odd-Lot Orders in Securities for Which the Exchange Is the Primary Market

(a) Odd-lot orders in securities for which the Exchange is the primary market shall be executed subject to the provisions of Rules 203 and 205 and in the manner prescribed below:

Order to buy at market

(i) An order to buy at the market shall be executed on the next round-lot transaction of the security, plus the differential if any is charged.

Order to sell at market

(ii) An order to sell at the market marked ''long'' *or ''sell short exempt''* shall be executed on the next round-lot transaction of the security, minus the differential if any is charged.

An order to sell at the market marked ''short'' *(but not marked ''sell short exempt'')* shall be executed at the price of the next round-lot transaction which is higher than the last different round-lot price, minus the differential if any is charged.

Order to buy at limit

(iii) The effective transaction for a limited order to buy shall be the next round-lot transaction which is either at or below the specified limit by the amount of any differential if charged or by a greater amount. The order shall be filled at the price of the effective transaction, plus the differential if any is charged.

Order to sell at limit ''long''

(iv) The effective transaction for a limited order to sell marked ''long'' *or ''sell short exempt''* shall be the next round-lot transaction which is either at or above the specified limit by the amount of any differential if charged by a greater amount. The order shall be filled at the price of the effective transaction, minus the differential if any is charged.

Order to sell at limit ''short''

The effective transaction for a limited order to sell marked ''short'' *(but not ''sell short exempt'')* shall be the next round-lot transaction which is either at or above the specified limit by the amount of any differential if charged, or by a greater amount, and which is also higher than the last different round-lot transaction (a ''plus'' or ''zero-plus'' tick). The order shall be filled at the price of the effective transaction, minus the differential if any is charged.

Buy stop order

(v) A buy stop order shall become a market order when a round-lot transaction takes place at or above the stop price. The order shall then be filled at the price of the next transaction, plus the differential if any is charged.

Sell stop order marked ''long''

(vi) A sell stop order marked ''long'' *or ''sell short exempt''* shall become a market order when a round-lot transaction takes place at or below the stop price. The order shall then be filled at the price of the next transaction, minus the differential if any is charged.

Sell stop order marked ''short''

A sell stop order marked ''short'' *(but not ''sell short exempt'')* shall become a market order when a round-lot transaction takes place at or below the stop price. The order shall then be filled at the price of the next transaction, which is higher than the last different round-lot price, minus the differential if any is charged.

Buy stop limited order

(vii) A buy stop limited order shall become a limited order when a round-lot transaction takes place at or above the stop price. The order shall then be filled in the manner prescribed for handling a limited order to buy.

Sell stop limited order marked ''long''

(viii) A sell stop limited order marked ''long'' *or ''sell short exempt''* shall become a limited order when a round-lot transaction takes place at or below the stop price. The order shall then be filled in the manner prescribed for handling a limited order to sell, marked ''long.''

Sell stop limited order marked ''short''

A sell stop limited order marked ''short'' *(but not ''sell short exempt'')* shall become a limited order when a round-lot transaction takes place at or below the stop price. The order shall then be filled in the manner prescribed for handling a limited order to sell, marked ''short.''

Buy on offer

(ix) An order to buy on the offer shall be filled at the round-lot offer price prevailing at the time the specialist receives the order, plus the differential if any is charged.

Sell on bid

(x) An order to sell on the bid marked ''long'' *or ''sell short exempt''* shall be filled at the round-lot bid price prevailing at the time the specialist receives the order, minus the differential if any is charged. An order to sell on the bid marked ''short'' *(but not ''sell short exempt'')* shall not be accepted.

Buy ''on close''

(xi) An order to buy ''on close'' shall be filled at the price of the closing round-lot offer, plus the differential if any is charged.

Sell ''on close''

(xii) An order to sell ''on close'' marked ''long'' *or ''sell short exempt''* shall be filled at the price of the closing round-lot bid, minus the differential if any is charged. An order to sell ''on close'' marked ''short'' *(but not ''sell short exempt'')* shall not be accepted.

Limited order to buy marked ''or at market on close''

(xiii) A limited order to buy marked ''or at the market on close'' which remains unfilled at the close of business on the Exchange, shall be filled at a price equal to the closing round-lot offer, plus the differential if any is charged.

Limited order to sell marked ''long'' and ''or at market on close''

(xiv) A limited order to sell marked ''long'' *or ''sell short exempt''* and marked ''or at market on close'' which remains unfilled at the close of business on the Exchange, shall be filled at a price equal to the closing round-lot bid, minus the differential if any is charged.

A limited order to sell marked ''short'' (*but not ''sell short exempt''*) and marked ''or at market on close'' shall not be accepted.

Limited order to buy on the offer

(xv) A limited order to buy on the offer shall be filled at a price equal to the round-lot offer price prevailing at the time the specialist receives the order, plus the differential if any is charged, but only if the offer price plus the differential if any is charged, is at or below the limit of the order. If the order cannot be filled forthwith, it shall be canceled and the originating member or member organization shall be informed regarding the quotation and the cancellation.

Limited order to sell on the bid marked ''long''

(xvi) A limited order to sell on the bid marked ''long'' *or ''sell short exempt''* shall be filled at a price equal to the round-lot bid price prevailing at the time the specialist receives the order, minus the differential if any is charged, but only if the bid price minus the differential if any is charged, is at or above the limit of the order. If the order cannot be filled forthwith, it shall be cancelled and the originating member or member organization shall be informed regarding the quotation and the cancellation.

Limited order to buy marked ''immediate or cancel''

(xvii) A limited order to buy marked ''Immediate or Cancel'' shall be handled in the manner specified in (xv) above for the handling of a limited order to buy on the offer. A limited order to sell marked ''Immediate or Cancel'' shall be handled in the manner specified in (xvi) above for the handling of a limited order to sell on the bid.

Buy or sell on closing bid or offer

(xviii) At the request of a customer an order may be filled after the close at a price based on the closing round-lot bid or offer provided that the order was received prior to the close and could have been filled, in the case of a buy order, if a sale had occurred at the offer price and, in the case of a sell order, if a sale had occurred at the bid price; the request is made within a reasonable time after the close; and nothing has occurred after the close which could affect the market value of the stock.

A buy order shall be filled at the price of the closing round-lot offer, plus the differential if any is charged.

A sell order marked ''long'' *or ''sell short exempt''* shall be filled at the price of the closing round-lot bid, minus the differential if any is charged. A sell order marked ''short'' (*but not ''sell short exempt''*) may not be accepted for filling after the close.

''Cash'' or ''seller's option''

(xix) Odd-lot orders for ''cash'' or ''seller's option'' may be filled only by agreement between customer and odd-lot dealer.

''Delayed sale'' or ''sold sale''

(xx) When a ''delayed sale'' or ''sold sale'' occurs (printed on the ticker tape followed by the symbol ''SLD''), the specialist shall make every effort to ascertain the approximate time the transaction took place. If there is some doubt as to whether or not this transaction in any way effects the execution of an odd-lot order, the firm that entered the order should be notified, informed of the circumstances, and given the opportunity to accept or reject a report based on the transaction.

Rule 785. Automated Submission of Trading Data

A member or member organization shall submit such of the following trade data elements specified below in such automated format as may be prescribed by the Exchange from time to time, in regard to such transaction or transactions as may be subject of a particular request for information made by the Exchange:

(a) If the transaction was a proprietary transaction effected or caused to be effected by the member or member organization for any account in which such member or member organization, or any member, allied member, approved person, partner, officer, director, or employee thereof, is directly or indirectly interested, such member or member organization shall submit or cause to be submitted the following information:

(1)–(4) No Change.

(5) Number of shares, or quantity of bonds or options contracts for each specific transaction and whether each transaction was a purchase, sale, short

sale, *exempt short sale*, and if an options contract whether open long or short or close long or short;

(6)–(8) No Change.

(b)–(d) No Change.

Rule 786. Periodic Reports

Member organizations shall submit, as required by the Exchange, periodic reports with respect to short positions in securities.

* * * Supplementary Material

.01 Short Positions—Member organizations for which the Exchange is the designated examining authority (''DEA'') are required to report short positions, including odd-lots, in each stock or warrant traded on the Exchange, and in each other stock or warrant not traded on the Exchange for which short positions are not otherwise reported to another United States securities exchange or association, using such automated format and methods as prescribed by the Exchange. Such reports must include customer and proprietary positions and must be made at such times and covering such time period as may be designated by the Exchange. Member organizations whose short positions have properly been reported to, and are carried by, a non-member clearing organization will be in compliance with this rule if adequate arrangements have been made providing for the clearing organization to properly report such positions to the Exchange or to another United States securities exchange or association.

''Short'' positions to be reported are those resulting from ''short'' sales as defined in Securities and Exchange Commission [Regulation 3b–3] *Rule 200 of Regulation SHO,* but excluding [positions resulting from sales specified in clauses (1), (6), (7), (8), (9) and (10) of paragraph (e) of Regulation 10a–1] *sales marked ''sell short exempt'' pursuant to Rule 200(g) of Regulation SHO.* Also, to be excluded are ''short'' positions carried for other members and member organizations reporting for themselves.

Only one report should be made for each stock or warrant which there is a short position, if more than one ''account'' has a short position in the same stock or warrant, the combined aggregate should be reported.

Member organizations for which the Exchange is not the DEA must report short positions to its DEA if such DEA has a requirement for such reports. If the DEA does not have such a reporting requirement, then such member organization must comply with the provisions of this rule.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Phlx included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The 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 update the Exchange's rules as they pertain to short sales in view of recent Commission actions in the area of short sale regulation. On July 28, 2004 the Commission published two releases making changes to the Commission's rules governing short sales. In the first release, the Commission adopted new Regulation SHO under the Act, replacing SEC Rules 3b–3 [6] and 10a–2.[7] SEC Rule 10a–1 [8] was also amended. In the second release, the Commission, by order, suspended the tick test provision of Rule 10a–1, and any short sale price test of any exchange or national securities association, with respect to certain securities, for a period of approximately one year (the ''Short Sale Pilot Program'') beginning on January 3, 2005, which beginning date the Commission extended to May 2, 2005 by order of November 29, 2004.[9] In view of these developments in the area of short sale regulation, the Exchange is proposing a number of amendments to Phlx rules related to short sales.

Rule 455, Short Sales. Existing Rule 455 is proposed to be deleted in its entirety. New, more general language which simply prohibits effecting a sell order or sale unless it is effected in compliance with Rule 10a–1, the Commission's short sale rule, would be substituted in its place. The proposed language is identical to Article IX, Rule 17(a) of the Chicago Stock Exchange rules.[10] The proposal is intended to simplify and streamline the Exchange's short sale rule to be no more burdensome than that imposed by the Commission, and to provide additional flexibility to the Exchange in the event the Commission determines to further liberalize Rule 10a–1. Additionally, some of existing Rule 455's provisions conflict with new Regulation SHO. For example, Rules 455(b) and (c) track old SEC Rules 10a–1(c) and (d), which Regulation SHO deletes, and conflict with comparable provisions in new SEC Rule 200(g).

Rule 203, Agreement of Specialists. Rule 203 currently provides that a market order to sell short at the opening is not to be treated as other market orders, but is to be treated as a limited price order to sell at the price of the first permissible short sale. The proposed amendment would make clear that this provision of Rule 203 does not apply to orders marked ''sell short exempt'' because such orders are not subject to Rule 10a–1's ''tick test'' restrictions.

Rule 225, Odd-Lot Orders in Securities Which the Exchange Is the Primary Market. Rule 225 currently prescribes the manner in which various types of odd-lot orders in securities for which the Exchange is the primary market are to be executed. The proposed amendments take into account that certain orders are now to be marked ''sell short exempt'' and are intended to clarify that orders that are marked ''short sale exempt'' are to be executed like long sale orders as opposed to short sale orders.

Rule 785, Automated Submission of Trading Data. Rule 785 requires members and member organizations to submit certain trade data elements in such automated format as may be prescribed by the Exchange from time to time, including whether each transaction was a purchase, sale, or short sale. The proposed amendment adds ''exempt short sale'' to these three categories of data elements.

Rule 786, Periodic Reports. Rule 786 requires member organizations to submit, as required by the Exchange, periodic reports with respect to short positions in securities. The proposed amendment would substitute a reference to new Rule 200 of Regulation SHO for old Commission Rule 3b–3, which the Commission has deleted.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b)

[6] 17 CFR 240.3b–3.

[7] 17 CFR 240.10a–2.

[8] 17 CFR 240.10a–1.

[9] Although the Commission's order resets the Short Sale Pilot Program to commence on May 2, 2005 and end on April 28, 2006, all other terms of the pilot program remain unchanged. *See* Securities Exchange Act Release No. 50747 (November 29, 2004).

[10] *See* Securities Exchange Act Release No. 40990 (January 28, 1999), 64 FR 5696 (February 4, 1999) (approving SR–CHX–98–24).

of the Act [11] in general, and furthers the objectives of Section 6(b)(5) of the Act [12] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and to perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. Specifically, the proposed rule change simplifies Rule 455 and conforms Exchange rules to new Commission rules relating to short sales.

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

The Exchange has designated the proposed rule change as a ''non-controversial'' rule change pursuant to Section 19(b)(3)(A) of the Act [13] and subparagraph (f)(6) of Rule 19b–4 thereunder.[14] Consequently, because the foregoing rule change: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, it has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6) thereunder. The Exchange requests that the Commission waive the 30-day pre-operative requirements contained in Rule 19b–4(f)(6)(iii),[15] so that the proposed rule change may become operative on January 3, 2005, the compliance date for Regulation SHO.

The Commission believes that waiving the 30-day pre-operative delay is consistent with the protection of investors and the public interest. The Commission believes that accelerating the operative date does not raise any new regulatory issues, significantly affect the protection of investors or the public interest, or impose any significant burden on competition. For these reasons, the Commission designates the proposed rule change as effective and operative immediately.

At any time within 60 days of the filing of a rule change pursuant to Section 19(b)(3)(A) of the Act, the Commission may summarily abrogate the rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. 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–2004–82 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–2004–82. 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 the filing also will be available for inspection and copying at the principal office of the 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–2004–82 and should be submitted on or before January 28, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[16]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 05–309 Filed 1–6–05; 8:45 am]

BILLING CODE 8010–01–P

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(5).

[13] 15 U.S.C. 78s(b)(3)(A).

[14] 17 CFR 240.19b–4(f)(6).

[15] Under subparagraph (f)(6)(iii) of Rule 19b–4, the proposal may not become operative for 30 days after the date of its filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest. 17 CFR 240.19b–4(f)(6)(iii).

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50946; File No. SR–Phlx–2004–87]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto by the Philadelphia Stock Exchange, Inc. Relating to Amending Phlx Rule 1072 in View of Commission Regulation SHO

December 29, 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 3, 2004, the Philadelphia Stock Exchange, Inc. (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Phlx. On December 27, 2004, the Exchange filed Amendment No. 1 to the proposed rule change.[3] The proposed rule change, as amended, was filed by the Exchange as a non-controversial filing under Rule 19b–4(f)(6) of the Act.[4] The Commission

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Amendment No. 1 to the proposed rule change (December 27, 2004). Amendment No. 1 replaced the Exchange's original filing in its entirety.

[4] 17 CFR 240.19b4(f)(6). For purposes of determining the effective date and calculating the sixty-day period within which the Commission may summarily abrogate the proposed rule change under Section 19(b)(3)(C) of the Act, the Commission considers that period to commence on December 28, 2004, the date the Exchange filed Amendment No. 1. *See* 15 U.S.C. 78s(b)(3)(C).

is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Phlx, pursuant to Section 19(b)(1) and Rule 19b–4 thereunder,[5] proposes to amend Phlx Rule 1072 in view of the recent adoption of Regulation SHO.[6] New text is italicized; deleted text is bracketed.

* * * * *

Rule 1072.

Reporting Requirements Applicable to Short Sales in NASD/NM Securities

This Rule is adopted in conjunction with the adoption of an addition to the Rules of Fair Practice of the NASD which imposes a bid test on short sales of stocks traded on the Nasdaq National Market subject to certain exemptions including, during a pilot period, an exemption for certain transactions of options market makers. This Rule will continue in effect only so long as the options market maker exemption from the NASD bid test remains in effect.

(a) No member shall initiate, accept or transmit for execution, or execute a sale of a Nasdaq National Market (''NM'') security for its own account or for the account of another member unless the sale is clearly identified in a form and manner prescribed by the [Exchange as a long sale, short sale or bid test example sale] *Securities and Exchange Commission's (''SEC'') Rule 200 under the Securities Exchange Act of 1934 promulgated pursuant to Regulation SHO (''SEC Rule 200'').*

(b) For purposes of this Rule, a short sale shall have the same meaning as set forth in SEC Rule [3b–3 under the Securities Exchange Act of 1934] *200.*

(c) through (f): No Change.

(g) Notwithstanding the foregoing, this Rule 1072 shall not be applicable to any short sales for which the SEC has suspended short sale price tests pursuant to its Rule 202T, including any short sales covered by the SEC's Pilot Program suspending certain short sale price provisions at Exchange Act Release No. 50104 (July 28, 2004), or any SEC amendment(s) of the same.

Commentary .01: No Change.

* * * * *

[5] 17 CFR 240.19b–4.

[6] Securities Exchange Act Release No. 50103 (July 28, 2004), 69 FR 48008 (August 6, 2004).

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Phlx included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The 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 conform the Exchange's Rule 1072 to recent Commission actions in the area of short sale regulation.

On July 28, 2004, the Commission published two releases making changes to the Commission's rules governing short sales. In the first release,[7] the Commission adopted new Regulation SHO under the Securities Exchange Act of 1934, thereby replacing SEC Rules 3b–3 [8] and 10a–2 [9] and amending SEC Rule 10a–1.[10] In particular, SEC Rule 3b–3 was replaced by new SEC Rule 200,[11] which defines ''short sales'' and requires brokers and dealers to mark sales in all equity securities ''long,'' ''short,'' or ''short exempt.'' In the second release,[12] the Commission promulgated a pilot program pursuant to new SEC Rule 202T, which suspended the tick test provision of SEC Rule 10a–1 and any short sale price test of any exchange or national securities association with respect to certain securities, for a period of approximately one year beginning on January 3, 2005 (''Short Sale Pilot Program''), which beginning date the Commission extended to May 2, 2005 by order of November 29, 2004.[13] In particular, the Short Sale Pilot Program suspended tick and national securities association price tests for 1000 of the securities in the Russell 3000 index. In view of these developments in the area of short sale regulation, the Exchange is proposing several amendments to Phlx Rule 1072 related to short sales.

Phlx Rule 1072(a) currently provides that Exchange members can not engage in transactions of Nasdaq National Market (NM) securities unless they are clearly identified in a form and manner prescribed by the Exchange. The proposed amendment to Rule 1072(a) clarifies that such transactions must be identified as prescribed by SEC Rule 200. Phlx Rule 1072(b) currently states that a short sale will have the meaning set forth in SEC Rule 3b–3. The proposed amendment to Rule 1072(b) adds a reference to SEC Rule 200 and deletes reference to SEC Rule 3b–3. Finally, an amendment proposes to add new section (g) to Rule 1072 to make clear that the provisions of the rule will not apply to any short sales for which the Commission suspends short sales price tests pursuant to its Rule 202T, including the Short Sale Pilot Program. These changes are intended to update Rule 1072 to reflect Regulation SHO.

2. Statutory Basis

The Exchange believes that its proposal 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, in that it is designed to promote just and equitable principles of trade, to remove impediments to and to perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. Specifically, the proposed rule change conforms Exchange options rule procedures to new Commission releases, rules, and a pilot program relating to short sales.

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.

[7] Securities Exchange Act Release No. 50103 (July 28, 2004), 69 FR 48008 (August 6, 2004).

[8] 17 CFR 240.3b–3.

[9] 17 CFR 240.10a–2.

[10] 17 CFR 240.10a–1.

[11] 17 CFR 240.200.

[12] Securities Exchange Act Release No. 50104 (July 28, 2004), 69 FR 48032 (August 6, 2004).

[13] Although the Commission's order resets the Short Sale Pilot Program to commence on May 2, 2005 and end on April 28, 2006, all other terms of the pilot program remain unchanged. *See* Securities Exchange Act Release No. 50747 (November 29, 2004).

[14] 15 U.S.C. 78f(b).

[15] 15 U.S.C. 78f(b)(5).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The proposed rule change is being designated by the Exchange as a ''non-controversial'' rule pursuant to Section 19(b)(3)(A) of the Act and subparagraph (f)(6) of Rule 19b–4 thereunder, because the proposed rule change: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) does not become operative for thirty days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest. Therefore, it has become effective pursuant to Section 19(b)(3)(A) [16] of the Act and Rule 19b–4(f)(6) [17] thereunder. The Exchange requests that the Commission waive the 30-day pre-operative delay requirement contained in Rule 19b–4(f)(6)(iii),[18] so that the proposed rule change may become operative on January 3, 2005, the compliance date for Regulation SHO. The Exchange is for similar reasons requesting that the five business day pre-filing period be waived in order to file by December 3, 2004.

The Commission believes that waiving the 5-day notice and 30-day pre-operative delay is consistent with the protection of investors and the public interest. The Commission believes that accelerating the operative date does not raise any new regulatory issues, significantly affect the protection of investors or the public interest, or impose any significant burden on competition. For these reasons, the Commission designates the proposed rule change effective and operative immediately.

At any time within 60 days of the filing of a rule change pursuant to Section 19(b)(3)(A) of the Act, the Commission may summarily abrogate the rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

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–2004–87 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–2004–87. 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 the 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–2004–87 and should be submitted on or before January 28, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[19]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E5–24 Filed 1–6–05; 8:45 am]

BILLING CODE 8010–01–P

[16] 15 U.S.C. 78s(b)(3)(A).

[17] 17 CFR 240.19b–4(f)(6).

[18] Under subparagraph (f)(6)(iii) of Rule 19b–4, the proposal may not become operative for 30 days after the date of its filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest. 17 CFR 240.19b–4(f)(6)(iii).

[19] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50945; File No. SR–Phlx–2004–66]

Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Order Granting Accelerated Approval to Proposed Rule Change Relating to Concentration Limit Listing Standards in Phlx Rule 1009A

December 29, 2004.

I. Introduction

On October 7, 2004, the Philadelphia Stock Exchange, Inc. (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend Phlx Rule 1009A, Designation of the Index, which applies to the listing of index options. On October 25, 2004, Phlx filed Amendment No. 1. The proposed rule change, as amended, was published for notice and comment in the **Federal Register** on December 1, 2004.[3] The Commission received no comments on the proposal. This order approves the proposed rule change on an accelerated basis.

II. Description of the Proposal

The Exchange proposes to amend Phlx Rule 1009A, Designation of the Index, which applies to the listing of index options. Specifically, the Exchange proposes to increase certain concentration limit listing standards in Phlx Rule 1009A. Currently, under Phlx Rule 1009A(b), the Exchange may trade options on a narrow-based index without filing a proposed rule change under Section 19(b)(2) of the Act if certain conditions are satisfied.[4] One of these conditions, set forth in Phlx Rule 1009A(b)(6), is that no single component security may represent more than 25% of the weight of the index, and that the five highest weighted component securities in the index may not, in the aggregate, account for more than 50% (60% for an index consisting of fewer than 25 component securities) of the weight of the index. The

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 50727 (November 23, 2004), 69 FR 69974.

[4] The Commission approved an amendment to Phlx Rule 1009A to provide that certain narrow-based index options that meet generic listing standards may be listed and traded on the Exchange without a filing pursuant to Rule 19b–4(e) under the Act. *See* Securities Exchange Act Release No. 43683 (December 6, 2000), 65 FR 78235 (December 14, 2000) (SR–Phlx–2000–67).

Exchange proposes to amend Phlx Rule 1009A(b)(6) to increase the 25% concentration limit for the highest weighted component stock to 30%, and to increase the concentration limit for the five mostly highly weighted stocks in an index consisting of fewer than 25 component securities from 60% to 65%.

III. Discussion and Commission Findings

The Commission has reviewed carefully the proposed rule change, as amended, and finds that it is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[5] In particular, the Commission finds that the proposed rule change, is consistent with Section 6(b)(5) of the Act,[6] which requires that the rules of an exchange be designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national securities system, and, in general, protect investors and the public interest.

The Commission believes that this proposed rule change should provide additional flexibility to the Exchange in listing and trading narrow-based index options and reduce the instances in which the addition of a new series is restricted pursuant to Phlx Rule 1009A. The proposed rule change should also reduce instances where an index option listed on the Exchange is temporarily out of compliance with the concentration limits set forth under Phlx Rule 1009A because of changes in the market value of the underlying index components. Lastly, the Commission believes that that the concentration limit listing standards should continue to serve the purpose for which they were originally intended of not permitting a single security or small number of securities to dominate an index.

The Exchange has requested accelerated approval of the proposed rule change. The Commission notes that the proposed rule change is similar to rules previously approved for other derivative products.[7] The Commission also notes that this proposed rule change was subject to the full comment period, with no comments received, and acceleration by two days would facilitate the Exchange's trading of certain index options.

Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Act,[8] for approving the proposed rule change, as amended, prior to the thirtieth day after the date of publication of notice thereof in the **Federal Register**.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[9] that the proposed rule change (File No. SR–Phlx–2004–66) be, and it hereby is, approved, on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[10]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E5–25 Filed 1–6–05; 8:45 am]

BILLING CODE 8010–01–P

[5] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[6] 15 U.S.C. 78f(b)(5).

[7] *See* Securities Exchange Act Release No. 44532 (July 10, 2001), 66 FR 37078 (July 16, 2001) (SR–Amex–2001–25); Securities Exchange Act Release No. 45920 (May 13, 2002), 67 FR 35605 (May 20, 2002) (SR–NASD–2002–45).

[8] 15 U.S.C. 78s(b)(2).

[9] 15 U.S.C. 78s(b)(2).

[10] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

[Declaration of Disaster #3624]

State of Alabama; Amendment #4

In accordance with a notice received from the Department of Homeland Security—Federal Emergency Management Agency—effective December 20, 2004, the above numbered declaration is hereby amended to extend the deadline for filing applications for physical damages as a result of this disaster to March 3, 2005.

All other information remains the same, *i.e.*, the deadline for filing applications for economic injury is June 15, 2005.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008)

Dated: December 29, 2004.

S. George Camp,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 05–361 Filed 1–6–05; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Declaration of Disaster #3615]

State of Florida; Amendment #6

In accordance with a notice received from the Department of Homeland Security—Federal Emergency Management Agency—effective December 28, 2004, the above numbered declaration is hereby amended to extend the deadline for filing applications for physical damages as a result of this disaster to February 28, 2005.

All other information remains the same, *i.e.*, the deadline for filing applications for economic injury is May 13, 2005.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008)

Dated: December 29, 2004.

S. George Camp,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 05–359 Filed 1–6–05; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Declaration of Disaster #3620]

State of Florida; Amendment #9

In accordance with a notice received from the Department of Homeland Security—Federal Emergency Management Agency—effective December 28, 2004, the above numbered declaration is hereby amended to extend the deadline for filing applications for physical damages as a result of this disaster to February 28, 2005.

All other information remains the same, *i.e.*, the deadline for filing applications for economic injury is June 6, 2005.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008)

Dated: December 29, 2004.

S. George Camp,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 05–360 Filed 1–6–05; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Declaration of Disaster #3627]

State of Florida; Amendment #6

In accordance with a notice received from the Department of Homeland Security—Federal Emergency Management Agency—effective December 28, 2004, the above numbered declaration is hereby amended to extend the deadline for filing applications for physical damages as a result of this disaster to February 28, 2005.

All other information remains the same, *i.e.*, the deadline for filing applications for economic injury is June 16, 2005.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008)

Dated: December 29, 2004.

S. George Camp,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 05–362 Filed 1–6–05; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Declaration of Disaster #3635]

State of Florida; Amendment #5

In accordance with a notice received from the Department of Homeland Security—Federal Emergency Management Agency—effective December 28, 2004, the above numbered declaration is hereby amended to extend the deadline for filing applications for physical damages as a result of this disaster to February 28, 2005.

All other information remains the same, *i.e.*, the deadline for filing applications for economic injury is June 27, 2005.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008)

Dated: December 29, 2004.

S. George Camp,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 05–363 Filed 1–6–05; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

Audit and Financial Management Advisory (AFMAC) Committee Meeting

The U.S. Small Business Administration's Audit and Financial Management Advisory Committee (AFMAC) will be hosting its third meeting to discuss such matters that may be presented by members, and staff of the U.S. Small Business Administration, or others present. The meeting will begin on Friday, January 28, 2005, starting at 9 a.m. The meeting will be held at the U.S. Small Business Administration Headquarters, located at 409 3rd Street, SW., Washington, DC 20416, in the Chief Financial Officer's Conference Room, 6th Floor. The AFMAC was established by the Administrator of the SBA to provide recommendation and advice regarding the Agency's financial management including the financial reporting process, systems of internal controls, audit process and process for monitoring compliance with relevant laws and regulations.

Anyone wishing to attend must contact Thomas Dumaresq in writing or by fax. Thomas Dumaresq, Chief Financial Officer, 409 3rd Street SW., Washington, DC 20416, phone (202) 205–6506, fax: (202) 205–6869, e-mail: *thomas.dumaresq@sba.gov*.

Matthew K. Becker,

Committee Management Officer.

[FR Doc. 05–364 Filed 1–6–05; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF TRANSPORTATION

[Docket No. OST–2004–20004]

Office of Small & Disadvantaged Business Utilization and Minority Resource Center; Notice of Request for New Data Collection

AGENCY: Office of the Secretary, DOT.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Office of Small and Disadvantaged Business Utilization and Minority Resource Center invites public comment on public information collections, which will be submitted to OMB for renewal.

DATES: Comments must be received on or before February 27, 2005.

ADDRESSES: You may submit comments identified by DOT DMS Docket Number OST–2004–20004 by any of the following methods:

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

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

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

FOR FURTHER INFORMATION CONTACT: Arthur Jackson, Chief of Field Operations, U.S. Department of Transportation, Office of Small and Disadvantaged Business Utilization and Minority Resource Center, 400 Seventh Street, SW., Washington, DC 20590, (202) 366–5344.

SUPPLEMENTARY INFORMATION:

Title: Counseling Information Form; Regional Center Intake Form; Monthly Report of Operations.

OMB Control Number: N/A.

Type of Request: New request for data collection.

Abstract: In accordance with 49 U.S.C. 332(b)(2), (5), the Minority Resource Center is authorized to facilitate, encourage, promote, and assist minority entrepreneurs and businesses in getting contracts, subcontracts, and projects related to those business opportunities. Moreover, the provision authorizes the Minority Resource Center to carry out market research, planning, economic and business analyses and feasibility studies to identify those business opportunities. The cumulative data collected will be analyzed by the Minority Resource Center to determine the effectiveness of counseling and services provided as well as a description of the Disadvantaged Business Enterprise (DBE).

The Minority Resource Regional Centers will collect information on Disadvantaged Business Enterprises (DBEs), such as type of business & services they seek from the Regional Centers. Services provided include business plans, marketing and sales, financial assistance, etc. Such data will be analyzed by the Office of Small and Disadvantaged Business Utilization and Minority Resource Center to determine agency effectiveness in assisting DBEs to obtain government contracts and subcontracts.

Respondents: Minority Resource Center Regional Center Disadvantaged Business Enterprises (DBEs).

Estimated Number of Respondents: 10,350.

Estimated Total Burden on Respondents: 4,311.

Comments are invited on: (a) 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; (b) the accuracy of the Department's estimate of the burden

of the proposed information collection; (c) ways to enhance the quality, utility and clarity of the information collection; and (d) ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

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.

Issued in Washington, DC on December 29, 2005.

Sean M. Moss,

Director, Office of Small and Disadvantaged Business Utilization.

[FR Doc. 05–375 Filed 1–6–05; 8:45 am]

BILLING CODE 4910–62–P

DEPARTMENT OF TRANSPORTATION

[Docket No. OST–2004–19172]

Office of Small and Disadvantaged Business Utilization and Minority Resource Center; Notice of Request for New Data Collection; Correction

AGENCY: Office of the Secretary, DOT.

ACTION: Notice; correction.

SUMMARY: The Office of Small and Disadvantaged Business Utilization and Minority Resource Center published a document in the **Federal Register** on December 30, 2004, concerning request for comments on new data collection for the Short-term Loan Program On-line Application. The document contained an incorrect date in which comments must be received.

FOR FURTHER INFORMATION CONTACT: Nancy Strine, Manager, Short-term Lending Program, Office of Small and Disadvantaged Business Utilization, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590, (202) 366–5344.

Correction

In the December 30, 2005, **Federal Register** [69 FR 78519], correct the ''**DATES**'' caption to read:

DATES: Comments must be received on or before February 27, 2005.

Issued in Washington, DC on December 30, 2004.

Sean M. Moss,

Director, Office of Small and Disadvantaged Business Utilization.

[FR Doc. 05–376 Filed 1–6–05; 8:45 am]

BILLING CODE 4910–62–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

Qualification of Drivers; Exemption Applications; Diabetes

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

ACTION: Notice of denials.

SUMMARY: The FMCSA announces its denial of 8 applications from individuals who requested an exemption from the Federal diabetes standard applicable to interstate truck drivers and the reasons for the denials. The FMCSA has statutory authority to exempt individuals from the diabetes standard if the exemptions granted will not compromise safety. The agency has concluded that granting these exemptions would not provide a level of safety that will equal or exceed the level of safety maintained without the exemptions for these commercial motor vehicle (CMV) drivers.

FOR FURTHER INFORMATION CONTACT: Ms. Maggie Gunnels, Office of Bus and Truck Standards and Operations, (MC–PSD), (202) 366–4001, Department of Transportation, FMCSA, 400 Seventh Street, SW., Washington, DC 20590–0001. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 31315 and 31136(e), FMCSA may grant an exemption from the Federal diabetes standard for commercial drivers with insulin-treated diabetes mellitus for a renewable 2-year period if it finds such an exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such an exemption (49 CFR 381.305(a)).

Accordingly, FMCSA evaluated 8 individual exemption requests on their merits and made a determination that these applicants do not satisfy the criteria established to demonstrate that granting an exemption is likely to achieve an equal or greater level of safety than exists without the exemption. Each applicant has, prior to this notice, received a letter of final disposition on his/her individual exemption request. Those decision letters fully outline the basis for the denial and constitute final agency action. The list published today summarizes the agency's recent denials as required under 49 U.S.C. 31315(b)(4) by periodically publishing names and reasons for denials.

Four applicants, Brian J. Carew, Dale R. Gansz, Thomas J. Martin, and Uve Witsch, lacked sufficient recent driving experience under normal highway operating conditions over the previous three years that would serve as an adequate predictor of future safe performance.

Two applicants, James F. Gaab and Armand O. Rondeau, do not have 3 years of experience driving a CMV on public highways with insulin-treated diabetes mellitus.

One applicant from Canada, Norman Peltzer, applied for an exemption. The medical reciprocity agreement between the United States (U.S.) and Canada prohibits U.S. and Canadian CMV drivers who are insulin-using diabetics from trans-border operations. In addition, an exemption from the diabetes standard is valid for operations only within the U.S. It does not exempt the driver from the physical qualification standards of any bordering jurisdiction.

One applicant, Joseph R. Suits, did not hold a license that allowed for operation of a vehicle with a gross combination weight rating over 26,001 lbs. for all or part of the 3-year period.

Issued on: December 28, 2004.

Pamela M. Pelcovits,

Director, Policy, Plans, and Program Development.

[FR Doc. 05–296 Filed 1–6–05; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

December 30, 2004.

The Department of the 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 February 7, 2005 to be assured of consideration.

Internal Revenue Service (IRS)

OMB Number: 1545–0197.

Form Number: IRS Form 5300 and Schedule Q (Form 5300).

Type of Review: Revision.

Title: Form 5300: Application for Determination for Employee Benefit Plan; and Schedule Q (Form 5300): Elective Determination Requests.

Description: IRS needs certain information on the financing and operating of employee benefits and employers. IRS uses Form 5300 to obtain the information needed to determine whether the plans qualify under Code sections 401(a) and 501(a). Schedule Q provides information related to the manner in which a plan satisfies certain qualification requirements relating to minimum participation, coverage, and nondiscrimination.

Respondents: Business or other for-profit, Individuals or households.

Estimated Number of Respondents/Recordkeepers: 185,000.

Estimated Burden Hours Respondent/Recordkeeper:

	Form 5300	Schedule Q (Form 5300)
Recordkeeping	41 hr., 7 min.	6 hr., 13 min.
Learning about the law or the form	8 hr., 0 min.	9 hr., 14 min.
Preparing the form	13 hr., 40 min.	9 hr., 45 min.
Copying, assembling, and sending the form to the IRS	1 hr., 20 min.	0 hr., 0 min.

Frequency of response: On occasion.

Estimated Total Reporting/Recordkeeping Burden: 7,972,750 hours.

Clearance Officer: Paul H. Finger (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. 05–336 Filed 1–6–05; 8:45 am]

BILLING CODE 4830–01–U

DEPARTMENT OF THE TREASURY

RIN 1505–AA87

Financial Crimes Enforcement Network; Agency Information Collection Activities; Proposed Collection; Correction

AGENCY: Financial Crimes Enforcement Network (FinCEN), Treasury.

ACTION: Notice and request for comments; correction.

SUMMARY: FinCEN published in the **Federal Register** of December 20, 2004, a document (69 FR 76033) inviting comment on an information collection relating to correspondent accounts for foreign banks and foreign shell banks. The document contained a typographical error related to the OMB Control Number.

DATES: This correction is effective December 20, 2004.

FOR FURTHER INFORMATION CONTACT: Office of the Chief Counsel (FinCEN), (703) 905–3590 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The notice and request for comments that is the subject of these corrections relates to 31 CFR 103.177.

Need for Correction

As published, the notice and request for comments contains errors that may prove to be misleading and are in need of clarification.

Correction of Publication

In the notice and request for comments FR Doc. 04–27747, published on December 20, 2004 (69 FR 76033), make the following corrections.

On page 76034, in column 2, correct line 17 by removing the words ''*OMB Number:* 1505–AA87'' and adding in their place the words ''*OMB Number:* 1505–0184'', and on page 76034, in column 2, correct footnote 1 by removing the words ''OMB Control Number 1505–AA87'' and adding in their place ''OMB Control Number 1505–0184''.

Dated: December 29, 2004.

Cynthia L. Clark,

Deputy Chief Counsel, Financial Crimes Enforcement Network, Federal Register Liaison.

[FR Doc. 05–297 Filed 1–6–05; 8:45 am]

BILLING CODE 4810–02–P

DEPARTMENT OF THE TREASURY

Presidential Determination Concerning Waiver of Section 901(j) of the Internal Revenue Code With Respect to Libya

AGENCY: Departmental Offices, Treasury.

ACTION: Notice.

DATES: Presidential Determination 2005–12 was issued December 10, 2004.

SUMMARY: On December 10, 2004, the President issued Presidential Determination 2005–12. Presidential Determination 2005–12 waives the application of section 901(j)(1) of the Internal Revenue Code with respect to Libya. Section 901(j)(1) imposes restrictions in the case of income and taxes attributable to certain countries. Pursuant to section 901(j)(5), the President may waive the restrictions of section 901(j)(1) if the President determines that such a waiver is in the national interest of the United States and will expand trade and investment opportunities for U.S. companies in such country, and the President reports to Congress his intention to grant the waiver and the reason for the determination. These statutory conditions were fulfilled by Presidential Determination 2004–48 and the report to Congress issued on October 6, 2004. *See* 69 FR 61703.

SUPPLEMENTARY INFORMATION: The text of Presidential Determination 2005–12 is printed below.

Dated: January 3, 2005.

Richard S. Carro,

Senior Advisor to the General Counsel (Regulatory Affairs).

Text of Presidential Determination No. 2005–12

The White House,
Washington, DC,
December 10, 2004.
Presidential Determination No. 2005–12.

Memorandum for the Secretary of the Treasury

Subject: Presidential Determination To Waive the Application of Section 901(j) of the Internal Revenue Code With Respect to Libya

By virtue of the authority vested in me by the Constitution and the laws of the United States, including section 901(j)(5) of the Internal Revenue Code (the ''Code''), I hereby waive the application of section 901(j)(1) of the Code with respect to Libya.

I hereby authorize and direct you to arrange for publication of this determination in the **Federal Register**.

George W. Bush

[FR Doc. 05–335 Filed 1–6–05; 8:45 am]

BILLING CODE 4810–25–U

Corrections

Federal Register

Vol. 70, No. 5

Friday, January 7, 2005

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 HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2004N–0539]

Establishing a Docket for the Development of Plasma Standards Public Workshop; Notice

Correction

In notice document 04–28655 beginning on page 91 in the issue of Monday, January 3, 2005 make the following correction:

On page 92, in the first column, under the **DATES** section, in the sixth line, ''July 5, 2004'' should read ''July 5, 2005''.

[FR Doc. C4–28655 Filed 1–6–05; 8:45 am]

BILLING CODE 1505–01–D

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

Correction

In proposed rule document 04–27934 beginning on page 77424 in the issue of Monday, December 27, 2004 make the following corrections:

1. On page 77463, in the first column, add footnote 17 to read as follows: [317]See, e.g. ArcaEx Letter at 12; Brut Letter at 22; Instinet Letter at 41; NSX Letter at 6; Phlx Letter at 4; Letter from Ronald A. Oguss, President Xanadu Investment Co., to Jonathon G. Katz, Secretary, Commission, dated June 29, 2004 (''Xanadu Letter'') at 2.

2. On the same page, in the third column, remove the duplicate footnotes 313-316.

[FR Doc. C4–27934 Filed 1–6–05; 8:45 am]

BILLING CODE 1505–01–D

Federal Register

Friday,
January 7, 2005

Part II

Securities and Exchange Commission

17 CFR Parts 210, 228, et al.
Asset-Backed Securities; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 210, 228, 229, 230, 232, 239, 240, 242, 245 and 249

[Release Nos. 33–8518; 34–50905; File No. S7–21–04]

RIN 3235–AF74

Asset-Backed Securities

AGENCY: Securities and Exchange Commission.

ACTION: Final rule; request for comment.

SUMMARY: We are adopting new and amended rules and forms to address comprehensively the registration, disclosure and reporting requirements for asset-backed securities under the Securities Act of 1933 and the Securities Exchange Act of 1934. The final rules and forms accomplish the following: update and clarify the Securities Act registration requirements for asset-backed securities offerings, including expanding the types of asset-backed securities that may be offered in delayed primary offerings on Form S–3; consolidate and codify existing interpretive positions that allow modified Exchange Act reporting that is more tailored and relevant to asset-backed securities; provide tailored disclosure guidance and requirements for Securities Act and Exchange Act filings involving asset-backed securities; and streamline and codify existing interpretive positions that permit the use of written communications in a registered offering of asset-backed securities in addition to the statutory registration statement prospectus. We also request additional comment regarding the appropriate treatment of certain structured securities that do not meet our definition of ''asset-backed security.''

DATES: *Effective Date:* March 8, 2005.

Comment Date: Comments regarding the request for comment in Section III.A.2.a. of this document and the Form 12b–25 ''collection of information'' requirement, within the meaning of the Paperwork Reduction Act of 1995, should be received on or before March 8, 2005.

Compliance Dates: Any registered offering of asset-backed securities commencing with an initial bona fide offer after December 31, 2005, and the asset-backed securities that are the subject of that registered offering, must comply with the new rules and forms. For any such offerings that rely on Securities Act Rule 415(a)(1)(x), Securities Act registration statements filed after August 31, 2005 related to such offerings must be pre-effectively or post-effectively amended, as applicable, to make the prospectus included in Part I of the registration statement compliant and to make any required undertakings or other changes for Part II of the registration statement. For Securities Act registration statements that were filed on or before August 31, 2005, the prospectus and prospectus supplement, taken together, relating to such offerings that rely on Rule 415(a)(1)(x) must comply, provided, that, (1) the Securities Act registration statement will need to be post-effectively amended if any new undertakings are required to be made with respect to such offerings in Part II of the registration statement; and (2) the Securities Act registration statement will need to be post-effectively amended to make the prospectus included in Part I of the registration statement compliant, as well as to make changes, if any, to Part II of the registration statement with respect to any registered offering of asset-backed securities under such registration statement commencing with an initial bona fide offer after March 31, 2006.

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/final.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number S7–21–04 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 S7–21–04. 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/final.shtml*). Comments are also 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: Jeffrey J. Minton, Special Counsel, or Jennifer G. Williams, Attorney-Advisor, at (202) 942–2910, in the Office of Rulemaking, Division of Corporation Finance, U.S. Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549.

SUPPLEMENTARY INFORMATION: We are adopting: amendments to Rules 1–02, 2–01, 2–02 and 2–07 [1] of Regulation S–X [2] under the Securities Act of 1933 (the ''Securities Act''); [3] amendments to Items 10, 308, 401 and 406 [4] of Regulation S–B [5] under the Securities Act; amendments to Items 10, 202, 308, 401, 406, 501, 503, 512, 601 and 701 [6] of Regulation S–K [7] under the Securities Act; a new subpart of Regulation S–K, the 1100 series (''Regulation AB''); [8] amendments to Rules 411 and 434 [9] under the Securities Act; new Rules 139a, 167, 190, 191 and 426 [10] under the Securities Act; amendments to Rule 311 [11] of Regulation S–T; [12] new Rule 312 [13] of Regulation S–T; amendments to Forms S–1, S–2, S–3, S–11, F–1, F–2 and F–3 [14] under the Securities Act; amendments to Rules 10A–3, 12b–2, 12b–15, 12b–25, 13a–10, 13a–11, 13a–13, 13a–14, 13a–15, 13a–16, 15c2–8, 15d–10, 15d–11, 15d–13, 15d–14, 15d–15 and 15d–16 [15] under the Securities Exchange Act of 1934 (the ''Exchange Act''); [16] new Rules 3a12–12, 3b–19, 13a–17, 13a–18, 15d–17, 15d–18, 15d–22 and 15d–23 [17] under the Exchange

[1] 17 CFR 210.1–02; 17 CFR 210.2–01; 17 CFR 210.2–02; and 17 CFR 210.2–07.

[2] 17 CFR 210.1–01 *et seq.*

[3] 15 U.S.C. 77a *et seq.*

[4] 17 CFR 228.10; 17 CFR 228.308; 17 CFR 228.401; and 17 CFR 228.406.

[5] 17 CFR 228.10 *et seq.*

[6] 17 CFR 229.10; 17 CFR 229.202; 17 CFR 229.308; 17 CFR 229.401; 17 CFR 229.406; 17 CFR 229.501; 17 CFR 229.503; 17 CFR 229.512; 17 CFR 229.601; and 17 CFR 229.701.

[7] 17 CFR 229.10 *et seq.*

[8] 17 CFR 229.1100 through 1123.

[9] 17 CFR 230.411 and 17 CFR 230.434.

[10] 17 CFR 230.139a; 17 CFR 230.167; 17 CFR 230.190; 17 CFR 230.191; and 17 CFR 230.426.

[11] 17 CFR 232.311.

[12] 17 CFR 232.10 *et seq.*

[13] 17 CFR 232.312.

[14] 17 CFR 239.11; 17 CFR 239.12; 17 CFR 239.13; 17 CFR 239.18; 17 CFR 239.31; 17 CFR 239.32; and 17 CFR 239.33.

[15] 17 CFR 240.10A–3; 17 CFR 240.12b–2; 17 CFR 240.12b–15; 17 CFR 240.12b–25; 17 CFR 240.13a–10; 17 CFR 240.13a–11; 17 CFR 240.13a–13; 17 CFR 240.13a–14; 17 CFR 240.13a–15; 17 CFR 240.13a–16; 17 CFR 240.15c2–8; 17 CFR 240.15d–10; 17 CFR 240.15d–11; 17 CFR 240.15d–13; 17 CFR 240.15d–14; 17 CFR 240.15d–15; and 17 CFR 240.15d–16.

[16] 15 U.S.C. 78a *et seq.*

[17] 17 CFR 240.3a12–12; 17 CFR 240.3b–19; 17 CFR 240.13a–17; 17 CFR 240.13a–18; 17 CFR 240.15d–17; 17 CFR 240.15d–18; 17 CFR 240.15d–22; and 17 CFR 240.15d–23.

Act; amendments to Rule 100 [18] of Regulation M [19] under the Exchange Act; amendments to Rule 101 [20] of Regulation BTR [21] under the Sarbanes-Oxley Act of 2002 (the ''Sarbanes-Oxley Act''); [22] amendments to Forms 20–F, 40–F, 8–K, 10–K, 10–KSB and 12b–25 [23] under the Exchange Act; and new Form 10–D [24] under the Exchange Act.

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[18] 17 CFR 242.100.

[19] 17 CFR 242.100 through 105.

[20] 17 CFR 245.101.

[21] 17 CFR 245.101 through 104.

[22] 15 U.S.C. 7201 *et seq.*

[23] 17 CFR 249.220f; 17 CFR 249.240f; 17 CFR 249.308; 17 CFR 249.310; 17 CFR 249.310b; and 17 CFR 249.322.

[24] 17 CFR 249.312.

I. Overview

A. What Are Asset-Backed Securities?

On May 3, 2004, we issued proposals to address comprehensively the registration, disclosure and reporting requirements for asset-backed securities, or ABS, under the Securities Act and the Exchange Act.[25] We received over 50 comments in response to our proposals.[26] Commenters expressed overall support for our proposals to establish a separate framework for the registration and reporting of asset-backed securities due to differences between asset-backed securities and other securities.[27] The final rule and form amendments we adopt today have been revised, as discussed in this

[25] See Release No. 33–8419 (May 3, 2004) [69 FR 26650] (the ''Proposing Release'').

[26] The public comments we received and a summary of the comments prepared by our staff (the ''Comment Summary'') are available for inspection in our Public Reference Room at 450 Fifth Street, NW., Washington, DC 20549 in File No. S7–21–04, or may be viewed at *http://www.sec.gov/rules/proposed/s72104.shtml.*

[27] See, *e.g.*, Letters of AIG Credit Corp. (''AIG''); Allen & Overy (''A&O''); American Bar Association (''ABA''); American Financial Services Association (''AFSA''); American Institute of Certified Public Accountants (''AICPA''); American Bankers Association (''Am. Bankers''); American Society of Corporate Secretaries (''ASCS''); American Securitization Forum (''ASF''); Australian Securitisation Forum (''Aus. SF''); Joint letter of American Honda Finance Corporation, DaimlerChrysler Services North America LLC, Ford Motor Credit Company, General Motors Acceptance Corporation, and Navistar Financial Corporation (''Auto Group''); Bond Market Association (''BMA''); Bank of America Corporation (''BOA''); Capital One Financial Corporation (''Capital One''); CFA Institute (''CFAI''); Citigroup Global Markets, Inc. (''CGMI''); Citigroup Inc. (''Citigroup''); Commercial Mortgage Securities Association (''CMSA''); Ernst & Young LLP (''E&Y''); European Securisation Forum (''ESF''); Fidelity Management & Research Company (''FMR''); First Marblehead Corporation (''First Marblehead''); Financial Services Roundtable (''FSR''); Investment Company Institute (''ICI''); Jones Day; JPMorganChase & Co. (''JPMorganChase); Kutak Rock LLP (''Kutak''); Mortgage Bankers Association (''MBA''); MBNA Corporation (''MBNA''); Metropolitan Life Insurance Company (''MetLife''); Moody's Investors Service (''Moody's''); PriceWaterhouseCoopers LLP (''PWC''); Joint letter of Sallie Mae., Inc. and Nelnet, Inc. (''Sallie Mae''); State Street Global Advisors (''State Street''); Toyota Motor Credit Corporation (''TMCC''); UBS Securities LLC (''UBS''); U.S. Bank National Association (''US Bank''); and Wells Fargo Bank, National Association (''Wells Fargo'').

release, to incorporate a number of changes recommended by commenters.

Asset-backed securities are securities that are backed by a discrete pool of self-liquidating financial assets. Asset-backed securitization is a financing technique in which financial assets, in many cases themselves less liquid, are pooled and converted into instruments that may be offered and sold in the capital markets.[28] In a basic securitization structure, an entity, often a financial institution and commonly known as a ''sponsor,'' originates or otherwise acquires a pool of financial assets, such as mortgage loans, either directly or through an affiliate. It then sells the financial assets, again either directly or through an affiliate, to a specially created investment vehicle that issues securities ''backed'' or supported by those financial assets, which securities are ''asset-backed securities.'' Payment on the asset-backed securities depends primarily on the cash flows generated by the assets in the underlying pool and other rights designed to assure timely payment, such as liquidity facilities, guarantees or other features generally known as credit enhancements. The structure of asset-backed securities is intended, among other things, to insulate ABS investors from the corporate credit risk of the sponsor that originated or acquired the financial assets.

The ABS market is fairly young and has rapidly become an important part of the U.S. capital markets. One source estimates that U.S. public non-agency ABS issuance grew from $46.8 billion in 1990 to $416 billion in 2003.[29] Another source estimates 2003 new issuance closer to $800 billion.[30] ABS issuance is on pace to exceed corporate debt issuance in 2004.[31] While residential mortgages were the first financial assets to be securitized, non-mortgage related securitizations have grown to include many other types of financial assets, such as credit card receivables, auto loans and student loans. Before the Proposing Release, the Commission had not previously addressed on a comprehensive basis the regulatory treatment of asset-backed securities under the Securities Act or the Exchange Act.

Asset-backed securities and ABS issuers differ from corporate securities and operating companies. In offering ABS, there is generally no business or management to describe. Instead, information about the transaction structure and the characteristics and quality of the asset pool and servicing is often what is most important to investors. Many of the Commission's existing disclosure and reporting requirements, which are designed primarily for corporate issuers and their securities, do not elicit relevant information for most asset-backed securities transactions. Over time, Commission staff, through no-action letters and the filing review process, have developed a framework to address the different nature of asset-backed securities while being cognizant of developments in market practice.

With a few exceptions, our proposals were designed to consolidate and codify current staff positions and industry practice. After carefully evaluating the public comment received, we are adopting new rules and amendments to address the four primary regulatory areas affecting asset-backed securities that were the subject of the proposal: Securities Act registration; disclosure; communications during the offering process; and ongoing reporting under the Exchange Act.

B. Securities Act Registration

We are adopting a principles-based definition of asset-backed security, substantially as proposed, to demarcate the securities and offerings to which the new rules apply. The definition consolidates several staff positions regarding the definition of asset-backed security, including those regarding delinquent and non-performing pool assets, with several revisions to the proposal in response to comment. The definition we are adopting today also allows more lease-backed transactions to be included in the definition of asset-backed security and permits the use of master trusts and revolving periods for more asset classes. As we explained in the Proposing Release, these changes are designed to remove regulatory uncertainty and reduce regulatory obstacles and costs of securitization.

In 1992, the Commission amended Form S–3 to allow registration of offerings of investment grade asset-backed securities on a delayed, or ''shelf,'' basis.[32] As proposed, we are requiring that all registered offerings of asset-backed securities be registered either on Form S–1 or Form S–3, and we are specifying in those forms which disclosure items are required. In addition, we are expanding the types of investment grade asset-backed securities that qualify for shelf registration.

Consistent with existing staff positions and our proposal, we are not adding a reporting history requirement for Form S–3 eligibility. However, we are codifying a staff position, as modified from the Proposing Release in response to comment, that Exchange Act reporting obligations regarding other ABS of the same asset class established by the depositor or an affiliate of the depositor must have been satisfied to maintain Form S–3 eligibility for new registration statements. Also consistent with existing staff positions, and pending consideration of our broader proposals recently issued for all Securities Act offerings,[33] we are excluding offerings of asset-backed securities eligible for Form S–3 registration from the requirements of Exchange Act Rule 15c2–8(b) to deliver a preliminary prospectus prior to delivery of a confirmation of sale.

We also are adopting proposals to alleviate impediments to the shelf registration of offerings of asset-backed securities by foreign issuers or backed by foreign financial assets. We are adopting proposals that consolidate and streamline existing staff positions regarding when and how the offering of underlying securities must be concurrently registered with an offering of asset-backed securities backed by those underlying securities. Finally, we are revisiting staff interpretations regarding the registration of market-making transactions in the ABS context in response to comment. In particular, we will no longer require registration or delivery of a prospectus for market-making transactions for asset-backed securities.

C. Disclosure

Before today, there were no disclosure items tailored specifically to asset-backed securities. We are adopting, with modifications in response to comment, a new principles-based set of disclosure items, ''Regulation AB,'' that will form

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[28] ''Securitization'' is a commonly used term to describe this financing technique, although other terms, such as ''asset-backed financing,'' also are used.

[29] See Bank One Capital Markets, Inc., 2004 Structured Debt Yearbook.

[30] See Asset Securitization Report (pub. by Thomson Media Inc). See also Asset-Backed Alert (pub. by Harrison Scott Publications). The four primary asset classes currently securitized are residential mortgages, automobile receivables, credit card receivables and student loans, which represented approximately 52%, 19%, 16% and 9% of 2003 new issuance, respectively.

[31] See, *e.g.*, Jennifer Hughes and David Wells, ''Asset-Backed Bonds Hit Record,'' Financial Times, Nov. 11, 2004, at 17; Aaron Lucchetti, ''Indebted Consumers Reshape the Bond Market—Betting on Americans' Ability To Pay Their Bills May Pose Risks If Interest Rates Move Higher,'' Wall St. J., Sep. 14, 2004, at C1; and Christine Richard, ''US Asset-Backeds: No Slowdown As Consumers Borrow,'' Dow Jones Capital Markets Report, Sep. 17, 2004. See also The Bond Market Association, Bond Market Research Quarterly, November 2004.

[32] See Release No. 33–6964 (Oct. 22, 1992) [57 FR 48970] (the ''1992 Release'').

[33] See Release No. 33–8501 (Nov. 3, 2004) [69 FR 67392] (the ''Offering Process Release'').

the basis for disclosure in both Securities Act registration statements and Exchange Act reports. Although the few comments we received on this point were mixed, we still do not believe it would be practical or effective to draft detailed disclosure guides for each asset type that may be securitized. Instead, and as proposed, we have attempted to identify the disclosure concept required and provide several illustrative examples, while understanding and emphasizing, as we did in the Proposing Release, that the application of the particular concept must be tailored to the particular transaction and asset type involved and resulting determinations as to the materiality of information.

As we explained in the Proposing Release, the new disclosure items are for the most part based on the market-driven disclosures that appear today. However, with a codification of a universal set of disclosure items, we do seek, as we stated in the Proposing Release, a reevaluation by transaction participants of the manner and content of presented disclosure, including the elimination of unnecessary boilerplate and a de-emphasis on unnecessary legal recitations of terms. We also understand, and the comment process confirmed, that existing disclosure standards may not adequately capture certain categories of information that may be material to an asset-backed securities transaction, such as the background, experience, performance and roles of various transaction parties, including the sponsor, the servicing entity that administers or services the financial assets and the trustee. Our new disclosure items relating to these entities are designed to elicit additional information in these areas to the extent material, and we have made several revisions to the proposed disclosure items in response to comment.

Consistent with our proposal, we also are requiring for the first time that certain statistical information on a ''static pool'' basis be provided if material to the transaction. The final rules relating to the provision of this information have been revised from the Proposing Release in response to comment. The requirement to provide static pool data is still based upon the materiality of the data, although we are providing additional guidance on the scope of the data covered by the requirement. In addition, the guidance for static pool data under the final rules includes not only delinquency and loss data, but also prepayment data, if material. We also are providing flexibility in the manner of making the static pool data available. The final rules permit issuers to provide data that would be included in the prospectus but provided through a Web site under certain specified conditions.

Consistent with current practice and our proposals, we are not requiring audited financial statements regarding the issuing entity for the asset-backed securities in Securities Act or Exchange Act filings. However, we are adopting proposals, revised in response to comment, that consolidate and codify current staff positions on when financial or other descriptive information is required regarding certain other third parties, such as obligors of financial assets that reach pool concentration levels or providers of significant credit enhancement or other cash flow support for the asset-backed securities. In particular, we have revised our proposals regarding the provision of such information with respect to certain derivative counterparties to use an alternate measure for determining significance. We also are streamlining and codifying current staff positions, substantially as proposed, on when financial information regarding third parties may be incorporated by reference or referred to in an asset-backed securities filing in lieu of actually including the information in the filing.

D. Communications During the Offering Process

In the mid 1990's, Commission staff issued a series of no-action letters permitting the use of various written materials in addition to the statutory prospectus in an offering of asset-backed securities.[34] These materials provide data about the potential payouts of the financial assets and the asset-backed securities using various prepayment and other assumptions as well as disclose information about the structure of the offering or about the underlying asset pool. Pending consideration of our broader communications proposals in the recently-issued Offering Process Release, we are here codifying and simplifying, as proposed, the current staff positions on when these materials can be used and when they must be publicly filed with the Commission. We are clarifying our intention stated in the Proposing Release that the communications allowed under our final rules mirror those allowed under the staff no-action letters. We also are reiterating clarifications regarding several interpretive issues involving the use of these materials given market developments over the decade since the letters were issued. In this regard and given advances made to EDGAR (our electronic data gathering, analysis and retrieval system), we also are eliminating as proposed the current exemption from electronic filing for these materials.

Shortly after the no-action letters referred to above were issued, Commission staff also issued a no-action letter regarding the publication of research reports by brokers or dealers proximate to an offering of asset-backed securities registered or to be registered on Form S–3.[35] The Commission had previously adopted several rules that provided safe harbors under which the publication of research reports would not be deemed a violation of the communications restrictions of Section 5 of the Securities Act.[36] However, several of the conditions in those rules were not relevant or practical for asset-backed securities. Again, pending consideration of any further changes to the research report safe harbors as a result of the Offering Process Release, we are codifying here, as proposed, the modified conditions in the staff no-action letter that provide a similar safe harbor for research reports as they relate to registered offerings of asset-backed securities on Form S–3.

E. Ongoing Reporting Under the Exchange Act

As with registration, the ongoing periodic and current reporting requirements under the Exchange Act applicable to operating companies do not elicit information that would be most relevant for asset-backed securities. First through a series of exemptive orders, and then primarily through the issuance of scores of no-action letters and other interpretations, Commission staff has allowed modified Exchange Act reporting by ABS issuers. In lieu of quarterly reports on Form 10–Q,[37] ABS issuers today generally file under cover of Form 8–K the distribution reports required to be prepared under the transaction agreements that detail the payments and performance of the financial assets in the asset pool and payments on the securities backed by that pool. Current reporting on Form 8–K for certain extraordinary events also is required

[34] See *Greenwood Trust Co., Discover Master Card Trust I* (Apr. 5, 1996); *Public Securities Ass'n* (Mar. 9, 1995); *Public Securities Ass'n* (Feb. 17, 1995); *Public Securities Ass'n* (May 27, 1994); and *Kidder Peabody Acceptance Corporation I* (May 20, 1994). The ''statutory prospectus'' refers to the full prospectus required by Section 10 of the Securities Act (15 U.S.C. 77j).

[35] See *Public Securities Ass'n* (Feb. 7, 1997).

[36] 15 U.S.C. 77e. See Securities Act Rules 137, 138 and 139 (17 CFR 230.137; 17 CFR 230.138; and 17 CFR 230.139).

[37] 17 CFR 249.308a.

regarding asset-backed securities, but historically only for a narrow subset of events. A modified annual report on Form 10–K is required with two items being most important: a servicer's statement of compliance with its servicing obligations; and a report by an independent public accountant regarding compliance with particular servicing criteria. Financial statements of the issuing entity are not required. An asset-backed issuer is required to include a certification under Section 302 of the Sarbanes-Oxley Act [38] with its Form 10–K, and, as provided by the Commission's rules governing certification, the staff has previously provided a special form of certification for ABS issuers to use.[39] ABS issuers are exempt from the rules implementing Section 404 of the Sarbanes-Oxley Act [40] regarding reporting on internal control over financial reporting.[41]

We are codifying as proposed the basic modified reporting system for asset-backed securities. To distinguish periodic reporting regarding distributions from disclosure of important events that appropriately call for current reporting, we are adopting our proposal for one new form type, Form 10–D, to act as the report for the periodic distribution information currently provided under cover of Form 8–K. We also are adopting instructions, substantially as proposed, that specify which of the Commission's recently adopted Form 8–K events will be applicable to asset-backed securities, and we are adding a few additional events specific to asset-backed securities, again with certain modifications from the proposal. Consistent with the modified reporting no-action letters, we are adopting our proposals to expressly exclude ABS from quarterly reporting on Form 10-Q and exempt ABS from Section 16 of the Exchange Act.[42] We also are adopting proposed amendments to clarify how transition reports are to be filed regarding a change in fiscal year.

We are adopting instructions, substantially as proposed, that specify the disclosure requirements applicable for annual reports on Form 10–K regarding asset-backed securities, which also are drawn from Regulation AB, and we are codifying the form of certification to be used under Section 302 of the Sarbanes-Oxley Act for asset-backed securities. As proposed, we are retaining the longstanding requirements relating to servicer compliance statements and reports by an independent public accountant as to compliance with particular servicing criteria. Regarding servicing criteria, we explained in the Proposing Release that there are very few existing criteria for evaluating compliance, the most widely used of which currently is the Uniform Single Attestation Program, or USAP, promulgated by the Mortgage Bankers Association. However, the USAP's ''minimum servicing standards'' are designed to be applicable only to servicing of residential mortgages and do not necessarily represent the full spectrum of servicing activities that may be material to an asset-backed securities transaction. We are adopting, with modifications, the proposed disclosure-based servicing criteria that will form the basis for an assessment and assertion as to material compliance with such criteria (or disclosure as to non-compliance). We also continue the practice of accountant involvement in assessing compliance with servicing criteria by adopting a requirement that a registered public accounting firm attest to the assertion of compliance. We are revising our proposal, however, to permit separate reports from each party that performs the actual servicing or administration functions. Both the reports containing the assertion of compliance and the accountant's attestation reports will be required to be filed with the report on Form 10–K. We also are revising the form of the Sarbanes-Oxley Section 302 certification to include an express statement by the certifying party as to whether reports have been filed covering the entire servicing function.

As with the Securities Act, we are adopting our proposed specification that the depositor is the ''issuer'' for purposes of Exchange Act reporting regarding asset-backed securities. We also are specifying who may sign the various Exchange Act reports. As proposed, either the depositor or the servicer may sign the reports on Form 10–K, Form 10–D and Form 8–K. A designated officer of that same party also must sign the Sarbanes-Oxley Section 302 certification. We also are clarifying how filings regarding asset-backed securities are to be filed on EDGAR and the operation of the reporting obligation for asset-backed securities under Section 15(d) of the Exchange Act,[43] including codifying as proposed several interpretive positions as to when the obligation starts and when it may be suspended.

F. Other Miscellaneous Amendments

Finally, as discussed in the Proposing Release, we are making several miscellaneous and technical amendments to our rules and forms to accommodate the new rules and to update references regarding asset-backed securities.

II. Background and Development of ABS and Regulatory Treatment

As noted above, the ABS market rapidly has developed into an important part of the U.S. capital markets.[44] The modern securitization market originated in the 1970's with the securitization of residential mortgages.[45] Since the mid-1980's, the techniques pioneered in the mortgage-backed securities, or MBS, market have been used to securitize other asset types. Most asset types that have been securitized have homogenous characteristics, including similar terms, structures and credit characteristics, with proven histories of performance, which in turn facilitate modeling of future payments and thus analysis of yield and credit risks.

There are several distinguishing features between asset-backed securities and other fixed-income securities. For example, ABS investors are generally

[38] 15 U.S.C. 7241.

[39] See Exchange Act Rules 13a–14 and 15d–14; Release No. 33–8124 (Aug. 28, 2003) [67 FR 57276]; and Division of Corporation Finance, ''Revised Statement: Compliance by Asset-Backed Issuers with Exchange Act Rules 13a–14 and 15d–14'' (Feb. 21, 2003). See also *Merrill Lynch Depositor, Inc.* (Mar. 28, 2003) and *Mitsubishi Motors Credit of America, Inc.* (Mar. 27, 2003).

[40] 15 U.S.C. 7262.

[41] See Exchange Act Rules 13a–15 and 15d–15.

[42] 15 U.S.C. 78p.

[43] 15 U.S.C. 78o(d).

[44] See note 31 above. See also Gary Silverman *et al.*, ''A $2.5 Trillion Market You Hardly Know,'' Business Week, Oct. 26, 1998 (''Securitization is one of the most important and abiding innovations to emerge in the financial markets since the 1930s' (quoting Leon T. Kendall)).

[45] The modern ABS market can be traced to 1970 when the Government National Mortgage Association (Ginnie Mae), a wholly owned federal government corporation, first guaranteed a pool of mortgage loans. The Federal Home Loan Mortgage Corporation (Freddie Mac) in 1971 issued its first mortgage-backed participation certificates. For a number of years, mortgage-backed securities were almost exclusively a product of government-sponsored entities (GSE's), such as Freddie Mac and the Federal National Mortgage Association (Fannie Mae), and Ginnie Mae. MBS issued by these GSE's and Ginnie Mae have been and continue to be exempt from registration under the Securities Act and most provisions of the federal securities laws. For example, Ginnie Mae guarantees are exempt securities under Section 3(a)(2) of the Securities Act (15 U.S.C. 77c(a)(2)) and Section 3(a)(12) of the Exchange Act (15 U.S.C. 78c(a)(12)). The chartering legislation for Fannie Mae and Freddie Mac contain exemptions with respect to those entities. See 12 U.S.C. 1723c and 12 U.S.C. 1455g. As a result, only non-GSE ABS, or so called ''private label'' ABS, will be required to comply with the new rules. For more information regarding the GSE's and Ginnie Mae, see Task Force on Mortgage-Backed Securities Disclosure, ''Staff Report: Enhancing Disclosure in the Mortgage-Backed Securities Markets'' (Jan. 2003) (hereinafter, the ''2003 MBS Disclosure Report''). This report is available on our Web site at *http: www.sec.gov.*

interested in the characteristics and quality of the underlying assets, the standards for their servicing, the timing and receipt of cash flows from those assets and the structure for distribution of those cash flows. As a general matter, there is essentially no business or management (and therefore no management's discussion and analysis of financial performance and condition) of the issuing entity, which is designed to be a solely passive entity. GAAP financial information about the issuing entity generally does not provide useful information to investors. Information regarding characteristics and quality of the assets is important for investors in assessing how a pool will perform. Information relating to the quality of servicing of the underlying assets also is relevant to assessing how the asset pool is expected to perform and the reliability of the allocation and distribution functions. Another focus is the legal and structural nature of the issuing entity and the transfer of the assets to the issuing entity to assess legal and credit separation from third parties. ABS investors also analyze the impact and quality of any credit enhancements and other support designed to provide additional protection against losses and ensure timely payments.

A sponsor typically initiates a securitization transaction by selling or pledging to a specially created issuing entity a group of financial assets that the sponsor either has originated itself or has purchased in the secondary market.[46] Sponsors of asset-backed securities often include banks, mortgage companies, finance companies, investment banks and other entities that originate or acquire and package financial assets for resale as ABS. In some instances, the transfer of assets is a two-step process: the financial assets are transferred by the sponsor first to an intermediate entity, often a limited purpose entity created by the sponsor for a securitization program and commonly called a depositor, and then the depositor will transfer the assets to the issuing entity for the particular asset-backed transaction.[47]

The issuing entity, most often a trust with an independent trustee, then issues asset-backed securities to investors that are either backed by or represent interests in the assets transferred to it. The proceeds of the sale of the asset-backed securities are used to pay for the assets that were transferred to the trust. Because the issuing entity is designed to be a passive entity, one or more ''servicers,'' often affiliated with the sponsor, are generally necessary to collect payments from obligors of the pool assets, carry out the other important functions involved in administering the assets and to calculate and pay the amounts net of fees due to the investors that hold the asset-backed securities to the trustee, which actually makes the payments to investors.

The predominant purchasers of asset-backed securities today are institutional investors, including financial institutions, pension funds, insurance companies, mutual funds and money managers.[48] Generally, ABS are not marketed to retail investors. However, securitizations of one fairly unique asset type—transactions that pool and securitize outstanding debt securities of other issuers—often are marketed to retail investors and are listed on a national securities exchange.[49]

While some ABS transactions consist of simple pass-through certificates representing a pro rata share of the cash flows from the underlying asset pool, ABS transactions often involve multiple classes of securities, or tranches, with complex formulas for the calculation and distribution of the cash flows. In addition to creating internal credit enhancement or support for more senior classes, these structures allow the cash flows from the asset pool to be packaged into securities designed to provide returns with specific risk and timing characteristics.

Transaction agreements specify the structure of an ABS transaction. A common form of such an agreement is a ''pooling and servicing agreement'' often among the sponsor, the trustee and the servicer. A pooling and servicing agreement often governs the transfer of the assets from the sponsor to the issuing entity and sets forth the rights and responsibilities of participants. Typically, the agreement also will detail how cash flows generated by the asset pool will be divided, commonly referred to as the ''flow of funds'' or ''waterfall.'' The flow of funds specifies the allocation and order of cash flows, including interest, principal and other payments on the various classes of securities, as well as any fees and expenses, such as servicing fees, trustee fees or amounts to maintain credit enhancement or other support. Cash flows also may be directed into various accounts, such as reserve accounts to provide support against potential future shortfalls. The agreement also specifies the type and content of reports that will be provided to investors regarding ongoing performance of the transaction.

In addition to any internally provided credit enhancement or support, the sponsor or other third parties may provide external credit enhancements or other support for the asset-backed securities.[50] For example, third party insurance may be obtained to reimburse losses on the pool assets or the asset-backed securities themselves. In addition, the issuing parties may arrange with a counterparty for an interest rate swap or similar swap transaction to provide incidental changes to cash-flow and return, such as where a floating-rate interest is to be paid on ABS backed by financial assets that pay a fixed rate of interest.

Credit rating agencies play a large role in most ABS transactions. As with a traditional corporate debt security, a rating on an asset-backed security is designed only to reflect credit risk. The rating generally does not address other market risks that may result from changes in interest rates or from prepayments on the underlying asset pool.

Before the Proposing Release, there had been few Commission initiatives directly related to ABS. In connection with the passage of the Secondary Mortgage Market Enhancement Act of 1984 (SMMEA),[51] the Commission permitted shelf registration to SMMEA eligible securities.[52] In 1992, the Commission extended shelf registration to non-mortgage investment grade ABS.[53] That same year, the Commission also adopted a rule under the Investment Company Act of 1940 [54] to exclude ABS transactions under specific conditions from the definition of an investment company.[55] More recently,

[46] While ''sponsor'' is a commonly used term for the entity that initiates the asset-backed securities transaction, the terms ''seller'' or ''originator'' also are often used in the market. However, as noted in the text, in some instances the sponsor is not the originator of the financial assets but has purchased them in the secondary market. Hence, we use the term ''sponsor.''

[47] Where there is not a two-step transfer, the terms ''sponsor'' and ''depositor'' are commonly used interchangeably in the market.

[48] See 2003 MBS Disclosure Report.

[49] A ''national securities exchange'' is an exchange registered as such under Section 6 of the Exchange Act (15 U.S.C. 78f).

[50] A guarantee of a security would be a separate ''security'' under Section 2(a)(1) of the Securities Act (15 U.S.C. 77b(a)(1)).

[51] Pub. L. No. 98–440, 98 Stat. 1689. See also Section II.C.1. of the 2003 MBS Disclosure Report.

[52] See Release No. 33–6499 (Nov. 17, 1983) [48 FR 52889] and Securities Act Rule 415(a)(1)(vii) (17 CFR 230.415(a)(1)(vii)).

[53] See note 32 above.

[54] 15 U.S.C. 80a–1 *et seq.*

[55] See Release No. IC–19105 (Nov. 19, 1992) [57 FR 56248] and Investment Company Act Rule 3a–7 (17 CFR 270.3a–7). See also Release No. IC–18736 (May 29, 1992) [57 FR 23980] (proposing Investment Company Act Rule 3a–7 and explaining the application of the Investment Company Act to

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the Commission tailored rules for asset-backed securities in its implementing rulemakings under the Sarbanes-Oxley Act, including exempting asset-backed securities from the reporting and attestation requirements relating to internal control over financial reporting established by Section 404 of the Sarbanes-Oxley Act.[56] The Commission followed this approach in contemplation of current staff practice and this rulemaking initiative where applicable objectives underlying the Sarbanes-Oxley Act, including requirements suitable to ABS transactions, could be evaluated.

As we stated in the Proposing Release, we recognize that securitization is playing an increasingly important role in the evolution of the fixed income financial markets. Our staff has attempted to accommodate the different nature of ABS and evolving business practices, while reducing unnecessary or impractical compliance burdens, through its numerous no-action and interpretive positions. However, the accumulated informal guidance, while helpful to some ABS transactions, has diminished the transparency of applicable requirements because an ABS registrant or investor seeking to understand the applicable requirements must review and assimilate a large body of no-action letters and other staff positions. This time-consuming practice decreases efficiency and transparency and leads to uncertainty and common problems. Even before we issued the proposals, many issuers, investors and other market participants had requested a defined set of regulatory requirements for guidance.[57] Commenters on the proposals expressed universal support for a separate framework for the registration and reporting of ABS.[58] Staff reviews of filings provide further evidence that many compliance issues may be mitigated and potential issues avoided through clearer and more transparent regulatory requirements. Recent market events involving distressed transactions also have highlighted the need for improved disclosures as well as a renewed attention on servicing practices.[59]

Against this background, we issued the proposals to clarify the regulatory requirements for asset-backed securities in order to increase market efficiency and transparency and provide more certainty for the overall ABS market and its investors and other participants. After carefully evaluating the comments received on the proposals, we are adopting these new regulatory requirements, as discussed further below.

III. Discussion of the Amendments

A. Securities Act Registration

1. Current Requirements

The 1992 Release, as part of a broad effort to expand access to shelf registration, allowed shelf registration for offerings of investment grade[60] asset-backed securities without a reporting history requirement for the issuing entity.[61] As a result, a sponsor or depositor may register asset-backed securities to be offered on a delayed basis in the future through one or more offerings, or ''takedowns,'' of securities off of the shelf registration statement. Since the 1992 Release, shelf registration on Form S–3 has become the predominant method of registration for public offerings of asset-backed securities. Offerings generally are only registered on another form, most likely Form S–1 and less frequently Form S–11, if for some reason the securities technically do not meet the definition of ''asset-backed security'' in General Instruction I.B.5 of Form S–3 or an interpretation of that definition.

For offerings registered on a shelf basis on Form S–3, the prospectus disclosure in the registration statement is often presented through the use of two primary documents: the ''base'' or ''core'' prospectus and the prospectus supplement. The base prospectus outlines the parameters of the various types of ABS offerings that may be

ABS transactions). As we stated in the Proposing Release, the application of the Investment Company Act to ABS transactions is beyond the scope of this release. We note, however, that an ABS transaction that relies on Rule 3a–7 must comply with the conditions of that rule regardless of whether the issuer may register the offering of its asset-backed securities on Form S–3 or S–1. We encourage pre-filing conferences with the staff to discuss, as appropriate, questions or issues that may arise regarding the availability of Rule 3a–7, or any other applicable exemption, under the Investment Company Act to an ABS transaction.

[56] See, *e.g.*, Release No. 33–8238 (Jun. 5, 2003) [68 FR 36636] (Management's report on internal control over financial reporting and certification of disclosure in Exchange Act reports); Release No. 33–8220 (Apr. 9, 2003) [68 FR 18788] (Standards relating to listed company audit committees); Release No. 33–8183 (Jan. 28, 2003) [68 FR 6006] (Commission requirements regarding auditor independence); and Release No. 33–8177 (Jan. 23, 2003) [68 FR 5110] (Disclosure required by Sections 406 and 407 of the Sarbanes-Oxley Act of 2002).

[57] See, *e.g.*, Letter from the Association for Investment Management and Research (''AIMR'') to Brian J. Lane, Director, Division of Corporation Finance, ''Recommendations for a Disclosure Regime for Asset-Backed Securities'' (Sep. 30, 1996); Letter from ICI to Michael H. Mitchell, Special Counsel, Division of Corporation Finance, ''Asset-Backed Securities Offerings'' (Oct. 29, 1996); Letter from BMA to Brian Lane, Director, Division of Corporation Finance, ''Response to Staff Request for Suggestions Concerning Possible Reforms of Disclosure and Reporting Rules for Mortgage and Asset-Backed Securities'' (Nov. 5, 1996); Letter from BMA to Jonathan G. Katz, Secretary, Securities and Exchange Commission, ''Securities Acts Concepts and Their Effects on Capital Formation (Release No. 33–7314) (File No. S7–19–96)'' (Nov. 8, 1996); Letter from MBA to Brian J. Lane, Director, Division of Corporation Finance (Feb. 18, 1997); Letter from The Association of the Bar of the City of New York to Jonathan G. Katz, Secretary, Securities and Exchange Commission, ''Securities Act Release No. 33–7606A File No. S7–30–98'' (Apr. 5, 1999); Letter from ABA to Jonathan G. Katz, Secretary, Securities and Exchange Commission, ''The Regulation of Securities Offerings (File No. S7–30–98)'' (Jun. 29, 1999); Letter from ICI to Jonathan G. Katz, Secretary, Securities and Exchange Commission, ''The Regulation of Securities Offerings (File No. S7–30–98)'' (Jun. 29, 1999); Letter from MBA to Jonathan G. Katz, Secretary, Securities and Exchange Commission, ''The Regulation of Securities Offerings (File No. S7–30–98)'' (Jun. 30, 1999); Letter from Merrill Lynch & Co., Inc. to Securities and Exchange Commission, ''The Regulation of Securities Offerings (File No. S7–30–98)'' (Jun. 30, 1999); Letter from Residential Funding Corporation to Securities and Exchange Commission, ''File No. S7–30–98—The 'Aircraft Carrier Release' '' (Jun. 30, 1999); Letter from BMA to David B.H. Martin, Director, Division of Corporation Finance, ''Securities Act Reform'' (Nov. 30, 2001); and Letter from BMA to Alan L. Beller, Director, Division of Corporation Finance, ''Prior Correspondence Regarding Asset-Backed Securities Reform'' (Apr. 23, 2002).

[58] See note 27 above.

[59] See, *e.g.*, notes 201, 229, and 235 below. See, also, ''If Issuers Can Steal, Where's the Deal Cop,'' Asset Securitization Report, Feb. 17, 2003, at 6; Christine Richard; ''Moody's Trustees Don't See Eye-to-Eye on Trustee Role,'' Dow Jones Newswires, Feb. 4, 2003; and ''SEC Filings Reveal Little ABS Reporting Consistency,'' Asset Securitization Report, Sep. 23, 2002, at 10.

[60] ''Investment grade'' is defined in General Instruction I.B.2 of Form S–3 to mean that, at the time of sale, at least one nationally recognized statistical rating organization (as that term is used in Exchange Act Rule 15c3–1(c)(2)(vi)(F) (17 CFR 240.15c3–1(c)(2)(vi)(F))) has rated the security in one of its generic rating categories which signifies investment grade. Typically, the four highest rating categories (within which there may be sub-categories or gradations indicating relative standing) signify investment grade.

[61] Securities Act Rule 415 (17 CFR 230.415) permits registration of offerings of securities on a delayed or continuous basis, and paragraph (a)(1)(x) of that rule permits such registration with respect to offerings registered (or qualified to be registered) on Form S–3. The 1992 Release, among other things, added General Instruction I.B.5 to Form S–3, which permits registration of offerings of investment grade asset-backed securities. Certain mortgage related securities, as defined in Section 3(a)(41) of the Exchange Act (15 U.S.C. 78c(a)(41)), are permitted to be offered on a delayed basis under Securities Act Rule 415(a)(1)(vii). See note 52 above. Our actions today do not affect the continued availability of Rule 415(a)(1)(vii) for shelf registration of mortgage related securities, as defined, even if they do not meet the requirements of Form S–3. However, consistent with our movement of all asset-backed securities offerings to Form S–1 or Form S–3, to the exclusion of Form S–11, mortgage related securities offerings should use Form S–1 in lieu of Form S–11 for future transactions. Just like prior practice on Form S–11, an offering meeting the requirements of Rule 415(a)(1)(vii) could be a continuous or delayed offering on Form S–1.

conducted in the future, including asset types that may be securitized, the types of security structures that may be used and possible credit enhancements or other forms of support. The registration statement at the time of effectiveness also contains one or more forms of prospectus supplement, which outline the format of deal-specific information that will be disclosed at the time of each takedown. At the time of a takedown, a final prospectus supplement is prepared which describes the specific terms of the takedown, and the base prospectus and the final prospectus supplement together form the final prospectus which is filed with the Commission pursuant to Securities Act Rule 424(b).[62]

2. Definition of Asset-Backed Security

a. Approach and Supplemental Request for Comment for Other Structured Securities

As we explained in the Proposing Release, the term ''asset-backed security'' currently is defined only for purposes of Form S–3. As many of our amendments relate to the treatment of asset-backed securities regardless of the form on which their offering is initially registered, we are moving the definition of ''asset-backed security,'' as proposed, to the definition section of Regulation AB, our new sub-part in Regulation S–K for asset-backed securities (discussed more fully in Section III.B). Under this new format, a security that meets the general definition of ''asset-backed security'' will be subject to the disclosure and other requirements of the new rules, regardless of the Form used for registration. Any additional conditions appropriate for Form S–3 eligibility, such as an investment grade requirement, will be retained in General Instruction I.B.5 of Form S–3, as discussed in Section III.A.3.c.

As we explained in the Proposing Release, after more than ten years of experience with the definition of ''asset-backed security,'' we believe that the core definition is still sound. The definition is principles-based and allows broad flexibility as to asset types and structures that we believe should be subject to the alternative disclosure and regulatory regime that exists for asset-backed securities. As the Commission stated in the 1992 Release, the definition does not distinguish between pass-through and pay-through asset-backed securities nor does it limit application to a list of ''eligible'' assets that can be securitized, so long as such assets meet the general principle that they are a discrete pool of financial assets that by their terms convert into cash within a finite time period.[63] We continue to believe, conversely, that the regime we have specifically designed for asset-backed securities is not necessarily appropriate for securities that do not meet these principles.

As we explained in the Proposing Release, experience with the definition has resulted in several interpretations since its adoption. These interpretations clarify the principles in the definition or, in some instances, permit limited exceptions to one or more of those principles where appropriate and consistent with overall application of the ABS regulatory regime. These interpretations have developed primarily through staff processing of ABS registration statements and, in a few instances, through staff no-action letters. As such, these interpretations may not always have been transparent, and we proposed codifying them with several expansions to allow additional asset types and transaction features to be considered an ''asset-backed security,'' including for purposes of shelf registration if the asset-backed securities meet the additional criteria for registration on Form S–3, such as the investment grade requirement.

Commenters were mixed on our proposed approach. On the one hand, commenters representing investors expressed reticence in expanding access to the ABS regulatory regime out of concern that it could have certain unintended consequences, such as investment decisions on these additional transactions being made under more compressed time frames and with less access to information through shelf registration.[64] On the other hand, commenters representing primarily issuers and their representatives would have preferred, in lieu of our proposed approach of codifying limited exceptions to the existing definition's core principles, abandoning many of the core principles themselves to allow additional securities to receive the benefits of the proposed regime, such as immediate shelf registration and the ability to use ABS informational and computational material.[65] For example, most of these commenters would have preferred deleting the ''discrete pool'' requirement from the existing 1992 definition, hence rendering the proposed expansions to the existing interpretive exceptions from that requirement, such as those relating to master trusts, prefunding periods and revolving periods, unnecessary and thereby permitting unlimited use of those concepts. These commenters generally argued that such requirements would restrict innovation and were unnecessary to protect the universe of mostly institutional investors. According to the view of these commenters, any concerns with abandoning these and several other existing principles in the definition, such as the proposed delinquency and non-performing interpretations designed to uphold the principle that the ABS are primarily dependent on a pool of assets that self-liquidate instead of on the ability of the entity managing and foreclosing on the assets, could be addressed through disclosure.

We continue to believe that the ABS regime is at bottom not designed for transactions that depart significantly from the principles behind the definition. The alternative regime for asset-backed securities represents the codification of a very different registration, disclosure and reporting regime from that applicable to other securities, including other structured securities. We continue to believe that the current and proposed definition of ''asset-backed security'' reflects the core principles for securities that should be subject to this alternative regime, while still providing great flexibility and room for development. We continue to believe that emphasis on certain core principles is appropriate for these purposes, such as that the securities are primarily backed by a pool of assets, that there is a discrete pool with a general absence of active pool management, and an emphasis on the self-liquidating nature of pool assets that by their own terms convert into cash.

We do recognize, as have the staff in their prior interpretations, that there are instances where some limited exceptions to these general principles would be appropriate and consistent with access to the alternate regulatory regime, and these are reflected in the interpretations and exceptions discussed below. However, necessarily there is a point where application of the alternate regime is no longer appropriate. The further the security deviates from the core principles, the more acute concerns, such as those expressed by investors, become, which are not just disclosure concerns, that the security should not be treated necessarily the same as other securities

[62] 17 CFR 230.424(b).

[63] For example, common stock and similar equity instruments do not meet this general principle. Our view would not be altered if the equity security was subject to a separate liquidity or repurchase agreement or other arrangement. However, limited life equity securities, such as trust preferred securities, that themselves have a finite life and a mandatory redemption, could satisfy the general principle.

[64] See, *e.g.*, Letter of ICI.

[65] See, *e.g.*, Letters of ABA; ASF; Auto Group; ESF; and FSR.

that meet our definition of ''asset-backed security.'' In those instances, additional or different disclosures and/or registration and reporting treatment may be more appropriate.

As an example, we noted in the Proposing Release that, given the existing concept in the definition of a discrete pool of financial assets that by their terms convert into cash within a finite time period, so-called ''synthetic'' securitizations are not included in Regulation AB's basic definition of ABS for purposes of determining whether the security qualifies for the particularized registration, disclosure and reporting regime under the Securities Act and Exchange Act we are adopting today. Synthetic securitizations are designed to create exposure to an asset that is not transferred to or otherwise part of the asset pool. These synthetic transactions are generally effectuated through the use of derivatives such as a credit default swap or total return swap. The assets that are to constitute the actual ''pool'' under which the return on the ABS is primarily based are only referenced through the credit derivative.

Some commenters representing primarily issuers and underwriters objected to not making accommodations in the definition of asset-backed security for synthetic securitizations.[66] These commenters generally argued that while these securities may not necessarily meet all of the core principles in the existing definition, they are still structured securities that should be treated under the Securities Act and the Exchange Act in the same manner and with access to the same benefits as an asset-backed security. The commenters also expressed concern that not addressing the appropriate treatment of synthetic securities would make it more difficult for market participants to develop such products without continued discussions with the staff, as they do today, for this developing submarket.

As we explained in the Proposing Release, for purposes of determining whether a security qualifies for the particularized regulation regime of Regulation AB, we believe the requirement that performance is primarily tied to a discrete pool of financial assets that by their terms convert into cash entails that the performance is primarily by reference to the assets in the pool. Synthetic securitizations do not meet the basic concepts embodied in our definition of asset-backed security for several reasons. Payments on the securities in a synthetic securitization can primarily or entirely comprise or include payments based on the value of a reference asset which is unrelated to the value of or payments on any actual assets in the pool. Payment is therefore by reference to an asset not in the pool instead of primarily from the performance of a discrete pool of financial assets that by their terms convert into cash and are transferred to a separate issuing entity.

An example of a synthetic exposure would be a transaction where the asset pool consists of securities coupled with a swap or other derivative under which payments are made based on the value of an equity or commodity or other index such that the payments on the security comprise or include payments based primarily on the performance of the external index and not by the performance of the actual securities in the pool. Because payments in synthetic securitizations are primarily based on the performance of assets or indices not included in the pool, we do not believe such a securitization should fall into the Regulation AB registration, disclosure and reporting regime. Payments on ABS must be based primarily on the performance of the financial assets in the pool.[67]

Synthetic securitization transactions also differ from ABS transactions where swaps or other derivatives are used either to reduce or alter risk resulting from assets contained in the pool held by the issuer. For example, the existence of an interest rate or currency swap covering either or both of the principal or interest payments on assets in the pool held by the issuer are designed to reduce or alter risk resulting from those assets and fall within the definition of asset-backed security. The return on the ABS is still based primarily on the performance of the financial assets in the pool.[68] We believe there is a principles-based difference between structures that use an interest rate or currency swap but whose performance is still primarily based on the performance of the financial assets in the pool and structures that use a swap or other derivative such that the performance of the security is no longer primarily related to the performance of the pool. Because certain interest rate and currency swaps have been permitted consistent with this principle does not lead to the conclusion that there is no such principle or that the principle should be abandoned. Instead, the difference as to application in many instances necessarily depends on the particular nature and structure of the transaction in question.

As we explained in the Proposing Release, the basic definition of ''asset-backed security'' and its interpretations are intended to establish parameters for the types of securities that are appropriate for the alternate disclosure and regulatory regime we are adopting today. This approach is based on the history and development of the traditional ABS market such that a definable set of criteria and requirements can be established. The definition does not mean or imply in any way that public offerings of securities outside of these parameters, such as synthetic securitizations, may not be registered with the Commission, but only that the alternate regulatory regime we are adopting today is not designed for those securities. The definition does mean that such securities must rely on non-ABS form eligibility for registration, including shelf registration.[69]

Some commenters were concerned that if such structured securities were left outside the definition, issuers of those securities would be forced to provide potentially misleading disclosures under Regulation S–K if they were not included in Regulation AB. Structured securities outside of the definition have been registered before the adoption of Regulation AB, and the staff has worked with issuers to develop appropriate disclosures for such securities under our existing disclosure regime. As is the case today, we encourage issuers that are

[66] See, *e.g.*, ASF; BMA; and CGMI.

[67] Our view that securities resulting from synthetic securitizations are not within the definition of ''asset-backed security'' is not altered by the fact that payments on the swap or other derivative based on the value of assets or indices not related to the assets in the pool held by the issuer are conditioned on performance of the assets in the pool held by the issuer. In addition, the derivative does not act as credit enhancement on existing pool assets or as rights or other assets designed to ensure timely servicing or distribution, because it does not relate to the value of any pool asset but instead relates to an external asset in order to bring the risk of that asset into the pool synthetically. Further, in a synthetic securitization, if a credit event occurs there may be a transfer of assets that would no longer make the pool discrete.

[68] As another example of a swap or other derivative permissible in an ABS transaction, a credit derivative such as a credit default swap could be used to provide viable credit enhancement for asset-backed securities. For example, a credit default swap may be used to reference assets actually in the asset pool, which would be analogous to buying protection against losses on those pool assets. The issuing entity would pay premiums to the counterparty (as opposed to the counterparty paying the premiums to the issuing entity). If a credit event occurred with respect to a referenced pool asset, the counterparty would be required to make settlement payments regarding the pool asset or purchase the asset to provide recovery against losses.

[69] As is the case today, Form S–1 is the default form for registration for which no other form is authorized or prescribed. See General Instruction I. to Form S–1.

contemplating structured securities outside of the Regulation AB definition to have pre-filing conferences with the staff to discuss the proposed transaction and the appropriate approach.

At the same time, we recognize that while it is pragmatic and feasible to establish Regulation AB at this time for an appropriately definable group of asset-backed securities, we also want to foster a system that is most efficient and consistent with investor protection for other structured securities, particularly for those that may develop in the future but may not be contemplated in Regulation AB. We understand that a default application of the existing disclosure regime might not be most appropriate for these structured securities, but we also believe that neither would it be appropriate for such securities to be treated the same as ''asset-backed securities'' as we are defining that term under Regulation AB. Depending on the structure of the transaction and the terms of the securities, some disclosure aspects of Regulation AB may be applicable, but aspects from the traditional disclosure regime also may be applicable. In some instances, a third approach might be more appropriate.

We seek additional comment on whether we should consider an alternative scheme for these kinds of securities. We will evaluate comments received in determining whether it is appropriate to issue additional proposals or take other additional action, as appropriate. In providing comments, please be as specific as possible.

Request for Comment

- Apart from the traditional approach of addressing hybrid securities as they arise, are there definable categories of securities where neither the existing regime nor Regulation AB would be appropriate, but a specifiable alternative regime would be? What would be the advantages and disadvantages of such an approach? Is the existing approach of addressing these securities more practical if and until a market for that particular type of security matures such that establishing a separate regime is appropriate? Are there additional alternatives that should be considered? How are these securities offered and sold today? Who offers and purchases these securities?
- If an alternative regime should be established, how would these securities be defined? Why should they be treated differently?
- What would be appropriate for this alternative regime with respect to registration, disclosure and ongoing reporting? What flexibility should be permitted under the existing regime and what additional or alternate requirements should be imposed?
- While the Investment Company Act considerations are beyond the scope of this release for ABS, we also would seek comment as to the treatment of such securities, including synthetic securitizations, under Rule 3a–7 under that Act or other exemptive provisions of that Act or rules thereunder.
- Regarding synthetic securitizations where the return on the securities is not primarily dependent on the performance of the pool, what additional disclosures would be appropriate? For example, for other entities that offer securities and have derivatives or contingent obligations, there is required disclosure of financial intricacies, such as disclosures under FIN No. 45,[70] FIN No. 46,[71] SFAS No. 5 [72] and SFAS No. 133,[73] and off-balance sheet and MD&A disclosure.[74] Would some or all of these disclosures be appropriate in synthetic securitizations? If not, why not? Please note these are non-exclusive examples.
- Would financial statements be necessary to fully understand the risks and potential performance of these securities? Should some form of off-balance sheet disclosure be required when performance is tied to such instruments? Should market valuations of assets and liabilities be required?
- Where performance of the security is primarily tied to the performance of a derivative rather than the performance of the pool assets, what additional disclosure should be required regarding the derivative counterparty? Should financial statements for the derivative counterparty always be required?
- Where performance is by reference to an unrelated entity or assets, what information should be required about the referenced entity or assets?

b. Basic Definition

We are retaining the same basic definition of asset-backed security that has existed since 1992, with the addition of the one modification we proposed with respect to leases, discussed below. Under Regulation AB, the basic definition of ''asset-backed security'' is ''a security that is primarily serviced by the cash flows of a discrete pool of receivables or other financial assets, either fixed or revolving, that by their terms convert into cash within a finite time period, plus any rights or other assets designed to assure the servicing or timely distributions of proceeds to the securityholders; provided that in the case of financial assets that are leases, those assets may convert to cash partially by the cash proceeds from the disposition of the physical property underlying such leases.'' [75] We also are codifying, with modifications and expansions in response to specific comment, the several clarifying interpretations we proposed to the definition that recognize and build upon the operational and structural distinctions between ABS and non-ABS transactions. Each of these interpretations is discussed below in a separate subsection.

As we stated in the 1992 Release and the Proposing Release, the basic definition is sufficiently broad to encompass any self-liquidating asset which by its terms converts into cash payments within a finite time period. There are no substantive requirements as to the timing of the cash flows under the definition, such as that they must be constant and uninterrupted. For example, so-called ''balloon'' loans that have large payments at maturity that differ from other payments during the term of the loan would be included.[76]

c. Nature of the Issuing Entity

The first set of interpretations we are codifying relates to the nature of the issuing entity in whose name the asset-backed securities are issued. As we explained in the Proposing Release, we believe that two interpretations always have been implied, and, as proposed, we are codifying both as additional

[70] See FASB Interpretation No. 45, Guarantor's Accounting and Disclosure Requirements for Guarantees, Including Indirect Guarantees of Indebtedness of Others (Nov. 2002).

[71] See FASB Interpretation No. 46R, Consolidation of Variable Interest Entities (Dec. 2003).

[72] See FASB Statement of Financial Accounting Standards No. 5, Accounting for Contingencies (Mar. 1975).

[73] See FASB Statement of Financial Accounting Standards No. 133, Accounting for Derivative Instruments and Hedging Activities (Jun. 1998).

[74] See Item 303 of Regulation S–K.

[75] The reference to ''financial assets that are leases'' is meant to clarify the application of the definition with respect to leases and is not meant to affect the accounting treatment of the lease.

[76] We understand that in some jurisdictions, balloon loans for motor vehicles are structured to be similar to leases. At maturity of the loan, the obligor may return the vehicle to the lender to satisfy the balloon payment. In such instances, if the cash flows that are to back the asset-backed securities are to include the balloon payment, the limits on the portion of the securitized pool balance attributable to residual values of the pool assets, discussed in Section III.A.2.d., should apply to such securities the same as if they were backed by leases and disclosure similar to that described in Section III.B.5.b. should be provided. If the pool includes a mixture of leases and balloon loans, they should be treated together for purposes of those calculations.

conditions to the definition of ''asset-backed security.''

The first condition is that neither the depositor nor the issuing entity is an investment company under the Investment Company Act, nor will either become one as a result of the asset-backed securities transaction. If either was the case, we continue to believe that the regime for asset-backed securities that we are adopting today would not be appropriate.

The second condition relates to the passive nature of the issuing entity in that its activities must be restricted to the asset-backed securities transaction. In particular, the activities of the issuing entity must be limited to passively owning or holding the pool of assets, issuing the asset-backed securities supported or serviced by those assets, and other activities reasonably incidental thereto. As we stated in the proposing release for the 1992 amendments, the legal nature of the issuing entity—whether a trust, limited purpose subsidiary or other legal person—is not necessarily relevant.[77] However, we believe the limited function and permissible activities of the issuing entity are fundamental to the notion of a security that is to be backed solely by a pool of assets.

Commenters generally agreed with this principle, although several expressed concern with the wording of the condition that the issuing entity's activities are limited to ''passively'' owning or holding the pool assets, issuing the ABS and other reasonably incidental activities.[78] This formulation already exists in Exchange Act Rule 10A–3 to exclude similar securities from the mandated requirements for national securities exchanges and national securities associations to impose audit committee listing requirements for such issuers.[79] We are retaining the term in the final condition for the definition of ''asset-backed security.'' We believe the use of this term neither imposes a new requirement, nor is inconsistent with existing practice, but instead is confirmatory of one of the fundamental premises of asset-backed securitization that the issuing entity is intended to be passive in nature and its activities limited to the asset-backed securities transaction.

In the Proposing Release, we also specified that in connection with this condition, securities issued out of so-called ''series trusts'' do not qualify as asset-backed securities under the definition. Under the concept of a series trust, the same trust will conduct wholly separate ABS transactions out of the same trust. The trust will hold separate pools of assets with separate classes of securities for each pool. Securities backed by one pool do not have rights to the other pools. As we described in the Proposing Release, the issuing entity in this instance is not limited to owning and holding one asset pool and issuing securities backed by that pool.

Several commenters representing issuers, underwriters and their representatives wished to relax this existing principle, arguing that series trusts may reduce the costs of creating multiple issuing entities by having multiple unrelated transactions under one entity.[80] However, the more fundamental issue with the use of multiple, separate and unrelated transactions under one issuing entity for asset-backed securities is that it raises concerns that deviate from the core principle that investors of a particular asset-backed security should look solely to the related pool of assets for primary repayment. With a series trust structure, instead of only analyzing the particular pool, an investor also may need to analyze any effect on its security, including bankruptcy remoteness issues, if problems were to arise in another wholly separate and unrelated transaction in the same issuing entity. These concerns are exacerbated if new unrelated transactions are created after the original transaction involving the investor. No commenter indicated that series trusts as described above have been commonly used for issuing asset-backed securities.

Other commenters requested clarification as to the scope of what is considered in the concept of a ''series trust.'' As we explained in the Proposing Release, the concept of a series trust, with multiple, separate and unrelated transactions in one issuing entity, is different from a master trust structure typical in credit card ABS and discussed later where all securities, although issued at different times, are backed by one pool. In addition, we explained that an ABS transaction with one asset pool could divide allocations of the cash flows from the pool among separate classes of securities and still qualify as an ''asset-backed security.''[81] This could include allocating cash flows from various defined subpools within the larger pool to support particular classes but not others, regardless of whether there is any cross-cashflow support or collateralization. In these instances, there is still only one ultimate pool held by the issuing entity with securities backed by that single pool.

We also explained in the Proposing Release that some ABS transactions are structured such that the asset pool consists of one or more financial assets that represent an interest in or the right to the payments or cash flows of another asset pool solely in order to facilitate the asset-backed issuance. For example, some older credit card master trust structures have added an ''issuance trust'' structure to provide additional flexibility in the types of ABS that may be offered. An issuance trust generally receives a collateral certificate from the master trust representing an interest in the master trust asset pool. The master trust often may have issued its own ABS backed by the same pool. The issuance trust then issues its own ABS backed by the collateral certificate, and hence indirectly by the whole master trust pool. This structure would be consistent with the definition of ''asset-backed security.''[82]

Another structure we referenced in the Proposing Release relates to one used in some auto lease transactions where the auto leases and car titles often are originated in the name of a separate trust, sometimes called an ''origination'' or ''titling'' trust, to avoid administrative expenses in retitling the physical property underlying the leases. The origination trust will issue to the issuing entity for the ABS a certificate, often called a ''special unit of beneficial interest'' or SUBI, representing a beneficial interest in a pool of leases and automobiles in the origination trust which is to constitute the asset pool. The ABS issuing entity will issue ABS backed by the SUBI certificate, and hence indirectly by the assets underlying the SUBI. For the next transaction, the origination trust will issue a separate SUBI representing a separate pool of leases and automobiles in the origination trust which is to constitute the asset pool for the next transaction. This SUBI will be transferred to a newly created issuing entity for the next transaction which will issue ABS backed by the second SUBI. In each instance, although the same origination trust will issue multiple SUBIs representing multiple pools in the trust, there is a separate

[77] See Release No. 33–6943 (July 16, 1992) [57 FR 32461].

[78] See, *e.g.*, Letters of ABA; ASF; and MBA.

[79] See 17 CFR 240.10A–3(c)(7).

[80] See, *e.g.*, Letters of ABA; ASF; and BMA.

[81] Further, both the condition relating to the passive nature of the issuing entity and the concept of a series trust are unrelated to the tax treatment of the transaction, such as REMIC elections.

[82] However, using the issuance trust for subsequent unrelated transactions in the manner discussed in the text with respect to series trusts would not be consistent with the definition.

issuing entity for each ABS issuance whose ''pool'' consists of a separate SUBI, and hence indirectly a separate underlying group of assets. In our proposals and in our final rules we recognize this unique structure that developed under current practice before the codification of the new ABS regulatory regime, but, as proposed, we do not extend the origination trust structure to other asset classes that do not use it currently.

d. Delinquent and Non-Performing Pool Assets

In 1997, Commission staff issued a no-action letter clarifying that an asset pool having total delinquencies of up to 20% at the time of the proposed offering may still be considered an ''asset-backed security.'' [83] In addition, there also exists a longstanding staff interpretive position that no non-performing assets may be included as part of the asset pool at the time of the proposed offering. We are codifying these interpretations, with modifications from our original proposal.

The issue in either case is that such assets may no longer be (or in the case of non-performing assets, are not) converting into cash within a finite time period, as required by the definition of asset-backed security, given that such assets are not performing in accordance with their terms and management or other action may be needed to convert them to cash. While as discussed above some commenters requested relaxing these clarifications, we believe the principle that the ABS should be primarily dependent on a pool of assets that self-liquidate instead of on the ability of the entity performing collection services is an important principle that should be retained. Further, we believe the conditions we are codifying regarding delinquent and non-performing assets, as revised in response to comment and discussed below, are appropriate in achieving this principle.

i. How To Calculate Delinquency and Non-Performing Levels

Several commenters requested clarification regarding when delinquency and non-performance levels should be measured.[84] In the Proposing Release, we reiterated the standard in the 1997 no-action letter that the cut-off date (*i.e.*, the date on and after which collections on the pool assets accrue for the benefit of the ABS holders) may be employed to establish delinquency and non-performance levels. The commenters requested further specificity regarding this standard, as well as clarity regarding application to master trusts. In response to commenters' suggestions, we are adding an instruction specifying that the measurement date for the delinquency and non-performing thresholds is to be the cut-off date for the transaction, if applicable, or, in the case of master trusts, the date as of which delinquency and loss information is presented in the prospectus for the securities.[85]

Additional commenters requested clarification regarding transactions that include non-performing or delinquent assets as part of a pool but not as part of the funded portion and not as part of cash flow calculations for the asset-backed securities.[86] In other words, some transactions permit non-performing or delinquent loans to be included, although the proceeds of the asset-backed securities are not used to fund or purchase those assets for the pool and those assets are not considered in cash flow calculations. As another example, a master trust may contemplate that a pool asset that becomes non-performing may remain designated to the pool after being charged-off, with the asset being assigned a zero balance and not considered in cash flow calculations. We are including an instruction clarifying that non-performing and delinquent assets that are not funded or purchased by proceeds from the asset-backed securities and that are not considered in cash flow calculations for the asset-backed securities need not be considered as part of the asset pool for purposes of determining non-performing and delinquency thresholds.[87]

Some commenters also requested clarification as to calculating the thresholds for master trusts given that the same asset pool supports different series of ABS over time.[88] We are adding an additional instruction clarifying that the thresholds are to be measured against the entire pool whose cash flows support the asset-backed securities and not just against any new assets that are added as a result of the new issuance. Otherwise, issuers could effectively avoid the requirements by conducting the transaction through a multi-step master trust transaction instead of through a single transaction.[89]

ii. Non-Performing Pool Assets

Regarding non-performing pool assets, we are codifying as proposed the longstanding requirement that no non-performing assets may be part of the asset pool, determined as of the measurement date discussed above. We are not persuaded by commenters' requests that the position should be relaxed.[90]

As we discussed in the Proposing Release, part of the difficulty for issuers in complying with the existing interpretive position is that there has been no uniform definition of what is a ''non-performing asset.'' As commenters confirmed to us, the point at which a financial asset is considered ''non-performing'' is often dependent upon asset type, with some financial assets being considered non-performing before other types of financial assets would.[91] However, we continue to believe the point at which the financial asset should be charged-off is a consistent reference point, even if the point at which that event would occur may vary. Accordingly, we are defining ''non-performing'' to be a pool asset if any of the following is true:

- The pool asset would be treated as wholly or partially charged-off under the requirements in the transaction agreements for the asset-backed securities;
- The pool asset would be treated as wholly or partially charged-off under the charge-off policies of the sponsor, an affiliate of the sponsor that originates the pool asset or a servicer that services the pool asset; or
- The pool asset would be treated as wholly or partially charged-off under the charge-off policies applicable to such pool asset established by the primary safety and soundness regulator of any entity listed above or the program or regulatory entity that oversees the program under which the pool asset was originated.[92]

[83] See *Bond Market Ass'n* (Oct. 8, 1997).

[84] See, *e.g.*, Letters of ABA; ASF; and Kutak.

[85] Also in response to commenters' concerns, we have eliminated the word ''original'' from the proposed reference to the asset pool as unnecessary under the revised formulation.

[86] See, *e.g.*, Letters of ASF; Capital One; and MBNA.

[87] Of course, in such instances clear disclosure should be provided to investors of these features and the manner, composition, treatment and effect of those assets.

[88] See, *e.g.*, Letters of A&O; ASF; and MBNA.

[89] Some of these commenters expressed concern regarding master trusts with assets that were originally performing for a previous issuance but that subsequently become non-performing. This situation for subsequent ABS issuances can be addressed by the codification of existing practice that such assets be assigned a zero pool balance and no longer be considered in cash flow transactions as part of the securitized pool.

[90] See, *e.g.*, Letters of ABA and Jones Day.

[91] See, *e.g.*, Letters of ABA; Auto Group; MBA; and MBNA.

[92] As a result, the charge-off requirement that is most restrictive will govern. Of course, under the definition as proposed and as adopted, a pool asset that changes payment status in accordance with its

Continued

We believe this definition provides flexibility for different asset classes while still ensuring that no assets are included in the securitized pool balance that would otherwise be considered to be non-performing and thus charged-off under an objective standard. Commenters generally supported this approach.[93] This definition differs from our original proposal in two principal ways. First, the definition has been revised in response to a commenter's request to include references not only to the sponsor's charge-off policies, but also to the policies of any affiliated originator or the servicer of the pool asset.[94] Second, the definition also includes a reference to the charge-off policies applicable to such pool asset established by either the primary safety and soundness regulator of the sponsor, an originating affiliate or the servicer, or the program or regulatory entity that oversees the program under which the pool asset was originated, as applicable. Several commenters indicated that, depending on the loan type, these regulators also have requirements for recognizing delinquencies and losses.[95]

As we described in the Proposing Release, we also are adopting requirements for disclosure of the relevant charge-off policies in Regulation AB, discussed more fully in Section III.B. Commenters representing investors in particular strongly supported such disclosure.[96]

iii. Delinquent Pool Assets

In addition to the non-performing limitation, we also are codifying a delinquency concentration limit in a manner consistent with the 1997 staff no-action letter. As we stated in the Proposing Release, because we are creating a general definition of ''asset-backed security'' regardless of eligibility for shelf registration, we are adopting two separate delinquency concentration limits. We are adopting the percentage limits as proposed. For the general definition (*e.g.*, for offerings that could be registered on a non-shelf basis on Form S–1), delinquent assets may not constitute 50% or more, as measured by dollar volume, of the asset pool as of the measurement date described above. As we noted in the Proposing Release, we believe concentrations above that threshold begin to raise serious doubt that the transaction should be characterized as an ''asset-backed security'' as the payments on the securities in such transactions would appear to depend more on the ability of the entity or entities that provide collection services for the delinquent assets than on the self-liquidating nature of the underlying assets. For shelf registration eligibility, we are retaining the existing 20% delinquency concentration level in the no-action letter, as proposed.

For purposes of determining whether a pool asset is delinquent under either threshold, we proposed to define a pool asset as ''delinquent'' if any portion of a contractually required payment on the asset is 30 days or more past due. The proposed definition was based on the existing standard in the staff no-action letter.[97]

Several commenters requested more flexibility for the definition. In particular, several commenters noted that some sponsors do not consider an obligor delinquent when any portion of a contractually required payment is late, but instead only when less than some percentage (*e.g.*, 90%) or amount of a payment is received.[98] Changing their systems for purposes of the proposed requirement, these commenters argued, would be burdensome. Others argued that sponsors use different reporting methodologies in determining delinquency, such as the Office of Thrift Supervision method or the Mortgage Bankers Association of America method.[99]

We noted in the Proposing Release that, with regard to determining delinquency, one potential area of concern is improper re-aging or restructuring of delinquent accounts, such as declaring an asset with multiple past-due payments as current even if only the last payment was made. We proposed clarifying in the definition of ''delinquent'' that a pool asset that was more than one payment past due could not be characterized as not delinquent if only partial payment on the total past due amount had been made, unless the obligor had contractually agreed to restructure the obligation, such as part of a workout plan. While not all agreed, commenters generally objected to this approach, arguing that servicers sometimes restructure obligations without contractually amending the pool asset documents.[100]

As an alternative to the proposed definition of ''delinquent,'' some of these commenters suggested an approach similar to the definition of ''non-performing'' that looks to the provisions specified in the relevant transaction agreements or the policies of the sponsor in determining delinquency, so long as these provisions and policies are disclosed. As commenters confirmed to us, policies relating to delinquency vary somewhat across asset types and sponsors, similar to charge-off policies. However, we continue to believe a standard linked to the longstanding 1997 no-action letter should be retained to clarify the degree of flexibility permitted.

Accordingly, we are defining a pool asset as ''delinquent'' if a pool asset is more than 30 or 31 days or a single payment cycle, as applicable, past due from the contractual due date, as determined in accordance with any of the following:

- The transaction agreements for the asset-backed securities;
- The delinquency recognition policies of the sponsor, any affiliate of the sponsor that originated the pool asset or the servicer of the pool asset; or
- The delinquency recognition policies applicable to such pool asset established by the primary safety and soundness regulator of any entity listed above or the program or regulatory entity that oversees the program under which the pool asset was originated.[101]

With an approach that relies more on a party's delinquency recognition policies, we believe appropriate disclosure of the policies and their application becomes even more important.[102] As a result and as referenced in the Proposing Release, in adopting delinquency limits, we also are adopting disclosure requirements, discussed more fully in Section III.B., of policies regarding grace periods, re-aging, restructures, partial payments considered current or other such practices on delinquencies. We also are adopting disclosure requirements for

terms (*e.g.*, a student loan that is in ''in-school,'' grace, deferment or forbearance status) does not make the asset ''non-performing,'' unless the asset also meets a charge-off policy identified in the definition of ''non-performing.''

[93] See, *e.g.*, Letters of ABA; Auto Group; and MBA.

[94] See Letter of ABA.

[95] See, *e.g.*, Letters of ASF and MBNA.

[96] See, *e.g.*, Letters of MetLife and State Street.

[97] See note 83 above.

[98] See, *e.g.*, Letters of ABA; ASFA; Auto Group; Citigroup; MBA; and TMCC.

[99] See, *e.g.*, Letters of ABA; MBA; and Metlife. See also Fitch, Inc., ''Residential Mortgage Delinquency Reporting Methods'' (Nov. 13, 2003).

[100] Compare, *e.g.*, Letters of ABA; ASFA; ASF; and TMCC; with Letter of State Street.

[101] Similar to the ''non-performing'' definition, the delinquency requirement that is most restrictive will govern. In addition and as similar to the ''non-performing'' definition, a pool asset that changes payment status in accordance with its terms (*e.g.*, a student loan that is in ''in-school,'' grace, deferment or forbearance status) does not make the asset ''delinquent,'' unless the asset also meets a delinquency policy identified in the definition of ''delinquent.''

[102] See, *e.g.*, Moody's Investors Service, Inc., ''Loan Modifications and Forbearance Plans Impact on Home Equity Securitizations'' (Sep. 24, 2004).

on-going reporting, discussed more fully in Section III.D., regarding material modifications, extensions or waivers to pool asset terms, fees, penalties or payments. We also are requiring disclosure of any material changes to delinquency recognition policies. Given this disclosure-based approach, we are not adopting the proposed requirement permitting only contractual-based re-agings.

e. Lease-Backed Securitizations and Residual Values

As discussed above, the one change we proposed making to the basic definition of ''asset-backed security'' is to expand the definition to include securitizations backed by leases where part of the cash flows backing the securities is to come from the disposal of the residual asset underlying the lease (*e.g.*, selling an automobile at the end of an automobile lease). In that instance, the asset-backed securities are not backed solely by financial assets that ''by their terms convert into cash,'' because the transaction also involves a physical asset that must be sold in order to obtain cash. As a result, securitizations where a portion of the cash flow to repay the securities is anticipated to come from the residual value of the physical property do not fall within the current definition of ''asset-backed security'' in Form S–3 and thus are often registered on a non-shelf basis on Form S–1.

As we explained in the Proposing Release, lease-backed ABS have grown into a common and recognized segment of the overall ABS market.[103] We received support from commenters for adding lease-backed ABS to the definition of ''asset-backed security,'' and therefore eligibility for shelf-registration if the requirements of Form S–3 are met.[104] However, as we explained in the Proposing Release, even though we are recognizing the growth in lease-backed ABS that include securitizations of residual value, such securitizations are subject to additional factors that are not present in securitizations backed solely by financial assets that convert into cash. Residual value is often determined at the inception of a lease contract and represents an estimate of the leased property's resale value at the end of the lease. Assumptions and modeling are necessary to determine the amount of the residual value. In addition, the transaction is not simply dependent on the servicing and amortization of the pool assets, but also on the capability and performance of the party that will be used to convert the physical property into cash and thus realize the residual values.

The higher the percentage of cash flows that are to come from residual values, the more important these other factors become and the less the transaction resembles a traditional securitization of financial assets for which our regime for asset-backed securities is designed. Although some commenters did not believe we should have any limits on residual values,[105] we continue to believe, as discussed above, that the core principle that an asset-backed security should be primarily serviced by financial assets that by their terms convert into cash should be retained. At the same time, we believe a defined limited exception to this general principle is appropriate and consistent for access to the alternate regulatory regime for certain lease-backed ABS.

As we explained in the Proposing Release, we are addressing concerns with the deviation from the core principle in two principal ways. First, we are adopting disclosures, discussed more fully in Section III.B., on how residual values are estimated and derived, statistical information on historical realization rates and disclosure of the manner and process in which residual values will be realized, including disclosure about the entity that will convert the residual values into cash. Second, we are establishing limits on the percentage of the securitized pool balance attributable to residual values in order to be considered an ''asset-backed security.'' We believe these changes will expand eligibility of lease-backed transactions for shelf registration and appropriately permit lease-backed transactions under our new rules while continuing to apply the core principles underlying the definition of ''asset-backed security.''

As we noted in the Proposing Release, market practice regarding lease-backed securitizations varies on the typical percentage of the securitized pool balance attributable to residual values. For example, motor vehicle lease securitizations often have higher residual value percentages than equipment lease securitizations due to the higher resale values that often exist between motor vehicles and other equipment. Accordingly, after reviewing residual value percentages for typical lease-backed securitizations, we proposed that the portion of the cash flow to repay the securities anticipated to come from the residual value of the physical property underlying the leases could not constitute:

- For automobile leases, 60% or more, as measured by dollar volume, of the original asset pool at the time of issuance of the asset-backed securities; and
- For all other leases, 50% or more, as measured by dollar volume, of the original asset pool at the time of issuance of the asset-backed securities.

In addition, we proposed a more stringent limitation for cash flow from residual values for offerings of securities backed by leases other than motor vehicle leases that may be registered on Form S–3 and thus eligible for shelf registration. For Form S–3 eligibility of ABS backed by such leases, we proposed that the portion of the cash flow anticipated to come from residual values could not constitute 20% or more, as measured by dollar volume, of the original asset pool at the time of issuance of the asset-backed securities.

Commenters raised several concerns with our proposal if percentage limitations were to be maintained. First, commenters believed the proposal did not provide enough clarity on how to make the necessary calculations.[106] In particular, commenters were concerned with the proposed choice of language for the calculation, which was phrased in reference to ''the portion of the cash flow anticipated to come from residual values.'' We note that filings for lease-backed ABS today typically disclose the portion of the securitized pool balance attributable to residual values and the method of determining such figures. Our intention had been and is to codify that practice in connection with complying with the residual value percentages. To clarify this intention, we are revising the language in the requirement to more closely track language used in lease-backed ABS filings to refer to the portion of the securitized pool balance attributable to residual values, as determined as of the measurement date in accordance with the transaction agreements for the asset-backed securities. We note that the residual value itself is often calculated at the inception of the lease, but the portion of the securitized pool balance attributable to it (*e.g., vis a vis* lease payments) is a percentage determined at the time of the transaction. Similar to our final rules with respect to determining delinquency and non-performance thresholds, we are

[103] See, *e.g.*, Fitch, Inc., ''Under the Hood: Automobile Lease ABS Uncovered'' (Jun. 14, 2000).

[104] See, *e.g.*, Letter of Auto Group.

[105] See, *e.g.*, Letters of ABA; American Honda Finance Corporation (''AHFC''); ASF; Auto Group; and TMCC.

[106] See, *e.g.*, Letters of ABA; ASF; Auto Group; and TMCC.

clarifying in an instruction that the ''measurement date'' is the cut-off date for the transaction, if applicable, or, in the case of master trusts, the date as of which securitized pool balance information is presented in the prospectus for the securities.

Second, commenters believed the proposed percentages were too stringent to permit all motor vehicle lease-backed ABS transactions that have been conducted.[107] A threshold set against market practice may not encompass every transaction conducted before the threshold was set. However, we do seek to codify percentages that are based upon current market practice. Based on further review of lease-backed ABS transactions during the past five years, including the examples provided by commenters, we are raising the percentage for motor vehicle lease-backed ABS from 60% to 65%.

Finally, commenters believed that if residual value limitations are retained, an exception should be made to the extent there is a residual value guarantee, residual value insurance or where the lessee is obligated to cover any residual losses.[108] In each instance, these commenters argued, the credit risk for the residual loss is with a separate obligated party. We are providing an instruction that residual values need not be included in measuring against the limitation to the extent a separate party is obligated for such amount. However, we note that, depending on the extent of the separate party's obligation for such amounts, such obligation may result in that party constituting a significant provider of credit enhancement or other support or, when the lessee is obligated to cover any residual losses, a significant obligor. In that instance, as described in Sections III.B.7 and 8, additional disclosures, including financial disclosures, may be required.

In addition to other technical changes,[109] we are adopting as proposed the limits for non-motor vehicle leases. For the basic definition, the portion of the securitized pool balance attributable to residual values for such leases may not constitute 50% or more, as measured by dollar volume. For Form S–3 eligibility, the portion of the securitized pool balance attributable to residual values for such leases may not constitute 20% or more, as measured by dollar volume.[110]

f. Exceptions to the ''Discrete'' Requirement

The last set of interpretations we are codifying relates to exceptions to the requirement in the definition of ''asset-backed security'' that the asset pool be ''discrete.'' As discussed above, the existence of the ''discrete'' requirement is to prevent a level of portfolio management that is not contemplated by the definition of ''asset-backed security'' or consistent with this registration and reporting regime. In addition, the lack of a ''discrete'' requirement would make it difficult for an investor to make an informed investment decision when the composition of the pool is unknown or could change over time.

However, as we explained in the Proposing Release, ever since the original definition of ''asset-backed security'' was adopted, there has been some confusion over the meaning of the term ''discrete'' in the definition, particularly with respect to language in the definition that specifies the asset pool must be a ''discrete pool of receivables or other financial assets, either fixed or revolving.'' The 1992 Release specified that the phrase ''fixed or revolving'' was added ''in order to make clear that the definition covers 'revolving' credit arrangements, such as credit card and short-term trade receivables, home equity loans and automotive dealer floorplan financings, where account or loan balances revolve due to periodic payments, charge-offs and closings of the receivables.''[111] Thus, the basic principle was that the balance of a pool asset may revolve, but not the asset pool itself.[112]

Nevertheless, in response to market developments, the staff has allowed certain exceptions, with limits, to the discrete pool requirement. These exceptions relate to master trusts, prefunding periods and revolving periods. In a master trust, the ABS transaction contemplates future issuances of asset-backed securities backed by the same, but expanded, asset pool. Pre-existing securities also would therefore be backed by the same expanded asset pool. In a prefunding period, a limited portion of the proceeds of the offering is set aside for the future acquisition of additional pool assets within a specified period of time after the issuance of the asset-backed securities. In a revolving period, cash flows from the asset pool may be recycled for a specified period to acquire new pool assets instead of being applied to payments on the asset-backed securities.[113]

The staff's interpretive history in this area has resulted in limits on which asset classes may use these structures and still be considered an ''asset-backed security.''[114] As discussed above, we are codifying these three exceptions and also expanding them so that they are applicable to all asset types.[115] As we noted in the Proposing Release, a transaction can employ one or more of these features and still qualify as an ''asset-backed security.''[116] We believe these expansions will result in increased flexibility in structuring transactions to meet market demands.

As in the case of our treatment of lease-backed ABS that involve residual values, we believe a large part of the concern relating to these structures can be appropriately addressed through disclosure, both at the time of issuance

[107] See, *e.g.*, Letters of ABA; AHFC; ASF; Auto Group; and TMCC.

[108] See, *e.g.*, Letters of ABA; ASF; and Auto Group.

[109] For example, in response to comment we are clarifying the reference from ''automobile'' lease to ''motor vehicle'' lease. Motor vehicle leases for this purpose includes leases for automobiles (which includes light duty trucks, sport utility vehicles and vans), motorcycles, trucks and buses. As proposed, motor vehicle lease would not include leases for leisure craft such as watercraft or snowmobiles.

[110] Securitizations backed solely from the payment on the leases and not including the residual value of the underlying physical property would not, of course, need to comply with the thresholds.

[111] See note 32 above. The 1992 Release also explained that, ''In credit card financings, for example, the securities are backed by current and future receivables generated by specified credit card accounts. The balances of the pool assets fluctuate as new receivables are generated and existing amounts are paid or charged off as a default. If the accounts do not generate sufficient cash flow to support the securities, the sponsor may be required to assign additional receivables from other accounts to the public security holders' interest in the pool.''

[112] As we indicated in the Proposing Release, there are additional instances when the asset pool may change under the current definition without infringing the ''discrete pool'' requirement. For example, often the depositor or other seller of the pool assets will make standard representations and warranties regarding the pool assets, such as to their principal balance and status at the time of transfer to the trust. If an asset fails to meet the requirements of those representations or warranties, there may be obligations for the depositor to repurchase or substitute that asset for assets that do comply with the representations or warranties. These pool composition changes are permissible under the current definition as ''rights or other assets designed to assure the servicing or timely distribution of proceeds to securityholders.'' There is thus no need to specify a separate exception from the ''discrete'' requirement for such instances.

[113] The period after the revolving period when cash flows are applied to payments on the asset-backed securities is often called the ''amortization'' or ''pay-down'' period.

[114] For example, nearly all asset classes might employ a limited prefunding period. However, only a limited subset of asset classes were permitted to have revolving periods. Not all of these interpretations have been transparent.

[115] But see note 179 and the accompanying text regarding other factors that may limit the use of these features where the distribution of the underlying pool assets may need to be separately registered.

[116] For example, an offering may be set up as a master trust with a prefunding period for a portion of the proceeds of the issuance and a revolving period.

of the asset-backed securities as well as on an ongoing basis through disclosure of how the asset pool is materially changing. As such, we are adopting, with certain modifications, our proposed requirements for more detailed disclosures in Regulation AB, discussed more fully in Sections III.B. and III.D., regarding the operation of such structures and changes to the asset pool over time.

We also are adopting limits, as discussed below, on the amount and duration of prefunding and certain revolving periods to limit the amount of changes to the asset pool, while still allowing flexibility to accommodate market demands. As noted in the Proposing Release, these limits are designed to establish parameters for the types of securities that should be subject to the ABS regulatory regime. As with lease-backed ABS, we believe these proposals will expand eligibility of these structures while continuing to apply the core principles underlying the definition of ''asset-backed security.''

i. Master Trusts

As proposed, master trust structures will be allowed to meet the definition of ''asset-backed security'' without any pre-determined limits.[117] Commenters supported expanding access to master trusts.[118] However, several commenters noted that most master trusts permit, and in some cases require, the depositor to make additional asset additions to the asset pool from time to time, regardless of when ABS are issued.[119] In particular, commenters expressed concern that the proposed wording of the exception for master trusts, which was limited to asset additions in connection with future issuances of asset-backed securities, would not allow for additions of pool assets in current master trust structures that are necessary to maintain minimum pool balances, such as the depositor's interest in the trust. As the commenters explained, permitting such additions is an essential means for these current structures of assuring an adequate pool balance for master trusts with revolving assets. To maintain existing practice, we are modifying the exception for master trusts to clarify that the offering related to the securities may contemplate both adding additional assets to the pool in contemplation of future issuances of asset-backed securities backed by such pool as well as, for master trusts with revolving periods or receivables or other financial assets that arise under revolving accounts, additions to the asset pool in connection with maintaining minimum pool balances in accordance with the transaction agreements.[120]

ii. Prefunding Periods

For prefunding periods, we proposed separate limits for shelf and non-shelf offerings similar to our proposals for lease-backed ABS. For the general definition of ''asset-backed security,'' we proposed that the amount of proceeds that may be used for a prefunding period could be up to 50% of offering proceeds and the length of the prefunding account could last up to one year from the date of issuance of the asset-backed securities. As we stated in the Proposing Release, we believe prefunding periods above these thresholds begin to raise serious doubt that the transaction should be characterized as an ''asset-backed security.'' For Form S–3 eligibility, we proposed that the amount of proceeds that may be used for a prefunding period could be up to 25% of offering proceeds over a similar one-year period.

Commenters were mixed on our proposals. One commenter representing an ABS investor supported the proposed limits.[121] Several other commenters representing primarily issuers and their representatives noted that although the proposed Form S–3 level was consistent with the requirements in the staff's no-action letter regarding relief from Rule 15c2–8(b), they believed the staff has permitted higher limits and requested eliminating or expanding the tests to provide increased flexibility.[122]

As discussed above, we continue to believe a limit on prefunding is appropriate. However, after evaluating the comment received, we no longer believe it is necessary to have separate limits for Form S–3 shelf registration. Therefore, we are only codifying the proposal with respect to the basic definition. In addition and in response to comment, we are clarifying application of the prefunding limitation with respect to master trusts.[123] Under the final rule, regardless of the form on which the offering was registered, a prefunding period is permitted for up to one year from the date of issuance of the asset-backed securities and the prefunded amount may consist of up to 50% of offering proceeds or, in the case of master trusts, up to 50% of the aggregate principal balance of the total asset pool whose cash flows support the asset-backed securities.

iii. Revolving Periods

Our proposals for revolving periods recognized the nature of the asset being securitized (*i.e.*, whether it itself is fixed or revolving). We proposed that for receivables or other financial assets that by their nature revolve (*e.g.*, credit cards, dealer floorplan financings or home equity lines of credit), there would as today be no limit on the number of assets that may revolve nor a limit on the duration of the revolving period. For fixed receivables or other financial assets (*e.g.*, standard residential mortgages, auto loans and leases), we proposed limits similar to prefunding periods; that is, the basic definition of ''asset-backed security'' would specify that the additional assets that may be acquired in the revolving period may constitute up to 50% of the proceeds of the offering and the duration of the revolving period may last for up to one year from the date of issuance of the asset-backed securities. For Form S–3 eligibility, the revolving period would be limited to 25% of proceeds over a one-year period.

Several commenters urged eliminating any restrictions on revolving periods, regardless of the type of asset or the form of registration.[124] Revolving periods, these commenters argued, allow issuers flexibility to create ABS with longer or different maturities and weighted average lives than the underlying pool assets. Revolving periods were argued to be particularly necessary in the case of shorter-term assets to create ABS with meaningful maturities. As with the other proposed exceptions to the definition of asset-backed security, these commenters believed concerns about increased revolving periods were mitigated by the proposed increased disclosure regarding

[117] Of course, each additional issuance of securities backed by the same pool and the additional pool assets would need to be consistent with the requirements for an ''asset-backed security.''

[118] See, *e.g.*, Letters of ABA; AFSA; AIG; Capital One; MBNA; and State Street.

[119] See, *e.g.*, Letters of AFSA, Capital One; and MBNA.

[120] Note that the limit on revolving periods for securities backed by receivables or other financial assets that do not arise under revolving accounts is co-extensive with this provision for master trusts. Hence, if a master trust for such pool assets uses a revolving period, including to maintain minimum pool balances, the revolving period for each series would be limited to a three-year period. We have included clarifying language regarding this point in the ''discrete'' pool exception for master trusts.

[121] See Letter of State Street. In addition, the commenter suggested further limiting prefunding such that it is applicable only to financially secure sponsors with a track record of securitizations with the same asset type.

[122] See, *e.g.*, Letters of ASFA; ASF; Auto Group; BMA; Capital One; FSR; and TMCC.

[123] See, *e.g.*, Letter of ASF.

[124] See, *e.g.*, Letters of ABA; AIG; ASF; Auto Group; ESF; and TMCC.

such periods and changes to the asset pool over time.

Revolving periods have long been permitted under staff practice for assets that by their nature revolve, as discussed above. There is thus an established record of experience with revolving periods for such asset classes. For other assets, while we recognize the commenters' arguments regarding the benefit of revolving periods in structuring asset-backed securities, we also recognize the management aspects that arise and are thus not prepared at this point to eliminate all restrictions on revolving periods for purposes of which securities should qualify as an ''asset-backed security'' subject to Regulation AB. However, after evaluating the comments and their arguments regarding the market reality of the use of revolving periods, we are expanding the exception from that proposed for those asset classes. We also are making technical changes to the proposal in response to comment to clarify the types of assets subject to the requirement.

Accordingly, under the final rules there will remain no restrictions on revolving periods for securities backed by receivables or other financial assets that arise under revolving accounts. For securities backed by receivables or other financial assets that do not arise under revolving accounts, an unlimited revolving period will be permitted for up to three years, so long as the new pool assets that are added are of the same general character as the original pool assets. One group of commenters who suggested such an alternative believed a three year revolving period would improve efficiency in structuring transactions.[125] As with prefunding accounts, we are not establishing a more stringent revolving limitation for Form S–3 eligibility. These expansions from the proposal allow issuers substantially increased flexibility over current staff practice to structure asset-backed securities.

3. Securities Act Registration Statements

a. Form Types

As we noted in the Proposing Release, we are not creating a new registration statement form for ABS offerings. We believe the existing form structure is sufficient, provided there are appropriate instructions in the applicable forms as to their use for ABS offerings. As proposed, we are limiting registration of asset-backed securities offerings to two forms: Form S–1 or Form S–3.[126] As is currently the case, Form S–3 will retain the requirements that will qualify an offering for delayed shelf registration on that form pursuant to Rule 415(a)(1)(x).[127] Form S–1 will be the form for all other offerings that meet the definition of an ''asset-backed security'' but do not meet the additional eligibility requirements for Form S–3 (*e.g.*, investment grade and additional limits on lease-backed ABS and delinquent pool assets). We received support from commenters for this approach.[128] As proposed, we are amending our other Securities Act registration statement forms for primary offerings to exclude explicitly their use for ABS offerings.[129] Since as discussed below we are not establishing a separate disclosure regime or requirements for foreign ABS, we continue to believe it is unnecessary to provide separate form types for foreign ABS offerings. These offerings also will be registered on Forms S–1 or S–3, as applicable.

As we noted in the Proposing Release, while Form S–3 currently specifies eligibility for ABS offerings, neither it nor any other form clarifies how the form is to be prepared for such an offering. Therefore, we are adopting our proposal for separate general instructions for both Form S–1 and Form S–3 to specify use for ABS offerings.

New General Instruction VI. to Form S–1 clarifies how that form is to be prepared for an ABS offering. In particular, the instruction clarifies who is to sign the registration statement (discussed more fully in Section III.A.3.d.) as well as the menu of required disclosure items. As to the latter, the instruction identifies the existing items in the form that may be omitted as well as substitute core disclosure items from Regulation AB that will be required. As discussed in Section III.B., Items 1102–1120 of Regulation AB represent the basic disclosure package for registered ABS offerings. Any other applicable items specified in Form S–1, such as the description of the securities and the offering, will continue to be required.[130] Under the final rules, the application of the disclosure items for Form S–1 will be as follows:

DISCLOSURE FOR FORM S–1 FOR REGISTERED ABS OFFERINGS

Existing form items	Required if applicable	May be omitted
Item 1. Forepart of Registration Statement and Outside Front Cover Page of Prospectus	•	
Item 2. Inside Front and Outside Back Cover Pages of Prospectus	•	
Item 3. Summary Information, Risk Factors and Ratio of Earnings to Fixed Charges	•	
Item 4. Use of Proceeds	•	
Item 5. Determination of Offering Price	•	
Item 6. Dilution	•	
Item 7. Selling Security Holders	•	
Item 8. Plan of Distribution	•	
Item 9. Description of Securities to be Registered	•	
Item 10. Interests of Named Experts and Counsel	•	
Item 11. Information with Respect to the Registrant	•	
Item 12. Disclosure of Commission Position on Indemnification for Securities Act Liabilities	•	
Item 13. Other Expenses of Issuance and Distribution	•	
Item 14. Indemnification of Directors and Officers	•	

[125] See Letter of Auto Group.

[126] As is the case today, Form S–4 also will remain available with respect to transactions, such as exchange offers, authorized by that Form. The disclosure required will remain consistent with that for a primary offering on Form S–1 or S–3, as applicable.

[127] 17 CFR 230.415(a)(1)(x). In the Offering Process Release, we proposed several changes to the operation of the shelf registration system under the Securities Act. We encourage ABS market participants to comment specifically on those proposals.

[128] See, *e.g.*, Letter of ABA.

[129] See amendments to Form S–2, S–11, F–1, F–2 and F–3. Any offerings meeting the definition of asset-backed security that previously used one of these forms for registration, such as Form S–11, in lieu of Form S–3 must henceforth be registered on Form S–1 instead. As discussed in Section III.E., we also are clarifying that ABS issuers do not qualify as a ''small business issuer.'' Therefore, ABS offerings are ineligible for Forms SB–1 and SB–2 (referenced in 17 CFR 239.9 and 17 CFR 239.10). For mortgage related securities that are relying on Rule 415(a)(1)(vii), see note 61 above.

[130] As is the case today, unless otherwise specified, no reference need be made in the prospectus to inapplicable items. See Securities Act Rule 404(c) (17 CFR 230.404(c)).

DISCLOSURE FOR FORM S–1 FOR REGISTERED ABS OFFERINGS—Continued

Existing form items	Required if applicable	May be omitted
Item 15. Recent Sales of Unregistered Securities	•	
Item 16. Exhibits and Financial Statement Schedules	•	
Item 17. Undertakings	•	
Additional Disclosure Items from Regulation AB:		
Items 1102–1120 of Regulation AB	•	

New General Instruction V. to Form S–3 performs a similar function for that form. As we explained in the Proposing Release, unlike current practice on Form S–1, non-ABS offerings on Form S–3 rely predominately on incorporation by reference of Exchange Act reports for disclosure unrelated to the offering. As a result, existing Form S–3 does not set forth a detailed menu of disclosure items apart from disclosure about the offering. However, because a reporting history is not required for ABS for Form S–3 eligibility, investment grade ABS offerings registered on that form often must present most of their disclosure in the base prospectus and prospectus supplement in lieu of incorporating information by reference. Accordingly, the new Form S–3 instruction for ABS, as proposed, does not specify any existing items that may be omitted, but rather specifies the addition of the same basic disclosure package from Regulation AB. The other disclosure items required by Form S–3, such as the description of the securities and the offering, will continue to be required as applicable. Therefore, as shown in the following table, the effect of the new instruction is to add the basic disclosure package of Items 1102–1120 of Regulation AB:

DISCLOSURE FOR FORM S–3 FOR REGISTERED ABS OFFERINGS

Existing form items	Required if applicable	May be omitted
Item 1. Forepart of Registration Statement and Outside Front Cover Page of Prospectus	•	
Item 2. Inside Front and Outside Back Cover Pages of Prospectus	•	
Item 3. Summary Information, Risk Factors and Ratio of Earnings to Fixed Charges	•	
Item 4. Use of Proceeds	•	
Item 5. Determination of Offering Price	•	
Item 6. Dilution	•	
Item 7. Selling Security Holders	•	
Item 8. Plan of Distribution	•	
Item 9. Description of Securities to be Registered	•	
Item 10. Interests of Named Experts and Counsel	•	
Item 11. Material Changes	•	
Item 12. Incorporation of Certain Information by Reference	•	
Item 13. Disclosure of Commission Position on Indemnification for Securities Act Liabilities	•	
Item 14. Other Expenses of Issuance and Distribution	•	
Item 15. Indemnification of Directors and Officers	•	
Item 16. Exhibits	•	
Item 17. Undertakings	•	
Additional Disclosure Items from Regulation AB:		
Items 1102—1120 of Regulation AB	•	

b. Presentation of Disclosure in Base Prospectuses and Prospectus Supplements

As we noted in the Proposing Release, by specifying the menu of disclosure items applicable for ABS offerings eligible for Form S–3, and thus shelf registration, we do not intend to change the current practice or ability to present such disclosure in a separate base prospectus and prospectus supplement, a practice also available for non-ABS offerings.[131] Items in the basic disclosure package that are known or reasonably available should continue to be described in the base prospectus, while disclosure dependent on the final terms of the particular takedown can still be provided in the prospectus supplement.[132] If this approach is followed, a form of prospectus supplement is required to accompany the base prospectus in the registration statement at the time of effectiveness that outlines the format of deal-specific information that will be disclosed at the time of each takedown.[133]

[131] However, as stated in the 1992 Release and as currently applicable to all shelf offerings, registrants are reminded that disclosure in the registration statement at the time of effectiveness should accurately reflect the registrant's current plans and arrangements with respect to the distribution of its securities. If a registrant plans to conduct a prompt takedown of asset-backed securities, the registration statement at the time of effectiveness must currently include all available information regarding the offering, including information about the asset pool, subject to any omissions permitted by Securities Act Rule 430A (17 CFR 230.430A), including a completed prospectus supplement and not just a form of prospectus supplement. Tax and legality opinions reflecting the takedown and related consents also would need to be filed pre-effectively with respect to any proposed offering contemplated to occur promptly. The Commission has proposed to eliminate this restriction on the use of so called ''convenience shelf.'' See the Offering Process Release. This proposed general change, if adopted, would also apply to ABS.

[132] For example, the base prospectus should likely contain risk factors applicable to the transaction as a whole or the nature of the securities to be issued. The base prospectus also should include a discussion of the material federal income tax consequences from investing in asset-backed securities. Of course, the prospectus supplement would include any additional risk factors or more specific disclosure as to tax consequences applicable to the particular structure and securities to be offered.

[133] In addition, consistent with the longstanding requirements for all registered offerings, required opinions of counsel regarding tax consequences and

Continued

As referenced in the 1992 Release, the type or category of asset to be securitized must be fully described in the registration statement at the time of effectiveness. The structural features contemplated also should be disclosed, as well as identification of the types or categories of securities that may be offered, such as interest-weighted or principal-weighted classes (including IO or PO securities), planned amortization or companion classes or residual or subordinated interests. In addition, risks associated with changes in interest rates or prepayment levels should be fully disclosed. The various scenarios under which payments on the asset-backed securities could be impaired also should be discussed.

In the Proposing Release, we explained the longstanding position that when presenting disclosure in base prospectuses and prospectus supplements, the base prospectus must describe the types of offerings contemplated by the registration statement. A takedown off of a shelf that involves assets, structural features, credit enhancement or other features that were not described as contemplated in the base prospectus will usually require either a new registration statement (*e.g.,* to include additional assets) or a post-effective amendment (*e.g.,* to include new structural features or credit enhancement) rather than simply describing them in the final prospectus filed with the Commission pursuant to Securities Act Rule 424. Registrants should exercise discretion, however, in describing only the material asset types or features reasonably contemplated to be included in an actual takedown.

As proposed, we are specifying in the general instruction to Form S–3 the existing requirement to prepare separate base prospectuses and forms of prospectus supplements when multiple asset types may be securitized in discrete pools in takedowns under that registration statement. As stated in the 1992 Release, a registration statement may not merely identify several alternative types of assets that may be securitized. A separate base prospectus and form of prospectus supplement must be presented for each asset class that may be securitized in a discrete pool in a takedown under that registration statement. We also are adopting as proposed a similar requirement for takedowns involving pools of foreign assets where the assets originate in separate countries or the property securing the pool assets is located in separate countries.

Commenters raised several questions about the proposed instruction, particularly regarding the proposed requirement for a separate base and form of supplement for takedowns involving separate jurisdictions.[134] We wish to clarify a potential misconception regarding these requirements. A separate base and form of supplement only is required for asset types or jurisdictions that may be securitized in a discrete pool in separate takedowns under the registration statement. If pool assets of different asset types or different jurisdictions are to be pooled together in a single transaction (*e.g.,* an offering with a multi-jurisdictional pool or an offering with a pool of 45% residential mortgages and 55% commercial mortgages), a single base and form of prospectus supplement would be permitted, so long as the appropriate disclosures for each asset type or jurisdiction were included.

Similarly, several commenters pointed out that the staff has permitted the use of a single base and form of supplement for transactions that principally consist of a particular asset class, but which also describes one or more potential additional asset classes, so long as the pool assets for the additional classes in the aggregate are limited to 10% of the pool for any particular takedown. We also are clarifying this position in the instruction and applying it to both separate asset classes and separate jurisdictions.

We noted in the Proposing Release that an additional issue that often results in staff comment is the inclusion of language in registration statements that investors should rely on the information in the prospectus supplement if the terms of a particular series of securities conflict or vary between the base prospectus and the accompanying prospectus supplement. As is currently the case today, disclosure in prospectus supplements regarding the transaction may enhance disclosure in the base prospectus regarding contemplated transactions, but should not contradict it. Similarly, including language to the effect of ''Except as otherwise provided in the prospectus supplement'' will permit some supplemental or modified terms of transactions, but should not be construed as creating the ability to add asset types or structural features in a takedown that were not otherwise contemplated by and described in the base prospectus.

c. Form S–3 Eligibility Requirements for ABS

As proposed, we are maintaining the existing requirement for ABS Form S–3 eligibility that the asset-backed securities must be rated ''investment grade'' by a nationally recognized statistical rating organization, or NRSRO, at the time of offer and sale to the public.[135] The definition of ''investment grade'' will remain the same as for other investment grade securities that may be registered on Form S–3.[136] As we explained in the Proposing Release, the ''investment grade'' requirement has existed for over ten years with respect to asset-backed securities and for over twenty years with respect to other non-convertible securities. The Commission is engaged in a broad review of the role of credit rating agencies in the operation of the securities markets, including whether credit ratings should continue to be used for regulatory purposes under the federal securities laws.[137] We received comment in response to the Proposing

the legality of the securities being registered must be filed prior to effectiveness of the registration statement. See Items 601(b)(5) and 601(b)(8) of Regulation S–K. Note that these requirements exist independently from any contractual requirements of the transaction to deliver opinions at the closing of the asset-backed securities transaction. Where a prompt offering under the registration statement is not contemplated, opinions filed as of effectiveness may be appropriately conditioned or qualified pending the actual issuance of securities in the future. However, the opinions filed as of the time of effectiveness must still be signed opinions, not unsigned or draft forms of opinion. For each takedown that occurs, as with other exhibits representing the final terms of the takedown, amended or final opinions without such conditions or qualifications must be filed, either as an exhibit to the registration statement (See Securities Act Rule 462(d) (17 CFR 230.462(d) which provides for immediate effectiveness of a post-effective amendment filed solely to add exhibits), or under cover of Form 8–K and incorporated by reference into the registration statement.

We also are adding a clarifying instruction to General Instruction V.A.2. of Form S–3 that when a preliminary prospectus is required under Form S–3 pursuant to new Securities Act Rule 190(b)(7), the information to be included in the base prospectus and prospectus supplement is to be substantially similar to that which would be included if the preliminary prospectus was required under Form S–1 pursuant to such rules.

[134] See, *e.g.,* Letters of A&O; ABA; ASF; Association of the Bar of the City of New York (''NYCBA''); Aus. SF; CMSA; and ESF.

[135] NRSRO continues to have the same meaning as used in 17 CFR 240.15c3–1(c)(2)(vi)(F).

[136] See General Instruction I.B.2 of Form S–3 and note 60 above.

[137] See Release No. 33–8236 (Jun. 4, 2003) [68 FR 35258]. For a detailed discussion on credit rating agencies and the Commission's use of credit ratings under the federal securities laws, see the U.S. Securities and Exchange Commission, ''Report on the Role and Function of Credit Rating Agencies in the Operation of the Securities Markets, As Required by Section 702(b) of the Sarbanes-Oxley Act of 2002'' (Jan. 2003). The Report is available on our Web site.

Release on possible alternatives to using an investment-grade requirement for ABS Form S–3 eligibility purposes.[138] However, pending the outcome of our review of credit rating agencies, we are maintaining the same rules and standards currently used for purposes of Form S–3 eligibility.

As discussed more fully in Section III.A.2. above, we are adding two additional conditions regarding the types of asset-backed securities that would qualify for Form S–3 eligibility. First, we are codifying the current position that delinquent assets may not constitute 20% or more, as measured by dollar volume, of the asset pool. Second, for securities backed by leases other than motor vehicle leases, the portion of the securitized pool balance attributable to residual values may not constitute 20% or more, as measured by dollar volume. As referenced in Section III.A.2.f., we are not adopting the proposed additional restrictions for prefunding accounts and revolving periods for Form S–3 eligibility.

Consistent with existing requirements, we did not propose to add an issuer Exchange Act reporting history requirement for ABS Form S–3 eligibility. However, we did propose codifying that Exchange Act reporting obligations regarding other asset-backed securities transactions established by the sponsor and the depositor must have been complied with for the prior 12 months for continued Form S–3 eligibility for new registration statements.[139] This proposal would not have required that there be a reporting history with respect to any prior transactions, only that any existing or prior requirements during the past year had been met. As explained in the Proposing Release, we did not believe it would be appropriate to continue to allow the benefits of shelf registration to new registration statements established by sponsors or depositors that have not complied with ongoing reporting obligations involving previous asset-backed securities transactions.

Comments from issuers and their representatives objected to the proposals as generally being more restrictive than necessary to encourage better Exchange Act reporting compliance.[140] Commenters also thought the proposed formulation linked to the sponsor was potentially ambiguous as to which depositors were affected. While some suggested alternatives, some commenters objected to conditioning form eligibility on any reporting history. Commenters also thought any disqualification should be limited to depositors of the same asset class, arguing that securitizations of separate asset classes are often separately managed business units within a sponsor and to penalize all of the sponsor's programs for the reporting noncompliance of one would be too burdensome. Several commenters also believed that Form S–3 eligibility for asset-backed securities should be treated differently from the requirements for non-ABS securities in that eligibility should not be impaired by good faith, immaterial, inadvertent or involuntary failures in Exchange Act reporting, particularly if the untimely reporting was the result of the inability to obtain information from an unaffiliated third party.

Compliance with Exchange Act reporting by ABS issuers under the existing modified reporting no-action letters has been unacceptable. While this may be partially attributable to a lack of widely understood requirements due to reduced transparency in the current process, which these final rules are intended to help remedy, the concerns in this area are more broad-based than minor inadvertent or unintentional failures to file. Instead, reporting issues in the ABS market include widespread instances of untimely, deficient and sometimes even complete lapses in reporting.

As a resultant responsibility from registering a public offering of securities under the Securities Act, the Exchange Act specifically requires that the obligation to provide information does not stop with the final prospectus, but continues afterwards, at least for a period of time.[141] For asset-backed securities in particular, commenters representing investors have expressed a clear preference for required Exchange Act reporting, regardless of whether the issuer also elects to provide the information voluntarily.[142] Given past deficiencies in Exchange Act reporting compliance in the ABS sector, we continue to believe that issuers that fail to comply with their responsibilities under the Exchange Act for prior transactions should not continue to receive the benefits of shelf registration for new registration statements. Nor do we believe that the current practice of being able to form a new special purpose depositor to avoid the consequences of reporting noncompliance creates appropriate incentives for reporting compliance. Several commenters also recognized the need to fix this current problem.[143] Further, the ability for investment grade ABS offerings to have immediate access to Form S–3 without a reporting history requirement for the newly created issuing entity separates ABS from most non-ABS issuers such that a linkage to affiliated entities is appropriate.

Accordingly, we believe it is appropriate to continue to link Form S–3 eligibility requirements to Exchange Act reporting compliance for prior transactions. In response to several commenter suggestions,[144] we are revising the proposal to focus not on any transactions established directly or indirectly by a sponsor, but instead on transactions established by affiliated depositors involving the same asset class. We think this approach addresses many commenter concerns about the potential breadth of the proposed application across asset classes and tying the requirements to the sponsor definition.[145]

Under the final rules, to the extent the depositor for an ABS offering or any issuing entity previously established, directly or indirectly, by the depositor or any affiliate of the depositor are or were during the previous twelve calendar months and any portion of a month immediately preceding the filing of the Form S–3 registration statement subject to Exchange Act reporting requirements with respect to asset-backed securities involving the same asset class, such depositor and each such issuing entity must have timely complied with its Exchange Act reporting requirements.[146] This would include all prior Exchange Act reporting obligations for such asset-backed securities during the preceding year, even if and only up until those obligations were suspended at some point during the year pursuant to Section 15(d) of the Exchange Act.''[147]

[138] See, *e.g.,* Letters of ABA; Kutak; Moody's; and State Street.

[139] The proposal with regard to the depositor was consistent with existing staff policy.

[140] See, *e.g.,* Letters of ABA; ASF; BMA; BOA; CGMI; Citigroup; CMSA; FSR; MBA; NYSBA; and UBS.

[141] See, *e.g.,* Section 15(d) of the Exchange Act.

[142] See, *e.g.,* Letters of FMR and ICI.

[143] See, *e.g.,* Letters of ASF and BMA.

[144] See, *e.g.,* Letters of ASF; BMA; CMSA; FSR; NYCBA; and UBS.

[145] Commenters were particularly concerned that tying to common sponsors could inadvertently link a person's Form S–3 eligibility to an unrelated entity's reporting history in the ''rent-a-shelf'' context. We are persuaded that tying the requirements to a common depositor avoids this problem while still ensuring related sponsors are covered because all depositors of a given sponsor would be considered affiliates.

[146] As discussed subsequently, compliance with Form 8–K requirements for certain Items of that Form is limited to whether such filings are current, instead of timely and current, as of the filing of the registration statement.

[147] An ''affiliate'' of, or a person ''affiliated'' with, a specified person, is defined in Commission rules

Continued

In response to comment, we are adopting one exception to the requirement. Some comments requested an exception for depositors of other parties that are acquired in a good faith business combination transaction, arguing that prior noncompliance by the acquired depositors should not affect pare-existing depositors of the acquirer, so long as the acquisition is not part of a plan or scheme to evade the reporting requirements.[148] We are providing an exception that, regarding an affiliated depositor that became an affiliate as a result of a business combination transaction during the twelve month period before the filing of the registration statement, the filing of any material prior to the business combination transaction relating to asset-backed securities of an issuing entity previously established, directly or indirectly, by such affiliated depositor is excluded, provided such business combination transaction was not part of a plan or scheme to evade the requirements of the Securities Act or the Exchange Act.

With respect to imposing a reporting compliance requirement, some commenters expressed concern that an untimely Exchange Act filing would have an immediate effect on the ability to conduct offers and sales under previously filed registration statements.[149] We wish to clarify that Securities Act Form eligibility requirements for ABS issuers are determined at the time of filing of the registration statement.[150]

In the Proposing Release, we proposed to add one of our proposed new Form 8–K items for ABS—Item 6.03, Change in Credit Enhancement or Other External Support—to the list of Form 8–K Items where failure to file such Items timely would not result in Form S–3 ineligibility.[151] One commenter believed two other ABS Form 8–K Items—Item 6.01, ABS Informational and Computational Material, and Item 6.05, Securities Act Updating Disclosure—should be added to the list because they relate to offerings for specific transactions and not to ongoing reporting.[152] We are adding Items 6.01 and 6.05 along with Item 6.03 to the Form 8–K Item list for Form S–3 eligibility purposes. However, we do not believe it is appropriate to include Items 6.01 and 6.05 in the list of Form 8–K items for the Rule 10b–5 safe harbor for failure to file such items. As discussed in Section III.D.8.d., we are only adding Item 6.03 to that safe harbor, as proposed.

We do not underestimate the effects of linking reporting compliance with continued Form S–3 eligibility. Non-ABS issuers have long dealt with the consequences of reporting compliance for Form S–3 eligibility, and we appreciate the consequences of losing access to shelf registration. There are several accommodations, both in the amendments we are adopting today and under existing Commission rules, which should assist ABS issuers. Most notably, we are providing an extensive transition period to allow issuers to improve their reporting processes from the present state. As noted above, we also are expanding the number of Form 8–K Items that need only be current and not timely for ABS Form S–3 eligibility purposes. As discussed in Section III.D.4.a., we are extending Rule 12b–25 to provide filing extensions for Form 10–D reports. We also are modifying several of the proposed Regulation AB disclosure requirements, discussed more fully in Section III.D., that could potentially require third party information, such as information about unaffiliated servicers.[153]

d. Determining the ''Issuer'' and Required Signatures

We are clarifying as proposed which entity is considered the ''issuer'' under the Securities Act with respect to an offering of asset-backed securities. The Securities Act defines the term ''issuer'' in part to include every person who issues or proposes to issue any security, except that with respect to certificates of deposit, voting-trust certificates, or collateral trust certificates, or with respect to certificates of interest or shares in an unincorporated investment trust not having a board of directors (or persons performing similar functions), the term issuer means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provision of the trust or other agreement or instrument under which the securities are issued.[154] Under current staff positions, the depositor must sign the Securities Act registration statement for an ABS offering.

We are clarifying that the depositor for the asset-backed securities, acting solely in its capacity as depositor to the issuing entity, is the ''issuer'' for purposes of the asset-backed securities of that issuing entity.[155] Further, our new rule specifies that the person acting in its capacity as the depositor for the issuing entity of an asset-backed security is a different ''issuer'' from that same person acting as a depositor for any other issuing entity or for purposes of that person's own securities. As the definition of asset-backed security requires the issuing entity to be a restricted special purpose investment vehicle, the new rule will apply regardless of the issuing entity's form of organization.

By clarifying that the person acting as the depositor in its capacity as depositor to the issuing entity is a different ''issuer'' from that person in respect of its own securities, we are making clear our longstanding position that any applicable exemptions from registration that person may have with respect to its own securities are not applicable to the asset-backed securities.[156] Similarly, the reporting history with respect to a particular class of asset-backed securities does not affect Form S–3 eligibility with respect to the depositor's

to mean ''a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified.'' See, *e.g.,* Securities Act Rule 405 and Exchange Act Rule 12b–2. The term ''control'' also is defined in those rules as ''the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.''

[148] See, *e.g.,* Letters of ABA; ASF; and Citigroup.

[149] See, *e.g.,* Letters of ABA; ASF; BMA; BOA; CMSA; FSR; Sallie Mae; and TMCC.

[150] In the Offering Process Release, the Commission has proposed that a new Form S–3 shelf registration statement would be required after three years, at which time form eligibility requirements would be reassessed.

[151] All required Form 8–K filings, however, must be current as of the date of filing.

[152] See Letter of ASF.

[153] Finally, we note that the need to rely on third party information certainly is not unique to ABS reporting, although we realize the extent of third party information that may be material for an ABS offering may be different from a non-ABS issuer. We also understand that informational and other aspects of ABS transactions are uniquely contractually based and that the long transition period should allow for contractual arrangements consistent with our adopted requirements.

[154] See Section 2(a)(4) of the Securities Act (15 U.S.C. 77b(a)(4)).

[155] See Securities Act Rule 191 (17 CFR 230.191). We are adopting an identical rule for purposes of the Exchange Act. See Exchange Act Rule 3b–19 (17 CFR 240.3b–19) and Section III.D.2. As noted in Section III.B.3.b., we are defining ''depositor'' as the depositor who receives or purchases and transfers or sells the pool assets to the issuing entity. For asset-backed securities where there is not an intermediate transfer of the assets from the sponsor to the issuing entity, the term ''depositor'' refers to the sponsor. See Item 1101(e) of Regulation AB. It should be noted that the definition of ''issuer'' under the Investment Company Act is different from the definitions in the Securities Act and the Exchange Act. See 15 U.S.C. 80a–2(a)(22). Our final rules do not affect that definition.

[156] For example, in an ABS transaction where there is not an intermediate transfer of the pool assets from the sponsor to the issuing entity and the sponsor is a bank, the rule does not mean that because the bank is acting as depositor, the asset-backed security is then a ''security issued * * * by a bank'' and thus exempt from registration under Section 3(a)(2) of the Securities Act (15 U.S.C. 77c(a)(2)). See, *e.g., Bank of America National Trust & Savings Ass'n* (May 19, 1977).

or sponsor's own securities, although as discussed above we are requiring that the reporting history with respect to certain prior ABS transactions can affect continued Form S–3 eligibility for future ABS registration statements.

Consistent with our proposal, we also are codifying in the general instructions for Forms S–1 and S–3 that the registration statement must be signed, as is currently the case, by the depositor, the depositor's principal executive officer or officers, principal financial officer and controller or principal accounting officer, and by at least a majority of the depositor's board of directors or persons performing similar functions. As proposed, we are not requiring the issuing entity to sign if formed prior to effectiveness as such a requirement would be superfluous.

4. Foreign ABS

As we described in the Proposing Release, while not as prevalent as in the U.S., securitization by foreign issuers has been developing rapidly.[157] However, asset-backed securities issued by a foreign issuer[158] or that are backed by foreign assets raise special issues due to potential differences in the legal and regulatory regime of the relevant home jurisdiction. Differing laws and practices regarding banking regulation, accounting, bankruptcy, property rights, secured transactions, ''true sale,'' tax, asset servicing, consumer protection and other matters may alter fundamentally the basic principles underlying an ''asset-backed security.'' Also, given the early stage of securitization in some foreign markets, ABS may be used not just as an alternative funding source, but more for capital management, including efforts to ''prune'' a lender's portfolio by off-loading poorly performing assets.[159]

As a result of these concerns, the staff historically has required additional conditions for the processing of Form S–3 registration statements involving foreign ABS offerings. These conditions have included first requiring one or more registered offerings on a non-shelf basis on Form S–1 or S–11 that is fully reviewed by the staff, as well as other steps or conditions to help assure that novel or unique questions can be addressed by the staff. As experience with a particular issuer, asset type and laws related to asset-backed issues in the home jurisdiction increases, the requirements decrease. Nevertheless, while designed to address the concerns noted above, these additional steps and conditions can result in delays and possible impediments to access to the U.S. public capital markets through shelf registration for foreign ABS, even if the other requirements for shelf registration, such as an investment grade rating, can be met.

As proposed, to address the foreign and legal and regulatory issues while appropriately treating foreign ABS transactions, we are not establishing a different disclosure or regulatory regime for foreign ABS, with the one exception discussed below. Foreign ABS will be registered on the same Securities Act registration forms as domestic ABS, and with the exception of the disclosure discussed below, foreign ABS will be subject to the same disclosure requirements in Regulation AB. Foreign ABS offerings registered on Form S–3 also will be eligible for our new rules regarding use of ABS informational and computational material and ABS research reports discussed in Section III.C.

As discussed in the Proposing Release, we believe that many of the concerns relating to foreign ABS can be appropriately addressed through adequate disclosure. Commenters supported this approach.[160] As such, we are adopting as proposed an additional general instruction in Regulation AB focused on foreign ABS. This instruction provides that if asset-backed securities are issued by a foreign issuer, are backed by foreign assets, or are affected by credit enhancement or other support provided by a foreign entity, then in providing the disclosures required, the filing also must describe any pertinent governmental, legal or regulatory or administrative matters and any pertinent tax matters, exchange controls, currency restrictions or other economic, fiscal, monetary or potential factors in the applicable home jurisdiction that could materially affect payments on, the performance of, or other matters relating to, the assets contained in the pool or the asset-backed securities.[161] This disclosure should particularly address the material items and legal and regulatory or administrative factors discussed above.

We expect that at the time of filing, the registration statement will include fully developed disclosure clearly articulating the material aspects and effects of the applicable home jurisdiction legal and regulatory regime. In this regard, we also encourage pre-filing conferences with the staff where appropriate to discuss the applicable home jurisdiction legal and regulatory environment, the proposed transaction and the relevant disclosures that will be required.[162]

As proposed, we also are not creating a different Exchange Act reporting structure for foreign ABS. We believe periodic disclosure of distribution and pool performance information, reports regarding servicing compliance (including the requirements regarding assessment and attestation of compliance with servicing criteria) and current disclosure of significant events are equally relevant and applicable for foreign ABS as they are for domestic ABS. Thus, like domestic ABS, foreign ABS will be required to report on Forms 10–D, 10–K and 8–K. In addition, ongoing disclosures will be required in Forms 10–D and 10–K, as proposed, regarding any material impact caused by foreign legal and regulatory developments during the period covered by the report which had not been previously described.

5. Exclusion From Exchange Act Rule 15c2–8(b) for Form S–3 ABS

Through a series of staff no-action letters dating back to 1995, broker-dealers, in connection with offerings of asset-backed securities eligible for registration on Form S–3, are not required under Exchange Act Rule 15c2–8(b) to deliver a copy of a preliminary prospectus to any person who is expected to receive a confirmation of sale at least 48 hours prior to the sending of such confirmation.[163] Without these no-

[157] For example, one source estimates that non-U.S. ABS issuance grew from $93 billion in 2000 to $185 billion in 2003. See Asset-Backed Alert (pub. by Harrison Scott Publications).

[158] The term ''foreign issuer'' is defined in Securities Act Rule 405 (17 CFR 230.405) as ''any issuer which is a foreign government, a national of any foreign country or a corporation or other organization incorporated or organized under the laws of any foreign country.''

[159] See, *e.g.*, Brian Bremner *et al.*, ''An Exit Plan for Japan?'' Business Week, Oct. 26, 1998. Our separate limits on delinquency concentrations and non-performing assets act somewhat as a limiter on such transactions qualifying as an ''asset-backed security.'' For example, the standard for non-performing assets includes linkage to the charge-off policies of the sponsor and the safety and soundness regulator, regardless of whether those policies are enforced by the sponsor or any relevant regulatory authority.

[160] See, *e.g.*, Letters of A&O; ABA; ASF; Aus. SF; ESF; Jones Day; and MBA.

[161] See Item 1100(e) of Regulation AB. Information specified in Item 101(g) of Regulation S–K and Instruction 2 to Item 202 of Regulation S–K also are required by Item 1100(e).

[162] Registrants also should consider building additional time into their planning schedules given the possibility for staff review of the disclosure. The review of these disclosures could include, for example, statistical disclosure regarding a hypothetical portfolio of financial assets that would be securitized in a takedown under the registration statement.

[163] See *Bond Market Ass'n* (Dec. 15, 2000); *Bond Market Ass'n* (Dec. 15, 1999); *Bond Market Ass'n* (Nov. 20, 1998); *PSA The Bond Market Ass'n* (Sep.

Continued

action letters, most broker-dealers would be required to deliver a preliminary prospectus in ABS offerings because Rule 15c2–8(b) requires such delivery if the issuer has not previously been required to file reports with the Commission pursuant to Section 13(a)[164] or 15(d) of the Exchange Act. Most ABS issuers at the time of the ABS offering are not so required to report.

Given the more than eight years of experience with the staff no-action letters, we proposed codifying the basic concept in those letters as a formal exclusion from Exchange Act Rule 15c2–8(b).[165] However, we expressed concern in the Proposing Release with statements from investors in previous communications to the staff that a combination of factors, including the introduction of shelf registration for ABS, relief from Rule 15c2–8(b) and the ability to use term sheets and computational material, has reduced the amount of time and information investors have to make informed investment decisions.[166] We requested comment on these concerns.

Commenters were split on our proposal to codify the exclusion from Rule 15c2–8(b). Commenters representing primarily issuers and their representatives supported the codification of the existing staff positions and requested it be expanded to all ABS offerings, not just those eligible to use Form S–3.[167] One commenter noted that Rule 15c2–8(b) was originally designed to take into account new and speculative offerings.[168] Some of the commenters discounted concerns that investors do not have adequate information to make informed investment decisions. Also, one commenter believed most ABS investors are institutional investors and can refrain from purchasing if they believe they do not have sufficient information.[169] In light of the fact that most investors continue to purchase ABS under the current no-action letter relief, the commenter argued, it would appear most investors believe they have sufficient information.

Commenters representing investors disagreed.[170] These commenters believed there are problems and inconsistencies with the absence of material information at the time investment decisions are made, especially given the complexity of ABS and the need to properly assess risk. In addition, in order for investors to receive the full benefits of the proposed new disclosure requirements, the commenters argued it is critical that investors receive the information for investment decisions. These commenters generally did not support excluding any ABS from Rule 15c2–8(b). The commenters also recommended requiring, such as a condition to shelf registration, ABS informational and computational material in a reasonable time frame prior to effecting sales, either as an addition to or as an alternative to delivery of a preliminary prospectus under Rule 15c2–8(b).

On November 3, 2004, we issued proposals to revise the Securities Act regulatory process for securities offerings in the Offering Process Release. As noted in that release, we agree with investors that materially accurate and complete information regarding an offering should be available to investors at the time they make an investment decision, and we issued an interpretation and proposed an interpretive rule to support that unassailable proposition. Under that interpretation and proposed rule, in determining whether there is a material misstatement or material omission necessary to make the statements made at the time of contract of sale not misleading under Securities Act Sections 12(a)(2) and 17(a)(2), information conveyed only after that time would not be taken into account. We believe concerns about the availability of adequate information for ABS offerings raise the same issues as those discussed in the Offering Process Release for all offerings and are best addressed through those proposals.

We also agree with issuers that Form S–3 ABS offerings differ from the offerings that were the focus of Rule 15c2–8(b) when it was originally adopted. In light of our proposals to address the information disparity issue for all offerings in the Offering Process Release, we have determined to continue our proposed approach here with respect to the existing staff no-action position regarding Rule 15c2–8(b). Accordingly, we are codifying, as proposed, an exclusion from Rule 15c2–8(b) for Form S–3 ABS.[171]

We will evaluate the comments we received regarding the availability of information in ABS offerings in connection with the Offering Process Release. We also encourage ABS market participants to comment specifically on the proposals in that release to address information availability issues. We will consider whether additional action is necessary or appropriate with respect to ABS offerings in connection with those proposals.

As we stated in the Proposing Release, although we are codifying the basic concept of the staff position regarding Rule 15c2–8(b), the codification does not affect any other obligation in that rule nor any other prospectus delivery obligation that may be applicable. Also, as proposed, the exclusion only is available, as it is today, with respect to registered offerings of investment grade asset-backed securities that meet the requirements of General Instruction I.B.5 of Form S–3. Although some commenters representing issuers and their representatives requested expanding the exclusion to other asset-backed securities, we continue to believe that such securities should remain subject to Rule 15c2–8(b). As we noted in the Proposing Release, because a separate registration statement is prepared for each Form S–1 offering, the impact of continued compliance with Rule 15c2–8(b) is less significant.

6. Registration of Underlying Pool Assets

a. Current Requirements

The 1992 Release included a statement that the definition of ''asset-backed security'' does not encompass securities issued in structured financings backed by assets of one obligor or group of related obligors. It also stated that asset-backed offerings with a significant asset concentration—that is, a significant concentration of obligations of one obligor or related obligors—may involve one or more co-

26, 1997); and *Public Securities Ass'n* (Dec. 15, 1995).

[164] 15 U.S.C. 78m(a).

[165] The original no-action relief for Rule 15c2–8(b) included a condition that the ABS offering would not contemplate a prefunding account in excess of 25% of the principal balance of the offered securities, which was consistent with staff practice regarding prefunding periods at the time. Otherwise, the relief from Rule 15c2–8(b) would not have been available. As discussed in Section III.A.2.f., we are now addressing limitations on prefunding periods in the definition of ''asset-backed security'' in lieu of in Rule 15c2–8(b). Because the definition of ''asset-backed security'' will permit a prefunding period of up to 50%, we are not codifying the 25% restriction on prefunding periods for the exclusion from Rule 15c2–8(b).

[166] See, *e.g.*, Letter from ICI to Michael H. Mitchell, Special Counsel, Division of Corporation Finance, ''Asset-Backed Securities Offerings'' (Oct. 29, 1996); and Letter from AIMR to Brian J. Lane, Director, Division of Corporation Finance, ''Recommendations for a Disclosure Regime for Asset-Backed Securities'' (Sep. 30, 1996). These letters also questioned the premise that there are ongoing dialogues with investors regarding structuring publicly offered ABS classes.

[167] See, *e.g.*, Letters from ABA; ASF; and NYCBA.

[168] See, *e.g.*, Letter of ASF.

[169] See, *e.g.*, Letter of ABA.

[170] See, *e.g.*, Letters of CFAI; FMR; ICI; and MetLife.

[171] We also are making an unrelated technical correction to paragraph (a) of Rule 15c2–8 to correct references to other paragraphs of the rule.

issuers under Securities Act Rule 140.[172] In interpreting these provisions, the staff has focused on ensuring that an ABS offering does not constitute an unregistered distribution of underlying securities and that non-S–3 eligible registrants do not circumvent Form S–3 eligibility requirements by attempting to structure their offering as an asset-backed offering. One of the basic premises underlying ABS offerings is that an investor is buying participation in the assets. Therefore, if the assets being securitized are themselves securities under the Securities Act, the offering of those securities also must be registered or exempt from registration from the Securities Act.[173]

As we explained in the Proposing Release, in considering whether the distribution of the underlying assets must be registered, the basic proposition is that where the underlying securities themselves are not exempt from registration, the depositor must be free to publicly resell the underlying securities without registration. Otherwise, their distribution must be registered. If registration of the underlying securities distribution is required, certain conditions and disclosures have developed through the staff comment process and industry practice regarding the method and manner of such registration. These conditions are designed to provide clear disclosure to investors of the different distributions involved, the relationships between the distributions and investor rights with respect to each distribution.

The nature of the distribution of the underlying securities is the important factor in determining whether concurrent registration is required, not necessarily their concentration in the pool. For example, if a $100 million asset pool included $5 million of securities that were not freely resalable by the depositor without registration, then the distribution of those $5 million of securities through the ABS distribution also would need to be registered, even though such securities only constituted 5% of the asset pool. Similarly, if a depositor obtained $100 million of freely resalable securities of one obligor from the secondary market, the offering of ABS backed by those securities would not require concurrent registration of the distribution of the underlying securities, even though one obligor represented 100% of the pool, because the securities were not purchased from the issuer or underwriter but rather were purchased in the secondary market. In that case, additional disclosure would be required regarding the concentrated obligor, including financial information about the obligor, but the concentration itself would not trigger a separate registration requirement.[174] As a result, the definition of ''asset-backed security'' may encompass securities issued in structured financings backed by assets of one obligor or group of related obligors, so long as any required disclosure about the underlying obligor is provided and any distribution of the underlying securities is registered if required.

b. When Registration Is Required

To provide further clarification and regulatory certainty regarding this topic, we are adopting in substantial part our proposal that would codify existing staff positions in this area.[175] First, we are adopting conditions when registration of the distribution of the underlying security will not be required. As noted in the Proposing Release, most asset types that are securitized today, including residential mortgages, student loans, auto loans and credit card receivables, meet these conditions and thus will not be affected. Under our final rule, in an ABS offering where the asset pool includes securities of another issuer, unless the underlying securities are exempt from registration under the Securities Act, the offering of the underlying securities itself must be registered as a primary offering of such securities, unless all of the following are true:

- The depositor would be free to publicly resell the underlying securities without registration under the Act;
- Neither the issuer of the underlying securities nor any of its affiliates has a direct or indirect agreement, arrangement, relationship or understanding, written or otherwise, relating to the underlying securities and the asset-backed securities transaction; and
- Neither the issuer of the underlying securities nor any of its affiliates is an affiliate of the sponsor, depositor, issuing entity or underwriter of the asset-backed securities transaction.

The first condition states the basic proposition that the securities of the underlying issuer must be freely resalable without registration. Consistent with our proposal and existing staff practice, we are including two examples in the final rule to clarify this condition. First, the underlying securities may not include restricted securities (*e.g.*, privately placed securities) that do not meet the conditions for resale under the safe harbor of Securities Act Rule 144(k) (*e.g.*, a two-year holding period by non-affiliates).[176] Second, the offering of the asset-backed security cannot constitute part of a distribution of the underlying securities. Underlying securities which at the time of their purchase for the asset pool are part of a subscription or unsold allotment will be considered a distribution of the underlying securities.

We also are codifying as proposed the staff's interpretive position where the ABS offering involves a sponsor, depositor or underwriter that was an underwriter or an affiliate of an underwriter in a registered offering of the underlying securities.[177] As proposed, the distribution of the asset-backed securities will not constitute part of a distribution of the underlying securities if the underlying securities were purchased at arm's length in the secondary market at least three months after the last sale of any unsold allotment or subscription by the affiliated underwriter that participated in the registered offering of the underlying securities.[178] As we stated in the Proposing Release, in this instance we believe three months provides sufficient certainty that the purchase was not part of the original distribution.

The second and third conditions clarify that if the issuer of the underlying securities is engaged in the distribution of its securities through the asset-backed securities or is affiliated with the sponsor, depositor, issuing entity or any underwriter for the ABS

[172] 17 CFR 230.140. Securities Act Rule 140 states, in pertinent part, as follows:

''A person, the chief part of whose business consists of the purchase of the securities of one issuer, or of two or more affiliated issuers, and the sale of its own securities, * * * to furnish the proceeds with which to acquire the securities of such issuer or affiliated issuers, is to be regarded as engaged in the distribution of the securities of such issuer or affiliated issuers within the meaning of section 2(a)(11) of the [Securities] Act.''

[173] Similarly, if a loan participation were securitized, that would be viewed as a public distribution of the loan participation and the loan participation would therefore be a security, the offer and sale of which, unless exempt, would be subject to the registration requirements of the Securities Act. See, *e.g., Pollack* v. *Laidlaw Holdings,* 27 F.3d 808 (2nd Cir. 1994).

[174] See Sections III.B.7 and 8. See also Section III.B.10. regarding alternative methods that may be available to present information regarding the concentrated obligor, such as through incorporation by reference or by including a reference to the obligor's Commission filings.

[175] See Securities Act Rule 190 (17 CFR 230.190).

[176] 17 CFR 230.144(k). The term ''restricted securities'' is defined in Securities Act Rule 144(a)(3) (17 CFR 230.144(a)(3)).

[177] See, *e.g.,* Section VIII.B.3.b.i. of the Division of Corporation Finance's ''Current Issues and Rulemaking Projects'' (Nov. 14, 2000).

[178] If an underwriter or dealer transfers an unsold allotment to an investment account or an affiliate, that does not turn the allotment into anything other than an unsold allotment. Rule 144 is not available to underwriters or dealers with unsold allotments.

offering, then registration of the underlying distribution is required along with registration of the ABS offering.

If any of the three conditions discussed above are not met, the offering of the relevant underlying securities itself must be separately registered as a primary offering of such securities. As proposed, such registration must be conducted in accordance with the following conditions: [179]

- If the ABS offering is registered on Form S–3, the offering of the underlying securities itself must be eligible to be registered under Form S–3 or F–3 as a primary offering of such securities;[180]
- The plan of distribution in the registration statement for the offering of the underlying securities contemplates this type of distribution at the time of the commencement of the ABS offering;[181]
- The prospectus for the ABS offering describes the plan of distribution for both the underlying securities and the asset-backed securities;
- The prospectus relating to the offering of the underlying securities is delivered simultaneously with delivery of the prospectus relating to the ABS offering, and the prospectus for the ABS offering includes disclosure that the prospectus for the offering of the underlying securities will be delivered with it or is combined with it;[182]
- The prospectus for the ABS offering identifies the issuing entity, depositor, sponsor and each underwriter for the ABS offering as an underwriter for the offering of the underlying securities;
- Neither prospectus disclaims or limits responsibility by the issuing entity, sponsor, depositor, trustee or any underwriter for information regarding the underlying securities; and
- If the ABS offering and the underlying securities offering are not made on a firm commitment basis, the issuing entity or the underwriters for the ABS offering must distribute a preliminary prospectus for both the underlying securities offering and the ABS offering that identifies the issuer of the underlying securities and the expected amount of the issuer's underlying securities that is to be included in the asset pool to any person who is expected to receive a confirmation of sale of the ABS at least 48 hours prior to sending such confirmation.[183]

c. Exceptions from Disclosure and Delivery Conditions and Form S–3 Eligibility Requirements

As discussed in Section III.A.2., some ABS transactions, such as credit card issuance trusts and motor vehicle lease transactions, are structured such that the asset pool consists of one or more financial assets that represent an interest in or the right to the payments or cash flows of another asset pool solely in order to facilitate the asset-backed issuance and not in order to re-securitize other securities. In each instance, these structures are solely designed to facilitate the ABS transaction. The ABS will be primarily serviced by cash flows from the underlying pool assets.[184] However, the deposit of the certificate of interest regarding the other pool would likely fail to satisfy our proposed conditions to avoid registration of its distribution. In fact, the deposit of the certificate of interest is concurrently registered today in connection with ABS offerings involving these structures.

As we noted in the Proposing Release, while these certificates do trigger additional registration obligations, they do not raise the same issues discussed above regarding the resecuritization of other underlying securities because they are merely facilitating structural devices.[185] Accordingly, although the distribution of the underlying financial asset in connection with the ABS offering must still be separately registered, we are excluding such transactions as proposed from the disclosure and delivery conditions discussed above with respect to other resecuritizations, if the following conditions are met:

- Both the issuing entity for the asset-backed securities and the entity issuing the underlying financial asset have been established under the direction of the same sponsor and depositor;
- The financial asset was created solely to satisfy legal requirements or otherwise facilitate the structuring of the ABS transaction;
- The financial asset is not part of a scheme to avoid registration or the resecuritization requirements discussed in the previous section; and
- The financial asset is held by the issuing entity and is a part of the asset pool for the asset-backed securities.

In the Proposing Release, we indicated that any separate registration of the distribution of the underlying financial asset would need to be on a form eligible for such distribution. Commenters requested relaxing Form S–3 eligibility requirements for such registration, arguing that the underlying financial asset being used to structure the transaction is not likely to otherwise be Form S–3 eligible.[186] If the underlying financial asset was required to be registered on Form S–1, the benefits of shelf registration for the ABS registered on Form S–3 would be lost. In response to these concerns, we are revising General Instruction I.B.5 to Form S–3 to permit the registration of the underlying financial asset on that form if it meets the same conditions outlined above.[187] As we indicated in the Proposing Release, the issuer of the underlying financial asset would need to sign the registration statement and any intervening transferors of the asset to the ABS issuing entity would need to be named as an underwriter.

7. Market-Making Transactions

In the Proposing Release, we briefly noted the requirements for keeping an ABS prospectus current for market-making or remarketing transactions. In non-ABS transactions, the Form S–3 registration statement is kept current by the incorporation by reference of subsequent Exchange Act reports. In a Form S–3 ABS transaction, the incorporation by reference of subsequent Exchange Act reports also would be important, although the information in those reports would not include the disclosure required in the registration statement regarding the

[179] As noted in the Proposing Release, because of the conditions, a prefunding or revolving period cannot be used to purchase unidentified securities whose distribution needs to be registered.

[180] This condition ensures that an offering of underlying securities that itself would not be eligible for shelf registration could not be conducted through the distribution of an ABS offering that was shelf eligible.

[181] For underlying securities that have already been registered under a previous shelf registration statement, this may require a post-effective amendment to that registration statement to incorporate this type of distribution into the plan of distribution description. Consistent with current practice, no additional filing fee is required for the underlying securities if they have already been registered under a previous registration statement. If adopted, the proposals in the Offering Process Release would allow a plan of distribution to be amended by supplement.

[182] The two prospectuses can be combined in a single prospectus that is filed pursuant to Rule 424 for each offering.

[183] In this instance, this condition would therefore overrule the exclusion from Exchange Act Rule 15c2–8(b). As noted above, the prospectuses may be combined into a single prospectus. See also note 133 above.

[184] See Section III.B.3.g. regarding the general instruction we are adopting for Regulation AB regarding the scope of disclosure that is required regarding these structures. In addition, any additional material risks regarding these structures should be clearly described.

[185] These other resecuritizations are subject to the requirements in the previous section on the method and manner of registering the distribution of the underlying securities.

[186] See, *e.g.*, Letters of ABA and Citigroup.

[187] The registration of the asset-backed securities and the underlying financial asset can be included on a combined Form S–3 registration statement.

asset pool, such as the pool composition tables. Consistent with staff interpretations, this information would have been required to be kept current for use in ABS market-making and remarketing transactions.

Many commenters argued that the basic policy of when registration of market-making transactions is required for ABS transactions was neither appropriate nor comparable to the requirements for non-ABS issuers.[188] One of the basic principles requiring registration of market-making transactions is that a broker-dealer affiliated with the issuer does not meet the definition of ''dealer'' in Section 2(a)(12) of the Securities Act,[189] and therefore the exemption from registration in Section 4(3) of the Securities Act [190] is not available for the market-making transaction, and it must be registered. Given the structure of ABS offerings, the staff has interpreted the requirement for ABS as instead relating to an affiliation between the broker-dealer and the servicer.

Commenters argued that this market-making registration paradigm is not appropriate to ABS transactions.[191] Unlike the relationship of an affiliated broker-dealer to a corporation, these commenters argued that a broker-dealer's affiliation with the servicer does not involve the same level of relationship to the issuer, the transaction and the securities as that of a broker-dealer affiliated with a corporate issuer. In addition, these commenters argued that other adequate safeguards exist under the federal securities laws, such as the general anti-fraud provisions, to prevent a broker-dealer from misusing any material non-public information it might obtain through its affiliated servicer.[192] We are sufficiently persuaded by these comments such that we no longer will require registration and delivery of a prospectus for market-making transactions for asset-backed securities.[193]

[188] See, *e.g.*, Letters of ABA; ASF; BMA; BOA; CGMI; CMSA; FSR; JPMorganChase; and NYCBA.

[189] 15 U.S.C. 77b(a)(12).

[190] 15 U.S.C. 77d(3).

[191] See, *e.g.*, Letter of ABA.

[192] See, *e.g.*, Letter of BMA.

[193] There remain a few situations where the prospectus must be kept evergreen or updated such as in a delayed or continuous selling shareholder offering, a registered remarketing transaction or a resecuritization of asset-backed securities where the underlying asset-backed securities constitute a significant obligor. In those situations our position on updating remains the same. A number of commenters requested clarification that merely incorporating by reference subsequent Exchange Act reports was sufficient for updating. A few commenters suggested that even if the issuer had suspended its reporting obligation, the prospectus could be used if it was accompanied by a copy of the most recent distribution report. We continue to believe that investors are entitled to the information required to be included in the prospectus when making an investment decision for a transaction covered by the registration statement. Therefore, to the extent information in the prospectus is not updated through incorporation of Exchange Act filings, which is typically not the case for much of the information about the composition of the asset pool, then the prospectus would need to be updated. This could be done either through filing and incorporating by reference a Form 8–K containing the information or by actually updating the prospectus.

B. Disclosure

1. Regulation AB

As we explained in the Proposing Release, no disclosure items have previously existed that were tailored specifically to asset-backed securities. While some disclosure items in Regulation S–K are relevant to ABS, such as a description of the security, most items do not elicit useful disclosure for ABS investors. For ABS, there is generally no business or management to describe; rather, information about the pool assets, servicing, transaction structure, flow of funds and enhancements is more relevant. Analysis regarding the characteristics of the pool assets is necessary to determine the timing and amount of expected payments on the assets and thus payments on the ABS. In addition, the legal and often complex flow of funds of the transaction and the impact of any credit enhancement or other support must be analyzed. Through the staff comment process and industry practice, informal disclosure practices have developed. These practices, however, may not have been fully transparent to issuers and investors.

As proposed, we are adopting a new principles-based set of disclosure items in one central location in a subpart of Regulation S–K, called Regulation AB.[194] These disclosure items, based on existing disclosure practices and revised from the proposal in response to comment, will form the basis for disclosure in both Securities Act registration statements and Exchange Act reports for asset-backed securities. As noted in Sections III.A. and D., specific disclosure requirements in ABS registration statements and forms will be keyed to items in Regulation AB in a manner consistent with the integrated disclosure system applicable to other issuers.

While not all commenters agreed, the majority of commenters supported our proposal for principles-based disclosure rules in lieu of detailed disclosure guides for each securitized asset class.[195] For example, one commenter representing ABS investors believed proposed Regulation AB represents a major step in improving disclosures provided to investors and includes many of the items investors have previously recommended as critical to investors.[196] We continue to believe a principles-based approach provides the best framework for disclosure in the context of asset-backed securities. We believe it would be impractical to provide an exhaustive list of disclosure items required for each asset class. Not only do we believe this approach would be impractical due to the many existing asset classes that are securitized today, it would not provide any effective guidance with respect to new asset classes that may be securitized in the future. Due to the dynamic nature of the ABS market, any such list would likely become outdated quickly.

Under our principles-based approach, in many instances we identify the disclosure concept or objective required and provide one or more illustrative examples. Some commenters objected to our providing illustrative examples, expressing concern that the mere identification of an item in the list could suggest that the item is required, regardless of its applicability or materiality to the particular asset class or transaction involved.[197] This concern is misplaced and would, if accepted, lead to a rules-based regime that would be both inflexible and subject to evasion. As we stressed in the Proposing Release, application of the particular concept or objective needs to be tailored in preparing and presenting the disclosure to the information material to the particular transaction and asset type involved. We have made several revisions to the proposed disclosure items where illustrative lists are used to clarify this point.

The balance we are striving to achieve through this approach is to provide enough clarity so that the disclosure concept or objective is understood and can be applied on a consistent basis, while not providing too much detail that could obscure or override the concept or objective or that would result in disclosure that would be immaterial or inapplicable. We believe using illustrative lists, with a reference that the actual disclosure must be tailored based on the material aspects of the transaction involved, helps to identify the types of disclosures that may be

[194] See Items 1100–1123 of Regulation AB.

[195] Compare, *e.g.*, Letters of AICPA; PWC; and State Street; with Letters of ABA; ASCS; ASF; FSR; ICI; MBA; MBNA; and MetLife.

[196] See Letter of ICI. See also Letter of CFAI.

[197] See, *e.g.*, Letters of ASF; ASFA; Capital One; MBA; and MBNA.

applicable in response to the identified disclosure concept. Issuers must assess the materiality to investors of the information that is identified by the particular concept or objective, or that would result from employing the example given, in the case of the particular transaction and asset type involved. We believe this approach fosters transparency and comparability without being overly rigid and reduces the risk that the disclosure requirements will become out-of-date. We also note that in some instances an item may not be material and therefore no disclosure would be required. We also direct issuers to longstanding Commission rules that state that, unless specified otherwise, no reference need be made in the prospectus to inapplicable disclosure items.[198]

Of course, as we stated in the Proposing Release, in some instances we believe we must and therefore do set forth certain disclosure items with greater specificity. Further, we are codifying several existing percentage tests, with several revisions from our proposal in response to comment, that provide requirements as to when particular disclosure is required, particularly regarding concentrated obligors or significant credit enhancement or other support. As we stated in the Proposing Release, we believe such breakpoints provide consistency, comparability and clarity.

The structure of Regulation AB is as follows:

- Item 1100 sets forth items of general applicability for the whole subpart, such as guidance regarding the presentation of delinquency and loss information when it is required, alternative methods for presenting third party financial information (discussed further in Section III.B.10.) and guidance regarding disclosures related to foreign ABS (previously discussed in Section III.A.4.).
- Item 1101 sets forth definitions applicable to asset-backed securities.
- Items 1102—1120 constitute the basic disclosure package for Securities Act registration statements for ABS offerings. In addition, several of the items will be required on an ongoing basis in Exchange Act reports, such as updated financial information regarding certain third parties and disclosure regarding legal proceedings.
- Item 1121 identifies disclosure for distribution reports on Form 10–D regarding cash flows and performance of the asset pool and the allocation of cash flows and distribution of payments on the ABS. This item is discussed more fully in Section III.D.4.
- Items 1122 and 1123 address two longstanding requirements for the annual Form 10–K report based on market practice and the modified reporting system. Item 1122 addresses assessments of compliance with servicing criteria and the filing of attestation reports by registered public accounting firms on such assessments. This item, as revised from the proposal, is discussed more fully in Section III.D.7. Item 1123 specifies the form of the separate servicer compliance statement. This compliance statement pertains to the servicer's compliance with the particular servicing agreement for the transaction, as opposed to an attested assertion of compliance against a general set of servicing criteria. This item is discussed more fully in Section III.D.5.

As we stated in the Proposing Release, many of our disclosure items are based on the market-driven disclosures that appear in filings today. Commenters, although suggesting comment on some individual items, generally agreed with this assessment.[199] In addition, as we explained in more detail in the Proposing Release, our consideration of the disclosure items was informed by the staff review process as well as the staff's participation in the 2003 MBS Disclosure Report. Commenters on the proposals also provided additional examples and suggestions to improve the disclosure items.

As we stated in the Proposing Release, however, we remain concerned that current disclosure practice has resulted in the inclusion of undue boilerplate language in ABS filings, particularly prospectuses and registration statements, and a disproportionate emphasis on legal recitations of transaction terms. Further, as disclosure practice may have been driven primarily by the staff review process and by observing and conforming to filings for other transactions, disclosures may have been included from other filings or retained from prior filings without necessarily considering their applicability or continued applicability with respect to the transaction in question. The cumulative effect of these practices is to diminish in some cases the usefulness of the disclosure documents through the accumulation of unnecessary detail, duplicative or uninformative disclosure and legalistic recitations of transaction terms that obscures material information. Efforts to revise disclosure documents in response to our ''plain English'' initiative have certainly helped by demonstrating that even the most complex structures can be described clearly and accurately without resorting to overly legalistic presentations.[200]

Therefore, in connection with our codification of a universal set of disclosure items, we continue to seek a reevaluation by transaction participants of the manner and content of presented disclosure, including the elimination of unnecessary boilerplate legal recitations of immaterial terms. Transaction participants should view this rulemaking initiative and the pre-compliance period for the new rules as an opportunity to evaluate whether there is information that has been included in registration statements and prospectuses that is not required, not material and not useful to investors, and therefore should be reduced or omitted. Transaction participants should similarly consider whether disclosure should be revised so that its relevance to the transaction in question is more apparent and is presented in a manner that is more focused on providing clear and understandable disclosure for investors. Transaction participants also should continue to be mindful of the plain English disclosure principles to avoid legalistic or overly complex presentations and recitations that make the substance of the disclosure difficult to understand. Transaction participants should continue to focus on the use of tabular presentations, flow charts and other design elements that aid understanding and analysis, and we have included, as proposed, several reminders and suggestions of these principles in various Items of Regulation AB where they may be particularly appropriate.

In addition to the manner and presentation of disclosures, we also stated in the Proposing Release and remain concerned that existing disclosure standards have not adequately captured certain categories of information in respect of an asset-backed securities transaction, such as the background, experience, performance and roles of various transaction parties, including the sponsor, the servicer and the trustee, that may be material and should be disclosed when they are material. While asset-backed securities are designed not to be direct obligations of these entities,

[198] See, *e.g.*, Securities Act Rule 404(c).

[199] See, *e.g.*, Letters of ABA; ASF; and MetLife.

[200] See, *e.g.*, Release No. 33–7497 (Jan. 28, 1998) [63 FR 6370]. See also Division of Corporation Finance Staff Legal Bulletin No. 7A, ''Plain English Disclosure'' (Jun. 7, 1999) and Office of Investor Education and Analysis, ''A Plain English Handbook: How to Create Clear SEC Disclosure Documents'' (Aug. 1998). All of these documents are available on our Web site at *http://www.sec.gov*.

it seems apparent from recent market events that their roles often can be as important to the performance of an ABS transaction as the transaction structure or its governing documents.[201] As a result, we proposed specific disclosure line items relating to these entities designed to elicit additional information in these areas to the extent material. While we received comment on the particularities of these disclosure items, we received overall support for increasing disclosure in this area beyond current market practice.[202] Accordingly, we have adopted these new disclosure items, with revisions in response to comment, discussed in more detail below.

We also note that several commenters speaking for investors expressed concerns that certain information is provided to rating agencies but is not otherwise disclosed or shared with investors, even upon request.[203] This practice, to the extent it exists, controverts in part issuer comments that such information is not available or that disclosure would be costly. If an issuer concludes that it need not disclose information in response to a particular disclosure line item because the issuer determines that the information is not material, but agrees to provide the information to credit rating agencies, the issuer should consider its determination regarding materiality in the context of the decision to provide the information to rating agencies.

Finally, consistent with current practice and our proposal, we are not requiring audited financial statements for the issuing entity in either Securities Act or Exchange Act filings. Commenters overall agreed that audited financial statements prepared in accordance with generally accepted accounting principles would not provide material information to investors.[204] Often a new issuing entity is created for each transaction, so prior financial information about that entity would likely be of little use. On an ongoing basis, while an annual audit could provide benefits in providing some assurance with respect to controls over the administration of the transaction and the pool assets, we believe our amendments to require registered public accounting firm attestation reports as to assessments of compliance with particular servicing criteria, discussed in Section III.D.7., are a more direct and targeted approach to achieve such objectives. Similarly, we believe that one of the other objectives for financial statements—to present results of financial activity during a period—can be addressed more particularly by our disclosure requirements regarding distributions on the asset-backed securities.

2. Forepart of Registration Statement and Prospectus

Existing Items 501–503 of Regulation S–K will still provide the basic disclosure requirements for the forepart of Securities Act registration statements and registration statement prospectuses, which cover items such as the cover page of the prospectus, the prospectus summary and risk factors. As proposed, new Items 1102 and 1103 of Regulation AB amplify those requirements by providing guidance on preparing those sections for ABS offerings consistent with current practice. In particular, they clarify information that is to appear on the cover page of the prospectus, as well as inform the type and manner of presentation for ABS-specific disclosure items for the prospectus summary.

As with prospectuses for all registered offerings, disclosure on the cover page is to be limited and brief. For example, credit enhancement disclosure for the cover page should consist of only brief identifying statements, such as bond insurance provided by the particular named insurer. We proposed that certain class-specific information appear on the cover page. However, some commenters noted that in some transactions, given the number of classes in the offering, it is difficult and sometimes impractical to provide such class-specific information on the cover page.[205] As suggested by these commenters, we are clarifying that if the information regarding multiple classes cannot appear on the cover page due to space limitations, the information is to be included in the summary or in an immediately preceding separate table.

Consistent with common ABS-specific items such as a summary of the flow of funds and credit enhancement, disclosure specified for the summary includes disclosure of the classes offered by the prospectus and classes issued in the same transaction or residual or equity interests in the transaction not being offered by the prospectus.[206] Also required is a summary of any prefunding or revolving periods, such as the length and amount of such periods and the requirements for assets that may be added.[207] A summary of the amount or formula for calculating the servicing fee, including the source of payment of those fees and their distribution priority, also is separately required for the prospectus summary.

As proposed, we are not providing a representative list of risk factors that may be common to many ABS transactions. The comment we received on this point supported this decision.[208] We remain concerned that any such list would result in boilerplate and generic disclosures in all prospectuses even if not applicable to the particular transaction. Registrants should take care in analyzing the most significant factors that make the ABS offering speculative and risky, and explain briefly yet

[201] See, *e.g.*, Moody's Investors Service, Inc., ''Rating Agency Will Launch Assessments of ABS, RMBS Governance'' (Oct. 6, 2004); Standard & Poor's, ''Operating Risk Analysis Strengthens Ties Between Structured Finance and Corporate Finance Sectors' (Sep. 15, 2004); Michael Gregory, ''Lessons of Risk in AAA-rated ABS: In the Rare Bankruptcy, It's Servicers, Not Collateral, That Are the Problem,'' Investment Dealers Digest, Mar. 15, 2004; Luis Araneda, ''Distress in Credit Card ABS,'' Asset Securitization Report, Mar. 3, 2003, at 8; Moody's Investors Service, Inc., ''Securitizations that Dodge Bankruptcy ''Bullet'' Rest on Qualitative Strengths'' (Sep. 16, 2002); ''Integrity Analysis to the Forefront: Is Issuer Quality More Important Than Structure,'' Asset Securitization Report, Oct. 14, 2002, at 4; Moody's Investors Service, Inc., ''Two Key Components of Mortgage Servicer Ratings Are Technical Ability and Financial Stability'' (Dec. 2, 2002); Moody's Investors Service, Inc., ''Evaluating Seller/Servicer Risk Concentrations in Structured Transactions Wrapped by Financial Guarantors' (Jan. 30, 1998); and Securitization of Financial Assets § 8.08 (2nd ed. 1996).

[202] See, *e.g.*, Letters of ABA; ASF; CFAI; ICI; and State Street.

[203] See, *e.g.*, Letters of ICI and State Street.

[204] See, *e.g.*, Letters of ABA; AICPA; ASF; E&Y; NYCBA; PWC; and Wells Fargo.

[205] See, *e.g.*, Letters of ABA and ASF.

[206] A particular issuance of asset-backed securities often involves one or more publicly offered classes (*e.g.*, classes rated investment grade) as well as one or more privately placed classes (*e.g.*, non-investment grade subordinated classes). In most instances, the subordinated classes act as structural credit enhancement for the publicly offered senior classes by receiving payments after, and therefore absorbing losses before, the senior classes. Cash flows from the pool assets back both the senior classes and the subordinate classes, and thus allocation of the cash flows to the subordinate classes could affect directly or indirectly the publicly offered classes. For example, while historically the servicing fee is near the top of the flow of funds, if the servicing fee in the flow of funds is subordinated below payments to the subordinated classes, and there are insufficient funds to pay the servicing fee in full after distribution to the subordinated classes, then the drop in the level of funds to the servicer could impact overall servicing, which could affect cash flows to senior classes. Identification of all classes and their impact on the transaction is thus relevant to the offering of the publicly offered classes. So long as the description of the non-offered classes is presented in a comparable manner, that description alone in the prospectus would not raise general solicitation issues with respect to the private placement of the subordinated classes.

[207] Similar disclosure is required for other instances when pool assets could be added, removed or substituted (for example, non-compliance with representations and warranties regarding pool assets). Like all of the disclosure items, reference to particular activities do not imply that limits that exist elsewhere regarding such activities (*e.g.*, the requirement that the asset pool be ''discrete'') can be disregarded.

[208] See, *e.g.*, Letter of ABA.

particularly how those risks affect investors. We are clarifying, as proposed, that in identifying risk factors, registrants are to identify any risks that may be different for investors in any offered class of asset-backed securities (such as subordinated classes or principal-weighted or interest-weighted classes), and if so, identify such classes and describe such differences.

3. Transaction Parties

a. Sponsor

We are adopting our proposed definition of ''sponsor'' as the person who organizes and initiates an asset-backed securities transaction by selling or transferring assets, either directly or indirectly, including through an affiliate, to the issuing entity. While some commenters supported the definition for purposes of disclosure,[209] others expressed various concerns about the definition, particularly given that the proposed definition also was to be used in our proposed Form S–3 filing eligibility condition relating to Exchange Act reporting compliance.[210] As discussed in Section III.A.3.c., we are adopting a revised formulation of the reporting compliance condition that is no longer linked to the sponsor definition.

In addition, commenters who questioned the proposed sponsor definition appeared to construe the proposed definition beyond its plain language. In particular, the commenters questioned application of the definition to so-called aggregator or consolidator transactions where the sponsor acquires loans from many other unaffiliated sellers before securitization by the sponsor. We do not believe in these typical situations that each of the underlying sellers, who did not take part in the organization or initiation of the securitization transaction, would meet the plain language of the definition of ''sponsor.'' We do recognize that the facts and circumstances of the particular transaction may result in a sponsor that is unaffiliated with the depositor (*e.g.*, a ''rent-a-shelf'' transaction) or that there may even be more than one unaffiliated sponsor. We also believe that where pool assets are transferred through one or more affiliates of the sponsor before transfer to the depositor and the issuing entity, it will be clear in nearly all instances as to which party was in the position of organizing and initiating the securitization transaction and thus is the sponsor.

We also are adopting, with minor revisions in response to comment, our proposed disclosure item for the sponsor.[211] Commenters representing investors particularly supported the disclosure discussed in the Proposing Release.[212] In addition to basic identifying information about the sponsor, a description of the sponsor's securitization program will be required. The purpose of the description is to provide context within which to analyze the asset-backed securities and the characteristics and quality of the asset pool. Such a description is to consist, to the extent material, of both a general discussion of the sponsor's experience in securitizing assets of any type, as well as a more detailed discussion of the sponsor's experience in and overall procedures for originating or acquiring and securitizing assets of the type to be included in the current transaction. Information is to be included, to the extent material, regarding the size, composition and growth of the sponsor's portfolio of assets of the type to be securitized, as well as information or factors related to the sponsor that may be materially relevant to an analysis of the origination or performance of the pool assets, such as whether any prior securitizations organized by the sponsor have defaulted or experienced an early amortization or other performance triggering event. Another example would be any action taken outside the ordinary performance of a transaction to prevent such an occurrence.

As we stated in the Proposing Release, other relevant information for the description, to the extent material, would include the sponsor's credit-granting or underwriting criteria for the asset types being securitized (and the extent to which they have changed), the extent to which the sponsor outsources to third parties any of its origination or purchasing functions and the extent to which the sponsor relies on securitization as a material funding source. A description of the sponsor's material roles and responsibilities in its securitization program and the sponsor's participation in structuring the transaction also is required, including whether the sponsor or an affiliate is responsible for the selection of the pool assets.

b. Depositor

We are adopting our proposed definition of ''depositor'' as the person who receives or purchases and transfers or sells the pool assets to the issuing entity. For asset-backed securities transactions where there is not an intermediate transfer of assets from the sponsor to the issuing entity, the sponsor is the depositor.[213]

Consistent with our proposal, if the depositor was not the same entity as the sponsor, separate identifying information about the depositor will be required, including information on the ownership structure of the depositor and the general character of any activities of the depositor other than securitizing assets.[214] In addition, if material and materially different from the sponsor, information similar to that discussed above regarding the depositor's securitization program and its experience would be required. Finally, disclosure will be required regarding any continuing duties of the depositor after issuance of the asset-backed securities with respect to the asset-backed securities or the pool assets.

c. Issuing Entity and Transfer of Asset Pool

As we explained in the Proposing Release, the nature of the issuing entity and the transfer of the pool assets is elemental to the concept of securitization. We are adopting our proposed definition of ''issuing entity'' as the trust or other entity created at the direction of the sponsor or depositor that owns or holds the pool assets and in whose name the asset-backed securities supported or serviced by the pool assets are issued.

Consistent with our proposal, disclosure will be required regarding both the nature of the issuing entity and the sale or transfer of the pool assets.[215] Information about the issuing entity itself will include a description of its permissible activities, restrictions on activities and capitalization. If the issuing entity has its own executive officers, board of directors or persons performing similar functions, disclosure required by Items 401, 402, 403 and 404 of Regulation S–K will be required.

[209] See, *e.g.*, Letter of ABA.

[210] See, *e.g.*, Letter of ASF.

[211] See Item 1104 of Regulation AB. We discuss the disclosure requirement for static pool information separately in Section III.B.4.

[212] See, *e.g.*, Letters of ICI and State Street.

[213] As noted in Section III.A.2.c., some ABS transactions, such as issuance trusts, are structured such that the asset pool consists of one or more financial assets that represent an interest in or the right to the payments or cash flows of another asset pool. In an issuance trust structure, the collateral trust certificate that is deposited into the asset pool comes from the master trust. For ABS transactions where the person transferring or selling the pool assets is itself a trust, we are specifying, as proposed, that the ''depositor'' of the issuing entity is the depositor of that trust.

[214] *See* Item 1106 of Regulation AB.

[215] *See* Item 1107 of Regulation AB.

The governing documents of the issuing entity will need to be filed as an exhibit.[216] This is consistent with the requirement in Item 601 of Regulation S–K of filing all governing documents and material agreements for the offering, which for ABS includes, among other things and as applicable depending on the transaction's structure, the pooling and servicing agreement, the indenture and related documents. The management or administration agreement for the issuing entity also must be filed in addition to describing its material terms in the prospectus.[217]

In addition to a material narrative description of the sale or transfer of the pool assets, such information also should be provided graphically or in a flow chart if it will aid understanding. The discussion also must describe the creation (and perfection and priority status) of any security interests for the benefit of the transaction. Disclosure also is required regarding any expenses incurred in connection with the selection and acquisition of the pool to be payable from offering proceeds.

Several commenters objected to our proposed disclosure requirement of the amount paid or to be paid for the pool assets, arguing that such information, particularly for pool assets that are not securities, is proprietary or in some instances not a meaningful concept.[218] We are limiting disclosure to instances when the pool assets are securities, as defined under the Securities Act, and requiring disclosure of the market price of the securities and the basis on which the market price was determined. We continue to support disclosure of such information in those securitizations, such as corporate debt securitizations or ABS repackagings.

We also are adopting our proposed requirements for disclosure, to the extent material, regarding any provisions or arrangements included to address any one or more of the following issues:[219]

- Whether any security interests granted in connection with the transaction are perfected, maintained and enforced;
- Whether a declaration of bankruptcy, receivership or similar proceeding with respect to the issuing entity can occur;
- Whether in the event of a bankruptcy, receivership or similar proceeding with respect to the sponsor, originator, depositor or other seller of the pool assets, the issuing entity's assets will become part of the bankruptcy estate or subject to the bankruptcy control of a third party; and
- Whether in the event of a bankruptcy, receivership or similar proceeding with respect to the issuing entity, the issuing entity's assets will become subject to the bankruptcy control of a third party.

We continue to believe such disclosure, where material, is appropriate to provide transparency to investors regarding the legal and structural complexities of ABS transactions. In addition, any material risks related to the above must be discussed in the risk factors section of the prospectus. Consistent with current practice and our proposal, we are not mandating the filing of any report or opinion of an expert or counsel regarding any of the above items, although registrants may elect to file such items voluntarily, subject to any applicable consent requirements.[220]

d. Servicers

As we explained in the Proposing Release, the role of the servicer is often not limited to administration and collection of the pool assets. The servicer often also is the primary party responsible for calculating the flow of funds for the transaction, preparing distribution reports and disbursing funds to the trustee who in turn uses the allocations provided by the servicer to distribute funds to security holders. We also recognize that in many transactions, multiple entities are used to perform different servicing functions. For example, while the particular division of responsibilities may vary by transaction or asset class, an ABS transaction may involve one or more entities, sometimes called ''master servicers,'' that oversee the actions of other servicers and may perform the allocation and distribution functions. Different servicers, sometimes called ''primary servicers,'' may be responsible for primary contact with obligors and collection efforts. In addition, one or more other servicers, sometimes called ''special servicers,'' may exist for specific servicing functions, such as borrower work-out or foreclosure functions. The allocation and distribution functions may be with a separate entity, sometimes called an ''administrator.'' While some servicers may be affiliated with the sponsor, other non-affiliated sub-servicers may be employed.

We are adopting as proposed a unified definition of ''servicer'' to mean any person responsible for the management or collection of the pool assets or making allocations or distributions to holders of the asset-backed securities. As we stated in the Proposing Release, our definition of ''servicer'' is designed to capture the entire spectrum of activity to include both collection and asset maintenance activities as well as cash flow allocation and distribution functions for the ABS. This includes parties often referred to as ''administrators.'' However, given that some of these functions may be performed by the trustee in certain transactions, the definition clarifies that the term ''servicer'' does not include a trustee for the issuing entity or the asset-backed securities that makes allocations or distributions to holders of the asset-backed securities, if the trustee receives such allocations or distributions from a servicer and the trustee does not otherwise perform the functions of a servicer.

We are not persuaded by some commenter suggestions that we should create separate definitions for different aspects of the servicing function.[221] These commenters suggested various additional definitions, including master servicer, administrator, primary servicer, special servicer, affiliated servicer and unaffiliated servicer. Similar to our concerns about creating asset-specific disclosure guides, there is not a uniform differentiation of servicing functions consistent across all asset classes or even within the same asset class. Nor do we think it is appropriate to establish rigid definitions that may not encompass future changes to market practice involving servicing. Our definition of servicer is a principles-based definition for any entity that performs any one or more of the servicing functions.

[216] Item 1100(f) of Regulation AB specifies that where agreements or other documents are specified by Regulation AB to be filed as exhibits to a Securities Act registration statement, such final agreements or other documents, if applicable, may be incorporated by reference as an exhibit to the registration statement, such as by filing a Form 8–K in the case of offerings registered on Form S–3.

[217] Any such description should avoid legal boilerplate and include the specific material duties imposed on the parties and not generic descriptions such as ''various administrative services.''

[218] See, *e.g.*, Letters ABA; AHFC; ASF; BMA; JPMorganChase; MBA; and TMCC.

[219] As proposed, if applicable law prohibits the issuing entity from holding the pool assets directly (for example, an ''eligible lender'' trustee must hold student loans originated under the Federal Family Education Loan Program of the Higher Education Act of 1965 (20 U.S.C. 1001 *et seq.*)), a description would be required of any arrangements to hold the pool assets on behalf of the issuing entity. Disclosure would need to be included regarding steps taken regarding bankruptcy separation and remoteness, as applicable, with respect to any such additional entity.

[220] See, *e.g.*, Securities Act Rule 436 (17 CFR 230.436).

[221] See, *e.g.*, Letters of ABA; ASF; JPMorganChase; MBA; Sallie Mae; and Wells Fargo.

Some of these commenters were concerned that applying the servicer disclosure item to an entity that performs only a limited aspect of the servicing function would compel inapplicable or immaterial disclosure. As stated above, this does not reflect an accurate understanding of how Commission disclosure items are to be applied. We have made several additional modifications to the servicer disclosure item to make clear that disclosure is required based on materiality.[222] If an entity's role is limited to one or more of the servicing or administrative functions such that an aspect of the disclosure item is not applicable or material, it is not required. For example, if a trustee also calculated the flow of funds for the transaction, information about the size, composition and growth of its serviced asset portfolio may not be material. However, even if a party performs only one function, if that function is material, such as calculation of the flow of funds for the transaction, material disclosure with respect to that function would of course be required.

Understanding the material aspects of the entire servicing function is important to understanding how servicing may impact expected performance. As proposed, the disclosure item requires information regarding the entire servicing function, including a clear introductory description of the roles, responsibilities and oversight requirements of the entire servicing process and the parties involved.[223] This will include identifying, as applicable:

- Each master servicer;
- Each affiliated servicer;
- Each unaffiliated servicer (such as primary servicers) that services 10% or more of the pool assets; and
- Any other material servicer responsible for calculating or making distributions to holders of the asset-backed securities, performing work-outs or foreclosures, or other aspect of the servicing of the pool assets or the asset-backed securities upon which the performance of the pool assets or the asset-backed securities is materially dependent.

In addition, additional information, discussed further below, will be required about each servicer identified in the first, second and fourth bullets above, as well as each unaffiliated servicer identified in the third bullet above that services 20% or more of the pool assets.

We are not limiting disclosure, as suggested by some commenters, only to those in actual contractual privity with the issuing entity.[224] We received support for disclosure of underlying servicers and all entities with a role in the servicing function that may materially impact performance of the pool assets and thus the asset-backed securities.[225] As proposed, disclosure will be required for such entities, to the extent material. In addition, we are maintaining our proposed approach of requiring disclosure regarding all affiliated servicers.

We have revised our percentage breakpoints for determining servicer disclosure for unaffiliated servicers, such as primary servicers, that service individual pool assets. While not all commenters agreed, several commenters believed the 10% threshold we originally proposed was too low.[226] To lessen potential disclosure burdens, many of these commenters suggested, alternatively, limited disclosure for unaffiliated servicers that service at least 10% of the pool assets, but less than some higher threshold, such as 20%.[227] As noted above, the final disclosure item will require identification of each unaffiliated servicer that services 10% or more of the pool assets. The more detailed disclosure discussed below will only be required for such servicers that service 20% or more of the pool assets. As noted in the Proposing Release, we believe 10% and 20% breakpoints provide consistency and clarity in determining a triggering event for disclosure, and are consistent with many other longstanding standards used for our existing disclosure requirements.[228]

As to those servicers where more detailed information is required, we explained in the Proposing Release that given the increasing realization of the importance of the role of the servicer in ABS transactions, the disclosure item is designed to elicit additional material information regarding the servicer's function, experience and servicing practices.[229] Commenters were mixed over our proposed disclosure requirements for these servicers. Commenters representing investors in particular supported additional disclosure regarding servicers,[230] while those representing primarily issuers and their representatives suggested reductions for disclosure that is not typically provided today.[231] In most instances, the objections from this latter group of commenters centered around concerns that aspects of the disclosure item may not be material in all instances. As we specified above, we are making additional revisions to the disclosure item to clarify that disclosure is required based upon materiality. We also are making a few other minor changes to individual aspects of the disclosure item in response to comment, discussed in further detail below.

The information to be provided, to the extent material, can be categorized into three general categories: basic information and experience; the agreement with the servicer and servicing practices; and back-up servicing. Basic information and experience regarding the servicer includes disclosing how long it has been servicing assets. As with the sponsor, the servicer disclosure is to include, to the extent material, both a general discussion of the servicer's experience in servicing assets of any type, as well as a more detailed discussion of the servicer's experience in, and procedures for, servicing assets of the type included in the current transaction.

We also are retaining disclosure of any material changes to the servicer's policies or procedures in servicing assets of the same type during the past three years in order to demonstrate recent trends involving the servicer. Some commenters expressed concern that the disclosure required about servicing policies and procedures and their changes could result in excessive disclosure or inappropriate disclosure of competitively sensitive information.[232] The description contemplated is limited to that which a reasonable investor would find material in considering an investment in the asset-backed securities and the servicing and administration of the pool assets and the ABS, as the case may be. Further, we believe this will not encompass

[222] See Item 1108 of Regulation AB.

[223] In addition to an appropriate narrative discussion of the allocation of servicing responsibilities, registrants also should consider presenting the information graphically if doing so will aid understanding.

[224] See, *e.g.*, Letters of ABA; ASF; BMA; CMSA; and Sallie Mae.

[225] See, *e.g.*, Letters of ICI; MetLife; and Wells Fargo.

[226] Compare, *e.g.*, Letters of ABA; ASF; BMA; MBA; and NYCBA; with Letter of MetLife.

[227] See, *e.g.*, Letters of ABA; ASF; JPMorganChase; MBA; and NYCBA.

[228] See, *e.g.*, Items 101(c)(1)(vii), 503(d), 601(b)(4)(ii) and 911(c)(5) of Regulation S–K (17 CFR 229.101(c)(7), 17 CFR 229.503(d), 17 CFR 229.601(b)(4)(ii) and 17 CFR 229.911(c)(5)); Instruction 2 to Item 103 of Regulation S–K (17 CFR 229.103); and Topic 1.I. to Release No. SAB–103.

[229] See also, *e.g.*, Fitch, Inc., ''Rating ABS Seller/Servicers: Credit Where Credit is Due'' (Sep. 14, 2004); and Fitch, Inc., ''Seller/Servicer Risk Trumps Trustee's Role in U.S. ABS'' (Mar. 4, 2003).

[230] See, *e.g.*, Letter of ICI.

[231] See, *e.g.*, Letter of ABA; ASF; Auto Group; JPMorganChase; and MBA.

[232] See, *e.g.*, Letters of JPMorganChase and MBA.

inappropriate disclosure of information that would cause competitive harm.

Other information specified in the disclosure item includes, to the extent material, information regarding the size, composition and growth of the servicer's portfolio of serviced assets of the type to be securitized and information on factors related to the servicer that may be material to an analysis of the servicing of the assets or the asset-backed securities, as applicable. Other information that may be material could include whether any prior securitizations of the same asset type involving the servicer have defaulted or experienced an early amortization or other performance triggering event because of servicing, the extent of outsourcing the servicer utilizes or if there has been previous disclosure of material noncompliance with servicing criteria with respect to other securitizations involving the servicer.

As proposed, information regarding the servicer's financial condition will continue to be required in some situations. In response to comments, we have revised this requirement to clarify information regarding the servicer's financial condition may be required to the extent that there is a material risk that the effect on one or more aspects of servicing resulting from such financial condition could have a material impact on pool performance or performance of the asset-backed securities. As we stated in the Proposing Release, general financial information is not required. We are seeking particular information when there is a material risk the financial condition could have a material impact as described.

Regarding the second category of disclosure, the material terms of the servicing agreement will need to be described, as well as the servicer's duties regarding the asset-backed securities transaction. As proposed, the servicing agreement will be required to be filed as an exhibit.[233] A description of the servicer's servicing practices also will be required to the extent material and applicable to the servicer's role in the transaction. The disclosure item identifies the following types of information: [234]

- The manner in which collections on the assets will be maintained, including the extent of commingling of funds.
- Terms or arrangements regarding advances of funds regarding cash flows, including interest or other fees charged and terms of recovery. As proposed, statistical information regarding past advance activity will be required, if material.
- The servicer's process for handling delinquencies and losses.
- Any material ability to waive or modify any terms, fees, penalties or payments on the assets.
- Custodial requirements regarding the assets.

As the ABS market has matured, another aspect of such transactions that has increased in importance is the role of servicer transition arrangements, or back-up servicing.[235] An efficient transition from one servicer to another can be essential to prevent portfolio deterioration and possible losses. However, depending on the nature of the assets and the availability of alternative servicers, the process of transferring servicing can be complex. In particular, if the existing servicing fee in a transaction is insufficient to attract a replacement servicer, delays may occur that could affect portfolio performance, and any additional fees required by a replacement servicer could affect cash flows that otherwise would be available to security holders.

As a result, the scrutiny of back-up servicing arrangements has increased, including the level of arrangements with a particular back-up servicer, often referred to in market practice as how ''warm'' the back-up servicer is. We are adopting our proposed disclosure requirements regarding any terms regarding a servicer's removal, replacement, resignation or transfer, including arrangements regarding, and any qualifications required for, a successor servicer. Material information on the process for transferring servicing will need to be described, as well as any provisions for the payment of expenses associated with a servicing transfer or any additional fees that may be charged by a successor servicer.[236]

e. Trustees

An ABS transaction may involve one or more trustees. For example, there may be a separate trustee for the issuing entity and for the ABS indenture. Commenters overall supported the proposed disclosure item regarding trustees.[237] We did not propose a separate definition of trustee, and, based on the comments received, we do not believe it is necessary to provide one.

As proposed, in addition to basic identifying information about any trustee, disclosure will be required regarding the trustee's prior experience in similar ABS transactions (if applicable), indemnification provisions, limitations on liability and removal or replacement provisions.[238] In addition, as we explained in the Proposing Release, there has been debate in the market on the nature and role of the trustee in ABS transactions, in particular the trustee's level of oversight regarding the transaction.[239] To help provide transparency to this topic, we are adopting our proposal for explicit disclosure of the trustee's duties and responsibilities regarding the asset-backed securities under the governing documents and under applicable law. In providing this information, the description should address material factors, as applicable, such as the extent to which the trustee independently verifies distribution calculations, access to and activity in transaction accounts, compliance with transaction covenants, use of credit enhancement, the addition, substitution or removal of pool assets, and the underlying data used for such determinations.

In addition, the trustee disclosure item requires disclosure of any actions required by the trustee, including whether notice is required to investors, rating agencies or other third parties, upon an event of default, potential event of default (and how defined) or other breach of a transaction covenant. The required percentage of a class or classes of asset-backed securities needed to require the trustee to take action also must be described.

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[233] We note that in certain limited instances, a registrant may request confidential treatment regarding information that otherwise would be required to be disclosed, such as commercial information obtained from a person and that is privileged or confidential. See, *e.g.,* Securities Act Rule 406 (17 CFR 230.406); Exchange Act Rule 24b–2 (17 CFR 240.24b–2); and Division of Corporation Finance Staff Legal Bulletins Nos. 1 (Feb. 28, 1997) and 1A (Jul. 11, 2001).

[234] Note that while this is a list for disclosure purposes, there may exist other applicable requirements regarding these items as well. For example, Investment Company Act Rule 3a–7(a)(4)(iii) has requirements for segregating funds.

[235] See, *e.g.*, note 229 above; ''Trustees Seek to Reinforce Loan Servicing,'' Asset-Backed Alert, Jul. 18, 2003; and Moody's Investors Service, Inc., ''Warming Up to Backup Servicing: Moody's Approach'' (Aug. 8, 1997).

[236] We note that a trustee's prospective role as a servicer ''of last resort'' would not alone make that trustee a ''servicer'' as defined in Regulation AB.

[237] See, *e.g.,* Letters of ABA; Am. Bankers; and MetLife.

[238] See Item 1109 of Regulation AB.

[239] Compare, *e.g.*, Moody's Investors Service, Inc., ''Moody's Re-examines Trustee's Role in ABS and RMBS'' (Feb. 4, 2003); with the American Bankers Association, ''The Trustee's Role in Asset-Backed Securities'' (Mar. 10, 2003). See also ''Moody's Unearths Trustee Failures,'' Asset-Backed Alert, Jun. 27, 2003; ''Trustee Role Seen as 'Minimal' at ASF Gathering,'' Asset Securitization Report, Jun. 16, 2003, at 12; and Paul Beckett, ''Asset-Backed Deals Draw Scrutiny—Trustees Must Administer and Oversee, Moody's Says, or Downgrades are Likely,'' Wall St. J., Feb. 5, 2003, at C13.

Finally, in response to comment regarding transactions with multiple trustees,[240] we are adding a clarifying instruction to the disclosure item that if multiple trustees are involved in the transaction, a description should be provided of the roles and responsibilities of each trustee.

f. Originators

Some ABS transactions involve pool assets that were not originated by the sponsor. The sponsor may have acquired the pool assets from a separate originator or through one or more intermediaries in the secondary market before securitizing them. If the pool assets from a single originator or group of affiliated originators reach a certain concentration threshold, information regarding that originator and its own origination program may become relevant.

We are adopting our proposed disclosure item for originators, but with revised percentage breakpoints for when disclosure is required.[241] The breakpoints we are adopting are similar to those being adopted for servicers. Like our proposed 10% threshold for servicers, some commenters believed the more detailed disclosure we proposed for originators should only be provided for originators that meet a higher percentage threshold, although again not all commenters agreed.[242]

Under the final disclosure item, each originator, apart from the sponsor or its affiliates, that has originated, or is expected to originate, 10% or more of the pool assets must be identified. In addition, for any originator where the percentage is 20% or more, additional information regarding the originator's origination program must be provided, including, if material, information regarding the size and composition of the originator's origination portfolio, as well as information material to an analysis of the performance of the pool assets, such as the originator's credit-granting or underwriting criteria. As with trustees, we do not believe it is necessary to provide a separate definition for originators.

g. Other Transaction Parties and Scope of Disclosure

As we explained in the Proposing Release, ABS transactions may involve additional or intermediate parties other than the typical ones identified above, such as intermediate transferors. As proposed, we are clarifying in the general applicability section of Regulation AB that if the ABS transaction involves such a party, information is required to the extent material regarding that party and its role, function and experience in relation to the asset-backed securities and the asset pool.[243] The material terms of any agreement with such party will need to be described, and the agreement with that party will need to be filed as an exhibit.

In addition, as noted in Section III.A.2.c., some ABS transactions are structured such that the asset pool consists of one or more financial assets that represent an interest in or the right to the payments or cash flows of another asset pool, such as in the case of a credit card issuance trust and an origination trust in a motor vehicle lease transaction. In many cases, such structures are established under the direction of the same sponsor or depositor and are designed solely to facilitate the ABS transaction. The actual source of the cash flows that are to be used to service the asset-backed securities is the asset pool underlying the intermediate financial asset. Consistent with current practice, we are clarifying as proposed that, in such an instance, references to the asset pool and the pool assets of the issuing entity also include the other asset pool.[244] As such, required disclosure regarding the composition of the asset pool, including servicers and significant originators and obligors, will include disclosure of the composition of the underlying asset pool, to the extent material. In addition, the requirements regarding assessments of compliance with servicing criteria and servicer compliance statements, discussed in Section III.D., encompass the assets underlying the intermediate financial asset.

4. Static Pool Information

In the Proposing Release, we noted the development of static pool information as an increasingly valuable tool in analyzing performance.[245] Such information indicates how the performance of groups, or static pools, of assets, such as those originated at different intervals, are performing over time. By presenting comparisons between originations at similar points in the assets' lives, such data allow the detection of patterns that may not be evident from overall portfolio numbers and thus may reveal a more informative picture of material elements of portfolio performance and risk. We had previously received requests that disclosure of such data should be required because investors view static pool data regarding delinquency and loss experience as important information in evaluating an investment in asset-backed securities.[246]

We proposed to require disclosure of static pool data if material to the transaction. In particular, we proposed to require static pool data with respect to the delinquency and loss experience of the sponsor's overall portfolio for the past three years, or such shorter period that the sponsor had been making originations or purchases, and that such data be presented in increments (*e.g.*, monthly or quarterly) material to the asset type being securitized. In addition to the sponsor's overall portfolio, static pool data also was proposed to be required, if material, on a pool level basis with respect to prior securitized pools involving the same asset type established by the sponsor during the period. We separately proposed requiring static pool data for the offered asset pool itself, to the extent material, such as in the case of securitizations involving seasoned assets.

Our proposals relating to static pool information generated considerable comment. Investors uniformly supported the proposals, emphasizing the importance of the information to them in making informed investment decisions.[247] Commenters representing issuers and their representatives generally expressed reticence about, and in some cases even opposition to, the proposed requirement, primarily because static pool data is not typically provided to investors today.[248] While this was in fact one of the primary reasons for our proposal, issuers nevertheless expressed concern about the lack of existing market practice for gauging materiality of the data.

Some of these commenters argued that because static pool data is not provided today, issuers have determined that such data is not and never would be material. However, as set out in the leading cases on the

[240] See, *e.g.*, Letters of ABA; ASF; and CMSA.

[241] See Item 1110 of Regulation AB.

[242] Compare, *e.g.*, Letters of ABA and ASF; with Letter of MetLife.

[243] See Item 1100(d) of Regulation AB.

[244] *Id.*

[245] See also, *e.g.*, Moody's Investors Service, Inc., ''Undisclosed Truths: Are ABS Investors Being Left in the Dark?'' (May 23, 1996) and Letter from AIMR to Brian J. Lane, Director, Division of Corporation Finance, ''Recommendations for a Disclosure Regime for Asset-Backed Securities'' (Sep. 30, 1996).

[246] See, *e.g.*, note 166 above.

[247] See, *e.g.*, Letters of ASF; FMR; ICI; MetLife; and State Street. Please note that the ASF submitted a separate comment letter, dated July 30, 2004, on our static pool disclosure proposal. In general, references in this section to the ASF letter are to that separate letter.

[248] See, *e.g.*, Letters of ABA; AFSA; ASF; Auto Group; Citigroup; Capital One; JPMorganChase; MBA; and UBS.

subject, *TSC Industries, Inc.* v. *Northway, Inc.*[249] and *Basic, Inc.* v. *Levinson*,[250] materiality is judged from the standpoint of a reasonable investor and whether there is a substantial likelihood that a reasonable investor would consider the information important in making an investment decision.[251] The argument by commenters against the materiality of the data is to some extent belied by the universal and sustained comment we have received from investors that they would find the information very important in making their investment decisions.

A new line item disclosure requirement represents our judgment that an item is or has become material. It is not, in and of itself, a judgment about past disclosure practices or requirements.[252] This is particularly true in the ABS context, where there have not previously been explicit Commission disclosure requirements. Disclosures for ABS offerings have developed informally over time through the staff review process. However, the basic disclosure framework was developed with the staff nearly two decades ago when the registered ABS market was in its relative infancy. The market has matured since that time, as has sophistication of investors in analyzing ABS. In addition, the growth of technology and the attendant ability to analyze more information means that information that may have not been considered material in the past may now have become material. The fact that we are now requiring static pool information as a disclosure item represents a judgment by us today that there are cases where the data is material and should be disclosed in such cases.

Some commenters, instead of arguing that static pool data would never be material, argued alternatively that the lack of additional guidance from the Commission regarding the scope of the proposed requirement could lead issuers to conclude that static pool information is required in all cases, which could, among other things, lead to unnecessary, excessive and expensive disclosure without corresponding benefits to investors. We stressed in the Proposing Release that in all instances disclosure was conditioned on what would be material for the particular asset class, sponsor and asset pool involved, and that disclosure for groups or factors that would not be material was not required. We recognize that under both our proposal and our final rules, there may be transactions where static pool information is not material. At the same time, and similar to many other disclosure requirements under the Federal securities laws, materiality determinations are necessary to determine appropriate levels of disclosure. Finally, we do not believe it is appropriate to exclude particular asset classes or transactions from the requirement in their entirety in lieu of requiring issuers and other offering participants to make materiality determinations.

Other commenters not taking blanket positions against the inclusion of static pool data instead requested more specific guidance as to the scope of the requirement, as well as additional flexibility in presenting the information that would be provided in response to the requirement. After careful consideration of all comments, we continue to believe that a requirement to provide static pool information based on the materiality of the information is appropriate to provide greater transparency to investors. As with our approach for Regulation AB overall, we do not believe it is practical or effective to prescribe specific disclosure by asset class. However, in response to comment, we are making several revisions to the proposal to provide more guidance on the scope of information contemplated by the requirement, as well as to provide alternative means to present the information. Both issuers and investors strongly support using electronic communications and Web site availability to present static pool information. We believe these changes should address many of the commenters' concerns as to the potential breadth and burdens of the proposal.

a. Disclosure Required

Several commenters expressed concern over the breadth of the proposals to require data for several different data groups, including the sponsor's overall portfolio, prior securitized pools and the asset pool itself.[253] These commenters believed that without additional direction regarding the appropriate starting point and parameters of the disclosure, uncertainty may promote excessive or redundant disclosures for all data groups. While not all commenters agreed, most believed the starting point for disclosure should be information for a single data group, with that data group being dependent on the type of ABS transaction being offered.[254] In particular, commenters suggested that the starting point could be different depending on whether the transaction involved an amortizing asset pool, such as residential mortgages, or a revolving asset master trust, such as a credit card master trust. For transactions involving amortizing asset pools, the starting point for disclosure also could be different depending on the sponsor's ''seasoning'' (*e.g.*, the amount of experience the sponsor has had securitizing assets of the same asset class). Using such starting points for disclosure also could promote comparability of information across issuers within particular asset types.

To provide further clarity in determining the material information to disclose, we are adopting this framework in the final rules.[255] We provide separate starting points for disclosure depending on whether the ABS transaction involves an amortizing asset pool or a revolving asset master trust. For amortizing asset pools, we further specify suggested starting points based on the sponsor's experience with securitizing assets of the type to be included in the offered asset pool.

In addition, while we proposed requiring material static pool information with respect to delinquency and loss experience, several commenters recommended expanding the requirement to also include prepayment experience, to the extent material for the particular asset class.[256] Prepayments typically include both voluntary prepayments and liquidations after defaults or charge-offs. For some asset types, such as home equity loans, prepayments also could refer to the liquidation rate of a portfolio, where such rate is a combination of scheduled payments, prepayments and charge-offs.

Under our final rules, the scope of the static pool requirement will encompass, to the extent material, static pool

[249] 426 U.S. 438 (1976).

[250] 485 U.S. 224 (1988).

[251] See *TSC Industries, Inc.* v. *Northway, Inc.*, at 449; and *Basic, Inc.* v. *Levinson*, at 231. See also the definition of ''material'' in Securities Act Rule 405, which states: The term ''material,'' when used to qualify a requirement for the furnishing of information as to any subject, limits the information required to those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to purchase the security registered.

[252] See, *e.g.*, Securities Act Rule 408; Securities Act Sections 11, 12(a)(2) and 17(a); Exchange Act Section 10(b); Exchange Act Rule 10b–5; and Exchange Act Rule 12b–20.

[253] See note 248 above.

[254] See, *e.g.*, Letters of ABA; ASF; and BMA. But see, *e.g.*, Letter of FMR.

[255] See Item 1105 of Regulation AB.

[256] See, *e.g.*, Letters of ABA and ASF. While some commenters suggested cumulative prepayment information, investors also expressed a preference for period prepayment information.

information regarding delinquencies, cumulative losses and prepayments, as applicable for the respective asset type.[257] As with prepayments, we also recognize that the particular metrics that would be material for delinquencies and cumulative losses may vary by asset class. For example, metrics for student loans, depending on the program, could include not only current period delinquency and cumulative net loss information, but also payment status information (*e.g.*, forbearance and deferment percentages) and claims reject information. For leases, metrics could include credit losses and residual losses.

i. Amortizing Asset Pools

Several commenters believed that in the context of amortizing asset pools, static pool data for prior securitized pools would be a better starting point for disclosure over information about the sponsor's overall portfolio, particularly as the sponsor's experience in securitizing prior pools increases.[258] These commenters argued that sponsor portfolio data by year, sometimes called ''vintage data,'' is less ''static'' than prior securitized pools because new loans are continually added to the portfolio over the course of that year's vintage. In addition, the sponsor's retained portfolio may include assets not eligible for securitization. As such, these commenters argued, static pool data for prior securitized pools would typically be more readily comparable to the current securitization transaction. However, to the extent the sponsor's experience with prior securitized pools is limited, vintage data on the sponsor's portfolio could be more appropriate as a starting point for static pool disclosure.

We are adopting this suggested approach for amortizing asset pools. Unless the registrant determines that such information is not material, the starting point for disclosure is static pool information, to the extent material, regarding delinquencies, cumulative losses and prepayments, if applicable, for prior securitized pools of the sponsor for that asset type. For unreasoned sponsors—sponsors lacking three years of securitization experience with the same asset type—consideration should be given to instead using as a starting point static pool information, to the extent material, regarding delinquencies, cumulative losses and prepayments, if applicable, by vintage origination years of originations or purchases by the sponsor, as applicable, for that asset type. A vintage origination year represents assets originated during the same year.

We proposed three years of static pool data (or such shorter period of time as the sponsor had been making originations or purchases). However, some commenters indicated that the amount of pool experience necessary for a meaningful evaluation of trends varies by asset type and three years may not be sufficient.[259] Our final rules call for information, to the extent material, for a minimum of five years (or such shorter period the sponsor has been either securitizing assets of the same asset type (in the case of seasoned sponsors) or making originations or purchases of assets of the same type (in the case of unseasoned sponsors)).

Consistent with our proposal, delinquency, cumulative loss and prepayment data for each prior securitized pool or vintage origination year, as applicable, is to be presented in periodic increments (*e.g.*, monthly or quarterly), to the extent material, over the life of the prior securitized pool or vintage origination year. We also are establishing a requirement regarding the age of the most recent periodic increment to ensure the currency of the data. Under the final rule, the most recent periodic increment for the data must be as of a date no later than 135 days of first use of the prospectus. For data based on quarterly increments, this allows 45 days from the end of the most recent quarter to include the data. The 135-day standard is consistent with our updating rules for interim financial information for non-ABS issuers that are not ''accelerated filers.'' [260]

Several commenters also believed that selected material characteristics for the prior securitized pools or vintage origination years should be provided along with the data to facilitate review and to assess comparability.[261] We are including in the requirement that summary information is to be provided for the original characteristics of the prior securitized pools or vintage origination years, as applicable and material. Commenters provided several examples of metrics that could be provided based on the relevant asset type. The final rule specifies that while the material summary characteristics may vary, these characteristics may include, among other things, the following: the number of pool assets; original pool balance; weighted average initial pool balance; weighted average interest or note rate; weighted average original term; weighted average remaining term, weighted average and minimum and maximum standardized credit scores or other applicable measure of obligor credit quality; product type; loan purpose; loan-to-value information; distribution of assets by loan or note rate; and geographic distribution information.

Based on the comment received, we are not adopting for amortizing asset pools our proposal to include a line-item disclosure requirement for static pool information for the offered pool itself. However, as we discuss more fully in Section III.B.4.a.iii., while we are not including a specific disclosure requirement for such information, we note there may be instances where failure to provide such information would make the data that is presented misleading.[262] For example, for a pool with a material concentration of seasoned assets, disclosure of static pool data about the pool itself may be necessary depending on whether such data would reveal a trend or pattern concerning one or more elements of pool performance and risk that is material and not evident from data relating to asset performance otherwise presented and such omission makes the information presented misleading.[263]

ii. Revolving Asset Master Trusts

We received comment that an alternative starting point would be more suitable for revolving asset master trusts, such as credit card master trusts.[264] In particular, these commenters argued there could be even more concerns about the ''static'' nature of the pool due to changes in the master trust revolving asset pool over time and the relationship between the sponsor's retained portfolio or other securitized pools previously established by the sponsor and the master trust asset pool. Instead, additional incremental performance information based on asset age for the master trust revolving asset pool itself was suggested as a more appropriate starting point. The additional disclosure, where material, would allow an investor to distinguish performance of newer accounts comprising the master trust asset pool from those of more seasoned accounts. Investors also suggested presenting static age-related data for payment rate, yield and standardized credit scores or

[257] As discussed in Section III.B.4.a.ii., additional variables were suggested and are included for revolving asset master trusts.

[258] See., *e.g.*, Letters of ABA; ASF; and BMA.

[259] See, *e.g.*, Letters of ASF and MetLife.

[260] See, *e.g.*, Rule 3–01 of Regulation S–X (17 CFR 210.3–01) and Rule 3–12 of Regulation S–X (17 CFR 210.3–12).

[261] See, *e.g.*, Letters of ABA; ASF; and Auto Group.

[262] See note 252 above.

[263] See Section III.B.3.a. of the Proposing Release.

[264] See, *e.g.*, Letter of ASF.

other applicable measure of obligor credit quality in addition to delinquency and loss data, if applicable.[265]

For such transactions, we are clarifying that, unless the registrant determines that such information is not material, the starting point for disclosure is data, to the extent material, regarding delinquencies, cumulative losses, prepayments, payment rate, yield and standardized credit scores or other applicable measure of obligor credit quality, as applicable, in separate increments based on the date of origination of the pool assets. While the material increments for presenting the performance data may vary, we are suggesting, based on comment, that issuers consider presenting such data at a minimum in 12-month increments through the first five years of the account's life (*e.g.*, 0–12 months, 13–24 months, 25–36 months, 37–48 months, 49–60 months and 61 months or more). However, as noted above for amortizing asset pools, performance data for longer periods, in shorter increments or for different pool characteristics may be more appropriate depending on the asset class involved.

iii. Alternative Presentations or Other Disclosure

We have attempted to identify above characteristics that may suggest to issuers the appropriate starting point for static pool disclosure. However, we recognize that materiality considerations may dictate that these starting points may not always be suitable to the particular sponsor, asset pool and transaction involved. For example, a sponsor may have three years of experience securitizing a particular asset type, but the sponsor's experience may have been sporadic, there may have been a significant gap in the experience, or the sponsor's origination or acquisition program may have materially changed to the point such that information about the sponsor's vintage portfolio, as well as any explanatory disclosure, may be more appropriate in lieu of or in addition to prior pool information. Similarly, for takedowns involving a new revolving asset master trust, information about prior master trusts by the sponsor or information about the sponsor's vintage portfolio, in addition to other explanatory disclosure, may also be appropriate in addition to or in lieu of age-related information about the offered master trust pool. Also, as we are expanding the ability to use master trusts to new asset classes, the same may be true for additional asset classes that may be securitized in the future. We noted above as well that in some instances static pool data about the pool itself may be more appropriate for amortizing asset pools.

To clarify this point, we are expressly providing in the final rule that if the information that would otherwise be required by the directed starting point is not material, but alternative static pool information (*e.g.*, prior pools, portfolio vintage or asset pool) would provide material disclosure, such alternative information is to be provided instead. Further, as we stated in the Proposing Release, registrants may and are encouraged to provide other explanatory information, including disclosure explaining the absence of data.[266]

Several commenters also expressed concern as to application of the disclosure requirement in transactions, such as ''rent-a-shelf'' [267] and aggregator transactions, where one or more entities transfer the pool assets to an unaffiliated depositor.[268] In particular, these commenters argued that in some instances static pool information for one or more entities other than the sponsor may be more appropriate than information about the sponsor. In response, we are clarifying that static pool information regarding a party or parties other than the sponsor may be provided in addition to or in lieu of the contemplated information regarding the sponsor if appropriate to provide material disclosure.

We are not including in the final rule the proposed general instruction to present static pool data separately based on other pool variables. Although as with the rest of our proposal this instruction was conditioned on materiality, the majority of commenters objected to including the language, arguing that the potential breadth of the disclosure that would be required would be too burdensome for prospectus disclosure.[269] Several of these commenters also believed the alternative approach we are adopting of requiring material summary characteristics for prior securitized pools or vintage origination years deemphasized the need for such data stratifications.

b. Method of Presentation

Many commenters, including those representing investors, requested flexibility in the presentation of required static pool information.[270] In particular, such commenters universally argued for the ability to provide such information electronically through an Internet Web site. Even under the revised disclosure framework suggested by commenters that we are adopting, commenters believed the resulting disclosure could nevertheless involve a significant amount of statistical information for some issuers with features that would be difficult to file electronically on EDGAR as it exists today and difficult for investors to use in that format. Commenters noted that several issuers already provide performance data through their Web sites, although it may not be freely accessible by all investors. In addition, a Web site-based approach, these commenters argued, could provide greater dynamic functionality and utility both for the ability of issuers to present the information and the ability of investors to access and analyze the information, including interactive facilities for organizing and viewing the information. Moreover, given that much of the information for prior securitized pools or the sponsor's portfolio would be similar from one transaction to the next, providing flexibility to allow the information to be presented in one place for multiple prospectuses would reduce the burdens of repeating the data for each prospectus. In addition, allowing a single place for presentation of the information would provide efficiencies for keeping the data updated and current for future transactions.

We wish to encourage efficient means of providing information to investors. Advances in technology, particularly the Internet, have greatly increased efficiencies in the ability to gather, process, present and analyze information of this type.[271] Both issuers and investors have expressed a preference for Web site disclosure of such information. Accordingly, we are providing issuers with alternatives for providing the required information for inclusion in the prospectus, as discussed below.

First, as is the case today, the issuer could physically include the information in the prospectus or, for ABS offerings on Form S–3, incorporate the information by reference from a filed Exchange Act report. Some commenters

[265] *Id.*

[266] As we stated in the Proposing Release, in some instances such additional information may be required. See note 252 above.

[267] A typical ABS ''rent-a-shelf'' transaction is one where the sponsor of the transaction transfers the pool assets to an unaffiliated depositor for a takedown off of a registration statement filed by the unaffiliated depositor, usually for a fee.

[268] See, *e.g.*, Letters of ASF and BMA.

[269] See, *e.g.*, Letters of A&O; ABA; ASF; BMA; MBA; Sallie Mae; and TMCC.

[270] See, *e.g.*, Letters of ABA; ASF; Auto Group; BMA; Citigroup; JPMorganChase; NYCBA; and TMCC.

[271] See also, *e.g.*, the Offering Process Release.

also suggested flexibility to provide the information in an electronic format together with the prospectus, such as a CD–ROM delivered with the prospectus. We have previously provided guidance on the use of such electronic media in providing prospectus disclosure.[272] This guidance continues to apply. However, as discussed below, we also are providing separate and specific guidance for providing the information through a Web site.

The second alternative for providing static pool information involves a temporary filing accommodation under our rules governing EDGAR filing that applies until December 31, 2009 and permits the posting of the information on an Internet Web site, subject to the following conditions.[273] As discussed further below, if these conditions are met, the information will be deemed to be included in the prospectus and need not be physically repeated in the prospectus or in a Form 8–K report incorporated by reference into the prospectus and registration statement. It will therefore be subject to all liability provisions applicable to prospectuses and registration statements, including Section 11 of the Securities Act.[274]

First, the prospectus at effectiveness shall disclose the intention to provide the information through a Web site and the final prospectus shall provide the specific Internet address where the information is posted.[275] This alerts investors to the location of the information. The specificity of the Internet address should be directly to the information that is to be deemed part of the prospectus.[276] The Web site used for disclosure of the information need not be a Web site maintained by the issuer, although, as noted below, there are conditions for the retention and availability of the information and the information provided through the Web site will be deemed part of the prospectus included in the registration statement.

Second, the information shall be provided through the designated Web site unrestricted as to access and free of charge. As we have stated in our other releases regarding Web site posting,[277] the medium to access the information must not be so burdensome that the intended users cannot effectively access the information provided. In addition, as the information provided through the Web site will be deemed a portion of the prospectus no different than if the information was physically included in the prospectus itself and available on EDGAR, we do not believe it would be appropriate to require prior user registration to access the Web site information.

Third, the information shall remain available on the Web site for a period of not less than five years. If a subsequent update or change is made to the information, the date of such update or change shall be clearly indicated on the Web site and the registrant shall undertake to provide to any person without charge, upon request, a copy of the information as of the date of the prospectus. In addition, the registrant shall retain all versions of the information posted through the Web site address for a period of not less than five years in a form that permits delivery to an investor or the Commission, and the registrant shall furnish to the Commission or its staff upon request a copy of any or all information retained pursuant to this requirement. The five-year period shall commence from the filing date of the prospectus, or the date of first use of the prospectus, whichever is earlier. These record retention provisions are consistent with record retention requirements for information retained by the issuer regarding Securities Act registration statements.[278] The requirement to keep the information posted ensures that, no different than if the information was physically included in the prospectus, an investor has access to the information at all times during such period.

Fourth, the registration statement shall contain an undertaking that, except as discussed below regarding certain information relating to periods before the compliance date of the new disclosure requirement, the information provided through the specified Internet address is deemed to be a part of the prospectus included in the registration statement for the asset-backed securities.[279] As the information will be deemed to be included in that prospectus no different than if the information was physically included in the prospectus, disclaimers of liability or responsibility for the information are not appropriate.[280]

The information that will be deemed to be part of the prospectus included in the registration statement as a result of the undertaking is limited to the information provided through the specified Web site address.[281] The reference to the specified Web site address would not mean, standing alone, that other information, including additional static pool information, available elsewhere on the Web site but not available through the Web site address would automatically be deemed to be a part of that prospectus.[282] As such, issuers electing the Web site disclosure option should ensure that the portion of the Web site used to disclose the information that is to be included as part of the prospectus does not contain references or hyperlinks to other portions of the Web site not to be included as part of the prospectus (for example, to the general corporate home page of the sponsor). However, for purposes of this requirement, we believe the Internet address to be disclosed in the prospectus would not necessarily be required to be to a separate address for each address that is a ''cul-de-sac.'' There may be circumstances where the

[272] See Release No. 33–7233 (Oct. 6, 1995) [60 FR 53458]; Release No. 33–7288 (May 9, 1996) [61 FR 24644]; Release No. 33–7856 (Apr. 28, 2000) [65 FR 25843]; and Rule 304 of Regulation S–T (17 CFR 232.304).

[273] See Rule 312 of Regulation S–T.

[274] 15 U.S.C. 77k.

[275] Note that the EDGAR System prohibits the use of active HTML hypertext links to external Web sites other than the SEC Web site. See Rule 105(b) of Regulation S–T (17 CFR 232.105(b)). Accordingly, the reference to the Internet address should be presented in the EDGAR submission as an inactive textual reference to avoid a suspension of the submission. Further, because new Rule 312 of Regulation S–T specifically provides for the availability of this accommodation to satisfy the disclosure requirement under identified conditions, which includes, among other conditions, an identification in the filing of an Internet address (which will not be an HTML hypertext link), Rule 105(c) of Regulation S–T (which prohibits satisfying reporting obligations through an external HTML hypertext link) is not implicated. Rule 105(c) of Regulation S–T continues to prohibit a filer from satisfying its disclosure requirements through impermissible hypertext links or references to external Web sites. However, like Rule 105(c) of Regulation S–T and as further explained in the text, the inclusion of the address in response to Rule 312 of Regulation S–T will cause the filer to be subject to the civil liability and anti-fraud provisions of the federal securities laws with reference to the information contained in the Internet address.

[276] See also the subsequent discussion in notes 281, 282 and their accompanying text. Our final rules are designed to provide issuers flexibility regarding the methods of presenting the information through a Web site.

[277] See, *e.g.*, Release No. 33–7233, at n. 24 and the accompanying text; Release No. 33–8128 (Sep. 16, 2002) [67 FR 58480] and Release No. 33–8230 (May 7, 2003) [68 FR 25788].

[278] See, *e.g.*, Securities Act Rule 428 (17 CFR 230.428); and Rule 304 of Regulation S–T (17 CFR 232.304).

[279] See also amendments to Item 512(l) of Regulation S–K (17 CFR 229.512(*l*)).

[280] For more information regarding inappropriate disclaimers or legends, see Section III.C.1.d.

[281] The static pool information could be provided through an address to a webpage that provides links or access to additional webpages that together constitutes the required information. All such information would be deemed a part of the prospectus.

[282] For additional interpretive guidance regarding the treatment of other Web site information during a registered offering and issuer responsibility for hyperlinked information, see Release No. 33–7856. For recent proposals in this area and a discussion of when other information by an issuer is considered an offering communication, see the Offering Process Release.

reference could be to a general index or introduction page for static pool data for multiple offerings with links on that page clearly indicating the information to be provided for each prospectus.[283] Unless the registrant or another offering participant otherwise acts to include the other static pool information as part of the prospectus included in the registration statement, the reference to the other information on the index or introduction page will not, by itself, make that information part of that prospectus or an offer for the respective asset-backed securities.[284]

While recognizing the desire to provide a potentially more cost-effective and useful method of providing static pool information through Web sites, nevertheless we continue to believe at some point for future transactions the information should also be submitted with the Commission in some fashion, provided this does not result in investors not receiving the information in the form they have requested. Accordingly, we are providing that the filing accommodation will apply with respect to filings filed on or before December 31, 2009. We are directing our staff to consult with the EDGAR contractor, EDGAR filing agents, issuers, investors and other market participants to consider how such information can be filed so it is also with the Commission in a cost-effective manner without undue burden or expense and without affecting the result we achieve today that realizes the overriding objective of allowing issuers to be able to provide the data in the form expressed as most desirable by commenters. We wish to assure market participants that any such filing mechanism to replace or supplement the temporary accommodation for filings after December 31, 2009 will not undercut these objectives. As a result, this could include, if necessary, extending the accommodation or, if it appears that an EDGAR solution would not be feasible in that timeframe, alternative methods of having the information submitted to the Commission.

[283] Such an index or introduction page is a possible example of how the information might under appropriate circumstances be provided through a Web site. If market participants need additional guidance regarding the operation of the Web site disclosure option for other considered alternatives, please feel free to contact the staff.

[284] Note that if an offering participant is otherwise using the information as part of the offering process, such information might be considered an ''offer'' and a ''prospectus,'' regardless of whether it is deemed to be part of the prospectus included in the registration statement discussed in the text. For more information, see the Offering Process Release.

Several commenters expressed concern over applying Securities Act liability standards [285] to static pool information, arguing instead for application of only general antifraud liability.[286] We note that investors expressed uniform support for the value of static pool information in making informed investment decisions.[287] We believe it is appropriate for such information used as part of the offering process to be subject to Securities Act liability requirements for the accuracy and reliability of the information, regardless of the medium in which the information is presented. Similarly, just because the information also may be prepared and used for additional corporate purposes does not mean that it should be treated differently from other offering information when used in connection with the offering.

Some of these commenters, due to concerns about issuer responsibility for materiality judgments, also requested a liability safe harbor for the selection of static pool information similar to that provided for forward-looking information.[288] However, many disclosure requirements under the Federal securities laws are based on a materiality standard without such a safe harbor.[289] Further, unlike forward-looking information relating to subjective events that may occur in the future, static pool information is by definition historical performance information. We also are not persuaded that the lack of existing market practice for the disclosure of static pool information justifies excluding such disclosure from Securities Act liability requirements. We note from the comments received that issuers already are developing standards for static pool disclosure for various asset classes. We are, however, providing accommodations, discussed below, for data regarding certain historical transactions and periods before the compliance date of the disclosure requirement.

As discussed further in Section III.F., we are providing an extended transition period for compliance with the disclosure requirements in Regulation AB, including the static pool disclosure requirements. This extended period allows issuers time to implement policies, processes and procedures to adapt to the new disclosure requirements. For offerings covered by the new rules and forms, material static pool information will be required for the time periods identified above (*e.g.*, previous five years). We believe this approach minimizes the amount of time before investors can begin to incorporate the information into their investment decisions. Of course, registrants voluntarily may comply with the new disclosure requirement before the compliance date, and we encourage them to do so if practicable.

However, we recognize that issuers may not have been collecting the necessary data for periods before the implementation date of the new rules. Even if they had been collecting the necessary information, the information may not have been collected under processes and controls with a view toward disclosure in a prospectus. Similarly, several commenters expressed concern regarding historical data before the implementation date of the rules that may not exist or cannot be provided without unreasonable effort or expense.[290]

Given that we are establishing a requirement for disclosure of material static pool information as well as an extended transition period to prepare for such disclosure, we believe many commenter concerns regarding availability and access to the data on a going forward basis will not be applicable. However, we are addressing commenter concerns in two ways to address the following static pool information:

- For static pool information regarding prior securitized pools of the sponsor that do not include the currently offered pool, information regarding prior securitized pools that were established before January 1, 2006; and
- For static pool information regarding the currently offered pool, information about the pool for periods before January 1, 2006.

First, we are providing in the Item that if any of such information is unknown and not available to the registrant without unreasonable effort or expense, such information may be omitted, provided the registrant provides the information on the subject it possesses or can acquire without unreasonable effort or expense, and the registrant includes a statement showing that unreasonable effort or expense would be involved in obtaining the omitted information.

Second, even for such information that is available or accessible without

[285] See Sections 11, 12(a)(2) and 17(a) of the Securities Act.

[286] See, *e.g.*, Letters of ABA; ASF; BMA; and NYCBA.

[287] See note 247 above.

[288] See, *e.g.*, Letters of ABA; ASF; and BMA.

[289] In particular, see Item 303 of Regulation S–K (17 CFR 229.303) regarding Management's Discussion and Analysis of Results of Operations.

[290] See, *e.g.*, Letters of ABA; ASF; and BMA.

unreasonable effort of expense, given concerns about proper due diligence regarding such information, we are specifying that the pre-January 1, 2006 information identified above provided in response to the static pool information disclosure requirement will not be deemed to be a prospectus or part of a prospectus for the asset-backed securities, nor shall such information be deemed to be part of the registration statement for the asset-backed securities. Of course, such information will remain subject to the general antifraud provisions of the Securities Act and Exchange Act.[291] In addition, the prospectus must disclose that such information is not deemed to be part of that prospectus or the registration statement for the asset-backed securities in order to alert investors.

5. Pool Assets

Information about the composition and characteristics of the asset pool is a cornerstone of the disclosure necessary to make an informed investment decision regarding an asset-backed security. As noted above, we are not establishing detailed industry guides for each asset type to be securitized. However, while the material characteristics will vary depending on the nature of the pool assets, we continue to believe, as proposed, that there are certain broad categories of disclosure and examples of common characteristics that can be identified. Of course, the actual disclosure to be provided must be tailored to the asset type and asset pool involved for the particular offering and resulting determinations as to the materiality of information.

a. Pool Composition

As proposed, certain general information regarding the asset pool will be required, including a brief description of the asset type to be securitized and a general description of the material terms of the pool assets.[292] In addition, the solicitation, credit-granting or underwriting criteria used to originate or purchase the pool assets must be described. The selection criteria for the asset pool also must be described, as well as the cut-off date or similar date for establishing pool composition. Finally, the effects of any legal or regulatory provisions are to be described, such as any bankruptcy, consumer protection, predatory lending, privacy, property rights or foreclosure laws or regulations, to the extent they may materially affect pool asset performance or payments or expected payments on the asset-backed securities.[293]

As information about the asset pool necessarily includes statistical information, the need for clear presentations emphasizing material information is important. Appropriate introductory and explanatory information is to be provided to introduce characteristics, the methodology used in determining or calculating the characteristics and any terms or abbreviations used. For example, this would include explaining the definitions and methodologies for various categories provided (*e.g.*, documentation guidelines for each loan documentation type), the components and method of calculating variables (*e.g.*, loan-to-value or debt-to-income ratios) and the date used for determining statistical data (*e.g.*, if not the cut-off date), as applicable. As is the case today, statistical information is to be presented in tabular or graphical format, if it will aid understanding. Statistical information also is to be presented in appropriate distributional groups or incremental ranges material to an analysis of the information, in addition to presenting appropriate overall pool totals, averages and weighted averages.[294]

Currently, statistical disclosures by distribution groups or ranges often present just the number, amount and percentage of pool assets for each group or range. If material, statistical information for each group or range also should be presented by other material variables, such as, average balance, weighted average coupon, average age and remaining term, average loan-to-value or similar ratio, and weighted average standardized credit score or other applicable measure of obligor credit quality. Similarly, when presenting averages on an aggregate basis and within each group or range, registrants should consider providing minimums and maximums underlying the averages. As is often the case today, historical data presented regarding pool assets is to be provided, as appropriate, such as the lesser of three years or the time such assets have existed, to allow a material evaluation of the pool data.

As discussed above, we have made several technical and clarifying revisions in response to comment to the proposed list of pool characteristics. While again recognizing that the characteristics that are material will vary depending on the nature of the pool assets, examples of illustrative characteristics in the disclosure item include:

- Number of each type of pool assets.
- Asset size, such as original balance and outstanding balance as of a designated cut-off date.
- Interest rate or rate of return, including type of interest rate if the pool includes different types, such as fixed and floating rates.
- Capitalized or uncapitalized accrued interest.
- Age, maturity, remaining term, average life (based on different prepayment assumptions), current payment/prepayment speeds and pool factors, as applicable.
- Servicer distribution, if different servicers service different pool assets.
- If a loan or similar receivable: Amortization period; loan purpose; loan status; loan-to-value (LTV) ratios and debt service coverage ratios (DSCR); and type and/or use of underlying property, product or collateral.
- If a receivable or other financial asset that arises under a revolving account, such as a credit card receivable: Monthly payment rate; maximum credit lines; average account balance; yield percentages; type of asset; finance charges, fees and other income earned; balance reductions granted for refunds, returns, fraudulent charges or other reasons; and percentage of full-balance and minimum payments made.
- Whether the pool asset is secured or unsecured, and if secured, the type(s) of collateral.
- Billing and payment procedures, including frequency of payment, payment options, fees, charges and origination or payment incentives.
- Information about the origination channel and origination process for the pool assets, such as originator information (and how acquired) and level of origination documentation required, as applicable.

In addition to the above, we are retaining a reference in the disclosure list to standardized credit scores of obligors and other information regarding obligor credit quality. While disclosure of standardized credit scores is typical today for several consumer asset classes, commenters representing issuers from other consumer asset classes that do not typically disclose such information, although generally agreeing that material information surrounding the

[291] See 15 U.S.C. 77q(a) and 78j(b) and Exchange Act Rule 10b–5.

[292] See Item 1111 of Regulation AB.

[293] As proposed, an instruction to the Item would specify that unless a material concentration of assets exists, it is not necessary to provide details of the laws in each jurisdiction. Even in that case, a legalistic description or recitation of the laws or regulations in a particular jurisdiction is not required.

[294] As noted in the Item, in making any calculations regarding overall pool balances, any funds set aside for a prefunding account are to be disregarded.

credit underwriting process and data used to determine suitability and extension of credit should be disclosed, nevertheless expressed reticence to the proposed reference to standardized credit scores.[295] However, comment from investors uniformly emphasized the importance of such data as an indicator of potential performance, similar to other variables such as loan-to-value and geographic origination, even though the data may not have been, like these other variables, the primary basis for the initial credit decision.[296] Accordingly, we are retaining the reference to standardized credit scores.[297]

Our proposed disclosure item also included disclosure about the geographic distribution of the pool assets, such as by state or other material geographic region. This aspect of the proposal caused some confusion among commenters as to the extent of disclosure that would be required.[298] We are clarifying this aspect of the disclosure item.[299] We are retaining a requirement for disclosure regarding the geographic distribution of the pool assets.[300] In addition, we are retaining the aspect of the proposal, which is typical for transactions today, that if 10% or more of the pool assets are or will be located in any one state or other geographic region, information is to be provided regarding any economic or other factors specific to such state or region that may materially impact the pool assets or pool asset cash flows. To avoid confusion, we are not adopting the other part of our proposed disclosure item that suggested separate statistical data should be provided for each 10% geographic concentration according to the factors or variables listed above for the entire asset pool. However, if additional material information about the geographic concentration would be necessary to make the disclosure otherwise provided not misleading, such disclosure would be required.[301] In addition to geographic concentrations, the disclosure requirement also references other concentrations material to the asset type (*e.g.*, school type for student loans), with information regarding such concentrations similar to that provided for geographic concentrations.

Consistent with existing practice, delinquency and loss information for the pool also will be required. As proposed, an item of general applicability for Regulation AB will provide guidance regarding the presentation of such information.[302] We received comment on the proposed minimum distributional groupings, or ''buckets,'' that are to be used in presenting delinquency information in addition to overall delinquency percentages.[303] We are clarifying that, at a minimum, delinquency experience is to be presented in 30 or 31 day increments, as applicable, beginning at least with assets that are 30 or 31 days delinquent, as applicable, through the point that assets are written off or charged off as uncollectable. Such information is to be presented at a minimum by number of accounts and dollar amount. Disclosure also will be required, as proposed, on how delinquencies, charge-offs and uncollectable accounts are defined or determined, addressing the effect of any grace period, re-aging, restructure, partial payments considered current or other practices on delinquency experience.[304] We believe this would include separate information on the amount of pool assets that had been previously re-aged, if material.

In a commercial mortgage-backed securitization, given the importance of the underlying properties, we proposed a separate list of illustrative disclosure items for these assets. The proposed disclosure was consistent with similar disclosure required by existing Form S–11 for the registration of offerings of securities for certain real estate companies. We received additional comment to tailor the disclosure further for CMBS transactions, particularly for significant loans in the pool.[305] Under the final rule, the following is to be provided, to the extent material.[306] For all commercial mortgages:

- Location and present use of each mortgaged property;
- Net operating income and net cash flow information, as well as the components of such items, for each mortgaged property;
- Current occupancy rates for each mortgaged property;
- Identity, square feet occupied by and lease expiration dates for the three largest tenants at each mortgaged property; and
- The nature and amount of all other material mortgages, liens or encumbrances against such properties and their priority.

In addition, the following additional information is to be provided for each commercial mortgage that represents, by dollar value, 10% or more of the asset pool, as measured as of the cut-off date:

- Proposed renovation, improvement or development programs.
- Competitive conditions.
- Management of the properties, historical occupancy rates and property uses.
- Further information about material tenants and lease terms.

b. Sources of Pool Cash Flow

As we explained in the Proposing Release, cash flows to support the asset-backed securities in some transactions come from more than one source, such as in lease-backed transactions that include separate cash flows from lease payments and from the sale of the residual asset at the termination of the lease. In such instances, disclosure will be required, as proposed, of the specific sources of funds and their uses, including, if applicable, the relative amount and percentage of funds that are to be derived from each source. Any assumptions, data, models and methodology used to derive such amounts also must be described.

As discussed in Section III.A.2.e., we are adopting our proposed requirements for additional specific disclosures in lease backed ABS if a portion of the securitized pool balance is attributable to the residual values of the physical property underlying the leases. Such disclosure includes information on how residual values are estimated and derived, statistical information regarding estimated residual values and historical statistics on turn-in rates and

[295] See, *e.g.*, Letters of ASF; AHFC; MBNA; and TMCC.

[296] See, *e.g.*, Letter of ASF.

[297] As proposed, the reference is to standardized credit scores, not proprietary internally-derived credit scores of the originator. However, as discussed above, a description of the material solicitation, credit-granting and underwriting criteria used to originate or purchases the pool assets is to be described.

[298] See, *e.g.*, Letters of ABA; AFSA; ASF; Citigroup; and TMCC.

[299] As proposed, an instruction to this Item specifies that for most assets, such as credit card accounts, automobile leases, trade receivables and student loans, the location of the asset is the underlying obligor's billing address. For assets involving real estate, such as mortgages, the location of the asset is where the physical property underlying the asset is located.

[300] See, *e.g.*, Kevin Donovan, ''Zimmerman Outlines Risks in HELs,'' Asset Securitization Report (Sep. 20, 2004).

[301] See note 252 above.

[302] See Item 1100(b) of Regulation AB.

[303] See, *e.g.*, Letters of ABA; ASF; Auto Group; MBA; and MetLife.

[304] Such disclosure should include the policies being used for purposes of the non-performing and delinquency thresholds in the definition of ''asset-backed security.''

[305] See, *e.g.*, Letter of CMSA.

[306] Similar to Form S–11, an instruction to the disclosure item specifies that what is required under the item is information material to an investor's understanding of the asset-backed securities. Detailed descriptions of the physical characteristics of individual properties or legal descriptions by metes and bounds are not required.

residual value realization rates. Information also will be required regarding the manner and process in which residual values are to be realized, including disclosure of the entity that will convert the residual values into cash and the experience of such entity. Finally, disclosure will be required of the effects if not enough proceeds are received from the realization of residual values, whether there exists any provisions to address such a contingency, as well as how any cash flow greater than that necessary to repay security holders will be allocated.

c. Changes to the Asset Pool

As discussed in Section III.A.2.f., we are adopting, as proposed, more detailed disclosures on when and how the composition of an asset pool may change, such as through a prefunding or revolving period. Such disclosure includes:

- The term or duration of any prefunding or revolving period.
- Aggregate amounts and percentages involved in the prefunding or revolving period, if applicable.
- Triggers that would limit or terminate such periods.
- When and how new pool assets may be added, removed or substituted, and the acquisition or underwriting criteria for additional pool assets, and the party that makes determinations on such changes.
- Any minimum requirements to add or remove pool assets.
- Temporary investment of funds pending use.
- Whether, and if so, how, investors will be notified of any changes to the asset pool.

d. Rights and Claims Regarding the Pool Assets

When pool assets are transferred to the issuing entity, the sponsor, transferor or other party often makes certain representations and warranties concerning the pool assets, such as to their principal balance and status at the time of transfer. If an asset fails to meet the requirements of those representations or warranties, there may be obligations for the depositor to repurchase or substitute assets that do comply with the representations and warranties for that non-complying asset. As proposed, and consistent with current practice, disclosure of these rights and remedies will be required, as well as disclosure regarding any material direct or contingent claims that parties other than the holders of the asset-backed securities have on any pool assets, such as prior mortgages, liens or encumbrances.

6. Transaction Structure

As proposed, existing Item 202 of Regulation S–K will continue to provide the core disclosure requirements for describing the securities being offered, and new Item 1113 of Regulation AB will provide additional guidance consistent with existing practice for preparing this disclosure for asset-backed securities. For example, the item clarifies that an explanation is to be given of the types or categories of securities that may be offered, such as interest-weighted or principal-weighted classes or planned amortization or companion classes, as well has how principal and interest on each class of securities is calculated and payable. Other specified items include amortization, performance or similar triggers or events (and their effects on the transaction if triggered), overcollateralization or undercollateralization information, cross-default or cross-collateralization provisions, voting requirements to amend the transaction documents and any minimum standards, restrictions or suitability requirements regarding ownership of the securities.

A clear description of the flow of funds for the transaction is required. Such a description is to include payment allocations, rights and distribution priorities among all classes of the issuing entity's securities, and within each class, with respect to cash flows, credit enhancement and any other structural features in the transaction. Any requirements directing cash flows are to be described, such as to reserve accounts, along with a description of the purpose and operation of those requirements. In addition to an appropriate narrative description, the flow of funds should be presented graphically if doing so would aid understanding.

There has been increased emphasis in the market on the level of fees and expenses involved in an ABS transaction.[307] To provide increased transparency of this information in a single location, we are adopting our proposal for a separate table with an itemized list of all estimated fees and expenses to be paid or payable out of the cash flows for the transaction. As proposed, the fee and expense table is to indicate for each item the amount of the fee or expense, its general purpose, the party receiving such fees or expenses, the source of funds for such fees or expenses (if different from other fees or expenses or if such fees or expenses are to be paid from a specified portion of the cash flows) and the distribution priority of such expenses. If the amount of a fee or expense is not fixed, the formula or method of calculation used to determine the fee or expense is to be provided. The tabular presentation should be accompanied by footnotes or other accompanying narrative disclosure to the extent necessary for an understanding of the timing or amount of such fees and expenses, such as any restrictions or limits on fees or whether the estimate may change in certain instances, such as in the event of an event of default (and how the fees would change in such an instance or the factors that would affect the change). In addition, through footnote or other accompanying narrative disclosure, disclosure is required of any, and if so how, fees or expenses could be changed without notice to, or approval by, security holders and any restrictions on the ability to change a fee or expense amount, such as due to a change in transaction party.

Other disclosures regarding the transaction structure include information on the frequency of distribution dates and collection periods for the pool assets and arrangements for cash held pending use, including identification of the parties with access to cash balances and the authority to make decisions regarding their investment and use. We also are retaining information on the ownership of any residual or retained interests to the cash flows, as well as the disposition of excess cash flow, although we are making revisions in response to comment.[308] In particular regarding residual ownership, the identity of the residual holder must be disclosed only if the residual holder is an affiliated party or if the residual holder has rights that may alter the transaction structure beyond receipt of residual or excess cash flows. Finally, disclosure will be required of any requirements to maintain a minimum amount of excess cash flow or spread from, or retained interest in, the transaction, and effects on the transaction if the requirements were not met.

As with any fixed-income security, optional or mandatory redemption or termination provisions are to be described, including any ''clean up'' calls if the principal balance of the pool assets reaches a specified minimum level, with minor revisions to our

[307] See, *e.g.*, notes 229 and 239 above. See also Fitch, Inc., ''Credit Card ABS Servicing Fee Adequacy and Priority'' (Sep. 15, 2004).

[308] See, *e.g.*, Letters of ABA; ASF; BMA; JPMorganChase; and MetLife.

proposal in response to comment.[309] Many ABS transactions include ''clean up'' calls whereby the securities are called and the trust terminated before its stated termination date when the administrative costs no longer justify the limited outstanding life.[310] They are typically conducted only when less than 10% of the outstanding pool balance is outstanding. As proposed, we are codifying the existing staff position that the title of any class of securities with an optional redemption or termination feature that may be exercised when 25% or more of the original principal balance of the pool assets is still outstanding must include the word ''callable.''[311] This is to alert investors that the callable feature is greater than a typical ABS ''clean up'' call. In addition, in response to comment,[312] we are clarifying that in the case of a master trust, a title of a class of securities must include the word ''callable'' when an optional redemption or termination feature may be exercised when 25% or more of the original principal balance of the particular series in which the class was issued is still outstanding, in lieu of the original principal balance of the entire master trust asset pool.

As proposed, we are adopting additional disclosure requirements if the transaction structure involves a master trust. For example, information will be required, to the extent material, regarding any additional securities already outstanding or that may be issued in the future that are backed by the same asset pool, including:

- The relative priority of those additional securities to the securities being offered and their respective rights to the underlying pool assets and cash flows;
- Allocations of cash flow from the asset pool and any expenses or losses among the various series or classes;
- Terms under which additional series or classes may be issued and pool assets increased or changed;
- The terms of any security holder approval or notification of any additional issuance; and
- Which party has the authority to determine whether additional securities may be issued.

In addition, if there are conditions to such additional issuance, whether or not there will be an independent verification of such person's exercise of authority or determinations.[313]

In describing generally the scope of disclosure expected in ABS registration statements, the 1992 Release specifically referenced disclosure regarding prepayment, maturity and yield considerations that may be material to ABS. As proposed, a description is required of any material models, including material assumptions and limitations, used as a means to identify cash flow patterns with respect to the pool assets. Similarly, the disclosure must, to the extent material, explain the degree to which each class of securities is sensitive to changes in the rate of payment on the pool assets, and describe the consequences of such changing rate of payment.[314] Consistent with market practice, statistical information of such effects is to be provided, such as the effect of prepayments on yield and weighted average life at one or more given prepayment speeds. Any special allocations of prepayment risks among the classes of securities must be described, as well as whether any class protects other classes from the effects of the uncertain timing of cash flow.

7. Significant Obligors

As we explained in the Proposing Release, a securitized asset pool typically represents obligations of a large enough number of separate obligors such that information on any individual obligor may not be material. However, as discussed in Section III.A.6., as concentration with a particular obligor or group of related obligors increases, additional disclosures regarding that obligor or group of related obligors, including financial information, is required. Analogizing to the standards in Topic 1.I of Staff Accounting Bulletin No. 103, current staff and market practice is to require additional disclosures regarding a particular obligor or group of related obligors when concentration reaches 10%, with more particular disclosures at 20%.[315] Commenters supported our proposals to codify these longstanding practices.[316]

As proposed, we define a ''significant obligor'' that would trigger additional disclosures as any of the following:

- An obligor or a group of affiliated obligors on any pool asset or group of pool assets if such pool asset or group of pool assets represents 10% or more of the asset pool;
- A single property or group of related properties securing a pool asset or a group of pool assets if such pool asset or group of pool assets represents 10% or more of the asset pool; or
- A lessee or group of affiliated lessees if the related lease or group of leases represents 10% or more of the asset pool.

Instructions to the definition clarify that if separate pool assets, or properties underlying pool assets, are cross-defaulted and/or cross-collateralized, such pool assets are to be aggregated and considered together in determining concentration levels. With respect to lessees, the concentration calculation must focus on the leases whose cash flow supports the asset-backed securities directly or indirectly, regardless of whether the asset pool contains the leases themselves, mortgages on properties that are the subject of the leases or other assets related to the leases. Finally, if the pool asset is a mortgage or lease relating to real estate and non-recourse to the obligor, and the obligor does not manage the property or does not own other assets and has no other operations, then the obligor need not be considered a separate significant obligor from the real estate. Otherwise, if any of the 10% tests were met, the obligor would be a separate significant obligor for which disclosure would be required.

For each significant obligor, both descriptive and financial information is required, consistent with existing practice and our proposal.[317] Descriptive information includes the identity of the significant obligor, its organizational form, the general character of its business, the nature of the concentration and the material terms of the pool assets and the agreements with the obligor involving the pool assets.

Also consistent with current practice and our proposal, different levels of financial information will be required depending upon the level of concentration.[318] If the pool assets relating to a significant obligor represent 10% or more, but less than 20%, of the asset pool, selected financial data required by Item 301 of Regulation S–

[309] See, *e.g.*, Letter of ABA.

[310] See Frank J. Fabozzi *et al.*, The Handbook of Nonagency Mortgage-Backed Securities, at 165 (1997).

[311] In response to comment, we are not including a mandatory redemption or termination features in this requirement. See, *e.g.*, Letter of ABA. However, structuring a redemption or termination feature as ''mandatory,'' but with the ability to waive or opt-out of the redemption or termination will still constitute an optional redemption or termination feature subject to the ''callable'' titling requirement.

[312] See, *e.g.*, Letters of ASF and Capital One.

[313] This final bullet was included to conform to the similar disclosure for the other ''discrete'' pool exceptions (prefunding and revolving periods).

[314] This includes, for example, information on interest rate sensitivity.

[315] Topic 1.I. to Release No. SAB–103.

[316] See, *e.g.*, Letters of ABA; CMSA; and MetLife.

[317] See Item 1112 of Regulation AB.

[318] See, *e.g.*, Section VIII.B.3.a.ii. of the Division of Corporation Finance's ''Current Issues and Rulemaking Projects'' (Nov. 14, 2000).

K must be provided.[319] If the pool assets relating to the significant obligor represent 20% or more of the asset pool, audited financial statements meeting the requirements of Regulation S–X are required.[320] As we noted in the Proposing Release, both thresholds represent longstanding breakpoints in Commission and staff requirements for determining the level of required financial disclosure.[321] Section III.B.10. discusses alternative methods that may be available, subject to conditions, to present this disclosure, such as through incorporation by reference or by including a reference to the obligor's Commission filings.

As proposed, we are adopting instructions to address exceptions to the requirement to provide financial information regarding a significant obligor. For example, no financial information is required if the obligations of the significant obligor as they relate to the pool assets are backed by the full faith and credit of the United States. Similarly, no financial information is required if the obligations of the significant obligor as they relate to the pool assets are backed by the full faith and credit of a foreign government, if the pool assets are investment grade securities. Otherwise, information required by paragraph (5) of Schedule B of the Securities Act [322] regarding the foreign government can be incorporated by reference from a Commission filing.[323] If the significant obligor was an asset-backed issuer and the pool assets relating to the significant obligor were asset-backed securities, rather than financial information disclosure is required pursuant to Items 1104–1115, 1117 and 1119 of Regulation AB regarding such asset-backed securities. However, if the disclosure about the asset-backed securities is required in a Form 10–K or Form 10–D, the information required by General Instruction J. of Form 10–K regarding such asset-backed securities is to be provided instead for the period for which the last Form 10–K of the asset-backed securities was due (or would have been due if such asset-backed securities are not subject to Exchange Act reporting requirements).

8. Credit Enhancement and Other Support

The definition of asset-backed security contemplates the inclusion of ''rights or other assets designed to assure the servicing or timely distribution of proceeds to security holders.'' Credit enhancement or other support for asset-backed securities can be provided in a variety of ways, including features internally structured into the transaction to provide support as well as externally provided enhancement or support.

We proposed a unified disclosure item for all such methods of enhancement and support, to the extent material, regardless of form. As we noted in the Proposing Release, our disclosure requirements were intended to cover all providers of external credit or liquidity enhancement, including insurance or guarantees, counterparties to swap or hedging arrangements, interest rate exchange arrangements, interest rate cap or floor arrangements, currency exchange arrangements or similar arrangements, and any other parties providing external credit enhancement or other support for payments on the asset-backed securities. Enhancement may support payment on the pool assets or payments on the asset-backed securities themselves.

In addition, similar to significant obligors and consistent with existing practice, we proposed that if the enhancement or other support by a particular entity or group of affiliated entities reached a certain level of concentration, additional disclosures, including financial disclosures, would be required. We also proposed a unified method for determining concentration based on whether the enhancement or support provider was liable or contingently liable to provide payments regarding cash flows supporting any offered class of asset-backed securities. Similar to significant obligors and existing practice, we proposed 10% and 20% breakpoints for determining the level of financial information that would be required.

We received substantial comment on our proposed unified approach. While generally agreeing with the proposal for most forms of enhancement or support, such as guarantees and bond insurance, many commenters believed the proposed approach was not appropriate for determining financial significance for all forms of such enhancement or support, in particular for counterparties of certain derivative instruments such as interest rate and currency swaps.[324] According to the commenters, this is because for some swaps, such as uncapped interest rate or currency swaps, a test based on contingent liability would require a measurement against maximum potential exposure, which would always result in financial disclosures regarding the swap counterparties. Such a result, the commenters argued, was against prevailing market practice and would be burdensome.

Several commenters suggested treating such derivative instruments differently from other forms of enhancement or support and suggested alternatives, such as using alternate tests for significance or alternate disclosures in lieu of any significance test. After evaluating the comments, we are separating the treatment and method of determining disclosure for such counterparties from other providers of enhancement or support for the ABS.[325] Derivatives, such as interest rate and currency swaps, that are used to alter the payment characteristics of the cashflows from the issuing entity and whose primary purpose is not to provide credit enhancement related to the pool assets or the ABS will have their own disclosure item and disclosure breakpoints. As noted in Section III.A.2.a., however, there are certain derivative instruments that could be structured such that their primary purpose is to provide credit enhancement for asset-backed securities.[326] These derivatives will continue to be treated the same as other forms of enhancement or support, as proposed.[327]

i. Forms of Enhancement and Support Other Than Certain Derivative Instruments

Accordingly, with the exception of the derivative instruments as discussed above, we are adopting our proposed disclosure item for other methods of enhancement or support substantially as

[319] 17 CFR 229.301. We also are clarifying in response to comment that for a significant obligor under Item 1100(k)(2) of Regulation AB, only net operating income for the most recent fiscal year and interim period is required. We also are providing a separate instruction if the significant obligor is a foreign business clarifying how the requirements may be complied with for such entities.

[320] Existing practices regarding financial statements that meet the requirements of Regulation S–X, including applicability of requirements for real estate properties, will continue to apply. See, *e.g.*, Rule 3–14 of Regulation S–X (17 CFR 210.3–14).

[321] See, *e.g.*, note 315 above.

[322] 15 U.S.C. 77aa.

[323] For example, a Form 18–K (17 CFR 249.318) or a Securities Act registration statement or filed prospectus.

[324] See, *e.g.*, ABA; ASFA; ASF; Auto Group; BMA; Capital One; ESF; JPMorganChase; MBNA; NYCBA; Sallie Mae; and TMCC.

[325] As with significant obligors, however, if the same party, or its affiliate, is providing multiple forms of enhancement or support, the exposure is to be aggregated and considered together in determining significance levels.

[326] See, *e.g.*, note 68 above.

[327] As discussed in Section III.A.2.a., synthetic securitization transactions do not qualify for the ABS regime we adopt today. If a registration and disclosure framework is developed for synthetic securitizations, the approach for valuing and disclosure required regarding a swap or a derivative in that transaction may differ from either of these two approaches.

proposed.[328] As proposed, the final item will encompass disclosure, to the extent material, regarding any of the following: [329]

- Any external credit enhancement designed to ensure that the asset-backed securities or pool assets will pay in accordance with their terms, such as bond insurance, letters of credit or guarantees;
- Any mechanisms to ensure that payments on the asset-backed securities are timely, such as liquidity facilities, lending facilities, guaranteed investment contracts and minimum principal payment agreements;
- Any derivatives whose primary purpose is to provide credit enhancement related to pool assets or the asset-backed securities; [330] and
- Any internal credit enhancement structured into the transaction to increase the likelihood that one or more classes of asset-backed securities will pay in accordance with their terms, such as subordination provisions, overcollateralization, reserve accounts, cash collateral accounts or spread accounts.

Disclosure of the material terms of the agreement to provide such enhancement or support is required, including any limits on the timing or amount of the enhancement or any conditions that must be met before the enhancement can be accessed. Provisions regarding substitution of enhancement also must be disclosed. The agreement relating to the material enhancement or support must be filed as an exhibit to the filing.

If an entity or group of affiliated entities providing enhancement or other support as listed above is liable or contingently liable to provide payments representing 10% or more of the cash flow supporting any offered class of asset-backed securities, additional information, both descriptive and financial, will be required. In addition to the identity of the enhancement provider, the descriptive information includes its organizational form and the general character of its business.

Regarding the level of financial information required, we are adopting the proposed 10% and 20% breakpoints currently used. In particular, if any entity or group of affiliated entities that provided enhancement or other support for the asset-backed securities is liable or contingently liable to provide payments representing 10% or more, but less than 20%, of the cash flow supporting any offered class of the asset-backed securities, selected financial data required by Item 301 of Regulation S–K must be provided. If the entity or group of affiliated entities is liable or contingently liable to provide payments representing 20% or more of the cash flow supporting any offered class of the asset-backed securities, audited financial statements meeting the requirements of Regulation S–X are required. As with financial disclosure regarding significant obligors, Section III.B.10. discusses alternative methods that may be available to incorporate the information by reference. We also are adopting similar instructions if the obligations of the enhancement provider are backed by the full faith and credit of the United States or certain foreign governments.[331]

In response to comment, we also are adopting an instruction if the enhancement provider is a guarantee agency under the Higher Education Act of 1965 for student loans under the Federal Family Education Loan Program (FFELP).[332] Due to the structure of the FFELP program, including reinsurance by the U.S. Department of Education, alternate statistical information about a significant guarantee agency has been permitted by the staff in lieu of the financial information discussed above. Accordingly, the instruction provides that if the pool assets are FFELP student loans and the enhancement provider for the pool assets is a guarantee agency under the Higher Education Act, the following information may be provided instead: [333]

- The number of pool assets and aggregate outstanding principal balance of pool assets guaranteed by the guarantee agency (both by number and percentage of the asset pool as of the cut-off date or other applicable date).
- Disclosure of the following with respect to the guarantee agency, as applicable, including a brief description regarding the method of calculation, covering at least five federal fiscal years:
- Aggregate principle amount of all student loans guaranteed.
- Reserve ratio.
- Recovery rate.
- Loss rate.
- Claims rate.

ii. Derivative Instruments Whose Primary Purpose Is Not To Provide Credit Enhancement

As discussed above, we are adopting a separate disclosure item for derivatives, such as interest rate and currency swaps, that are used to alter the payment characteristics of the cashflows from the issuing entity and whose primary purpose is not to provide credit enhancement.[334] For all such instruments, basic information about the derivative counterparty is required, including the name of the counterparty, its organizational form and the general character of its business. Disclosure of the material terms of the instrument is required, including any limits on the timing or amount of payments or any conditions to payments. Provisions regarding substitution of the instrument also must be disclosed. The agreement relating to derivative instrument must be filed as an exhibit.

With respect to determining whether additional financial information is required regarding the derivative counterparty, several commenters noted that participants in the derivatives markets routinely evaluate the maximum probable exposure of a counterparty, such as in order to make a credit decision as to counterparty risk or set required collateral levels.[335] These commenters believed that a similar approach should be used for measuring the financial significance of derivatives subject to our new disclosure item. Such an approach, these commenters argued, would be more consistent with how the market estimates the significance of such instruments.

We are adopting this approach. The measurement of the significance of the derivative is to be determined based on a reasonable good-faith estimate of maximum probable exposure, made in substantially the same manner as that

[328] See Item 1114 of Regulation AB.

[329] As we stated in the Proposing Release, in addition to the level of disclosure required, credit enhancement may raise questions as to whether a separate security is involved that needs to be separately registered. For example, a guarantee of a security, rather than on the underlying assets, would be a separate ''security'' under Section 2(a)(1) of the Securities Act (15 U.S.C. 77b(a)(1)) and must be covered by a Securities Act registration statement filed by the guarantor, as issuer, unless exempt from registration.

[330] Instruction to both Item 1114(a) and Item 1115 of Regulation AB provide that those items should not be construed as allowing anything other than an asset-backed security whose payment is based primarily by reference to the performance of the receivables or other financial assets in the asset pool. Derivatives that are not related to the financial assets, such as credit default swaps or other derivatives designed to create a synthetic exposure to an external asset or index, are not permitted under the definition of ''asset-backed security.'' See, *e.g.*, note 67 and the accompanying text.

[331] We also are providing separate instructions in Items 1114 and 1115, similar to the instruction for significant obligors, if the enhancement provider is a foreign business.

[332] See, *e.g.*, Letter of Sallie Mae.

[333] Of course, as with other parties, to the extent disclosure of additional information about the guarantee agency would be necessary to make the required disclosure, in the light of the circumstances under which they are made, not misleading, such disclosure also would be required. See note 252 above.

[334] See Item 1115 of Regulation AB.

[335] See, *e.g.*, Letter of ABA; ASF; and BMA.

used in the sponsor's internal risk management process in respect of similar instruments. The resulting estimate is to be measured against the aggregate principal balance of the pool assets. However, if the derivative only relates to one or more ABS classes, the estimate is to be measured against the aggregate principal balance of those classes.

For all such instruments, disclosure will be required regarding this significance measurement. At a minimum, disclosure is required as to whether the resulting significance percentage is less than 10%, at least 10% but less than 20%, or 20% or more. Further, if the significance percentage is 10% or more, we continue to believe that additional financial information should be provided, consistent with the approach for other third parties that may provide support for the ABS cashflows. In particular, if the significance percentage is at least 10%, but less than 20%, selected financial data required by Item 301 of Regulation S–K must be provided. If the significance percentage is 20% or more, audited financial statements meeting the requirements of Regulation S–X are required. As with disclosure for enhancement providers, alternative methods discussed in Section III.B.10. may be available to incorporate the information by reference.

9. Other Basic Disclosure Items

a. Tax Matters

Consistent with our proposal and existing practice, a brief, clear and understandable summary will be required of: [336]

- The tax treatment of the asset-backed securities transaction under federal income tax laws.
- The material federal income tax consequences of purchasing, owning and selling the asset-backed securities. In addition, if any of the material federal income tax consequences are not expected to be the same for investors in all classes offered by the registration statement, the material differences must be described.
- The substance of counsel's tax opinion, including identification of the material consequences upon which counsel has not been asked, or is unable, to opine.

As we explained in the Proposing Release, the filing and disclosure of tax opinions is a frequent topic of staff comment. The requirements with respect to tax opinions in ABS transactions have long been generally consistent with the requirements for non-ABS transactions.[337] For example, when using a ''short form'' tax opinion where disclosure in the prospectus or prospectus supplement is to constitute counsel's opinion, the tax opinion filed as an exhibit to the registration statement or filed on a Form 8–K and incorporated by reference must confirm or adopt the statements in the prospectus discussion as counsel's opinion. It is not sufficient for the tax opinion to merely state that the disclosure in the prospectus is accurate in all material respects. Registrants and their counsel should take care in preparing and describing tax opinions consistent with practices required for Securities Act registration statements.[338]

b. Legal Proceedings

In lieu of Item 103 of Regulation S–K, we are adopting, substantially as proposed, a more tailored disclosure item for material legal proceedings with respect to asset-backed securities.[339] Under the final disclosure item, a brief description will be required regarding any legal proceedings pending against the sponsor, depositor, trustee, issuing entity, servicer meeting the thresholds of Item 1108(a)(3) of Regulation AB [340] or 20% or more originator, or of which any property of the foregoing is the subject, that is material to security holders. Consistent with longstanding requirements under existing Item 103 of Regulation S–K, similar information will be required as to any such proceedings known to be contemplated by governmental authorities.

c. Affiliations and Certain Relationships and Related Transactions

As we explained in the Proposing Release, there often can be several affiliations between parties in an ABS transaction. For example, the servicer is often an affiliate of the sponsor. We are adopting as proposed a requirement to describe whether, and if so, how, the sponsor, depositor or issuing entity is an affiliate of any of the following parties: Servicer meeting the thresholds of Item 1108(a)(3) of Regulation AB, trustee, originator of at least 10% of the pool assets, significant obligor, significant provider of enhancement or other support or other material party identified with respect to the transaction. Disclosure also will be required, to the extent known and material, of any affiliate relationships among any of the parties listed above.[341]

We also are adopting disclosure requirements regarding material related party transactions between the sponsor, depositor or issuing entity and the above-referenced entities.[342] As under the proposal, two aspects of disclosure in this area are required. First, disclosure is required regarding whether there is, and if so, the general character of, any business relationship, agreement, arrangement, transaction or understanding entered into outside the ordinary course of business or on terms other than would be obtained in an arm's length transaction with an unrelated third party, apart from the asset-backed securities transaction, between the sponsor, depositor or issuing entity and any of the above referenced parties that either currently exists or that existed during the past two years that is material to an investor's understanding of the asset-backed securities. An instruction to the item clarifies that what is required is information material to an investor's understanding of the asset-backed securities, not a detailed description or itemized listing of all commercial relationships among the parties. Instead, the disclosure should indicate whether any relationships outside of the asset-backed securities transaction do exist that meet the specified standard, including materiality to an understanding of the asset-backed securities, and the general character of those relationships.

We have revised the disclosure item to clarify further the second aspect of the related party disclosure that we proposed and that will be required under the Item, which is disclosure regarding specific material relationships involving or related to the current ABS transaction and the pool assets. Unlike non-ABS or pool asset specific relationships the general character of which only need be described if outside the ordinary course of business or not on arm's length terms, there is no such limiter for relationships specific to the transaction, other than materiality. An ABS or pool asset specific transaction with a related party may still be material even if made in the ordinary course of business or on arm's length terms. For any ABS or pool asset specific transaction, the material terms and approximate dollar amount involved

[336] See Item 1116 of Regulation AB.

[337] See also note 133.

[338] See Item 601(b)(8) of Regulation S–K.

[339] See Item 1117 of Regulation AB.

[340] *I.e.,* master servicer, each affiliated servicer, each unaffiliated servicer that services 20% or more of the pool assets and any other servicer that performs a material aspect of the servicing of the pool assets.

[341] For the definition of affiliate, see note 147 above and accompanying text.

[342] See Item 1119 of Regulation AB.

will need to be described, to the extent material.[343]

We are not including a reference to underwriters in this disclosure item, including the proposed example of material credit arrangements relating to the pool assets provided by an underwriter, because existing Item 508 of Regulation S–K [344] already requires disclosure of material relationships with such parties.[345] We would expect comparable disclosure of relationships and transactions between the sponsor, depositor and issuing entity and an underwriter, where material, in connection with that information.

d. Ratings

We are adopting our disclosure Item regarding ratings as proposed.[346] As proposed, the Item codifies current industry practice by requiring disclosure of whether the issuance or sale of any class of the offered securities is conditioned on the assignment of a rating by one or more rating agencies, whether or not NRSROs.[347] If so, each rating agency must be identified as well as the minimum rating that must be assigned. A description regarding any arrangements to have such rating monitored while the securities are outstanding also is required.

e. Reports and Additional Information

Post-issuance reporting of information regarding an ABS transaction is important to an understanding of transaction performance and, hence, investment decisions, including whether existing holders should sell their securities and whether prospective buyers should purchase them. Such disclosures in the ABS context generally involve both updated information about pool performance as well as information on allocations and distributions of cash flows to holders of the securities and other third parties according to the flow of funds. Investors necessarily consider the availability and quality of transaction reporting in determining whether, and at what level, to invest in such securities.

In addition to disclosure regarding reports to be filed with the Commission, we are adopting our proposed requirement for disclosure of the reporting investors can expect to receive and be able to access.[348] This disclosure is to include a description of the reports or other documents required under the transaction agreements, including the information to be included in the reports, the schedule and manner of their distribution or availability and who will prepare the reports.

We also are adopting our proposed requirement to disclose whether Web site access will be provided to Commission and transaction reports.[349] Commenters supported this proposal.[350] Disclosure is to be provided in the prospectus regarding whether the issuing entity's annual reports on Form 10–K, distribution reports on Form 10–D, current reports on Form 8–K and amendments to those reports filed or furnished with the Commission will be made available on the Web site of a specified transaction party (*e.g.*, sponsor, depositor, servicer, issuing entity or trustee) as soon as reasonably practicable after such material is electronically filed with, or furnished to, the Commission. As the Commission specified in its release adopting similar disclosure for accelerated filers, we interpret the ''as soon as reasonably practicable'' standard to mean that the report would be available, barring unforeseen circumstances, on the same day as filing.[351] In addition, disclosure will be required regarding:

- Whether other reports to security holders or information about the asset-backed securities will be made available in this manner;
- If filings and other reports will be made available in this manner, the Web site address where such filings may be found; and
- If filings and other reports will not be made available in this manner, the reasons why they will not and whether an identified transaction party voluntarily will provide electronic or paper copies of those filings and other reports free of charge upon request.

The guidance provided in the Commission's release adopting similar disclosure for accelerated filers, such as how the Web site access can be provided, will be equally applicable to this disclosure.[352] In addition, the inclusion of the Web site address in response to the disclosure requirement will not, by itself, include or incorporate by reference the information on the site into the prospectus or registration statement, unless the registrant otherwise acts to incorporate the information by reference.[353] Similarly, the disclosure requirement is not designed to create new duties under the antifraud provisions of the federal securities laws or in private rights of action or to alter any existing liability provisions. For example, the new disclosure will not separately create or otherwise affect any duty to update prior statements.

10. Alternatives to Present Third Party Financial Information

As discussed in Sections III.B.7. and 8., there are instances both today and under our final rules when additional financial information regarding third parties is required in ABS filings, including financial information about significant obligors and significant providers of enhancement or other support. Over time, through several no-action letters and interpretations, the staff has permitted alternative methods to present or refer to this information if it exists in other Commission filings of the third party. The first alternative allows incorporation by reference of the third party's financial information into the ABS filing. The second alternative, available only with respect to certain unrelated significant obligors, allows an ABS filing to reference the significant obligor's Exchange Act reports on file with the Commission in lieu of providing the information. We proposed codifying both of these alternatives.

Commenters expressed support for the flexibility provided by these proposed alternatives,[354] and we are adopting both substantially as proposed. As stated in the Proposing Release, both alternatives relate only to the presentation of financial information regarding the third party. Information specific to the asset-backed securities transaction, such as the material terms of the pool assets in the case of

[343] Some of these relationships may be disclosed already under other Regulation AB items. Duplicate disclosure is not required.

[344] 17 CFR 229.508.

[345] We note that the requirement in Item 508 of Regulation S–K for material relationships is also not limited to transactions outside the ordinary course or not on arm's length terms. Where material, such relationships are to be described.

[346] See Item 1120 of Regulation AB. For additional information regarding the Commission's current review of the role of credit rating agencies in the operation of the securities markets, including whether credit ratings should continue to be used for regulatory purposes under the federal securities laws, see note 137 above and accompanying text.

[347] As proposed, we are not codifying one of the items specified for disclosure in the 1992 Release, which was an explanation of what an NRSRO rating addresses and the characteristics the rating does not address. We believe this issue no longer requires general clarification with respect to the ABS market.

[348] See Item 1118 of Regulation AB.

[349] ''Accelerated filers,'' as defined in 17 CFR 240.12b–2, already are required to include similar disclosure in their annual reports on Form 10–K. See Item 101(e)(4) of Regulation S–K.

[350] See, *e.g.*, Letter of ABA.

[351] See Release No. 33–8128 (Sep. 5, 2002) [67 FR 58480].

[352] *Id.*

[353] In Release No. 33–7856 (Apr. 28, 2000) [65 FR 25843], we provided interpretive guidance on the effect of including a Web site address in other situations. We are not changing that guidance for those other situations. See also Section III.B.4. and note 282 above.

[354] See, *e.g.*, Letters of ABA and BMA.

significant obligors or the enhancement in the case of an enhancement provider, will still be required as is the case today.

a. Incorporation by Reference

The first alternative is derived from several staff no-action letters that permit the incorporation by reference of financial information regarding certain bond insurers from their or their affiliated entities' Exchange Act reports.[355] We are codifying an expansion of these positions substantially as proposed to permit incorporation by reference (by means of a statement in the ABS filing to that effect) of the required financial information of any enhancement provider from its Exchange Act reports (or the reports of the entity that consolidates such party), if the following conditions are met: [356]

- The third party or entity that consolidates the third party in its financial statements is subject to the Exchange Act reporting requirements;
- The third party or entity that consolidates the third party in its financial statements is current with its Exchange Act reporting for the past twelve months (or such shorter period that it has been required to file reports); [357]
- The reports to be incorporated by reference include (or properly incorporate by reference) the financial statements of the third party; and [358]
- If incorporated by reference into in a prospectus or registration statement, the prospectus also states that all documents subsequently filed by such third party, or the entity that consolidates the third party, prior to the termination of the offering also will be deemed to be incorporated by reference into the prospectus.

As proposed, this option also is available under the same conditions to include the information required of any significant obligor.

Because we are expanding the basic definition of asset-backed security to registered offerings on Form S–1, we also are permitting incorporation by reference of third party financial information for ABS offerings registered on that form, as proposed. In addition, several amendments to our existing incorporation by reference and updating rules are necessary to reflect incorporation by reference of information of third party filings in Securities Act registration statements.[359] For example, if the registrant is relying on the incorporation by reference alternative for third party financial information, it will need to make an undertaking in its registration statement, similar to that required for existing registration statements that rely on incorporation of subsequent Exchange Act reports of the registrant,[360] that, for purposes of determining any liability under the Securities Act, each filing of the annual report of the third party that is incorporated by reference in the registration statement will be deemed to be a new registration statement relating to the securities offered by that registration statement, and the offering of such securities at that time will be deemed to be the initial bona fide offering thereof.

As proposed, we also are adding three instructions to remind registrants of our other existing incorporation by reference and updating requirements. The first instruction reminds ABS issuers that in addition to the conditions above, any information incorporated by reference must comply with any other applicable Commission rules pertaining to incorporation by reference.[361] The second instruction reminds issuers that any applicable requirements under the Securities Act or our rules and regulations regarding the filing of a written consent for the use of incorporated material also applies to the material incorporated by reference.[362] These consent requirements reflect the application of longstanding requirements under the Securities Act.[363] The third instruction reminds issuers that any undertakings set forth in Item 512 of Regulation S–K apply to any material incorporated by reference in a registration statement or prospectus.

b. Reference Information

The second alternative to presenting third party financial information is derived from several staff no-action letters and interpretive positions that permit reference to the Exchange Act reports of a significant obligor in lieu of inclusion of the obligor's financial information in the filing or incorporating them by reference.[364] In particular, these positions recognize the practical difficulties that may be involved in obtaining the required information or the necessary consent to use the information, or the ability to evaluate the information, from an unaffiliated significant obligor whose securities have been securitized without any obligor involvement in the ABS transaction. A common example of such a situation is a sponsor that acquires outstanding corporate debt securities of other issuers in purely secondary market transactions (*i.e.*, there is no relationship to the issuer or the issuer's distribution) and securitizes them in a transaction where one or more of these issuers is a significant obligor.

Under our final rules, an ABS filing may include a reference to a significant obligor's Exchange Act reports (which would include a statement of how those reports may be accessed, including the third party's name and Commission file number) in lieu of providing the required financial information in the filing, if the following conditions are met: [365]

- Neither the significant obligor nor any of its affiliates has had a direct or indirect agreement, arrangement, relationship or understanding, written or otherwise, relating to the asset-backed securities transaction, and neither the third party nor any of its affiliates is an affiliate of the sponsor, depositor, issuing entity or underwriter

[355] See *Financial Security Assurance, Inc.* (Jul. 16, 1993); *MBIA Insurance Corp.* (Sep. 6, 1996); and *AMBAC Indemnity Corp.* (Dec. 19, 1996).

[356] If the conditions are not met, the required information will need to be provided in the filing.

[357] An instruction provides that, if neither the third party nor any of its affiliates has had a direct or indirect agreement, arrangement, relationship or understanding, written or otherwise, relating to the ABS transaction, and neither the third party nor any of its affiliates is an affiliate of the sponsor, depositor, issuing entity or underwriter of the ABS transaction, then this condition is qualified by the knowledge of the ABS registrant.

[358] An instruction provides that, if incorporation by reference is being used with respect to information about a significant obligor that is an asset-backed issuer and the pool assets relating to the significant obligor are asset-backed securities, then the term ''financial statements'' means the information about the asset-backed securities discussed in Section III.B.7 (*e.g.*, Item 3.(a) of Item 1112 of Regulation AB for a registration statement or Rule 424 prospectus, and Item 3.(b) of Item 1112 of Regulation AB for a Form 10–K or 10–D). The instruction also provides that information required by Instruction 3.a. of Item 1112 may be incorporated by reference from a prospectus included in an effective Securities Act registration statement or filed pursuant to Rule 424.

[359] See, *e.g.*, amendments to Items 10 and 512 of Regulation S–K and Securities Act Rule 411.

[360] See, *e.g.*, Item 512(c) of Regulation S–K.

[361] Other such rules include Rule 10(d) of Regulation S–K; Rule 303 of Regulation S–T (17 CFR 232.303); Rule 411 of Regulation C; and Exchange Act Rules 12b–23 and 12b–32 (17 CFR 240.12b–23 and 17 CFR 240.12b–32).

[362] See, *e.g.*, Securities Act Rule 439 (17 CFR 230.439).

[363] See, *e.g.*, Section 7 of the Securities Act (15 U.S.C. 77g).

[364] See, *e.g.*, *Morgan Stanley & Co., Inc.* (Jun. 24, 1996). This letter related to non-ABS rather than ABS, but the concept has been subsequently extended to ABS by the staff. See Section VIII.B.3.b.i. of the Division of Corporation Finance's ''Current Issues and Rulemaking Projects'' (Nov. 14, 2000).

[365] Like the incorporation by reference alternative, the reference alternative will be available to ABS offerings registered on Form S–1.

of the asset-backed securities transaction;[366] and

• To the knowledge of the registrant, the significant obligor meets at least one of the eligibility categories discussed below.

The first condition clarifies that the significant obligor must be unaffiliated and otherwise not involved with the ABS transaction.[367] While some commenters suggested expanding existing practice to allow the reference alternative for all third parties, regardless of their affiliation or involvement with the transaction, we are not persuaded that it is appropriate at this time to expand existing practice.[368] As we explained in the Proposing Release, if the obligor was affiliated or involved with or participating in the ABS transaction, the policy argument to permit reference to the third party's reports in lieu of presenting the information or incorporating it by reference because of the potential impracticality in obtaining it is not present. As a result, the reference alternative will continue to be unavailable for financial information regarding such parties, including significant enhancement providers due to their involvement in the transaction. Instead, the information must either be included in the filing or, if the conditions in Section III.B.10.a. are met, incorporated by reference.

The second condition refers to the categories of significant obligors eligible for the reference alternative. Consistent with existing staff positions and market practice, the eligible categories relate to the existing Form S–3 eligibility requirements of the significant obligor. For example, the first category is a significant obligor eligible to use Form S–3 or F–3 for a primary offering of non-investment grade securities pursuant to General Instruction I.B.1 of such forms, which requires a $75 million public float.[369] A second category is a significant obligor eligible to register the related pool assets under General Instruction I.B.2 of Form S–3 or F–3 (*i.e.*, the pool assets relating to the significant obligor are non-convertible investment grade securities). A third and fourth category relate to pool assets guaranteed by a parent or subsidiary of the significant obligor where both the information requirements under Rule 3–10 of Regulation S–X[370] and applicable Form S–3 or Form F–3 eligibility requirements (such as General Instruction I.C.3 of Form S–3) are met.

A fifth category relates to significant obligors that are U.S. government-sponsored enterprises. Several GSE's historically have not been subject to Exchange Act reporting requirements. The staff has made accommodations for securitizations of the securities issued or guaranteed by these entities so long as the GSE's have outstanding securities held by non-affiliates with a market value of $75 million or more and publicly make available audited financial statements prepared in accordance with generally accepted accounting principles and extensive business information. As proposed, the final Item clarifies the meaning of this requirement by permitting reference if the GSE had $75 million outstanding of securities held by non-affiliates and the GSE makes information publicly available on an annual and quarterly basis, including audited financial statements prepared in accordance with generally accepted accounting principles covering the same periods that would be required for audited financial statements under Regulation S–X and non-financial information consistent with that required by Regulation S–K.

A final category relates to significant obligors where the pool assets in question are themselves asset-backed securities. As proposed, reference is permitted in this instance if the significant obligor is filing Exchange Act reports and is current in such reporting for at least twelve calendar months and any portion of a month immediately preceding the filing referencing the obligor's reports (or such shorter period that the obligor was required to file such materials). We also are adding an instruction that if the reference alternative is being used for purposes of a registration statement under the Securities Act or the Exchange Act or a prospectus to be filed pursuant to Rule 424, a reference also must be included to the final prospectus or effective registration statement for the third party asset-backed securities that contains the information about the asset-backed securities discussed in Section III.B.7.[371]

As we noted in the Proposing Release, because of the possibility that corporate debt issuers can suspend their Exchange Act reporting requirements, the staff has acceded to the requests of ABS issuers securitizing such debt to include a provision that, if an ABS issuer is unable or unwilling to provide the significant obligor's financial information, the transaction, or the portion of the transaction, will terminate, such as by distributing the pool assets to investors or selling the pool assets and liquidating the asset-backed securities. This option to terminate the transaction was suggested by market participants who believed that the alternative of including the necessary information in the ABS filing might become impractical or impossible. Consistent with this practice, our proposal would have allowed termination as an alternative to providing the information.

Several commenters objected to codifying this position.[372] However, many of these commenters appeared to be under the belief that the existing option to terminate the transaction was a staff requirement that was proposed to be codified. The underlying requirement has been and remains that because of the concentration of the significant obligor in the asset pool, financial information about that significant obligor is required. The reference alternative, like the incorporation by reference alternative, represents an alternative that may be available to present that disclosure. Each alternative is subject to conditions, including that the third party is reporting under the Exchange Act. If the third party ceases to report, the reference or incorporation by reference alternative will no longer be available because the obligor will no longer file reports with the Commission, but the requirement to provide the financial information about the significant obligor remains.[373] Through the course of reviews of registration statements by the staff, ABS issuers decided to include termination provisions in their transaction

[366] See Section III.A.6. as to registration and resulting disclosure issues if the ABS transaction also comprises a distribution of underlying securities. These registration and disclosure issues are not dependent on whether the issuer of the underlying securities is a significant obligor. The reference alternative is not available with respect to information about the issuer of the underlying securities if registration is required pursuant to Securities Act Rule 190.

[367] Of course, if the registrant is in possession of material nonpublic information about the third party being referenced, such information must be disclosed. The absence of such material nonpublic information was a determining factor in the original staff no-action letters on this topic.

[368] See, *e.g.*, Letters of ABA and NYCBA.

[369] Public float is the aggregate market value of a company's outstanding voting and non-voting common equity (*i.e.*, market capitalization) minus the value of common equity held by affiliates of the company. See General Instruction I.B.1 to Form S–3.

[370] 17 CFR 210.3–10.

[371] *E.g.*, the information required by Item 3.(a) of Item 1112 of Regulation AB.

[372] See, *e.g.*, Letters of ABA; ASF; BMA; and NYCBA.

[373] For example, if the information is available from another source (*e.g.*, a Web site), while the incorporation by reference or reference alternative would not be available, the ABS issuer could physically include the information in its Exchange Act report.

structures to address their unwillingness to provide the information if the reference alternative was no longer available.

To avoid confusion, we are not codifying the proposed undertaking that references the termination option in lieu of providing the information if the reference alternative is not available. As before, issuers can still structure their securities to provide for termination if they are unwilling or unable to provide the required financial information.[374] However, we are not providing an exception to the requirement to provide the required financial information if the underlying issuer ceases reporting. The need for the information about the underlying issuer in the reports for the asset-backed securities does not change due to a change in the reporting status of the underlying issuer.

C. Communications During the Offering Process

1. ABS Informational and Computational Material

a. Current Requirements

As we explained in the Proposing Release, the Securities Act currently restricts the types of offering communications that a registrant or other parties subject to the Act's provisions (such as underwriters) may use during a registered public offering.[375] The nature of the restrictions depends on the period during which the communications are to occur. Before the registration statement is filed, all offers, in whatever form, are prohibited.[376] Between the filing of the registration statement and its effectiveness, offers made in writing (including by e-mail or Internet), by radio or by television are limited to a ''statutory prospectus'' that conforms to the information requirements of Section 10 of the Securities Act.[377] As a result, the only written material that is permitted in connection with the offering of the securities during this period is a preliminary prospectus meeting the requirements of Section 10, which must be filed with the Commission.[378] Even after the registration statement is declared effective, offering participants may still make written offers only through a statutory prospectus, except that they may use additional written offering materials, if a final prospectus that meets the requirements of Section 10(a) of the Securities Act precedes or accompanies those materials.[379]

The structuring of various classes of ABS can be quite complex involving a detailed analysis of the asset pool and a complicated allocation of pool asset cash flows. These factors may vary from transaction to transaction. Given the important focus on tranching and pool characteristics, including potential cash flow patterns, sponsors or underwriters may wish to provide to potential investors computational materials and term sheets identifying the structure and underlying assets prior to finalizing the deal structure and printing the final prospectus. These materials may help investors understand the proposed transaction and analyze prepayment assumptions and other issues affecting yield and flow of funds. This information, which often includes detailed statistical and tabular data, would be impractical to provide orally. Historically, few investors had the computer resources to prepare these analytics themselves.

Following a series of staff no-action letters from the mid-1990's, issuers of Form S–3 ABS have been permitted to use term sheets and computational material after the effectiveness of a registration statement but before availability and delivery of a final Section 10(a) prospectus.[380] Under these no-action letters, three basic types of materials can be used: Structural term sheets; collateral term sheets; and computational materials. Structural term sheets identify the proposed structure of the securities being offered, such as the parameters of the various types of classes offered. Collateral term sheets provide information regarding the proposed underlying assets. Computational materials contain statistical data displaying for a particular class of asset-backed securities the yield, average life, expected maturity, interest rate sensitivity, cash flow characteristics or other such information under specified prepayment, interest rate, loss or related scenarios.

All of the existing staff no-action letters contain filing requirements for the use of these materials, and provide that no confirmations of sale can be sent until the filing requirements are met. The filing requirements vary depending upon the type of material used and how it is used. Subject to various conditions, any collateral term sheet used before the final prospectus is delivered that represents a substantive change from a prior collateral term sheet must be filed on Form 8–K within two business days after first use and incorporated by reference into the registration statement for the offering.

Under slightly more complex conditions, structural term sheets and computational materials used before the final prospectus is available must be filed on Form 8–K prior to or with the filing of the final prospectus and incorporated by reference into the registration statement. If the materials are provided after the final prospectus is available but before it is delivered, they must be filed as soon as possible but not later than two business days after first use. Materials that relate to abandoned structures or that are furnished before the structure of the entire issue is finalized to investors which have not indicated their intention to purchase the ABS need not be filed.

Commenters confirmed our understanding that where they are used, term sheets and computational material often represent the primary, if not the only, written materials that currently are used to offer asset-backed securities.[381] As we stated in the Proposing Release, we also understand that advances in technology over the decade since the first no-action action letter was issued have raised several interpretive issues regarding the scope and application of the letters. For example, an increasing number of investors possess or have access to the analytical capacity to perform their own models and scenarios on pool data and therefore may request data at the individual pool asset level, or ''loan level'' data, instead of summarized charts and tables.[382] There had been some concern over whether the existing no-action letters would have permitted disclosure at this level of granularity. In addition, various third party services have developed over the past decade that allow issuers and underwriters to import collateral and

[374] Disclosure of such provisions should be made clear to investors. In addition, as we stated in the Proposing Release, if the termination option was elected, the transaction, or that portion of the transaction, must terminate before updated information regarding the third party would be required. Provisions that the transaction would terminate ''in a reasonable time'' or after a given period of time would not be an alternative to providing the required information, just as such delays would not be available with respect to providing the required information itself.

[375] See Section 5 of the Securities Act (15 U.S.C. 77e). For more information on the background and current operation of Securities Act communication requirements, as well as our recent proposals in this area, see the Offering Process Release.

[376] See Section 5(c) of the Securities Act (15 U.S.C. 77e(c)).

[377] 15 U.S.C. 77j. See Section 5(b)(1) of the Securities Act (15 U.S.C. 77e(b)(1)).

[378] Oral offers are allowed during this period and do not have to satisfy the informational requirements of Section 10. See note 375 above.

[379] 15 U.S.C. 77j(a). See Section 2(a)(10) (15 U.S.C. 77b(a)(10)) and Section 5(b)(1) of the Securities Act.

[380] See note 34 above.

[381] See, *e.g.*, Letter of ABA.

[382] See, *e.g.*, ''Investors Gain Clout, Urge Specifics,'' Asset-Backed Alert, Jun. 6, 2003.

structural data about a proposed transaction into a format that allows investors to conduct their own analytics and computations with self-selected assumptions and estimates in lieu of relying on underwriters to perform these functions for them. This had raised questions over what information should be filed with the Commission under the no-action letters where such services are used.

b. Exemptive Rule

We proposed to codify the concept in the staff no-action letters that permits the use of ABS informational and computational material after the effectiveness of a Form S–3 registration statement for an offering of asset-backed securities but before delivery of the final Section 10(a) prospectus. Commenters overall supported the proposals, although several commenters representing primarily issuers and their representatives requested several expansions beyond the existing no-action letter positions.[383] For example, these commenters requested expanding the type of materials that may be used, expanding the ability to use materials to Form S–1 ABS offerings, allowing the use of materials before effectiveness of the registration statement and excluding underwriter-prepared material from filing and Securities Act liability requirements.

As discussed previously, we recently issued expansive proposals to revise the Securities Act regulatory process for all securities offerings.[384] These proposals directly address matters such as the appropriate use, filing and liability requirements for communications during the offering process, including whether communications prepared by separate parties should be treated differently. As we indicated in the Proposing Release, requests for further relaxation of the communications restrictions in the ABS context raise broad issues that also are implicated by the proposals in the Offering Process Release. Given the current evaluation of these broader issues in that release, we do not think it would be appropriate at this time to make substantial changes to our proposed approach with respect to ABS communications. The existing staff no-action letters already permit ABS Form S–3 offerings to use significantly more material outside of the statutory prospectus than non-ABS Form S–3 offerings. We plan to address the issue of whether additional accommodations to the communications restrictions would be appropriate, including for ABS offerings, in connection with the Offering Process Release. Therefore, our approach here remains codifying the longstanding existing allowance for additional materials in the ABS context. We will evaluate the comments we received regarding ABS communications in connection with the Offering Process Release. We also encourage ABS market participants to comment specifically on the proposals in that release.

Accordingly, today we are adopting, as proposed, an exemption from Section 5(b)(1) of the Securities Act for the use of ABS informational and computational materials in offerings of Form S–3 ABS after the effectiveness of a registration statement but before delivery of the final Section 10(a) prospectus.[385] As we stated in the Proposing Release, given the current use of these materials in providing an increased flow of information to investors, the flexibility to tailor materials to specifically identified investor needs, and the liability for false and misleading statements or omissions, we believe permitting the use of ABS informational and computational material for Form S–3 ABS during such period is appropriate in the public interest and consistent with the protection of investors under the conditions discussed below, including the filing conditions.[386] However, as we stated in the Proposing Release and similar to our existing communications exemptions regarding business combination transactions, the rule makes clear that the exemption is not available to communications that may technically comply with the rule, but have the primary purpose or effect of conditioning the market for another transaction or are part of a plan or scheme to evade the requirements of Section 5 of the Securities Act.[387]

As proposed, the exemption continues to include filing requirements for such material and only will be available with respect to registered offerings of investment grade asset-backed securities that meet the requirements of General Instruction I.B.5 of Form S–3, which is consistent with the existing staff no-action letters. As discussed above, we do not believe it is appropriate at this time to either expand the exemption to additional offerings or alter the basic filing requirements under the letters, except as discussed below regarding consolidating those requirements, as proposed.

c. Definition of ABS Informational and Computational Material

We explained in the Proposing Release that there is an overlap in the existing no-action letters between the descriptions of structural term sheets, collateral term sheets and computational materials. There also are differences regarding which and how materials are to be filed depending on the type of materials used. These differences can create uncertainty as to when material must be filed given the overlapping descriptions.

We proposed consolidating the descriptions of the materials that may be used under a single definition of ''ABS informational and computational material.'' Although we were proposing to consolidate the descriptions, we specifically noted that we were not intending to change the scope of materials that may be used. Nevertheless, several commenters were concerned that the proposed consolidated definition could possibly be read as somehow more restrictive than the no-action letters and suggested revisions to more closely track the descriptions of such material in the existing no-action letters to avoid any confusion.[388]

We believe many of the examples provided by commenters of information used today were already covered by the proposed consolidated definition. However, in response to these comments and to clarify further that we are not intending to change current practice, we are revising the definition of ''ABS informational and computational material'' to more closely track the descriptions in the existing staff no-action letters. We also are adding several non-exclusive examples provided by commenters of information provided today that may not have been otherwise clear from the descriptions of the materials in the no-action letters, such as information on key parties to the transaction, to clarify the scope of

[383] See, *e.g.*, Letters of ABA; ASF; BMA; FSR; and NYCBA.

[384] See note 33 above.

[385] See Securities Act Rule 167. Similar to our existing rules that allow communications in business combination transactions outside of the Section 10 prospectus, for ABS informational and computational material we are adopting a general Securities Act Rule that sets forth the basic exemption and its conditions (Securities Act Rule 167) and a rule under Regulation C (17 CFR 230.401 through 230.498) that sets forth the filing requirements for such communications (Securities Act Rule 426). For more on our exemptive rules in the business combination context, see Release No. 33–7760 (Oct. 22, 1999) [64 FR 61408].

[386] As is the case under the existing no-action letters, such material can be used regardless of whether a preliminary prospectus is prepared and used.

[387] For similar provisions, see Securities Act Rules 165 and 166 (17 CFR 230.165 and 17 CFR 230.166). We also proposed similar provisions in the Offering Process Release.

[388] See, *e.g.*, Letters of ABA; ASF; BMA; CMSA; FSR; and NYCBA.

materials that can be used. Finally, we are expanding the scope of the definition in response to comment to include certain basic factual information about the offering process.[389]

As a result, ABS informational and computational material will be defined as a written communication consisting solely of one or some combination of the following:

- Factual information regarding the asset-backed securities being offered and the structure and basic parameters of the securities, such as the number of classes, seniority, payment priorities, terms of payment, the tax, ERISA and other legal conclusions of counsel, and descriptive information relating to each class (*e.g.*, principal amount, coupon, minimum denomination, anticipated price, yield, weighted average life, credit enhancements, anticipated ratings, and other similar information relating to the proposed structure of the offering);
- Factual information regarding the pool assets underlying the asset-backed securities,[390] including origination, acquisition and pool selection criteria, information regarding any prefunding or revolving period applicable to the offering, information regarding significant obligors, data regarding the contractual and related characteristics of the underlying pool assets (*e.g.*, weighted average coupon, weighted average maturity, delinquency and loss information and geographic distribution) and other factual information concerning the parameters of the asset pool appropriate to the nature of the underlying assets, such as the type of assets comprising the pool and the programs under which the loans were originated;
- Identification of key parties to the transaction, such as servicers, trustees, depositors, sponsors, originators and providers of credit enhancement or other support, including a brief description of each such party's roles, responsibilities, background and experience;
- Static pool data, as discussed previously, such as for the sponsor's and/or servicer's portfolio, prior transactions or the asset pool itself; [391]
- Statistical information displaying for a particular class of asset-backed securities the yield, average life, expected maturity, interest rate sensitivity, cash flow characteristics, total rate of return, option adjusted spread or other financial or statistical information relating to the class or classes under specified prepayment, interest rate, loss or other hypothetical scenarios. Examples of such information under the definition include:
- Statistical results of interest rate sensitivity analyses regarding the impact on yield or other financial characteristics of a class of securities from changes in interest rates at one or more assumed prepayment speeds;
- Statistical information showing the cash flows that would be associated with a particular class of asset-backed securities at a specified prepayment speed; and
- Statistical information reflecting the financial impact of losses based on a variety of loss or default experience, prepayment, interest rate and related assumptions.
- The names of underwriters participating in the offering of the securities, and their additional roles, if any, within the underwriting syndicate;
- The anticipated schedule for the offering (including the approximate date upon which the proposed sale to the public will begin) and a description of marketing events (including the dates, times, locations and procedures for attending or otherwise accessing them); and
- A description of the procedures by which the underwriters will conduct the offering and the procedures for transactions in connection with the offering with an underwriter or participating dealer (including procedures regarding account-opening and submitting indications of interest and conditional offers to buy).

As we stated in the Proposing Release, the definition of ABS informational and computational material is intended to include existing structural term sheets, collateral term sheets and computational materials and also to clarify that several additional items are permitted, such as static pool data and basic information about the offering process. Consistent with the unified filing rule we are adopting for these materials discussed below, ABS informational and computational material may be used that includes one or more of these basic types of materials in one set of materials without concern over the characterization of the material or differing standards regarding when it must be filed.[392]

We also are reiterating several clarifications from the Proposing Release regarding the scope of the materials. First, and as noted above, some had been concerned whether the existing no-action letters would permit ''loan level'' information to be provided. We believe providing data at the individual pool asset level was already consistent with the no-action letters and is permitted under the exemptive rule. However, we again note, as we did in the Proposing Release, that in providing such detail issuers and underwriters should be mindful of any privacy, consumer protection or other regulatory requirements regarding the disclosure of individual information, such as including Social Security Numbers, especially given that in most cases the data must be publicly filed with the Commission.

Second, questions had arisen over what information should be considered ABS informational and computational material and filed with the Commission under the no-action letters, and by extension our exemptive rule, regarding investor analytics or other third party services that allow issuers and underwriters to import into a system or otherwise provide data regarding structure or underlying assets that investors can then use to conduct their own analytics and computations. As we stated in the Proposing Release, in the case of third party services, a particular relationship with the individual third party service may affect the analysis, such as whether the issuer or the underwriter are affiliates with the service provider or how the compensation is structured with the third party. Otherwise, if the investor analytics or third party service simply allow an investor to perform its own calculations based on collateral and structural inputs and models provided by the issuer or underwriter, only the inputs, models and other information provided by the issuer or underwriter would constitute ABS informational and computational material for purposes of the exemptive rule.[393]

[389] Note we also proposed to add these items to Rule 134 in the Offering Process Release.

[390] We note this may include graphical material regarding the pool assets, such as photographs, maps and site plans in CMBS transactions.

[391] Such information could be provided through a Web site address for inclusion in the ABS informational and computational material under the same conditions specified in Section III.B.4.b. In addition, disclosure required by Item 1105(e) of Regulation AB is to be provided in ABS informational and computational material, if applicable.

[392] As a result, the definition subsumes the concept of ''Series Term Sheets'' addressed in the Greenwood Trust Company no-action letter where a Series Term Sheet was defined as a combined collateral and structural term sheet. See note 34 above.

[393] Any subsequent modification or updates to the information provided by the issuer or an underwriter would be considered new ABS informational and computational material no different than if a separate set of materials were prepared. As was the case under the no-action letters, under the final rule, data presented in ABS informational and computational material that are

Some also had questioned the format in which the material must be filed, as the third party service may employ a unique file format for the data inputs. Consistent with an allowance that already existed in the no-action letters and which will continue in the exemptive rule, discussed below, issuers and underwriters may aggregate data presented in ABS informational and computational material that are to be filed and file such data in consolidated form, so long as any such aggregation does not result in the omission of any information that should have been filed or makes the information misleading. As we stated in the Proposing Release, presentation of the information should be in an understandable form. While the preference is to file material using the same presentation used for investors, just as with other documents that contain computer instructions or formatting code, executable code used by a program to read the information is not to be filed.[394] As is the case today, issuers and underwriters should contact the staff with any specific questions regarding the filing of particular materials.

d. Conditions for Use

As proposed, the final rule requires two conditions for ABS informational and computational material, both of which are consistent with the existing no-action letters:

- The communications shall be filed to the extent required under new Rule 426 (discussed in Section III.C.1.e.); and
- The communication shall include prominently on the cover page:
- The issuing entity's name and depositor's name;
- The Commission file number for the related registration statement;
- A statement that the communication is ABS informational and computational material used in reliance on the exemptive rule; and
- A legend that urges investors to read the relevant documents filed or to be filed with the Commission because they contain important information. The legend also shall explain to investors that they can get the documents for free at the Commission's Web site and describe which documents are available free from the issuer or an underwriter.

As we stated in the Proposing Release, we are not conditioning use on providing additional legends from the no-action letters that the information contained in the material supercedes all prior ABS informational and computational material for the offering or will be superseded by the description of the offering contained in the Section 10(a) prospectus.[395] Instead, the legend we are adopting is designed to alert investors of the documents filed or to be filed with the Commission. We also are not requiring the condition in the no-action letters that any required filings must be made before an Exchange Act Rule 10b–10 confirmation of sale may be sent.[396] As we explained in the Proposing Release, the filing requirement discussed below is a separate condition under Commission rules, and thus conditioning the exemption on filing before sending of the Rule 10b–10 confirmation does not appear to be warranted as an additional incentive for filing.

We also explained in the Proposing Release that, in addition to the legends discussed above, some issuers and other users of these materials have been including legends or disclaimers in the materials that are inappropriate. As discussed more fully below, the materials are considered prospectuses and in many instances also must be filed with the Commission and incorporated by reference into the registration statement. Thus, as we stated in the Proposing Release, disclaimers of responsibility or liability that are not appropriate for a prospectus or registration statement also are not appropriate for these materials.

Examples of inappropriate legends or disclaimers that we identified include disclaimers regarding accuracy or completeness and statements requiring investors to read or acknowledge that they have read any disclaimers or legends or the registration statement.[397] Language indicating that the communication is neither a prospectus nor an offer to sell or a solicitation or an offer to buy also is inappropriate. Finally, as the information in many instances must be publicly filed, statements that the information is privileged, confidential or otherwise restricted as to use or reliance are inappropriate.

Several commenters indicated that they wish to include additional legends in their materials and requested an instruction clarifying that the prescribed legend in the exemptive rule is not exclusive and other legends may be included.[398] We do not believe such an instruction is necessary. However, some of the legends suggested by commenters also would be inappropriate. For example, as explained in the Offering Process Release, we interpret Section 12(a)(2) and Section 17(a)(2) as not taking into account information conveyed only after the date of sale, which includes the date of a contract for sale (*e.g.*, the date of the investment decision). As such, it would be inappropriate to include a legend that information contained in ABS informational and computational material will be superceded or changed by the final prospectus, even if limited to the extent the information was included in the final prospectus, if the final prospectus is not delivered until after the date of the contract for sale.

Apart from the two conditions for the exemption, we also are clarifying, as proposed and consistent with a similar provision in our communications exemptions for business combination transactions,[399] that the exemption for ABS informational and computational material is applicable not only to the offeror of the asset-backed securities, but also to any other party to the asset-backed securities transaction and any persons authorized to act on their behalf that may need to rely on and complies with the rule in communicating about the transaction. As we explained in the Proposing Release, this ensures that affiliates, underwriters, dealers and others acting on behalf of the parties to the transaction are permitted to rely on the exemption if necessary. While we realize that in many circumstances the exemptions will not be necessary for persons other than the parties to the transaction or the parties making the offer, we do not want to chill the appropriate free flow of the information where it would be helpful to investors and efficient capital formation.

We also are codifying as requested a provision in the existing no-action letters that failure by a particular underwriter to cause the filing of materials in connection with an offering will not affect the ability of any other underwriter who has complied with the procedures to rely on the exemption.

to be filed may be aggregated and filed in consolidated form, so long as any such aggregation does not result in the omission of any information that should have been filed or makes the information misleading.

[394] See, *e.g.*, Rule 106 of Regulation S–T (17 CFR 232.106).

[395] As we stated in the Proposing Release, one of the reasons such statements do not appear applicable is that not all of the information—particularly the computational material—is included or updated in subsequent materials or the final prospectus. In addition, and as discussed subsequently in the text, there are additional problems with such statements. For more information, see the Offering Process Release.

[396] See 17 CFR 240.10b–10.

[397] Such disclaimers of responsibility by the issuer are also inappropriate.

[398] See, *e.g.*, Letters of ASF; BMA; and FSR.

[399] See, *e.g.*, Securities Act Rule 165(d) (17 CFR 230.165(d)).

While this position was mentioned in the text of the Proposing Release, several commenters wished to codify the provision to avoid any potential confusion.[400] We are including it in the final rule as it appears in the existing no-action letters.

We are adding another provision in response to comment that currently exists in the communications exemptions for business combination transactions[401] that an immaterial or unintentional failure to file or delay in meeting the filing requirements will not result in a loss of protection under the exemption, so long as a good faith and reasonable effort was made to comply with the filing requirement and the material is filed as soon as practicable after discovery of the failure to file.[402] Several commenters believed that the absence of this provision in the existing no-action letters, which were issued before the communications exemptions for business combination transactions were adopted, has had a chilling effect on the use of materials due to concerns over filing errors and the harsh consequences of a potential Section 5 violation as a result.[403] Commenters particularly stressed the need for such a provision if underwriter communications continue to be included in the filing requirements. As discussed in our adopting release for the business combination communication exemptions, this provision is similar to the good faith standard in Rule 508(a) of Regulation D.[404] Although an immaterial or unintentional failure to file or delay in filing is a violation of the filing requirement, it will not render the exemption unavailable.

e. Filing Requirements

As noted above, there are multiple filing requirements under the staff no-action letters depending on the type of materials used and the circumstances in which they are used. As proposed, we are streamlining these requirements into a unified filing rule that applies regardless of the type of materials used. We believe a unified filing requirement will result in a more consistent approach and ease compliance without a significant drop in investor protection.

As proposed, under new Rule 426 the following ABS informational and computational material must be filed:

- If a prospective investor has indicated to the issuer or an underwriter that it will purchase all or a portion of the class of asset-backed securities to which such materials relate, all materials relating to such class that are or have been provided to such prospective investor;[405] and
- For any other prospective investor, all materials provided to that prospective investor after the final terms have been established for all classes of the offering.

As under the existing no-action letters, these materials must be filed on Form 8–K (under new Item 6.01 of that Form), and thereby incorporated by reference into the registration statement, by the later of the due date for filing the final prospectus or two business days after first use.

The cover page of the Form 8–K must disclose the Commission file number of the related registration statement for the asset-backed securities. Consistent with the no-action letters, ABS informational and computational material that relate to abandoned structures or that are furnished to a prospective investor prior to the time the final terms have been established for all classes of the offering where such prospective investor has not indicated to the issuer or an underwriter its intention to purchase the asset-backed securities need not be filed.

The final rule clarifies, as did the letters and our proposal, that ABS informational and computational material that does not contain new or different information from that which was previously filed need not be filed. In addition, the issuer may aggregate data presented in ABS informational and computational material that are to be filed and file such data in consolidated form, so long as any such aggregation does not result in the omission of any information that should have been filed or makes the information misleading. Finally, the filing rule clarifies that certain communications allowed under other Commission rules, though they may technically fall into the definition of ABS informational and computational material, need not be filed under this filing rule, such as limited notices of the offering meeting the requirements of Securities Act Rules 134, 135 and 135c,[406] Exchange Act Rule 10b–10[407] confirmations, prospectuses filed under Securities Act Rule 424 and research reports relying on one of our safe harbors discussed below.[408]

Under the final rule, as was the case under the existing no-action letters, multiple ABS informational and computational material for an offering may need to be filed. For example, if an underwriter provides a set of materials to an investor, and the investor then asks for and the underwriter provides an additional set of materials with the same pool and structure but with different modeling assumptions (*e.g.*, different expectations of future interest rates or prepayment speeds), then both sets of materials would need to be filed if the offering was completed with that same structure or the investor had indicated an intention to purchase. Similarly, if multiple investors requested different analytics on the same structure but with different assumptions, each set of materials would need to be filed under the same circumstances.

Consistent with the no-action letters and the Proposing Release, ABS informational and computational material are not being excluded from the definition of ''offer,'' ''offer to sell,'' ''offer for sale'' or ''prospectus'' under the Securities Act.[409] We continue to believe the Securities Act standard of liability is appropriate for materials that are used to offer the asset-backed securities. The flexibility to use offering materials outside the statutory prospectus does not mean that the materials should not have liability as offering materials. Accordingly and as proposed, to the extent these communications constitute offers, they will continue to be subject to liability under Section 12(a)(2) of the Securities Act, as is the case today with oral offers and statutory prospectuses.[410] In addition, the final rule specifies, as proposed, that material used in reliance on the exemption will be considered ''prospectuses'' and thus subject to Section 12(a)(2) liability, even if not filed. Further, consistent with the existing no-action letters and our proposal, the materials that are filed on Form 8–K will be incorporated by reference into the registration statement, which is subject to liability under Section 11 of the Securities Act.

As we explained in the Proposing Release, the staff no-action letters were

[400] See, *e.g.*, Letters of ABA; ASF; FSR; and NYCBA.

[401] See, *e.g.*, Securities Act Rule 165(e) (17 CFR 230.165(e)).

[402] A similar provision has been proposed in connection with written communications in the Offering Process Release.

[403] See, *e.g.*, Letters of ABA and ASF.

[404] 17 CFR 230.508(a).

[405] This provision applies regardless of whether the indication to purchase is given before or after the final terms have been established for all classes of the offering.

[406] 17 CFR 230.134; 17 CFR 230.135; and 17 CFR 230.135c.

[407] 17 CFR 240.10b–10.

[408] Similar clarifying provisions exist in our existing communications exemptions for business combination transactions.

[409] See 15 U.S.C. 77b(a)(3) and 15 U.S.C. 77b(a)(10).

[410] 15 U.S.C. 77*l*(a)(2). Such information also will remain subject to the general antifraud provisions of the Securities Act and Exchange Act. See Section 17(a) of the Securities Act; Section 10(b) of the Exchange Act and Exchange Act Rule 10b–5.

issued when electronic filing on EDGAR was still in its relative infancy. At that time, EDGAR only accepted submissions in ASCII format, and ABS market participants argued that data included in computational material, which could be extensive, were in formats that were impractical to convert into ASCII format for electronic filing. In response, we amended our EDGAR filing rules to exempt computational materials filed as an exhibit to Form 8–K from electronic filing.[411] Instead, such materials can currently be filed in paper under cover of a Form SE.[412]

We proposed eliminating the electronic filing exemption. There have been many advances to EDGAR since the original staff no-action letters. In particular, EDGAR now accepts HTML documents in addition to ASCII documents and also accepts filings made over the Internet. Even non-ABS registrants now routinely include detailed statistical and tabular data in their EDGAR filings.

Two commenters suggested delaying electronic filing until the ability to file material in additional formats, such as PDF, is allowed.[413] However, we continue to believe that even under the current system, the filing of ABS informational and computational material no longer needs an electronic filing exemption. As we stated in the Proposing Release, filing in paper form is of little practical use to investors as the material cannot be retrieved electronically. By treating these materials consistently with nearly all other material filed with the Commission, we seek to realize the same investor benefits and efficiencies in information transmission, dissemination, retrieval and analysis achieved since we began mandating EDGAR filing in 1993. Accordingly, as proposed, we are eliminating the electronic filing exemption.[414]

[411] See Rule 311(j) of Regulation S–T (17 CFR 232.311(j)).

[412] 17 CFR 239.64.

[413] See, *e.g.*, Letters of ASF and BMA.

[414] As electronically filed documents, ABS informational and computational material are eligible for any applicable hardship exemptions similar to other filings that must be made electronically, such as the temporary hardship exemption in Rule 201 of Regulation S–T (17 CFR 232.201). However, the practice that existed prior to adoption of the electronic filing exemption in Rule 311(j) of Regulation S–T of seeking a continued hardship exemption for the filing of these materials is not appropriate except in the rarest of circumstances. See Rule 202 of Regulation S T (17 CFR 232.202). We do not believe that the routine filing of such material qualifies for a continued hardship exemption.

2. Research Reports

a. Current Requirements

The publication or distribution by a broker or dealer of information, opinions or recommendations with respect to an issuer or its securities around the time of a registered offering can present issues under the communications restrictions of the Securities Act, especially if the broker is or will be a participant in the distribution of the securities.[415] In particular, such a report may constitute an offer to sell the securities and thus constitute an illegal offer if published or distributed before a registration statement is filed, or it may constitute an illegal written offer to sell securities that does not meet the information requirements of Section 10 of the Securities Act if published or distributed after the registration statement is filed.

To recognize the potential benefits of research reports while limiting their potential misuse to promote a securities offering, the Commission has previously issued Securities Act Rules 137, 138 and 139. These rules create safe harbors that describe circumstances under which brokers or dealers may publish or distribute research reports in and around a registered offering without fear of violating Section 5 of the Securities Act through making an illegal offer or using a non-conforming prospectus. The existing rules look to the broker's participation in an offering, differences between the securities offered and those covered in the research report and the size and reporting history of the issuer.

As we explained in the Proposing Release, the conditions in those rules do not correspond well to ABS offerings. For example, several of the requirements in the research rules, particularly Rule 139, require issuer size and reporting history requirements, neither of which are applicable to most asset-backed securities.

[415] For more information about research reports and recent Commission proposals in this area, see the Offering Process Release. The Commission's existing Securities Act safe harbors in this area (Rules 137, 138 and 139) refer to the publication by a broker or dealer of information, an opinion or a recommendation with respect to a registrant's securities or in some instances the registrant itself. For sake of simplicity, we refer to these publications in this release as ''research reports.'' By using this convention, we do not mean necessarily to encompass in this release the separate definition of ''research report'' in Section 15D of the Exchange Act (15 U.S.C. 78o–6) added by the Sarbanes-Oxley Act. Nor does our new safe harbor in new Rule 139a affect in any way the applicability of that Section, any of our other rules with respect to research reports or any applicable SRO rules or other requirements regarding research reports. For more information, again see the Offering Process Release.

In response, the staff of the Division of Corporation Finance issued a no-action letter in 1997 to provide a separate safe harbor for the publication of research reports by brokers or dealers in and around offerings of asset-backed securities registered or to be registered on Form S–3.[416] The no-action letter contained conditions for the safe harbor adapted from Rules 137, 138 and 139 and modified for ABS. We proposed codifying this safe harbor with several minor adjustments to add it to our existing research report safe harbors.

b. ABS Research Report Safe Harbor

Commenters were mixed about our proposal to codify the no-action letter. One commenter believed the 1997 no-action letter provides a workable compromise to address the issues discussed above.[417] However, this commenter and several others also suggested extending the proposal in several ways beyond the current no-action letter, such as extending the safe harbor to Form S–1 ABS, eliminating one or more of the letter's conditions or suggesting alternative sets of conditions that would have the same practical effect of eliminating conditions in the letter.[418]

However, another commenter objected to codifying the no-action letter and instead urged a 30-day quiet period on research for ABS offerings.[419] This commenter believed permitting research during this period is unlikely to provide any benefits to the institutional investors which make up most of the market but could have a harmful impact if retail investors take a more active role. The commenter also thought permitting research could lead to structures designated as ABS but that are, in effect, equity securities to avoid other research rules.

After evaluating these comments, we are adopting the safe harbor along the lines of the existing no-action letter as proposed.[420] We are not persuaded that one or more of the existing conditions in the no-action letter should be relaxed to expand the safe harbor beyond its current contours. The reasons expressed for the expansions do not sufficiently relate to whether the proposed research is separate enough from offering

[416] See note 35 above.

[417] See Letter of ABA.

[418] See, *e.g.*, Letters of ABA; ASF; BMA; and NYCBA.

[419] See Letter of CFAI.

[420] See Securities Act Rule 139a. As we noted in the Proposing Release, the safe harbor is a non-exclusive safe-harbor the same as existing Rules 137, 138 and 139. In addition, each of the existing safe harbors in Rules 137, 138 and 139 remain available with respect to asset-backed securities if the conditions for the particular safe harbor are met.

material such that it should be excluded from the definition of ''offer'' in its entirety.

In addition, consistent with our proposal and the existing no-action letter, the safe harbor will be available only with respect to ABS offerings registered on Form S–3. That is, it is only available with respect to offerings of investment grade asset-backed securities that meet the requirements of General Instruction I.B.5 of Form S–3. Similar to our rules for ABS informational and computational material and existing Rule 139, we believe offerings of securities meeting the requirements for Form S–3 registration represent the appropriate categories of offerings for the safe harbor.

Under the safe harbor, the publication or distribution by a broker or dealer of a research report with respect to investment grade asset-backed securities meeting the criteria of General Instruction I.B.5 of Form S–3 will not be deemed to constitute an offer for sale or offer to sell such asset-backed securities registered or proposed to be registered, even if the broker or dealer is or will be a participant in the registered offering, if the following conditions are met:[421]

- The broker or dealer shall have previously published or distributed with reasonable regularity information, opinions or recommendations relating to Form S–3 ABS backed directly (or, with respect to securitizations of other securities, indirectly) by substantially similar collateral as that directly or indirectly backing Form S–3 ABS that is the subject of the information, opinion or recommendation that is proposed to be published or distributed.
- If the securities for the registered offering are proposed to be offered, offered or part of an unsold allotment or subscription, the information, opinion or recommendation shall not:
- Identify those securities;
- Give greater prominence to specific structural or collateral-related attributes of those securities than it gives to the same attributes of other ABS that it mentions; [422] or
- Contain any ABS informational and computational material relating to those securities.
- If the material identifies specific ABS of a specific issuer and specifically recommends that such ABS be purchased, sold or held by persons receiving such material, then a recommendation as favorable or more favorable as to such ABS shall have been published by the broker or dealer in the last publication of such broker or dealer addressing such ABS prior to the commencement of its participation in the distribution of the securities whose offering is being registered.
- Sufficient information is available from one or more public sources to provide a reasonable basis for the view expressed by the broker or dealer with respect to the ABS that are the subject of the information, opinion or recommendation.
- If the material published by the broker or dealer identifies other ABS backed directly or indirectly by substantially similar collateral as that directly or indirectly backing the securities whose offering is being registered and specifically recommends that such ABS be preferred over other ABS backed by different types of collateral, then the material shall explain in reasonable detail the reasons for such preference.

As proposed, not included in the list is a condition in the existing no-action letter that the research material must refer as required by law or applicable rules to any relationship that may exist between the issuer of the information, opinion or recommendation and any participant of the offering. A footnote in the incoming request for the no-action letter stated that the condition ''contemplates statutory provisions such as Section 17(b) of the [Securities] Act or relevant SRO standards requiring disclosure of possible sources of bias.'' As we explained in the Proposing Release, because these types of disclosures already are themselves separate regulatory requirements, we do not believe this additional condition is necessary for the safe harbor. Further, no similar condition exists in Rules 137, 138 or 139 even though the situation is analogous. However, our decision not to retain this condition to the safe harbor does not affect any other requirement that would require disclosure of such relationships.

As part of the Offering Process Release, we proposed revisions to the existing research report safe harbors of Rules 137, 138 and 139.[423] To the extent these existing safe harbors are modified, we also will consider similar modifications to the ABS safe harbor. We also encourage ABS market participants to comment specifically on the proposals in that release regarding any appropriate changes to the existing safe harbors or the ABS safe harbor.

3. Other Communications During the Offering Process

In response to a request for comment, several commenters recommended revising Securities Act Rule 134 [424] to provide additional items for purposes of ABS offerings.[425] Rule 134 deems certain limited communications announcing an offering (often called ''tombstone'' announcements) not a prospectus so long as the communication is limited to the items specified in that rule. In the Offering Process Release, we proposed several expansions to Rule 134 that would address in part these commenters' requests. Some of the remaining items requested by commenters may be beyond the proper scope of Rule 134.[426] As we stated in the Offering Process Release, we have not proposed to amend Rule 134 in a manner that would permit detailed term sheets for offerings under the rule, which is consistent with Rule 134 for offerings generally. We encourage ABS market participants to comment specifically on the proposals in that release. In the meantime, we note that the scope of the detailed items requested by commenters for Rule 134 are generally subsumed already within the scope of permitted ABS informational and computational material.

Finally, one commenter requested clarification regarding issuer or underwriter involvement with pre-sale reports by rating agencies.[427] Whether information prepared and distributed by third parties that are not offering participants is attributable to an issuer or underwriter depends upon whether the issuer or underwriter has involved itself in the preparation of the information or explicitly or implicitly endorsed or approved the information. The courts and we have referred to the first line of inquiry as the ''entanglement'' theory and the second as the ''adoption'' theory.[428] We think these theories are equally applicable with respect to ABS issuer or

[421] Consistent with the existing no-action letter, in the case of a multi-tranche registered offering of asset-backed securities, each tranche is to be treated as a different security.

[422] Consistent with the staff no-action letter, this condition does not by itself prevent the dissemination of research material that focuses on a single topic (*e.g.*, a single collateral attribute, asset type (but not a particular obligor), structural attribute or market sector).

[423] For example, we proposed to remove a similar prohibition in existing Rule 139 on a broker or dealer making a more favorable recommendation than the one it made in the last publication.

[424] 17 CFR 230.134.

[425] See, *e.g.*, Letters of ABA; ASF; BMA; and FSR.

[426] *E.g.*, more detailed class or pool level information, even if on a summary characteristic basis, such as LTV ratio, weighted average FICO, grace and forbearance percentages, delinquencies, losses and asset concentrations.

[427] See Letter of ABA.

[428] For a fuller discussion of these theories, see Release No. 33–7856 (Apr. 28, 2000) [65 FR 24843], at fn. 48 and accompanying text.

underwriter involvement regarding rating agency pre-sale reports. For example, if an issuer or underwriter distributed the pre-sale report in connection with an offering of the securities, it would be appropriate to conclude that such party has adopted that report and should be liable for its contents. Liability under the ''entanglement'' theory depends upon the level of pre-publication involvement in the preparation of the information.

D. Ongoing Reporting Under the Exchange Act

1. Current Requirements

As discussed previously, post-issuance reporting regarding an asset-backed security is important to monitoring and understanding the performance of both the asset pool and transaction parties.[429] Issuers of asset-backed securities are not exempt from Exchange Act reporting requirements. In particular, if asset-backed securities are to be listed on a national securities exchange, they must be registered pursuant to Section 12 of the Exchange Act[430] and file reports pursuant to Section 13(a) of the Exchange Act.[431] Even without a listing, an offering of asset-backed securities pursuant to an effective Securities Act registration statement triggers a reporting obligation under Section 15(d) of the Exchange Act with respect to those securities, at least for a period of time. This obligation automatically suspends as to any fiscal year, other than the fiscal year within which the registration statement became effective, if, at the beginning of such fiscal year, the securities of each class to which the registration statement relates are held of record by less than 300 persons.[432]

As most asset-backed securities are not presently listed and are held by less than three hundred record holders, most publicly offered asset-backed securities cease reporting with the Commission once they qualify for the automatic suspension. In the context of shelf registration statements where a new issuing entity is used for the issuance of each separate series of securities, a new reporting obligation is incurred with respect to those securities. Reporting regarding the asset-backed securities by that issuing entity may suspend if those securities subsequently meet the requirements of Section 15(d) of the Exchange Act (*e.g.*, held of record by less than 300 persons at the beginning of any fiscal year other than the fiscal year in which the takedown occurred), notwithstanding that separate issuing entities of the same sponsor may issue additional asset-backed securities during the fiscal year.

Regardless of an ability to suspend reporting under the Exchange Act, ABS transaction agreements often require continued reporting of information to security holders. More and more issuers also are making such information available through their Web sites, although some still require registration and pre-approval before permitting access to such important information. Third party services continue to evolve to provide post-issuance performance data, although again such services often charge a fee and coverage may not be uniform.

Even though asset-backed securities are subject to an Exchange Act reporting obligation, the type and frequency of disclosure required under the Exchange Act with respect to operating companies generally is not relevant with respect to asset-backed securities. As a result, issuers of asset-backed securities have requested and received, first through Commission exemptive orders under the Exchange Act and later through scores of staff no-action letters, permission to modify the reports they may file to fulfill their reporting obligation.[433]

Under the modified reporting system, in lieu of quarterly reports on Form 10–Q, reports on Form 8–K typically are filed based on the frequency of distributions on the asset-backed securities (predominantly monthly), which in turn generally match the payment frequency of the underlying pool assets. These filings include a copy of the servicing or distribution report required by the ABS transaction agreements that contains unaudited information about the performance of the assets, payments on the asset-backed securities and any other material developments that affect the transaction. It also is a longstanding requirement under the modified reporting system that disclosure that otherwise would be required by certain items of Form 10–Q, such as legal proceedings, material uncured defaults and matters submitted to a vote of security holders, also are required for the Form 8–K distribution report for the period in which such events occurred. In addition to these ''periodic'' filings on Form 8–K, current reports on Form 8–K also are required, but only for a narrow list of events. Insider reporting under Section 16 also is generally not required.

An annual report on Form 10–K is still required, but the information required is reduced and modified. Audited financial statements for the issuing entity are not generally required. In lieu of audited financial statements, the ABS issuer must file as exhibits to the Form 10–K a servicer compliance statement and a reporting by an independent public accountant. The servicer compliance statement addresses compliance by the servicer with its obligations under the servicing agreement for the reporting period. The accountant's report generally relates to the report required under the transaction agreements from an independent public accountant attesting to an assertion of compliance regarding particular servicing criteria.

As a result of implementation of the Sarbanes-Oxley Act, and in consideration of the existing requirement in the modified reporting system for an accountant attestation as to an assertion of compliance with servicing criteria, the Commission exempted asset-backed issuers from the reporting requirements regarding internal control over financial reporting.[434] However, asset-backed issuers must include a certification

[429] See Section III.B.9.e. See also Hema B. Oza, ''Surveillance—The Truth * * * Told by Investors,'' Asset Securitization Report, Sep. 27, 2004.

[430] 15 U.S.C. 78*l*.

[431] See Section 12(b) of the Exchange Act (15 U.S.C. 78*l*(b)). In addition, asset-backed securities that constitute equity securities also may need to register under Section 12(g) of the Exchange Act (15 U.S.C. 78*l*(g)) if they meet certain size and ownership requirements. Voluntarily registration of such securities also is permitted under Section 12(g). Whether registered under Section 12(b) or 12(g), reporting under Section 13(a) is required.

[432] If the duty to report is suspended, a Form 15 is required to be filed 30 days after the beginning of the first fiscal year it is suspended. See Exchange Act Rule 15d–6 (17 CFR 240.15d–6). See also Exchange Act Rule 12h–3 (17 CFR 240.12h–3). Our rules do not affect Form 15 filing requirements. In addition, we are not addressing at this time the definition of ''held of record,'' as defined in Exchange Act Rule 12g5–1 (17 CFR 240.12g5–1).

[433] As examples of the many actions in this area, see, *e.g.*, Release No. 34–16520 (Jan. 23, 1980) (order granting application pursuant to Section 12(h) of Home Savings and Loan Association); Release No. 34–14446 (Feb. 6, 1978) (order granting application pursuant to Section 12(h) of Bank of America National Trust and Savings Association); *CWMBS, Inc.* (Feb. 3, 1994); and *Bank One Auto Trust 1995–A* (Aug. 16, 1995). Such relief generally includes language stating that similar relief will apply to subsequent issuances of substantially similar securities representing ownership interests in a trust whose principal assets are substantially similar to the assets covered by the no-action letter. After many years of issuing modified reporting no-action letters, the staff ceased requiring each new registrant to obtain a new no-action letter and has instead instructed new ABS issuers they could look to an existing modified reporting no-action letter granted with respect to another issuer which has substantially similar characteristics to the new asset-backed securities for requirements of Exchange Act reporting. If the specified requirements in a particular exemptive order or no-action letter are not satisfied, the relief is not available.

[434] See note 41 above.

required by Section 302 of that Act with their annual report on Form 10–K. In a staff statement originally published on August 29, 2002 and subsequently revised on February 21, 2003, the staff provided a tailored form of certification for use with ABS annual reports to address the realities of their structure as well as to address the information included in their reports under the modified reporting system.[435] In addition, the staff statement provided alternatives with respect to who can sign the certification given the lack of a traditional CEO or CFO. Under the staff statement, a designated officer of the depositor, servicer or trustee may sign the certification, and alternate language for the certification is permitted depending on which entity's officer is making the certification.

Commenters supported our proposal to codify the basic modified reporting system for asset-backed securities.[436] We describe the final rules and forms with respect to the system, as modified in response to comment, in more detail below. In addition and as noted in Section III.A.4., we are not creating a separate Exchange Act reporting system for foreign ABS. As a result, foreign ABS will report on Forms 10–K, 10–D and 8–K, the same as domestic ABS. Commenters also supported this approach.[437]

2. Determining the ''Issuer'' and Operation of the Section 15(d) Reporting Obligation

First, we are adopting our proposed definition of ''issuer'' with respect to the reporting obligation and the nature and operation of the Section 15(d) reporting obligation with respect to asset-backed securities. The relevant aspects of the statutory definition of ''issuer'' under the Exchange Act are identical to the Securities Act definition.[438] Accordingly, we are adopting a corollary Exchange Act rule for clarifying the definition of ''issuer'' for ABS similar to our new rule discussed in Section III.A.3.d. regarding the Securities Act. In particular, the Exchange Act rule clarifies that the depositor for the asset-backed securities, acting solely in its capacity as depositor to the issuing entity, is the ''issuer'' for purposes of the asset-backed securities of that issuing entity.[439] Like our similar definition for the Securities Act, the Exchange Act definition specifies that the person acting in its capacity as depositor for the issuing entity of an asset-backed security is a different ''issuer'' from that same person acting as a depositor for any other issuing entity or for purposes of that person's own securities. For example, the depositor for a particular issuing entity created for the first takedown under a shelf registration statement will be deemed to be a different ''issuer'' than that depositor acting as depositor for a subsequent issuing entity created for a subsequent takedown under the same registration statement.[440] Like our Securities Act rule, our Exchange Act rule will apply regardless of the issuing entity's form of organization.

This approach addresses the reality of ABS offerings that offerings by different issuing entities registered on the same shelf registration statement are not related. Furthermore, it places responsibility for Exchange Act reporting with the party most able to oversee the reporting requirements. Finally, this approach differentiates reporting with respect to each issuing entity, and thus each ABS transaction, and does not require continuous reporting with respect to transactions that would otherwise be able to suspend reporting.

Consistent with this new definition, we are identifying who must sign Exchange Act reports. The particular signature requirements for each Exchange Act report are discussed below in connection with the discussions of the requirements for each report. However, our basic principle remains the same as in the Proposing Release that the depositor is to sign Exchange Act reports, although an authorized representative of the servicer will be permitted to sign on behalf of the issuing entity as an alternative.

As discussed in more detail in the next section, a takedown of asset-backed securities by a new issuing entity triggers a new reporting obligation under Exchange Act Section 15(d). Separate EDGAR access codes need to be established for the new issuing entity created at the time of each takedown to ensure that Exchange Act reports related to these ABS are filed under a separate file number from other ABS or from the depositor's or sponsor's own securities. As proposed and consistent with longstanding staff and prevalent industry practice, issuers should not ''combine'' reporting regarding multiple transactions in one report or with a report for the depositor's or sponsor's own securities.

In addition to clarifying who is the ''issuer,'' we are clarifying, as proposed, several interpretive positions regarding the operation of the Section 15(d) reporting obligation with respect to asset-backed securities, which commenters supported.[441] The first position relates to the time when any reporting obligation begins. Where an aggregate amount of asset-backed securities to be offered on a delayed basis is registered on Form S–3, until the first takedown of securities under the registration statement, there is no asset pool or securities to report about and no Exchange Act reporting requirement. It is only when the first takedown occurs and ABS are issued that ongoing reporting becomes relevant. Accordingly, we are codifying the longstanding interpretive position that no annual or other reports need be filed pursuant to Section 15(d) for ABS until the first bona fide sale in a takedown of securities under the registration statement.[442] For example, if an ABS Form S–3 shelf registration statement was declared effective on October 1, 2004 but no takedown occurred until February 1, 2005, no reports will need to be filed until after the first takedown. The first reporting obligation is triggered by the first takedown of asset-backed securities.[443]

[435] See Division of Corporation Finance, ''Statement: Compliance by Asset-Backed Issuers with Exchange Act Rules 13a–14 and 15d–14'' (Aug. 29, 2002); and Division of Corporation Finance, ''Revised Statement: Compliance by Asset-Backed Issuers with Exchange Act Rules 13a–14 and 15d–14'' (Feb. 21, 2003). In addition, the staff subsequently issued two no-action letters to address resecuritizations (*Merrill Lynch Depositor, Inc.* (Mar. 28, 2003)) and auto lease and similar securitizations (*Mitsubishi Motors Credit of America, Inc.* (Mar. 27, 2003)).

[436] See, *e.g.*, Letters of ABA; ASF; FSR; and ICI.

[437] See, *e.g.* Letter of A&O.

[438] See Section 3(a)(8) of the Exchange Act (15 U.S.C. 77c(a)(8)).

[439] See Exchange Act Rule 3b–19 (17 CFR 240.3b–19). The rule in the Exchange Act is identical to Securities Act Rule 191. See Section III.A.3.d. As proposed, we also are defining the term ''asset-backed issuer'' as an issuer whose reporting obligation results from either the registration of an offering of asset-backed securities under the Securities Act, or the registration of a class of asset-backed securities under Section 12 of the Exchange Act.

[440] Likewise, any applicable exemptions from reporting that the person acting as depositor may have with respect to its own securities will not be applicable to the asset-backed securities.

[441] See, *e.g.*, Letters of ABA and ASF. As proposed, these new rules only are applicable with respect to reporting obligations under Section 15(d). They are not meant to affect any reporting obligation that may exist as to any class of asset-backed securities registered under Section 12 of the Exchange Act. For example, a Section 15(d) reporting obligation is automatically suspended while a class of securities is registered under Section 12 and reporting pursuant to Section 13(a) of the Exchange Act. See Exchange Act Section 15(d). Hence, any discussion regarding suspension of the Section 15(d) reporting obligation is not applicable while a class of securities is reporting pursuant to Section 13(a).

[442] See Exchange Act Rule 15d–22(a).

[443] A few modified reporting no-action letters permitted the filing of no reports, including a Form 10–K, if the takedown occurred near the end of a fiscal year and no distribution had occurred prior

We also are codifying the current position that the starting and suspension dates for any reporting obligation with respect to a takedown of asset-backed securities is determined separately for each takedown.[444] For example, if takedowns involving different issuing entities occurred in 2004 and 2005, the reporting obligation related to the issuing entity created with respect to the 2004 takedown is separate from the reporting obligation related to a different issuing entity created with respect to the 2005 takedown. If at the beginning of the 2005 fiscal year the securities in the 2004 takedown were held of record by less than 300 holders, the reporting obligation related to the issuing entity for the 2004 takedown will be suspended.[445] Of course, the suspension of that reporting obligation has no effect on any separate reporting obligation related to the issuing entity with respect to the 2005 takedown or related to issuing entities created with respect to any other takedown.

We requested comment on whether the ability to suspend reporting under Section 15(d) should be revisited. For example, we requested comment on whether it should be a condition or required undertaking for registration statement form eligibility or for any of our other proposals that Exchange Act reporting must continue for the life of the security. One commenter primarily representing investors recommended conditioning ABS shelf registration upon an issuer agreeing either to continue filing reports under Section 15(d) or to make publicly available on their Web sites copies of reports that contain the information required by proposed Form 10–D.[446] Under the current system, the commenter argued, most investors remain dependent on sponsors voluntarily providing ongoing disclosures after the Section 15(d) suspension, and some issuers refuse to issue ongoing disclosures after their Exchange Act reporting obligation has been suspended.

Many other commenters did not believe the ability to suspend the Section 15(d) reporting obligation should be revised.[447] These commenters generally argued that there is no reason to treat ABS issuers differently from other securities that can suspend reporting under Section 15(d). In addition, such a change would be costly and the commenters believed ABS investors, which are mostly institutional, already have sufficient access to information through proprietary and third party Web sites.

We are not at this time revisiting the statutory framework of Section 15(d) regarding the suspension of reporting obligations. Modifying the obligation would raise broad issues regarding the treatment of other non-ABS issuers that do not have public common equity. However, the concerns raised by investors do confirm the importance to investors of post-issuance reporting of information regarding an ABS transaction in understanding transaction performance and in making ongoing investment decisions.

Finally, we are adopting a separate rule, as proposed, to address the separate Section 15(d) reporting obligation that may be involved in ABS transactions where the issuing entity holds a pool asset that represents the interest in or the right to the payments or cash flows of another asset pool.[448] As discussed in Section III.A., some credit card and auto lease ABS transactions are structured such that the issuing entity's asset pool consists of one or more of such intermediate financial assets. For example, in an issuance trust structure, the asset pool of the issuing entity for the ABS consists of a collateral certificate representing an interest in the asset pool of the credit card master trust. In many instances, the deposit of the collateral certificate into the issuing entity's asset pool must be separately registered along with the registration of the offering of the issuing entity's asset-backed securities, thereby triggering a separate reporting obligation under Section 15(d) with respect to the collateral certificate.

Recognizing that these structures are designed solely to facilitate the structuring of the transaction, separate reports regarding the intermediate financial asset would provide no additional information to investors. Accordingly, we are providing that no separate annual and other reports need be filed with respect to the intermediate financial asset's reporting obligation, if the following conditions are met:[449]

- Both the issuing entity for the asset-backed securities and the entity that issued the financial asset were established under the direction of the same sponsor and depositor;
- The financial asset was created solely to satisfy legal requirements or otherwise facilitate the structuring of the ABS transaction;
- The financial asset is not part of a scheme to avoid registration or reporting requirements of the Act;
- The financial asset is held by the issuing entity and is a part of the asset pool for the asset-backed securities; and
- The offering of the asset-backed securities and the offering of the financial asset were both registered under the Securities Act.

As proposed, the new rule does not affect any reporting obligation applicable with respect to the asset-backed securities, nor does it affect any obligation to provide information regarding the financial asset or the underlying asset pool in the ABS reports.[450]

3. Reporting on EDGAR

Registration statements and annual and other periodic and current reports are filed in electronic format on EDGAR.[451] As proposed, we are not fundamentally changing how documents regarding asset-backed securities are to be filed on EDGAR. However, there have been and continue to be inconsistencies by ABS issuers with respect to filing of registration statements and reports on EDGAR, thus making it difficult and time-consuming for investors and others to locate documents related to particular asset-backed securities. As such, we are reiterating the following guidance from the Proposing Release on how to submit

to the end of the fiscal year. See, *e.g., Fleet Finance Home Equity Trust 1990–1* (Apr. 9, 1991); *AIC Premium Finance Loan Master Trust* (Apr. 3, 1995); and *Toyota Auto Receivables 1995–A Grantor Trust* (Dec. 19, 1995). While not all commenters agreed (See, *e.g.*, Letters of Am. Bankers and ASF), we continue to believe that, even if the period is short, information regarding the servicing and administration of the asset pool for the period (particularly the servicer compliance statement and assessment of compliance with servicing criteria) is still important information to provide to investors in an annual report, even if no distributions were made to investors prior to the fiscal year end. For example, such information is not otherwise required to be part of or filed in connection with the filing of the final prospectus. Accordingly, as proposed, the accommodation in those letters will no longer be available.

[444] See Exchange Act Rule 15d–22(b).

[445] An annual report on Form 10–K for the 2004 fiscal period with respect to the classes in the 2004 takedown will still be required, although the report is not required until 90 days after the end of the 2004 fiscal period.

[446] See, *e.g.*, Letter of ICI.

[447] See, *e.g.*, Letters of ABA; Am. Bankers; ASF; Capital One; CMSA; and Wells Fargo.

[448] See Exchange Act Rule 15d–23. This rule is not applicable with respect to underlying securities that do not meet its conditions, such as the securitization of outstanding corporate debt securities or other ABS the offering of which must be separately registered under the Securities Act.

[449] As with note 441 above, these amendments are only applicable with respect to the reports filed pursuant to Section 15(d) for the intermediate financial asset. They do not affect any other reporting obligation that may exist with respect to the issuer of the intermediate financial asset, such as other securities by that entity.

[450] See Item 1100(d) of Regulation AB.

[451] See Rule 101 of Regulation S–T (17 CFR 232.101).

documents on EDGAR that will enable investors and others to locate material information about particular asset-backed securities more efficiently.

This guidance clarifies existing practice regarding how documents are to be submitted on EDGAR. In addition, we are planning programming changes to the EDGAR system to permit the generation of new EDGAR access codes for an issuing entity before the Securities Act Rule 424(b) prospectus is filed. We believe such changes should significantly reduce some of the technical and compliance issues involved in establishing new transactions under the EDGAR system. We or the staff will issue additional instructive guidance once these programming changes are made to update and clarify further EDGAR reporting processes for ABS.

Under our EDGAR system, each entity that makes an EDGAR submission is assigned a Central Index Key code, or ''CIK'' code. For submissions to appear under the correct entity, the correct CIK code must be included in the EDGAR submission header.

Because typically no issuing entity exists at the time of filing, the depositor initially submits the registration statement registering the offering of an aggregate amount of asset-backed securities on EDGAR under its own CIK code. With each takedown of asset-backed securities by a new entity off the registration statement, a new reporting obligation under Exchange Act Section 15(d) is created. The EDGAR system will automatically generate a new CIK code and an Exchange Act reporting file number for the new entity when the depositor includes a ''serial'' tag in the header of the prospectus filed under Securities Act Rule 424(b) to report the takedown.[452] The depositor must include the complete name of the new entity as part of the serial tag.[453] Subsequent takedowns from the same registration statement that create new reporting entities should follow the same approach for obtaining separate CIK codes and file numbers through serial tags.[454]

When these procedures are followed, the Rule 424(b) prospectus will appear under both the depositor's and the new issuing entity's CIK codes. The issuer in its capacity as depositor for newly created entities should prepare separate annual, periodic and other reports for each issuing entity and file such reports under the separate CIK code for each issuing entity.[455] To make these subsequent filings under the newly created issuing entities, the sponsor will have to obtain additional access codes by creating and submitting Form IDs to the SEC using the SEC's Web site.

As we explained in the Proposing Release, the creation of new issuing entities by identifying the serial tag in the Rule 424 filing header effectively identifies the reporting obligation of the depositor from that of the new entities. While not all commenters agreed,[456] we continue to believe that filing separate annual, periodic and other reports for each issuing entity provides easier access to information on a particular issuing entity and its asset-backed securities, which increases transparency of such information for investors as well as the market for these securities. Also, submitting separate Exchange Act reports under the issuing entity's CIK code will facilitate tracking of the respective issuing entity's reporting obligation, as well as when such reporting obligation may be suspended under Section 15(d) of the Exchange Act, if applicable.

Conversely, we continue to believe that providing required information for multiple issuing entities in a ''combined'' annual or periodic report containing information regarding multiple issuing entities of a single sponsor or depositor is inconsistent with these objectives.[457] Combined reporting contributes to confusion on the part of investors attempting to locate a report on EDGAR relating to the securities that are relevant to that investor. Combined reporting forces investors and other users to wade through superfluous information in order to retrieve information that is relevant to them. Further, combined reports create inefficiencies in the storage, retrieval, and analysis of information on EDGAR, which impedes market access and staff review.

4. Distribution Reports on Form 10–D

a. New Form 10–D and Deadline for Filing

Under the modified reporting system, periodic distribution and pool performance information is generally filed on Form 8–K in lieu of filing quarterly reports on Form 10–Q. However, investors are not able to easily distinguish these Form 8–K reports from other reporting on Form 8–K, such as the reporting of extraordinary events or the filing of transaction agreements.

Form 8–K is not designed to be a report filed on a periodic basis. Accordingly, we are adopting our

[452] As we explained in the Proposing Release, there are instances when materials relating to a particular ABS transaction may be filed before the filing of the final Rule 424 prospectus that generates the new CIK code and Exchange Act reporting file number for the new issuing entity. For example, with respect to one or more classes of asset-backed securities that are to be listed on a national securities exchange, an Exchange Act registration statement, such as a Form 8–A (17 CFR 249.208a), often must be filed before the final Rule 424(b) prospectus is filed. In addition, under the existing no-action letters and our proposals regarding ABS informational and computational material, such material could be voluntarily filed on Form 8–K before the final Rule 424(b) prospectus is filed. Until the programming changes discussed in the text are made, such materials should be filed under the CIK code for which the Securities Act registration statement was filed, which is usually the depositor's CIK code. Note that if a new CIK code and Exchange Act reporting file number for the new issuing entity had been previously generated (*e.g.*, a preliminary prospectus with respect to the offering had been filed), these materials should be filed under the CIK code of the issuing entity. In either case, to insure increased efficiencies in the filing and processing of such material, we encourage the depositor to list the name of the issuing entity on the cover page of the material. For example, to ensure that the certifications that we receive from the exchanges may be properly matched against the Form 8–A's on file, the Form 8–A should identify the specific issuing entity. Where the Form 8–A calls for the name of the registrant, depositors should list their name but include a notation that they are filing on behalf of the issuing entity and name the issuing entity.

[453] In the past, issuing entity names have been truncated in order to comply with EDGAR requirements regarding the permissible length of a company name. These abbreviations, historically assigned by SEC staff, sometimes were not consistently applied. A recent upgrade to the EDGAR system now permits company names of up to 150 characters in length. See Release No. 33–8409 (Apr. 19, 2004). The staff believes this revision will alleviate the problems we have seen in the past regarding inconsistent abbreviation of names.

[454] For example, if a depositor completes five takedowns from a shelf registration statement and creates five separate issuing entities, then each separate issuing entity should have its own CIK code. After obtaining a CIK code for the issuing entity, the depositor must obtain additional EDGAR codes from the Commission for the issuing entity to enable it to file additional documents under the CIK code. See Release No. 33–8410 (Apr. 21, 2004). As noted in the text, we are considering EDGAR programming changes to streamline this process for ABS.

[455] Once the issuing entity's CIK code is generated, subsequent filings relating to the transaction relating to that issuing entity should be filed under that CIK code. The filing of documents under the issuing entity's CIK code under cover of Form 8–K, such as unqualified legality and tax opinions, does not affect the incorporation by reference of these documents into the registration statement originally filed under the depositor's CIK code.

[456] See, *e.g.*, Letters of ASF and Sallie Mae.

[457] We understand the staff in a few isolated instances has previously allowed combined reporting for a limited number of trusts. See, *e.g., TMS Home Equity Trust 1992–D–I; TMS Home Equity Trust 1992–D–II* (Mar. 22, 1993) and *The Money Story, Inc.; TMS Home Equity Trust 1993–A–I* (Aug. 4, 1993) (allowing combined reporting with respect to two trusts). The staff believes these rare exceptions have led to the current practice of a few registrants combining in some instances information on dozens of issuing entities into a lengthy combined report. The result is filings that can run for hundreds of pages that are unfriendly to the user. Combined reporting is not the prevalent industry practice, even for issuers that frequently access the public securitization market, and the position in these letters is no longer applicable.

proposal for one new form type for asset-backed securities, Form 10–D, to act as the report for the periodic distribution and pool performance information.[458] Commenters supported a new form type for such reports.[459] Under the final rule, every asset-backed issuer subject to Exchange Act reporting requirements will be required to make such reports on Form 10–D.[460]

Consistent with our proposal and the existing modified reporting system, these reports will be required to be filed within 15 days after each required distribution date on the asset-backed securities, as specified in the governing documents for such securities. Commenters generally supported codifying the existing deadline.[461] As proposed, a report will be required regardless of whether the required distribution was actually made or whether a distribution report was in fact prepared or delivered under the governing documents.

We also are providing the ability to obtain a five calendar day filing extension under Exchange Act Rule 12b–25 for Form 10–D filings, similar to the process available today for Form 10–Q filings by non-ABS issuers.[462] Commenters supported extending Rule 12b–25 to Form 10–D filings, particularly if we continued an approach that linked Exchange Act reporting compliance with Form S–3 eligibility requirements.[463] Under Rule 12b–25, the issuer must file a Form 12b–25 no later than one business day after the due date for the Form 10–D filing if all or any portion of the Form 10–D report is not filed in a timely manner. To obtain the filing extension, the Form 12b–25 must contain certain representations by the registrant, including why the inability to file timely could not be eliminated without unreasonable effort or expense and that the subject Form 10–D filing will be made not later than the fifth calendar day following its original due date. The related Form 10–D filing must then be made not later than five calendar days after its original due date.[464] If the issuer timely provides the proper notice on Form 12b–25 filing and subsequently makes the related Form 10–D filing within the required five calendar day period, the Form 10–D filing will be deemed to be filed on its original due date, including for purposes of Form S–3 eligibility.[465]

b. Signatures

As we stated in the Proposing Release, it is our understanding that in many ABS transactions, the trustee is the recipient and not necessarily the preparer of the Form 10–D information, and the depositor or the servicer is thus in a better position with respect to possession, responsibility and awareness of the information that would need to be reported. Our proposed signature requirements for Form 10–D reflected this understanding by proposing that the report must be signed by either the depositor, or in the alternative, on behalf of the issuing entity by a duly authorized representative of the servicer (or master servicer if multiple servicers were involved). We did not propose to permit the trustee to sign the report as an alternative to the depositor or the servicer.

Commenters were mixed on these proposals. While some commenters supported the proposals,[466] others believed additional parties should be able to sign, including the trustee.[467] Some of these commenters believed any party should be permitted to sign an Exchange Act report for asset-backed securities, if the transaction parties so agreed.

We are not persuaded that additional parties should be permitted to sign the Form 10–D. While the final rule will result in a change in practice for some issuers from the inconsistent practice under the modified reporting system, we continue to believe it is more appropriate for the reports to be signed by either the depositor, or the servicer in the alternative. In the various scenarios presented by commenters who argued for the ability of additional parties to sign, in each case either the depositor or the servicer would still be in a position to sign. We also do not believe it is appropriate to permit any transaction party to sign a required report under the Exchange Act.[468] Accordingly, we are adopting our signature requirements as proposed.[469]

c. Content

Consistent with our proposal and the longstanding requirements under the modified reporting system, the disclosure content for Form 10–D will consist of both the distribution and pool performance information for the distribution period, and certain non-financial disclosures, similar to those required by Part II of Form 10–Q, that occurred during the period. Some commenters requested a change from this longstanding practice by limiting the Form 10–D to only distribution and pool performance information and moving the other disclosures from the modified reporting system to Form 8–K disclosure requirements, albeit with longer deadlines than current Form 8–K requirements.[470] Given our other amendments to Form 8–K disclosure requirements for ABS, discussed below, we do not believe it is necessary at this time to deviate further from the established requirements of the ABS modified reporting system.

The menu of disclosure items for Form 10–D is presented in the following table:

[458] See 17 CFR 249.312. Like our other Exchange Act reports, Form 10–D will be subject to all applicable requirements of the general rules and regulations under the Exchange Act for the preparation, signing and filing of Exchange Act reports, including Regulation 12B (17 CFR 240.12b–1 *et seq.*); Regulation 13A (17 CFR 240.13a–1 *et seq.*); and Regulation 15D (17 CFR 240.15d–1 *et seq.*). In addition, the report will be required to be submitted in electronic form in accordance with the EDGAR rules set forth in Regulation S–T.

[459] See, *e.g.*, ABA; ASF; Aus. SF; ICI; JPMorganChase; MBNA; and Wells Fargo.

[460] See Exchange Act Rules 13a–17 and 15d–17.

[461] See, *e.g.*, Letters of ABA; ASF; JPMorganChase; MBNA; and Wells Fargo.

[462] A 15 calendar day filing extension for Form 10–K already exists under Exchange Act Rule 12b–25.

[463] See, *e.g.*, Letters of ABA; ASF; Capital One; CMSA; JPMorganChase; and U.S. Bank.

[464] The filing extension procedure in Rule 12b-25 is not available more than once for any particular Form 10–D filing.

[465] Note, however, that Exchange Act Rule 12b–25(d) provides that ''a registrant will not be eligible to use any registration statement form under the Securities Act of 1933 the use of which is predicated on timely filed reports until the subject report is actually filed'' pursuant to Rule 12b–25.

[466] See, *e.g.*, Letters of JPMorganChase and Wells Fargo.

[467] See, *e.g.*, Letters of ABA; Am. Bankers; ASF; BMA; and U.S. Bank.

[468] This approach is consistent with non-ABS, including other structured securities.

[469] Several commenters requested clarification on the use of a power of attorney to sign Exchange Act reports. See, *e.g.*, Letters of ASF; BMA; JPMorganChase; and U.S. Bank. Existing Item 601(b)(24) of Regulation S-K addresses the procedural requirements for the use of a power of attorney if any name is signed to an Exchange Act report pursuant to a power of attorney. Manually signed copies of such power of attorney must be filed. In addition, if the name of any officer signing on behalf of the registrant (*e.g.*, for ABS, either the officer of the depositor signing on behalf of the depositor or the officer of the servicer signing on behalf of the issuing entity by the servicer) is signed pursuant to a power of attorney, certified copies of a resolution of the registrant's board of directors authorizing such signature shall also be filed (*e.g.*, by the depositor's board of directors). A power of attorney filed relating to an Exchange Act report must relate to a specific filing or amendment. A power of attorney that confers general authority shall not be filed. A power of attorney is to be for an individual person. Note that a power of attorney cannot be used for signing a certification pursuant to Exchange Act Rule 13a-14 or 15d-14. See Exchange Act Rule 13a-14(c) and 15d-14(c). In addition, even in instances where a power of attorney may be used, the use of the power of attorney does not affect the responsibility of the principal whose signature is being signed pursuant to the power of attorney.

[470] See, *e.g.*, Am. Bankers; ASF; CMSA; and Sallie Mae.

DISCLOSURE FOR FORM 10–D

Form items and source of disclosure required
Item 1. Distribution and Pool Performance Information (Item 1121 of Regulation AB).
Item 2. Legal Proceedings (Item 1117 of Regulation AB).
Item 3. Sales of Securities and Use of Proceeds (Item 2 of Part II of Form 10–Q).
Item 4. Defaults Upon Senior Securities (Item 3 of Part II of Form 10–Q).
Item 5. Submission of Matters to a Vote of Security Holders (Item 4 of Part II of Form 10–Q).
Item 6. Significant Obligors of Pool Assets (Item 1112(b) of Regulation AB).
Item 7. Significant Enhancement Provider Information (Items 1114(b)(2) and 1115(b) of Regulation AB).
Item 8. Other Information.
Item 9. Exhibits (Item 601 of Regulation S–K).

The requirement with respect to distribution and pool performance information requires the registrant to provide the information required by Item 1121 of Regulation AB and to attach as an exhibit to the Form 10–D the distribution report delivered to the trustee or security holders, as the case may be, pursuant to the transaction agreements for the related distribution date. Recognizing that the distribution report specified under the transaction agreements will likely contain most, if not all, of the disclosures about the distribution and pool performance that will be required by Item 1121 of Regulation AB, any information required by that Item that was included in the attached distribution report need not be repeated in the Form 10–D.[471] As a result, and as is typically the case today with distribution reports filed under Form 8–K, no additional information may be required in the Form 10–D with respect to distribution or pool performance if all of the required information is included in the attached distribution report. However, taken together, the attached distribution report and the information provided in the Form 10–D must contain the information required by Item 1121 of Regulation AB.

Item 1121 of Regulation AB, as proposed, requires a description of the distribution and the performance of the asset pool during the distribution period. Recognizing the variety of asset types that can be securitized and the variety of transaction structures that can be used, we did not propose and we are not adopting a standardized format for the presentation of either the information required by Item 1121 of Regulation AB or the distribution report prepared under the transaction agreements. Commenters overall supported this decision.[472] However, while the material characteristics will vary depending on the nature of the transaction, we continue to believe that, similar to asset pool disclosure for the registration statement prospectus, there are certain broad categories of disclosure and examples of common characteristics that can be identified as illustrative examples. Therefore, Item 1121 of Regulation AB continues to set forth non-exclusive examples of such information, as revised in response to comment. As we stressed in the Proposing Release, and consistent with our discussion above regarding prospectus disclosure, the actual disclosure to be provided will need to be tailored to the material characteristics of the asset pool and transaction involved. As with the item for prospectus asset pool disclosure, we recognize that not all of the characteristics identified will be applicable or material to the particular asset class and transaction involved. As proposed, appropriate introductory and explanatory information should be provided to introduce material terms, parties and abbreviations used (or a cross-reference to a Commission filing where such information may be found), and statistical information should be presented in tabular and graphical formats, if such presentations will aid understanding.

Commenters representing investors in particular supported our proposed disclosure for the distribution and pool performance information.[473] As adopted, examples of illustrative characteristics in Item 1121 of Regulation AB include:

- Applicable record dates, accrual dates, determination dates and distribution dates.
- Cash flows received and their sources (including portfolio yield, if applicable).
- Calculated amounts and distribution of the flow of funds for the period itemized by type and priority of payment, including fees and expenses, payments with respect to enhancement, distributions to security holders and excess cash flow and disposition of excess cash flow.[474]
- Interest rates applicable to the assets and the asset-backed securities, as applicable. Registrants should consider providing interest rate information for pool assets in appropriate distributional groups or incremental ranges.
- Beginning and ending principal balances of the asset-backed securities.
- Beginning and ending balances of transaction accounts, such as reserve accounts, and material account activity during the period.
- Amounts drawn on any credit enhancement or other support, as applicable,[475] and amounts still available, if known and applicable.
- Updated pool composition information for the period, such as the number and amount of pool assets at the beginning and ending of each period, weighted average coupon, weighted average life, weighted average remaining term, pool factors and prepayment amounts.[476]
- Delinquency and loss information for the period.[477]
- The amount, terms and general purpose of any advances made or reimbursed during the period.
- Material modifications, extensions or waivers to pool asset terms, fees, penalties or payments during the distribution period or that have cumulatively become material over time.
- Material breaches of pool asset representations or warranties or transaction covenants.
- Information on ratio, coverage or other tests used for determining any early amortization, liquidation or other

[471] While we make this point specifically in Item 1 of Form 10–D with respect to distribution and pool performance information, the same is true regarding any of the other Items of Form 10–D. See, *e.g.*, General Instruction D. of Form 10–D. In addition, any item which is inapplicable or to which the answer is negative may be omitted and no reference need be made in the report. If substantially the same information had been previously reported by the asset-backed issuer, an additional report of the information on Form 10–D need not be made. See General Instructions C.3 an C.4 of Form 10–D and the definition of ''previously reported'' in Exchange Act Rule 12b–2.

[472] See, *e.g.*, Letter of ABA; ASF; and PWC.

[473] See, *e.g.*, Letters of CFAI and ICI.

[474] For example, excess cash flow released to the residual holder or other disposition, such as deposit into a transaction account.

[475] For example, for internal credit enhancement or other support, this would not include application of subordination among classes, but would include use of reserve accounts.

[476] For asset-backed securities backed by leases where a portion of the securitized pool balance is attributable to the residual value of the physical property underlying the leases, this information also would include turn-in rates and residual value realization rates.

[477] This item, like the other listed items in Item 1121(a) of Regulation AB, is based on materiality. We have deleted the reference in this item to Item 1100(b) of Regulation AB. We included the reference as general guidance on presenting delinquency and loss information. We understand that such information in distribution reports typically is less expansive than the full delinquency and loss information presented in the final Rule 424 prospectus for the offering. However, we would expect any material changes to how delinquencies, charge-offs and uncollectable accounts are defined or determined, including re-aging policies, would be disclosed in the Form 10–D report.

performance trigger and whether the trigger was met.

As explained in the Proposing Release, in part because we are expanding the availability of prefunding periods, revolving periods and master trusts, we also are expanding related periodic disclosure to include information regarding any new issuance of asset-backed securities backed by the same asset pool and any pool asset changes (other than in connection with a pool asset converting into cash in accordance with its terms), such as additions or removals in connection with a prefunding or revolving period and pool asset substitutions and repurchases. Such information includes any material changes in solicitation, credit-granting, underwriting, origination, acquisition or pool selection criteria or procedures. While comments on this aspect of the proposal were mixed between investors who desired such information and issuers and their representatives who generally objected to providing information that is not already provided today,[478] we continue to believe it is important to provide transparency in those instances where the pool is changing not as a result of the assets converting into cash in accordance with their terms, but instead through external administration via an exception to the basic principle that the asset pool is discrete.

In addition, we proposed that if the addition, substitution or removal of pool assets had materially changed the composition of the asset pool as a whole, full updated pool composition information required by Items 1110, 1111 and 1112 of Regulation AB would be required to the extent such information had not been provided previously. Several commenters representing primarily issuers and their representatives objected to the proposal, generally arguing that disclosure of the parameters of the possible pool changes in the prospectus should be sufficient and updated pool disclosure reflecting actual changes, even if the pool has materially changed, should not be required because such disclosure is not publicly provided today.[479] We continue to believe that, with respect to changes to the asset pool that occur not as a result of the assets converting into cash in accordance with their terms but rather as a result of external administration, updated disclosure about the effects of such external changes should be required. We understand that the proposal, which would have triggered new pool composition information at any time a material change in pool composition occurred, could create administrative burdens in assessing on an ongoing basis whether the pool composition has materially changed. To ease these burdens and difficulties associated with the proposal, our final requirement will require such updated pool composition information at set times, but only where a prefunding or revolving period is in effect or new issuances have occurred from a master trust and, in each instance, only if the information has materially changed from that previously provided.

Under the final requirement, during a prefunding or revolving period (including for asset classes where an unlimited revolving period is permitted), or if there has been a new issuance of ABS backed by the same pool under a master trust during the fiscal year of the issuing entity, updated pool composition information will be required in the Form 10–D report for the last required distribution of the fiscal year of the issuing entity. In addition, such updated pool composition information also will be required in the first Form 10–D report filed for the period in which the prefunding or revolving period ends (if applicable).[480] Consistent with the proposal, such updated pool composition information will include information required by Items 1110, 1111 and 1112 of Regulation AB applied taking the revised pool composition into account.[481]

Consistent with our proposal, no information will be required, however, if the information has not materially changed from that provided previously in an Exchange Act report, an effective registration statement under the Securities Act or a prospectus timely filed pursuant to Securities Act Rule 424 under the same CIK code regarding a subsequent issuance of asset-backed securities backed by the same pool. For example, if a takedown related to an ABS transaction with a revolving period occurred in October and the revised pool as of the end of the issuing entity's fiscal year in December while the revolving period was still in effect had not materially changed from the pool described in the prospectus supplement for the takedown, updated pool composition information would not be required. Similarly, if a new issuance from a master trust occurred in October and the revised pool as of the end of the issuing entity's fiscal year in December was substantially similar to the pool described in the prospectus supplement for the takedown, updated pool composition information would not be required.

Regarding the other disclosure items for Form 10–D, the requirements regarding disclosure of legal proceedings, sales of securities, use of proceeds, submission of matters to a vote of security holders, defaults on senior securities and other information are consistent with the longstanding non-financial disclosures in Form 10–Q required under the modified reporting system.[482] For legal proceedings, we reference as proposed the tailored ABS disclosure in Item 1117 of Regulation AB. As with legal proceedings disclosure in Form 10–Q, a proceeding only will need to be reported for the distribution period in which it first became a reportable event and in subsequent periods where there have been material developments. The other disclosure items contain cross-references to similar items in Form 10–Q. For disclosure regarding the issuance of additional securities, we are providing, in response to comment, that information regarding consideration required by Item 701(c) of Regulation S–K[483] need not be provided with respect to securities that were not registered under the Securities Act.[484]

As proposed, Items 6 and 7 of Form 10–D will require updated financial information about significant obligors and providers of enhancement, to the extent updated information is required. As has long been the case under the modified reporting system and consistent with the practice for non-ABS issuers, we continue to believe that such information should be provided on an ongoing basis in addition to in the initial prospectus while the asset-backed securities are reporting under the Exchange Act. As proposed, such information only will need to be included in the first distribution report for the period in which updated

[478] Compare, *e.g.*, Letters of CFAI and ICI; with Letters of ABA and ASF.

[479] See, *e.g.*, Letters of ABA; ASF; BMA; and Wells Fargo.

[480] In most instances, due to the fact most ABS issuers suspend reporting obligations under Section 15(d) after the end of their first fiscal year after the takedown occurs, the operation of these requirements will most likely result in the disclosure being provided once, if applicable.

[481] See Item 1121(b) of Regulation AB. The original proposal also would have required information required by Item 1108 of Regulation AB (proposed Item 1107) to address new servicers not previously described. However, as new servicer disclosure already will be covered by Item 6.02 of Form 8–K, we are not including it separately with this disclosure requirement.

[482] See Release No. 33–8400 (Mar. 16, 2004) [69 FR 15594] (the ''Form 8–K Release'') regarding recent changes to these items of Form 10–Q that are incorporated into the similar disclosure required for Form 10–D.

[483] 17 CFR 229.701(c).

[484] See, *e.g.*, Letter of ASF.

financial information regarding the third party is required under Regulation S–X. As discussed in Section III.B.10., alternative methods may be available, subject to conditions, to present information regarding the third party, such as through incorporation by reference or by including a reference to the third party's Commission filings.

Regarding providing updated financial information for third parties, several commenters requested clarification as to when the percentage concentration tests should be measured for determining significant obligors.[485] The suggestions by commenters were mixed. Some commenters believed determinations should be made at closing and not change over time as a result of pool fluctuations, arguing that to monitor changes on an ongoing basis would be burdensome.[486] In addition, some of these commenters argued that it is typical to contract with known significant obligors at closing that additional information is to be provided for securitization reporting, and new significant obligors that arise as the pool pays down would not have such provisions negotiated into their agreements. Other commenters, however, thought the tests should be recalculated with pool fluctuations.[487] One commenter believed the tests should be measured as of the date the significant obligor is initially added to the transaction, but not change as the pool pays down.[488]

We are clarifying in an instruction to the definition of significant obligor that the determination of significant obligors is to be made as of the designated cut-off date for the transaction, provided, that, in the case of master trusts, the determination is to be made as of the cut-off date (or issuance date if there is not a cut-off date) for each issuance of asset-backed securities backed by the same asset pool.[489] We also are noting, however, that if the percentage concentration drops below 10% subsequent to the dates discussed above, then the entity no longer need be considered a significant obligor.

Similar to recent revisions to Form 10–Q, we are requiring, as proposed, that if any event occurs that required the filing of a Form 8–K during the period covered by the particular distribution report, but was not disclosed on Form 8–K, the Form 10–D must include the disclosure prescribed by the relevant Form 8–K item for the period during which that event occurred.[490] Like Form 10–Q, this requirement applies to all Form 8–K items, including those covered by the recently enacted Form 8–K safe harbor from liability under Exchange Act Section 10(b) or Rule 10b–5 for failure to timely file certain Form 8–K reports.[491] With respect to the Form 8–K items covered by the safe harbor, the safe harbor extends only until the due date of the next report of the issuer for the relevant periodic period in which the Form 8–K was not timely filed. As with similar disclosure now required in Forms 10–Q and 10–K, failure to make such disclosure would subject the issuer to potential liability under Section 10(b) and Rule 10b–5, in addition to potential liability under Section 13(a) or 15(d).

5. Annual Reports on Form 10–K

Similar to our new general instructions for Forms S–1 and S–3, we are adopting a separate general instruction for Form 10–K to specify how that form is to be used for an annual report with respect to asset-backed securities.[492] As proposed, under the instruction the depositor's name and sponsor's name also will need to be listed on the cover page of the Form 10–K.[493]

The instruction also clarifies who is to sign the Form 10–K. Consistent with our proposal and the existing requirements for who must sign the Sarbanes-Oxley Section 302 certification, the report must be signed either on behalf of the depositor by the senior officer in charge of securitization of the depositor, or on behalf of the issuing entity by the senior officer in charge of the servicing function of the servicer. If a servicer is to sign the report on behalf of the issuing entity and multiple servicers are involved in the servicing of the pool assets, the senior officer in charge of the servicing function of the master servicer (or entity performing the equivalent function) must sign. For the same reasons as the Form 10–D, we are not persuaded that additional parties, such as the trustee, should be permitted to sign the report as an alternative to the depositor or the servicer.[494]

Substantially as proposed, the general instruction identifies the existing items in the form that may be omitted as well as substitute items from Regulation AB that are required. Any other applicable items specified in Form 10–K will continue to be required.[495] As we explained in the Proposing Release, the requirements specified are consistent with the modified reporting system, and commenters overall agreed.[496] The application of the disclosure items for Form 10–K is presented in the following table: [497]

DISCLOSURE FOR FORM 10–K FOR ABS

Existing form items	Required if applicable	May be omitted
Item 1. Business	.....	•
Item 2. Properties	.....	•
Item 3. Legal Proceedings	.....	•

[485] We are adopting our proposed Form 8–K requirement for the addition and loss of material providers of credit enhancement or other support. Therefore, we do not believe separate accommodations are necessary for such entities.

[486] See, *e.g.*, Letters of ASF and CMSA.

[487] See, *e.g.*, Letter of NYCBA.

[488] See, *e.g.*, Letter of ABA.

[489] As noted in Section III.D.8.c., we also are clarifying that separate determinations of significant obligors must be made for disclosure required by Item 6.05 of Form 8–K if the actual asset pool differs materially from that described in the prospectus. Separate determinations also must be made if disclosure is required by Item 1121(b) of Regulation AB. See note 481 above and accompanying text.

[490] See also Section III.D.8.d.

[491] As discussed more fully in Section III.D.8., this safe harbor only applies to a failure to file a report on Form 8–K for certain specified items. Material misstatements or omissions in a Form 8–K will continue to be subject to Section 10(b) and Rule 10b–5 liability. In addition, the safe harbor does not apply to liability under Section 13(a) or 15(d) or with respect to any failure to satisfy any other separate disclosure obligation that may exist.

[492] See General Instruction J. to Form 10–K. We also are codifying as proposed the existing staff position that General Instruction I. to Form 10–K (Omission of Information by Certain Wholly-Owned Subsidiaries) is not applicable with respect to asset-backed issuers.

[493] While we are requiring the identification of these additional parties on the cover page, the report should still be filed on EDGAR only under the issuing entity's CIK code. See Section III.D.3.

[494] Regarding the potential use of a power of attorney, see note 469 above.

[495] As is the case today for Form 10–K, if any item is inapplicable or the answer thereto is in the negative, an appropriate statement to that effect shall be made. See Exchange Act Rule 12b–13 (17 CFR 240.12b–13).

[496] See, *e.g.*, Letters of ABA and ASF.

[497] In response to comment and given our revisions to the assessment and attestation proposal, we have moved Items 5 and 9 of Form 10–K to the list of Items that may be omitted. See, *e.g.*, Letters of ABA and ASF.

DISCLOSURE FOR FORM 10–K FOR ABS—Continued

Existing form items	Required if applicable	May be omitted
Item 4. Submission of Matters to a Vote of Security Holders		•
Item 5. Market for Registrant's Common Equity and Related Stockholder Matters		•
Item 6. Selected Financial Data		•
Item 7. Management's Discussion and Analysis of Financial Condition and Results of Operations		•
Item 7A. Quantitative and Qualitative Disclosure About Market Risk		•
Item 8. Financial Statements and Supplementary Data		•
Item 9. Changes in and Disagreements with Accountants on Accounting and Financial Disclosure		•
Item 9A. Controls and Procedures		•
Item 9B. Other Information	•	
Item 10. Directors and Executive Officers of the Registrant		•[1]
Item 11. Executive Compensation		•[1]
Item 12. Security Ownership of Certain Beneficial Owners and Management		•[1]
Item 13. Certain Relationships and Related Transactions		•[1]
Item 14. Principal Accountant Fees and Services		•
Item 15. Exhibits and Financial Statement Schedules	•	
Additional Disclosure Items from Regulation AB:		
Item 1112(b) of Regulation AB, Significant Obligor Financial Information	•	
Items 1114(b)(2) and 1115(b) of Regulation AB, Significant Enhancement Provider Financial Information	•	
Item 1117 of Regulation AB, Legal Proceedings	•	
Item 1119 of Regulation AB, Affiliations and Certain Relationships and Related Transactions	•	
Item 1122 of Regulation AB, Compliance with Applicable Servicing Criteria	•	
Item 1123 of Regulation AB, Servicer Compliance Statement	•	

[1] If the issuing entity does not have any executive officers or directors.

As noted in the table above, if the issuing entity has its own executive officers, board of directors or persons performing similar functions, Items 401, 402, 403 and 404 of Regulation S–K, will be required.[498] As discussed in Section III.B.1., we are not requiring audited financial statements for the issuing entity, nor are we adding reporting requirements regarding internal control over financial reporting.

Regarding the items to be included from Regulation AB, information about legal proceedings required by Item 1117 of Regulation AB will need to be provided, as well as information on affiliate relationships and related party transactions required by Item 1119 of Regulation AB. Regarding the latter, no information will be required, however, if substantially the same information had been provided previously in an annual report on Form 10–K for the asset-backed securities or in an effective registration statement under the Securities Act or prospectus timely filed pursuant to Securities Act Rule 424 under the same CIK code as the current annual report on Form 10–K. Updated financial information regarding significant obligors and enhancement providers also will be required,[499] although alternative methods may be available, subject to conditions, to present the information, such as through incorporation by reference or by including a reference to their Commission filings. The reporting requirement regarding an assessment of compliance with servicing criteria is discussed in Section III.D.7.

As proposed, we are codifying the longstanding requirement in the modified reporting system that a servicer compliance statement must be filed as an exhibit to the Form 10–K.[500] The servicer compliance statement requires a statement of compliance regarding the servicer's obligations under the particular servicing agreement for the ABS transaction. This is different from both the assessment of and attestation regarding compliance with servicing criteria, which is against a single set of criteria applicable to all ABS transactions, and the Section 302 certification, which is related to disclosure in Commission reports.

Like the existing requirement under the modified reporting system, the servicer compliance statement is a statement, signed by an authorized officer of the servicer, to the effect that a review of the activities of the servicer and its performance under the servicing agreement had been made under the officer's supervision, and that to the best of the officer's knowledge and except as otherwise disclosed, the servicer has fulfilled its obligations under the agreement in all material respects throughout the reporting period. If multiple servicers are involved in servicing the pool assets, separate compliance statements are required from each servicer that meets the criteria in Item 1108(a)(2)(i) through (iii) of Regulation AB (*i.e.*, master servicer, each affiliated servicer and each unaffiliated servicer that services 10% or more of the pool assets). As we explained in the Proposing Release, we believe this is consistent with general practice and should result in coverage of the material aspects of the primary servicing function.

6. Certifications Under Section 302 of the Sarbanes-Oxley Act

In June 2003, the Commission adopted amendments to its general rules relating to certifications required by the Sarbanes-Oxley Act, including providing the form of the Section 302 certification in the exhibit requirements in Item 601 of Regulation S–K.[501] As proposed, we are amending Item 601 of Regulation S–K to add the specific form and content of the required ABS Section 302 certification to the exhibit filing requirements.[502]

[498] Otherwise, all of Item 403 of Regulation S–K, including Item 403(a) of Regulation S–K, may be omitted.

[499] See text accompanying note 489 above regarding when determinations of significant obligors must be made.

[500] See Item 1123 of Regulation AB. Amendments to Item 601 of Regulation S–K specify that servicer compliance statements are to be filed as Exhibit 35 to the Form 10–K.

[501] See Release No. 33–8238 (Jun. 5, 2003) [68 FR 36636].

[502] See amendments to Item 601 of Regulation S–K and Exchange Act Rules 13a–14 and 15d–14. Under Exchange Act Rules 13a–14 and 15d–14, the requirements relating to the ABS Section 302 certification are specified in paragraph (d) of those Rules. The amendments to Item 601 of Regulation S–K segregate the separate forms of Section 302 certifications for non-ABS issuers (required by paragraph (a) of Exchange Act Rules 13a–14 and

Continued

As we explained in the Proposing Release, in specifying the form of the ABS Section 302 certification, we are making several amendments to the form provided in the revised staff statement to reflect our other substantive Exchange Act amendments.[503] Other changes reflect the approach, as proposed and consistent with the approach for non-ABS issuers, that the language of the certification must not be revised in providing the certification apart from the alternatives specified. Instead, any issues should be addressed through disclosure in the reports. Commenters generally agreed with our proposed revisions to the form of the certification.[504] The new form of certification, as modified from the proposal, is as follows: [505]

Certifications

I, [identify the certifying individual], certify that:

1. I have reviewed this report on Form 10–K and all reports on Form 10–D required to be filed in respect of the period covered by this report on Form 10–K of [identify the issuing entity] (the ''Exchange Act periodic reports'');

2. Based on my knowledge, the Exchange Act periodic reports, taken as a whole, do not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;

3. Based on my knowledge, all of the distribution, servicing and other information required to be provided under Form 10–D for the period covered by this report is included in the Exchange Act periodic reports;

4. [I am responsible for reviewing the activities performed by the servicer(s) and based on my knowledge and the compliance review(s) conducted in preparing the servicer compliance statement(s) required in this report under Item 1123 of Regulation AB, and except as disclosed in the Exchange Act periodic reports, the servicer(s) [has/have] fulfilled [its/their] obligations under the servicing agreement(s); and]

[Based on my knowledge and the servicer compliance statement(s) required in this report under Item 1123 of Regulation AB, and except as disclosed in the Exchange Act periodic reports, the servicer(s) [has/have] fulfilled [its/their] obligations under the servicing agreement(s); and]

5. All of the reports on assessment of compliance with servicing criteria for asset-backed securities and their related attestation reports on assessment of compliance with servicing criteria for asset-backed securities required to be included in this report in accordance with Item 1122 of Regulation AB and Exchange Act Rules 13a–18 and 15d–18 have been included as an exhibit to this report, except as otherwise disclosed in this report. Any material instances of noncompliance described in such reports have been disclosed in this report on Form 10–K.

[In giving the certifications above, I have reasonably relied on information provided to me by the following unaffiliated parties [name of servicer, sub-servicer, co-servicer, depositor or trustee].]

Date: _____

_____

[Signature]

[Title]

As we explained in the Proposing Release, paragraphs 1 and 3 have been changed from the revised staff statement to reflect the addition of Form 10–D and the fact that the certification covers the information filed in those distribution reports rather than Form 8–K.[506] Paragraph 4 refers to the servicer compliance statement explicitly required by our rules. In addition and consistent with the revised staff statement, two alternatives are provided for paragraph 4 depending on who is signing the Form 10–K report. The first version is to be used when the servicer signs the report on behalf of the issuing entity. The second version is to be used when the depositor is signing the report. Paragraph 5 of the certification has been amended from the revised staff statement and our proposal to refer specifically to our revised requirements regarding assessment of compliance with servicing criteria, discussed more fully in Section III.D.7.

Because asset–backed issuers do not typically have a principal executive officer or principal financial officer, the signature requirements for the ABS certifications differ from other issuers. Consistent with our proposal and the revised staff statement, the final rules specify who must sign the certification. The certification must be signed by either the senior officer in charge of securitization of the depositor if the depositor is signing the Form 10–K report, or the senior officer in charge of the servicing function of the servicer if the servicer is signing the Form 10–K report on behalf of the issuing entity.[507] If multiple servicers are involved in servicing the pool assets, the senior officer in charge of the servicing function of the master servicer (or entity performing the equivalent function) must sign if a representative of the servicer is to sign, and references in the certification relate to the master servicer. As is the case today for all Section 302 certifications, a natural person must sign the certification in his or her individual capacity, although the title of that person in the organization of which he or she is an officer may be included under the title.

As proposed, these signature requirements are consistent with our final rules for who must sign the Form 10–K. The same person that signs the Form 10–K must sign the Section 302 certification. Although comments in this area were mixed, we are not persuaded that a representative of the trustee should be permitted to sign the Section 302 certification, especially given that the trustee is not the party signing the report itself.[508]

Consistent with our proposal and the revised staff statement, we are including an instruction to the certification to clarify that because the signer of the certification must rely in certain circumstances on information provided by unaffiliated parties outside of the signer's control, the signer in such situation may reasonably rely on information that unaffiliated trustees, depositors, servicers, sub-servicers or

15d–14) from those for ABS filings (required by paragraph (d) of Exchange Act Rules 13a–14 and 15d–14). In both instances, Section 302 certifications still must be filed under Exhibit 31. We also are revising Exchange Act Rules 13a–14(d) and 15d–14(d) as proposed to delete from those paragraphs the detailed description of the contents of the ABS Section 302 certifications. We are making several other technical amendments to the rules regarding certifications, as proposed, including amendments to Exchange Act Rule 12b–15 and paragraph (c) of Exchange Act Rules 13a–14 and 15d–14 to confirm the Commission's intention that those provisions also apply with respect to ABS Section 302 certifications required by paragraph (d) of Exchange Act Rules 13a–14 and 15d–14.

[503] We believe the combination of these and other amendments render the two staff no-action letters issued subsequent to the revised staff statement no longer necessary. See *Merrill Lynch Depositor, Inc.* (Mar. 28, 2003) and *Mitsubishi Motors Credit of America, Inc.* (Mar. 27, 2003).

[504] See, *e.g.*, Letters of ABA and ASF.

[505] Unlike Section 302 certifications, certifications required by Section 906 of the Sarbanes-Oxley Act are required only in periodic reports that contain financial statements filed by the issuer. See 15 U.S.C. 1350. We are not requiring that ABS reports on Form 10–K must contain the ABS issuer's financial statements. Thus, a Section 906 certification requirement will not be triggered.

[506] In addition, we are making conforming revisions to paragraph 2 of the certification to track similar changes made in the June 2003 certification release, which was issued after the revised staff statement.

[507] See amendments to paragraph (e) of Exchange Act Rules 13a–14 and 15d–14.

[508] Compare, *e.g.*, Letters of Aus. SF and Wells Fargo; with Letters of ABA; ASF; and BMA.

co-servicers have provided. As is the case today, if the signer does so, it must provide an additional statement in the certification identifying the unaffiliated parties on which the signer reasonably relied. Commenters supported retaining this instruction.[509] Like the revised staff statement, we are not specifying the manner in which reasonable reliance may be established. As proposed, the reasonable reliance instruction for the Section 302 certification is not applicable with respect to affiliated parties, nor is it applicable with respect to information from any registered public accounting firm or firms performing an attestation on an assessment of compliance with servicing criteria for an affiliated party.

7. Report on Assessment of Compliance With Servicing Criteria and Accountant's Attestation

a. Background

As noted above, the modified reporting system has not required audited financial statements for the issuing entity in the annual report on Form 10–K, but has instead generally required an assertion by the servicer and an attestation by an independent public accountant regarding compliance with servicing criteria. This longstanding framework was developed based on the recognition that one of the most important elements affecting an investor's assessment of a particular asset-backed security is the performance of the servicer and that an independent third party checking some aspect of the servicing function provides a certain level of assurance and transparency regarding the servicer's performance.

However, the types of assessments and attestations, and the criteria that servicing compliance was assessed against, historically have varied significantly. The most common example involves an assertion on and disclosure regarding compliance with criteria set forth in the Uniform Single Attestation Program for Mortgage Bankers, or USAP, developed by the Mortgage Bankers Association.[510] The accountant's report attesting to the assertion under the USAP is prepared in accordance with SSAE No. 10.[511] The servicer's assertion as to compliance and the accompanying accountant's report are commonly referred to as a ''USAP Report.''

As we noted in the Proposing Release, the USAP was created early in the development of securitization as a mortgage financing technique to provide uniform minimum criteria against which the servicing of mortgage-backed securities could be assessed. It was created at a time when most securitizations consisted of either simple pass-through or pay-through structures of simple pools of residential mortgages. As new, more-complex ABS transactions were introduced into the marketplace and additional asset types were securitized, the USAP, in the absence of any other well-recognized criteria, continued to be used as the default criteria for assessment and disclosure of servicer performance.

The USAP describes uniform minimum servicing criteria against which a servicing entity is to assess material compliance. In general, the servicer's management makes a written assertion about compliance with the USAP minimum criteria for a particular period (usually a year). The accountant engaged to perform the examination engagement evaluates the servicer's assertion regarding compliance with the minimum servicing criteria.[512]

While the USAP has by default become the dominant criteria to assess servicing compliance for purposes of fulfilling the accountant report requirement of the modified reporting system, it has significant limitations in the context of ABS reporting. The USAP was originally written to address compliance criteria related to residential mortgage loan servicing. Over time, it has been extended to other ABS transactions, such as those involving auto loans. However, the USAP's minimum servicing criteria may not adequately capture the needs of investors in ABS transactions other than mortgage-backed securities. Some of the USAP criteria may not be applicable to these other asset types (*e.g.*, criteria regarding property tax escrow accounts) and are often specifically excluded from the assertion of compliance and the related accountant's report. There does not appear to be any consistency as to which USAP criteria are applied to a particular asset type outside of residential mortgage loans, so the list of exceptions varies from issuer to issuer, even in the same asset class. In addition, rarely are substitute criteria included that would be relevant to that asset class, further diminishing the scope and relevance of the final report for other asset classes.

Another difficulty with the current criteria is that they do not clearly address the totality of activities and parties involved in servicing an ABS transaction, even for mortgage-backed securities. The USAP does not completely address the full spectrum of servicing functions, including allocation and distribution functions, that may be important in an ABS transaction, particularly as the complexity of flow of funds calculations has increased. In addition, the current system does not contemplate the fact that multiple unaffiliated parties may be involved in servicing an asset-backed security. As a result, the current system potentially leaves gaps in servicing compliance reporting.

b. Our Proposal and Overview of Revised Approach

Our proposal sought to retain the assessment and attestation approach as well as improve and add consistency to the approach by providing a specified manner for making assertions and associated attestations. These improvements were largely facilitated by the introduction of a single uniform set of servicing criteria that covers all aspects of the servicing function and that could be used in the context of multiple asset classes.

We continue to believe that for asset-backed securities, an assessment and attestation regarding servicing compliance provides material information to investors in monitoring transactions and thus their investments more directly and efficiently than an audit of financial statements or reporting on internal control over financial reporting. As we stated in the Proposing Release, the performance of the servicing function is of material importance to the performance of an ABS transaction. Recent events in both the ABS and non-ABS markets have highlighted the need for appropriate controls and processes and mechanisms

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[509] See, *e.g.*, Letters of ABA and ASF.

[510] Mortgage Bankers Association of America, *Uniform Single Attestation Program for Mortgage Bankers* (last rev. 1995).

[511] Statements on Standards for Attestation Engagements No. 10 (SSAE No. 10), *Attestation Standards: Revision and Recodification* (Jan. 2001). Specifically, Chapters 1 and 6 of SSAE No. 10 set forth the standards that accountants are required to follow in attesting to an entity's compliance with specified requirements. As set forth in paragraph 1.23, ''the practitioner shall perform the engagement only if he or she has reason to believe that the subject matter is capable of evaluation against criteria that are suitable and available to users.'' The USAP has generally been accepted by practitioners as meeting that requirement. See paragraphs 1.24 through 1.34 of SSAE No. 10.

[512] SSAE No. 10, paragraph 6.54, provides two methods of reporting: (a) Directly on an entity's compliance or (b) on a responsible party's written assertion regarding compliance. However, SSAE No. 10, paragraph 6.64, states that ''when an examination of an entity's compliance with specified requirements discloses noncompliance with the applicable requirements that the practitioner believes have a material effect on the entity's compliance, the practitioner should modify the report and, to most effectively communicate with the reader of the report, should state his or her opinion on the entity's specified compliance requirements, not on the responsible party's assertion.''

to assess compliance with controls and processes.[513] A disclosure-based assessment and attestation system identifies for investors those aspects of the standard servicing criteria that are in material compliance. Investors will thus be better able to evaluate servicing responsibilities and performance and the reliability of the information they receive. Additionally, the assessment should help to identify potential weaknesses that may adversely affect security holders.

As we noted in the Proposing Release, the current modified reporting system does not provide complete transparency as to what is expected of issuers, servicers, accountants and other parties. While the varying no-action letters on this subject need uniform codification, the principal weakness in the current system is the lack of suitable servicing criteria on which reporting can be based. The result has been significant inconsistencies in the type of reporting provided, diminishing its usefulness, relevance and comparability.[514]

Accordingly, we are retaining the basic approach set forth in our original proposal, although we are making certain modifications, discussed in more detail below. Specifically, we are modifying our original proposal to remove the requirement for a single responsible party to make an assertion regarding servicing compliance covering the entire servicing function, which was the primary area of comment on the proposals.[515] Instead, we are adopting a revised approach suggested by many commenters that will require reports on assessments of compliance with servicing criteria from each party participating in the servicing function as specified, with associated attestation reports from registered public accountants, to be filed as exhibits to the Form 10–K report.[516] As an additional aspect of this revised approach, we are revising paragraph 5 of the ABS Section 302 certification, as discussed further below in response to comment, to require a certification that, except as otherwise disclosed, required reports from all parties participating in the servicing function as specified have been included as an exhibit to the Form 10–K report.

As proposed, a material instance of noncompliance identified in the reports will not by itself have regulatory restrictions on market access, such as an effect on continued form eligibility under the Securities Act for additional ABS transactions.[517] Rather, the assessment and reporting on the criteria is designed to operate within a disclosure-based framework.

c. Assessment and Attestation of Servicing Compliance

As discussed above, our revised approach will require that the annual report on Form 10–K must include as exhibits reports from each party participating in the servicing function that assesses compliance with the servicing criteria that we are adopting in Item 1122 of Regulation AB.[518] Item 1122 of Regulation AB also specifies the format for each of the assessment reports and requires them to include: [519]

- A statement of the party's responsibility for assessing compliance with the servicing criteria applicable to it.
- A statement that the party used the servicing criteria to assess compliance with the applicable servicing criteria.
- The party's assessment of compliance with the applicable servicing criteria as of and for the period ending the end of the fiscal year covered by the Form 10–K report. The report must include disclosure of any material instance of noncompliance identified by the party.
- A statement that a registered public accounting firm has issued an attestation report on the party's assessment of compliance with the applicable servicing criteria as of and for the period ending the end of the fiscal year covered by the report on Form 10–K.

As discussed further in Section III.D.7.d, our revised approach also requires the attestation report of a registered public accounting firm to be filed as an exhibit to the Form 10–K report.[520]

i. Responsible Party

Our proposal contemplated that a single ''responsible party,'' defined as either the depositor if the depositor signs the report on Form 10–K, or the servicer if the servicer signs the report on behalf of the issuing entity, would make an assertion regarding compliance with the servicing criteria. The proposal contemplated that the responsible party's assertion would cover the entire servicing function and that the responsible party would, in certain instances, have to place reasonable reliance upon third parties in making its assertion.

As discussed above, this was the primary focus of comment on our assessment and attestation proposals. Many of the commenters, in responding to our specific requests for comment on this point, believed that instead of a single ''responsible party,'' there should be separate assessments of compliance by each entity responsible for the particular criteria and separate accompanying auditor attestations.[521] These commenters believed the responsibility for assessing compliance with the criteria should be placed solely, in each case, with the individual party whose servicing activities are being evaluated. As stated by one of these commenters, individual assessments can be performed by each party at a platform level consistent with the proposal and these reports could be filed as exhibits to the Form 10–K report along with the responsible party's assessment of its own servicing compliance, as applicable.[522] Several commenters also supported as an addition to this alternative a requirement that a single party would either confirm that an assessment and attestation covering each unaffiliated party with material servicing or administration responsibilities has been received, or disclose that an entity with such responsibilities has failed to deliver its required assessment and attestation.[523]

These alternatives still achieve our proposed objective of covering the entire servicing function. We continue to believe it is important that the investor receives notice as to whether reports evidencing all aspects of the servicing function are in fact provided. As discussed in Section III.B.3.d., the

[513] See, *e.g.*, note 59 above.

[514] See, *e.g.*, ''SEC Filings Reveal Little ABS Reporting Consistency,'' Asset Securitization Report, Sep. 23, 2002, at 10.

[515] See, *e.g.*, Letters of ABA; AICPA; ASF; BMA; CMSA; Dewey Ballantine (''Dewey); E&Y; JPMorganChase; MBA; MBNA; U.S. Bank; and Wells Fargo.

[516] See, *e.g.*, Letters of AICPA; ASF; BMA; CMSA; E&Y; JPMorganChase; MBA; and Wells Fargo.

[517] However one of the proposed criteria relates to reporting with the Commission. If reports are not filed in accordance with our reporting rules, this may have an effect on continued form eligibility. See Section III.A.3.

[518] See Exchange Act Rules 13a–18 and 15d–18. Item 601 of Regulation S–K specifies that the assessment reports will need to be filed under Exhibit 33 to the Form 10–K.

[519] See Item 1122(a) of Regulation AB.

[520] See Item 1122(b) of Regulation AB. Item 601 of Regulation S–K specifies that each attestation report of a registered public accounting firm will need to be filed under Exhibit 34 to the Form 10–K. As proposed, the substitution of another type of accountant's report or opinion, such as a USAP report or an agreed-upon procedures report, will not satisfy the reporting requirement. Of course, ABS transaction agreements may continue to require a separate accountant engagement, such as a USAP engagement or an agreed-upon procedures engagement, in addition to the report called for by this rule.

[521] See note 515 above.

[522] See Letter of ASF.

[523] See, *e.g.*, Letters of AICPA; ASF; BMA; CMSA; E&Y; JPMorganChase; MBA; and Wells Fargo.

delegation of servicing and administration functions in an ABS transaction can vary significantly among different parties, even in the same asset class. The investor likely will not be in the best position to determine whether the reports that are ultimately attached to the Form 10–K report collectively cover all aspects of the servicing criteria.

Thus, we are adopting a revised approach in response to these comments that does not require an assertion by a single responsible party, but instead requires that the person that signs the Section 302 certification certify in paragraph 5 of the certification that assertions prepared by all parties participating in the servicing function as specified, and associated attestation reports from registered public accountants, have been included as exhibits to the report on Form 10–K, except as otherwise disclosed in the report.[524] In addition, the certifying person must certify that all material instances of noncompliance with the servicing criteria described in the reports have been disclosed in the report on Form 10–K. In order to make this certification, reports will need to be accumulated from all parties participating in the servicing function as specified, along with associated attestation reports from registered public accounting firms, and filed as exhibits. Disclosure will be required in the Form 10–K if any of those reports are missing, along with an associated explanation, and disclosure also will be required of material instances of noncompliance described in the reports, if any.

The revised approach we are adopting requires coordination among the various parties participating in the servicing function to be able to comply with the filing requirements; however, we believe that the amount of required coordination is reduced from our original proposal and, as discussed above, meets the regulatory objective of providing investors insight into the operation of the entire servicing function. We expect that such coordination is possible and, as confirmed to us by commenters, issuers can obtain the reports that must be filed as exhibits.

ii. Scope: Period Covered

We proposed that the assessment of the servicing function would be for a full fiscal period, rather than just at a point in time. We continue to believe that an assessment and attestation for the entire period covered by the report on Form 10–K is the appropriate approach in this context, and commenters generally agreed.[525] This approach is consistent with the USAP approach commonly followed today. Accordingly, we are adopting this approach without modification.

iii. Scope: Level of Reporting

In light of current practice and servicers' focus on overall compliance with standards at the platform level, we proposed to accept a ''platform'' level assessment for purposes of assessing servicing compliance. This means an assessment of compliance with respect to all asset-backed securities transactions involving the asserting party that are backed by assets of the type backing the asset-backed securities covered by the Form 10–K report. This ''platform'' level assessment was proposed to permit a single assessment and assertion regarding compliance for entities involved in multiple ABS transactions, as compared to requiring separate assessments for each individual transaction, which would be more costly and might be administratively burdensome. Commenters generally supported an assessment at the platform, rather than transaction, level.[526] We are adopting this approach as we continue to believe a platform level assessment provides an appropriate level of information to investors and does not result in substantial increased cost to issuers. As commenters confirmed to us, we believe that platform level assessments can be performed by all parties participating in the servicing function to allow an issuer to meet its requirements to file the resulting assessment and related attestation reports as exhibits to the Form 10–K report.

iv. Scope: Entire Servicing Function

As we explained in the Proposing Release, the servicing of an asset-backed security consists of many functions, including: collecting principal, interest and other payments from obligors; paying taxes and insurance from escrowed funds; monitoring and accounting for delinquencies; executing foreclosure if necessary; temporarily investing funds pending distribution; remitting fees and payments to enhancement providers, trustees and others providing services; and allocating and remitting distributions to security holders. Each of these functions can represent a material element of ABS performance.

In addition, the entire servicing function may be performed by a single party or different aspects may be performed by multiple parties (*e.g.*, primary servicers, master servicers, trustees, etc.). For example, in some instances, one party may perform the servicing functions that relate to administration of the pool assets while another party may perform the servicing functions that relate to calculating payments to security holders. Currently, when multiple parties are involved in the servicing function, sometimes only one report on servicing compliance by one servicer is filed with the Form 10–K report covering only a limited subset of the servicing function. As we explained in the Proposing Release, this approach provides no assurance with respect to other aspects of the servicing function. In other instances, multiple reports may be filed, one from each party involved in the servicing function covering only those steps that are applicable for the standards impacted by their work. This approach may lead to fragmented reporting that potentially results in certain aspects of the servicing function not being addressed by the reports at all or requiring an investor to ascertain if all aspects have been covered.

To address these concerns, we proposed that the responsible party would assess material compliance with the servicing criteria covering the entire servicing function, based on reasonable reliance upon third-parties where necessary. We continue to believe that the entire servicing function should be subject to an assessment of compliance. As noted above, we believe the revised approach we are adopting requiring separate reports regarding compliance by each party participating in the servicing function as specified also achieves this objective while eliminating many of the concerns or potential complexities raised by commenters regarding a single ''responsible party'' approach.

Some commenters thought that, in the event that we pursued a multiple report approach, we should set a specific threshold for which reports should be required as some parties may be providing servicing activities for only a minor portion of the assets included in a transaction.[527] Other commenters thought that providing a threshold for reporting may result in very few reports being included in instances where there

[524] See Item 601(b)(31)(ii) of Regulation S–K; Item 1122 of Regulation AB; and Exchange Act Rules 13a–18 and 15d–18.

[525] Compare, *e.g.*, Letters of ASF and E&Y; with Letter of ABA.

[526] See, *e.g.*, Letters of AICPA; ASF; E&Y; MBNA; PWC; and Wells Fargo.

[527] See, *e.g.*, Letters of AICPA; ASF; BMA; Dewey; and E&Y.

are multiple parties each servicing a minor portion of the assets included in the transaction, such as may be the case in residential mortgage ABS transactions.[528]

To address this issue, we are specifying that reports will be required by any ''party participating in the servicing function,'' which is defined as any entity that is performing activities that address the servicing criteria, unless such entity's activities relate only to 5% or less of the pool assets. For example, if a party is servicing individual pool assets that comprise only 4% of the pool, a report from that party will not be required. However, some servicing functions cover all assets included in a transaction. For example, a single party, such as a trustee or an administrator, may calculate the amount due to investors in a transaction. In those cases, an assessment from that party and a related attestation report from a registered public accounting firm will be required to be filed as an exhibit to the Form 10–K for the transaction.

As proposed, the revised approach we are adopting does not distinguish which parties should file reports based on the respective role played by the party in the servicing function. Any party participating in the servicing function, including trustees, may be required to provide an assessment and related attestation report to the extent that the assets covered by their activities relates to more than 5% of the pool assets. However, the fact that a party, such as a trustee, may perform an aspect of the servicing function covered by the criteria for purposes of requiring an assessment and attestation report does not mean that the party is included in the definition of ''servicer'' in Regulation AB for purposes of other requirements, such as disclosure regarding servicers and servicer compliance statements.

v. Servicing Criteria

As we explained in the Proposing Release, the only generally used criteria for assessing and reporting on servicing compliance is the USAP. However, as previously discussed, the USAP was not designed for the breadth of asset classes included in ABS offerings. It also does not address aspects of the servicing function that may be important in servicing asset-backed securities.

In the absence of other suitable criteria, we proposed to establish disclosure-based servicing criteria to be used by those making an assertion regarding servicing compliance and by registered public accounting firms in assessing servicing compliance. Our proposal illustrated our belief that a single set of servicing criteria that is publicly available would enhance the quality of the assessment of compliance, promote the comparability of reports of different issuers, and provide value in establishing market-wide benchmarks with respect to assessing the servicing function.

Most commenters commended the initiative to enunciate a consistent set of criteria.[529] As explained by one of these commenters, substantial modifications to the existing criteria under the USAP were in order and the proposed modifications were appropriate.[530]

With certain minor clarifying revisions in response to comment, we are adopting the uniform set of servicing criteria substantially in the form proposed. As we explained in the Proposing Release, no other set of uniform servicing criteria exists for purposes of this type of compliance assessment today, nor are we aware of any that are under development in the market. A few commenters believed that our final rules should permit the use of criteria established by a private body or group that followed due-process procedures.[531] If other sets of criteria were developed by market participants in the future that were subject to appropriate due process, we would be willing to consider, at that time, their applicability in a separate rulemaking action. As we explained in the Proposing Release, in order for a set of servicing criteria to be considered in the future, the criteria would need to: be established by a group or body that has followed due process procedures; be free from bias; permit reasonably consistent qualitative and quantitative measurements; be sufficiently complete so that relevant factors that would alter a conclusion about the subject matter were not omitted; and be relevant to the subject matter.[532] In addition, the set of criteria would need to address all material aspects of the servicing function with respect to an asset-backed securities transaction.

As proposed, the disclosure-based servicing criteria we are adopting are designed to be incremental to the current criteria in the USAP. Accordingly, and as commenters confirmed to us, many of the criteria are not new.[533] Criteria that we proposed that included specific timeframes, such as two business days, mirrored for the most part the current criteria in the USAP. The servicing criteria we proposed that were incremental to the USAP criteria were developed based on staff study and experience with ABS transactions, including experience gained through the filing review process and the 2003 MBS Disclosure Report. Commenters suggested several minor clarifying revisions to the proposed criteria, and as discussed above we have made clarifying revisions to the final criteria in response.

While certain of the proposed servicing criteria referred to specific timeframes as adapted from the USAP, others relied upon transaction agreements to set forth specific details regarding that aspect of the servicing function. The few commenters that commented on this aspect of the proposal were mixed. One commenter preferred more reliance on transaction agreements instead of specific timeframes to provide flexibility, while another commenter preferred specific timeframes in the criteria instead of reliance on transaction agreements to promote consistency.[534] To balance these objectives, we are maintaining our proposed references to specific timeframes in the criteria, which as noted above were adapted from the current USAP. However, we are also providing in those criteria that transaction agreements can expressly provide an alternate timeframe. Under this approach, the specific timeframes in the criteria will continue to apply in the event that the transaction agreements happen to be silent on those timeframes. We believe this approach appropriately leaves the responsibility for determining the details of the servicing functions with investors and ABS issuers while still providing default benchmarks that are generally consistent with the existing USAP. Further, as ABS transaction agreements are required to be filed with the Commission, disclosure of these details for individual transactions will be readily available.

Regarding another commenter's concern that the assessment and related attestation regarding servicing compliance will be performed at the platform level while the servicing criteria refer to transaction

[528] See, *e.g.*, Letter of Wells Fargo.

[529] See, *e.g.*, Letters of ASF; CMSA; MBA; U.S. Bank; and Steve Walls. One of these commenters noted that while market participants could develop suitable uniform criteria if given enough time, the proposed criteria, if revised to give effect to the commenter's comments on specific items, would be an acceptable set of criteria that could be applied across asset types. See Letter of ASF.

[530] See Letter of Steve Walls.

[531] See, *e.g.*, Letters of AICPA; E&Y; and PWC.

[532] See AT § 101, paragraph 24.

[533] See, *e.g.*, Letter of MBA.

[534] Compare the Letter of ABA with the Letter of MBA.

agreements,[535] in many instances we do not expect this will be a major issue because it is our understanding that many transaction agreements, particularly in the same asset class, contain the same or nearly the same specific servicing-related requirements.

The criteria, as proposed, consist of four broad categories: general servicing considerations; cash collection and administration; investor remittances and reporting; and pool asset administration. As we explained in the Proposing Release, these categories describe major components of the servicing function, and each category contains servicing criteria that have been designed to have general applicability to the servicing of all asset-backed securities. The complete criteria are set forth in the text of paragraph (d) of Item 1122 of Regulation AB. As noted in Section III.D.7.c.vi., some servicing criteria may be more or less applicable depending on the type of asset underlying the ABS transactions.

The servicing criteria are summarized as follows:

General servicing considerations. The general servicing considerations are designed to provide disclosure on whether the servicer or other relevant party has instituted policies and procedures for structural monitoring of the ABS securities (*e.g.*, triggers or events of default) and performed other general administrative tasks during the period covered by the report as set forth in the transaction agreements, such as monitoring the activities of third parties to which material servicing activities have been outsourced, maintaining a back-up servicer and maintaining certain insurance coverages in force, if applicable. As we explained in the Proposing Release, with the exception of the criterion regarding the maintenance of certain insurance coverages in force, these criteria are not addressed in the current USAP. We continue to believe they are appropriately included given their importance to an ABS transaction.

Cash collection and administration. These servicing criteria are designed to provide disclosure on whether the servicer or other relevant party has administered the collection of cash from obligors, segregated (as applicable) and reconciled such cash for investors and maintained transaction accounts as set forth in the transaction agreements. As we explained in the Proposing Release, the servicing criteria included within this section are comparable to those set forth in the USAP, although the USAP does not have specific criteria to address the maintenance of transaction accounts. We continue to believe disclosure of whether the servicer complies with maintenance of transaction accounts is information investors may need to confirm the ABS transaction is functioning as originally planned.

Investor remittances and reporting. These servicing criteria are designed to provide disclosure on whether the servicer or other relevant party is calculating amounts due to investors and reporting such amounts to investors in accordance with the flow of funds in the transaction agreements. These servicing criteria also are designed to provide disclosure on whether the servicer or other relevant party has allocated and remitted distributions to investors in accordance with the transaction agreements and filed information with the Commission as required by its rules and regulations. As we explained in the Proposing Release, while certain elements of these criteria are presently included in the USAP, an explicit assessment of compliance with the flow of funds calculations may be incremental to what is currently performed in satisfying the current USAP criteria. It remains our understanding that oversight of the flow of funds calculations can be critical for proper distributions to investors.

Pool asset administration. These servicing criteria are designed to provide disclosure on whether the servicer or other relevant party is maintaining the pool assets as set forth in the transaction agreements, including:

- Maintaining specified collateral;
- Administering changes to the asset pool;
- Posting payments and other changes regarding pool assets;
- Instituting loss mitigation or recovery actions;
- Administering funds held in trust for an obligor, if required for the pool assets; and
- Maintaining external credit enhancement or other support.

As we explained in the Proposing Release, these servicing criteria, mostly included within the USAP, have been incrementally enhanced to encompass more aspects of pool asset maintenance. For example, the USAP does not address external credit enhancement or other support.

vi. Identification of Inapplicable Criteria

Because of the unique and fluid nature of the ABS market, our proposal provided discretion to the responsible party to exclude those servicing criteria that were inapplicable to the servicing of a particular asset class, so long as the excluded criteria were identified in the responsible party's and the registered public accounting firm's reports. We also requested comment on an alternative approach that would allow for a party to voluntarily determine which specific servicing criteria to exclude from its assessment (even if they were otherwise applicable to the particular asset class), so long as any excluded criteria were disclosed and the reason for their exclusion was also disclosed.

One commenter thought it critical to permit exclusion of criteria that was inapplicable to the asset class and did not object to requiring each assessing party to identify either all of the inapplicable criteria, or, alternatively, only the criteria that were applicable.[536] One commenter supported our alternative approach and believed a servicer should be able to exclude any particular criterion, even if it cannot conclude that the criterion is not applicable to the asset class, as long as it discloses the exclusion in the assessment (*e.g.*, the criterion is not required by the transaction documents).[537]

As noted above, we continue to believe all applicable servicing criteria should be covered. However, with our revised approach requiring reports from multiple parties that participate in the servicing function, we also recognize that it may be necessary for a particular party to exclude a particular criterion from its assessment not because it is inapplicable to the asset class, but because that particular party does not perform it. As a result, we are revising our proposal to allow for the exclusion in a party's assessment report of those specific servicing criteria that are not applicable to the asserting party based on the activities it performs with respect to asset-backed securities transactions taken as a whole involving such party and that are backed by the same asset type backing the class of asset-backed securities. For example, a servicer may exclude a particular criterion either because in its servicing platform it does not participate in that element of the servicing function or the criterion is broadly inapplicable in the context of the asset class being serviced. However, a party may not voluntarily select to exclude specific servicing criteria if they are otherwise applicable to that party.

In the event that servicing criteria are excluded for those reasons that are permitted, the inapplicability of the criteria must be disclosed in both the asserting party's assertion and the

[535] See Letter of Wells Fargo.

[536] See, *e.g.*, Letter of ASF.

[537] See, *e.g.*, Letter of TMCC.

related registered public accounting firm's report. However, while the individual asserting parties will be permitted to exclude criteria they do not perform, it will be incumbent on the person making the Section 302 certification to certify whether all required reports covering the entire servicing function, including all the criteria applicable to the asset class, are included with the Form 10–K report.

One commenter requested the ability to exclude certain servicing criteria that are inapplicable in certain foreign jurisdictions, as some of the proposed criteria do not apply to non-U.S. issuers given there is not a corresponding concept in the home jurisdiction.[538] We do not believe it is necessary to create a separate ability to exclude certain criteria for foreign ABS transactions. The approach we have adopted provides those parties who participate in servicing foreign ABS transactions the ability to exclude certain criteria if those criteria are not applicable to the asserting party based on the activities it performs. For example, if there are certain activities that are necessary for the servicing of a mortgage loan in the U.S. that are not applicable for the servicing of a mortgage loan in a foreign jurisdiction because of regulatory or other structural reasons, the approach we have adopted would permit the inapplicable criteria for the foreign asset class to be excluded from the assertion and related attestation with appropriate disclosure in each of those reports.

vii. Disclosure of Material Instances of Non-Compliance

Our proposal contemplated that the responsible party's report on an assessment of compliance with servicing criteria would identify any material instance of noncompliance with the criteria, and that the same party would be required to disclose in the report on Form 10–K any material impacts or effects as a result of the material instances of noncompliance that have affected or that may reasonably be likely to affect pool asset performance, servicing of the pool assets or payments or expected payments on the asset-backed securities. We continue to believe it is important for material instances of noncompliance that are reported in each of the reports prepared by parties participating in the servicing function to be identified by the person preparing the Form 10–K in the report on Form 10–K.

However, we are not adopting a specific line item requirement to disclose any material impacts or effects as a result of the material instances of noncompliance. Commenters were mixed on whether and to what extent there should be such a specific disclosure requirement.[539] Even in the absence of a specific line item disclosure requirement, whether any such disclosure is required will depend on the particular facts and circumstances.[540]

Consistent with our proposal, the period to be covered by the report on Form 10–K is consistent with the common practice today under the USAP of assessing compliance as of and for the period ending on a particular date. As we explained in the Proposing Release, this is different from reporting regarding internal control over financial reporting under Section 404 of the Sarbanes-Oxley Act, which speaks as of a particular date only. Thus, consistent with our proposal and general practice today, disclosure will be required of material instances of noncompliance during the reporting period, even if such noncompliance was subsequently corrected in the period. We continue to believe this approach is consistent with our approach not to require interim evaluations and reporting of compliance or disclosures of changes in reports (*i.e.*, Form 10–D reports) during the Form 10–K reporting period.

d. Attestation Report on Assessment of Compliance

We proposed that a registered public accounting firm would be required to attest to, and report on, the assessment of compliance made by the single responsible party through performance of an examination engagement. As our proposal would be in lieu of audited financial statements and Sarbanes-Oxley Section 404 reporting, we believed that requiring a registered public accounting firm to provide the attestation is important to help assure independence and objectivity for the attestation function, similar to that required with respect to an audit of financial statements, and thereby increase investor confidence in the reliability of the compliance assessment.

Our revised approach does not require an assertion by a single responsible party covering the entire servicing function, but instead contemplates that assertions will be made by each party participating in the servicing function as specified and that each party will be responsible for having an attestation engagement performed by a registered public accounting firm. The attestation would not cover servicing criteria properly excluded by the servicing party and disclosed as described above. Further, the revised approach requires that each registered public accounting firm's report be filed as an exhibit to the report on Form 10–K.[541] As proposed, the attestation examination must be made in accordance with standards for attestation engagements issued or adopted by the Public Company Accounting Oversight Board (PCAOB). On April 25, 2003, the Commission approved the PCAOB's adoption of the auditing and attestation standards in existence as of April 16, 2003 as interim auditing and attestation standards.[542] The Attestation Standards for Compliance Attestation (AT § 601) in those interim auditing and attestation standards should be used in performing this examination engagement.

We are adopting conforming amendments to Regulation S–X, substantially as proposed, to reflect the attestation report that will be prepared by a registered public accounting firm and to require an ABS issuer to file the attestation report with the report on Form 10–K. Under these amendments, a new ''Attestation report on assessment of compliance with servicing criteria for asset-backed securities'' is defined as a report in which a registered public accounting firm expresses an opinion, or states that an opinion cannot be expressed, concerning an asserting party's assessment of compliance with servicing criteria, as required under the revised approach, in accordance with standards on attestation engagements.[543] When an overall opinion cannot be expressed, the registered public accounting firm must state why it was unable to express such an opinion. As proposed, the report must be dated, signed manually, identify the period covered by the report and clearly state the opinion of the accountant as to

[538] See, *e.g.*, Letter of A&O.

[539] Compare, *e.g.*, Letter of ASF; with Letters of AICPA; E&Y; and Wells Fargo.

[540] See note 252 above.

[541] As is currently the case under the modified reporting system, to the extent the Form 10–K is incorporated by reference into a Securities Act registration statement, a consent would need to be filed with respect to the accountant's report. See Securities Act Rule 439.

[542] See Release No. 33–8222 (Apr. 25, 2003) [68 FR 23335]. See also Release No. 34–50495 (Oct. 5, 2004) [69 FR 60913] (Notice of Filing of Proposed Rules on Conforming Amendments to PCAOB Interim Standards Resulting from the Adoption of PCAOB Auditing Standard No. 2, ''An Audit Of Internal Control Over Financial Reporting Performed In Conjunction With An Audit of Financial Statements''); and Release No. 34–50688 (Nov. 17, 2004) [69 FR 68434] (Order Approving Proposed Conforming Amendments to PCAOB Interim Standards Resulting from the Adoption of PCAOB Auditing Standard No. 2, ''An Audit Of Internal Control Over Financial Reporting Performed In Conjunction With An Audit of Financial Statements'').

[543] See Rule 1–02(a)(3) of Regulation S–X.

whether the party's assessment of compliance with the servicing criteria was fairly stated in all material respects, or must include an opinion to the effect that an overall opinion cannot be expressed.[544]

Consistent with our proposal, the report issued by the registered public accounting firm must be available for general use and not contain restricted use language. We believe that the servicing criteria we have adopted as part of Item 1122 of Regulation AB are suitable criteria, as that term is defined in the SSAE No. 10, and are available to enable a registered public accounting firm to issue a report on a party's assertion without restricted use language.

8. Current Reporting on Form 8–K

On March 11, 2004, the Commission adopted amendments to expand the number of events that are reportable on Form 8–K.[545] The amendments also shortened the Form 8–K filing deadline for most items to four business days after the occurrence of an event requiring disclosure under the form. These amendments were responsive to the ''real time disclosure'' mandate in Section 409 of the Sarbanes-Oxley Act and were intended to provide investors with better and faster disclosure of important events.[546] As we stated in the Proposing Release, we believe the objectives of those amendments are equally applicable with respect to asset-backed securities. Accordingly, we are clarifying application of the Form 8–K reporting items for asset-backed securities. As proposed, the result of the existing amendments and our clarifying amendments will mean that the number of reportable events under Form 8–K with respect to asset-backed securities will increase from current modified reporting requirements.

a. Items Requiring Current Disclosure

Similar to Form 10–K, we are adding a new general instruction to Form 8–K to specify how the form is to be used with respect to asset-backed securities. Like the Form 10–D, the instruction permits either the depositor or the servicer to sign Form 8–K reports. The depositor's name and sponsor's name will need to be listed on the cover page of the Form 8–K.[547+] As proposed, the instruction also identifies which of the existing items may be omitted. Any other applicable items specified in Form 8–K will continue to be applicable under the new reporting deadlines adopted in the Form 8–K Release. While some commenters did not agree, we continue to believe the same Form 8–K reporting deadlines that apply to non–ABS issuers should apply to ABS issuers.[548] We also are adopting several proposed ABS-specific items under Section 6 of Form 8–K, with modifications in response to comment, which are discussed further below.

The resulting application of the Form 8–K items for ABS is presented in the following table:[549]

DISCLOSURE FOR FORM 8–K FOR ABS

Existing form items	Required if applicable	May be omitted
Item 1.01. Entry into a Material Definitive Agreement	•	
Item 1.02. Termination of a Material Definitive Agreement	•	
Item 1.03. Bankruptcy or Receivership	•	
Item 2.01. Completion of Acquisition or Disposition of Assets		•
Item 2.02. Results of Operations and Financial Condition		•
Item 2.03. Creation of a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement of a Registrant		•
Item 2.04. Triggering Events That Accelerate or Increase a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement	•	
Item 2.05. Costs Associated with Exit or Disposal Activities		•
Item 2.06. Material Impairments		•
Item 3.01. Notice of Delisting or Failure to Satisfy a Continued Listing Rule or Standard; Transfer of Listing		•
Item 3.02. Unregistered Sales of Equity Securities		•
Item 3.03. Material Modifications to Rights of Security Holders	•	
Item 4.01. Changes in Registrant's Certifying Accountant		•
Item 4.02. Non-Reliance on Previously Issued Financial Statements or a Related Audit Report or Completed Interim Review		•
Item 5.01. Changes in Control of Registrant		•
Item 5.02. Departure of Directors or Principal Officers. Election of Directors. Appointment of Principal Officers		•
Item 5.03. Amendments to Articles of Incorporation or Bylaws. Change in Fiscal Year	•	
Item 5.04. Temporary Suspension of Trading Under Registrant's Employee Benefit Plans		•
Item 5.05. Amendments to the Registrant's Code of Ethics, or Waiver of a Provision of the Code of Ethics		•
Item 7.01. Regulation FD Disclosure	•	
Item 8.01. Other Events	•	
Item 9.01. Financial Statements and Exhibits	•	
Additional Items added to Form 8–K for ABS:		
Item 6.01. ABS Informational and Computational Material	•	
Item 6.02. Change of Servicer or Trustee	•	
Item 6.03. Change in Credit Enhancement or Other External Support	•	
Item 6.04. Failure to Make a Required Distribution	•	
Item 6.05. Securities Act Updating Disclosure	•	

[544] See Rule 2–02(g) of Regulation S–X.

[545] See the Form 8–K Release.

[546] Section 409 of the Sarbanes-Oxley Act added paragraph (*l*) to Section 13 of the Exchange Act (15 U.S.C. 78m(*l*)), which provides that ''each issuer reporting under section 13(a) or 15(d) shall disclose to the public on a rapid and current basis such additional information concerning material changes in the financial condition or operations of the issuer, in plain English, which may include trend and qualitative information and graphic presentations, as the Commission determines, by rule, is necessary or useful for the protection of investors and in the public interest.''

[547] See note 493 above.

[548] See, *e.g.*, Letters of Am. Bankers; JPMorganChase; and Wells Fargo.

[549] In response to comment and given our revisions to the assessment and attestation proposal, we have moved Items 2.02 and 4.01 of Form 8–K to the list of Items that may be omitted. See, *e.g.*, Letters of ABA and ASF.

b. Clarifying Amendments to Existing Items

As proposed, we are adopting several clarifying instructions to the existing items that remain applicable for ABS. For example, we are clarifying that a reportable event under Items 1.01 and 1.02 also includes the entry into, modification of or termination of a material transaction agreement, even if the issuing entity is not a party to the transaction, such as a servicing agreement involving a servicer discussed in Item 1108(a)(3) of Regulation AB. A new instruction to Item 1.03 clarifies that disclosure also is required under that item if the depositor (or servicer if the servicer signs the report on Form 10–K on behalf of the issuing entity) becomes aware of the entry of bankruptcy or receivership of the sponsor, depositor, servicer, trustee, significant obligor, significant enhancement provider or other material party involved in the ABS transaction. A new instruction to Item 2.04 clarifies that a reportable event also includes the occurrence of an early amortization, performance trigger or other event, including an event of default, that would materially alter the payment priority or distribution of cash flows regarding the asset-backed securities or the amortization schedule for the asset-backed securities. Finally, for Item 5.03 regarding amendments to governing documents, a new instruction clarifies, as proposed, that regardless of the basis of reporting (Section 13 or 15(d)), any amendment to the governing documents of the issuing entity of the asset-backed securities will trigger disclosure under that Item. Not only do we believe this requirement is appropriate given the critical role these governing documents serve for the transaction, the requirement is consistent with the same requirement for non-ABS under Item 5.03.

c. New Items

As proposed, we are adding several new ABS-specific reportable events to Form 8–K. These new items are grouped under Section 6 to the Form. As with the existing Form 8–K items, we believe that, with the exception of the new Item regarding ABS informational and computational material, which is designed to facilitate the categorization of Form 8–K disclosures, these new Items represent events that unquestionably or presumptively have such significance that timely disclosure should be required. In response to comment, we are not adopting the proposed Form 8–K item relating to sales of additional securities in lieu of similar disclosure on Form 10–D.[550]

As proposed, all of the new Items, except Item 6.01, will have a four business day reporting deadline similar to other Form 8–K reportable events. Filing deadlines with respect to Item 6.01 are pursuant to our new rule for filing ABS informational and computational material, as discussed in Section III.C.1.

The following is a discussion of the new items, as modified in response to comment.[551]

Item 6.01. ABS Informational and Computational Material

This item provides a Form 8–K item to report any ABS informational and computational material filed pursuant to new Securities Act Rule 426.[552] It does not otherwise create an obligation to file such material.

Item 6.02. Change of Servicer or Trustee

If a servicer that met the thresholds for disclosure in Item 1108(a)(2) of Regulation AB or a trustee had resigned or had been removed, replaced or substituted, or if a new servicer or trustee had been appointed, disclosure will be required of the date the event occurred and the circumstances surrounding the change. In addition, information relating to the transition, such as that required by Item 1108(d) of Regulation AB, will be required. If a new servicer or trustee had been appointed, a description required by the applicable item of Regulation AB relating to that party will be required.

In response to concerns by commenters regarding obtaining the required information within the four business day deadline,[553] we are providing an instruction similar to Instruction 2 to existing Item 5.02 of Form 8–K regarding new executive officers that, to the extent that information called for by Item 6.02 is not determined or is unavailable at the time of the required Form 8–K filing, the registrant must include a statement to this effect in the filing and then must file an amendment to the Item 6.02 Form 8–K filing containing the information within four business days after the information is determined or becomes available.

Item 6.03. Change in Credit Enhancement or Other External Support

This item requires disclosure of the loss, addition or material modification of any material credit enhancement or other support provided by a third party.[554] If any such enhancement or support is terminated other than by expiration of the contract on its stated termination date or as a result of all parties completing their obligations, disclosure will be required of the date of termination, identity of the parties to the agreement, a brief description of the terms of the enhancement or support, a brief description of the material circumstances surrounding the termination and any material early termination penalties paid or to be paid out of cash flows. If any new enhancement or support is added, disclosure specified in Items 1114 or 1115 of Regulation AB will be required, as applicable, regarding the new enhancement or support. If any existing material enhancement or support has been materially modified, a brief description of the material terms and conditions of the amendments will be required. An instruction to the new Item specifies that disclosure under this Form 8–K item will be required whether or not the issuing entity was a party to any agreement regarding the enhancement or support if the loss, addition or modification of such enhancement or support materially affects, directly or indirectly, the asset-backed securities, the pool assets or the cash flows underlying the asset-backed securities. Similar to Item 6.02 discussed above, we are providing an instruction to Item 6.03 that, to the extent that information called for by the Item regarding the enhancement or support is not determined or is unavailable at the time of the required Form 8–K filing, the registrant must include a statement to this effect in the filing and then must file an amendment to the Form 8–K filing containing the information within four business days after the information is determined or becomes available.

Item 6.04. Failure To Make a Required Distribution

If a required distribution to holders of the asset-backed securities is not made as of the required distribution date under the transaction documents, and such failure is material, disclosure will be required of the failure and the nature of the failure. Accelerated disclosure

[550] See, *e.g.*, Letters of ABA and ASF.

[551] In the Form 8–K Release, the Commission recognized that a registrant may need to report a given event under multiple items. General Instruction D. to Form 8–K permits a registrant to file a single Form 8–K that sets forth the required disclosure once as long as the number and captions for all applicable items are included.

[552] See Section III.C.1.

[553] See, *e.g.*, Letter of ABA.

[554] An instruction to the item clarifies that disclosure regarding changes to material enhancements are to be reported under Item 6.03 in lieu of Items 1.01 and 1.02 of Form 8–K.

under this item will not replace the requirement to file a report on Form 10–D with respect to the related distribution period (*e.g.*, to include pool performance information).

Item 6.05. Securities Act Updating Disclosure

As proposed, the last item is intended to address instances where the composition of the actual asset pool at the time of issuance of the asset-backed securities differs from the composition of the pool described in the final prospectus for the offering. Reflecting a longstanding staff position, if, with respect to a takedown off of a shelf registration statement on Form S–3, any material pool characteristic of the asset pool at the time of issuance of the asset-backed securities differs by 5% or more (other than as a result of the pool assets converting into cash in accordance with their terms) [555] from the description of the asset pool in the final prospectus filed for the takedown pursuant to Securities Act Rule 424, disclosure about the actual asset pool will be required, including disclosure regarding any new significant obligors, servicers or significant originators.[556] As proposed, no report will be required if substantially the same information was provided in a post-effective amendment to the Securities Act registration statement or in a subsequent Rule 424 prospectus.

We continue to believe that if the actual pool backing the investor's securities differs materially from that offered and described to the investor in the prospectus (and hence was to reflect the basis for the investor's investment decision), the investor is entitled to disclosure of the actual asset pool that the investor is primarily dependent on for repayment. We note that the requirement in Item 6.05 only relates to the situation where the actual asset pool at issuance differs materially from that described in the prospectus, other than as a result of the pool assets converting into cash in accordance with their terms.

[555] If a revolving period was in effect, while this proviso would exclude asset paydowns, it would not exclude additional assets acquired into the pool with the proceeds of the paydowns.

[556] This reportable event only will be applicable with respect to offerings registered on Form S–3. For registered offerings on Form S–1, due to current restrictions on incorporation by reference, if the final asset pool likewise differed from the final Rule 424 prospectus, a post-effective amendment to the registration statement will be required as is the case today. Of course, for Form S–3 registered offerings, some changes in pool composition or other features of a transaction not reflected in previous disclosure would be so significant such that a filing on Form 8–K would not be the appropriate means to address the changes.

d. Safe Harbor and Eligibility To Use Form S–3

In the March amendments to Form 8–K, the Commission addressed concerns raised by commenters over the effect of failure to file Form 8–K reports on liability under Exchange Act Section 10(b) and Exchange Act Rule 10b–5. The Commission adopted a limited safe harbor for a defined subset of Form 8–K items that provides that no failure to file a Form 8–K that is required to be filed solely by reason of the provisions of the Form shall be deemed to be a violation of Section 10(b) and Rule 10b–5.[557] The limited safe harbor was granted only to a subset of Form 8–K items premised on the recognition that those items may require quick assessments of the materiality of the event, adding difficulty to the determination of whether a triggering event has occurred. The existing Form 8–K safe harbor extends only until the due date of the periodic report for the relevant period in which the Form 8–K was not timely filed.

In the Proposing Release, we proposed extending the safe harbor to proposed Item 6.03, Change in Credit Enhancement or Other External Support, as this Item appears to meet the criteria of the existing subset of Form 8–K items to which the safe harbor applies. In addition, as discussed in Section III.D.4., because asset-backed securities will be excluded from quarterly reporting on Form 10–Q, we are requiring that disclosure prescribed by a required but not filed item of Form 8–K must be included in the Form 10–D report for the period during which that event occurred. Consistent with similar requirements in Forms 10–K and 10–Q, failure to make such disclosure in the Form 10–D report would subject a company to potential liability under Section 10(b) and Rule 10b–5 regarding any of the covered items in the safe harbor, in addition to potential liability under Section 13(a) or 15(d).

While a few commenters did not believe the Form 8–K safe harbor should be conditioned on Form 10–D disclosure, arguing that the Form 10–D should be limited to remittance reporting,[558] we continue to believe that tying the safe harbor to the next periodic report, which the Form 10–D would be, is appropriate and consistent with the application of the safe harbor to non-ABS issuers. The alternative of extending the term of the safe harbor to the next annual report on Form 10–K would not be consistent with the objective of Exchange Act Section 13(l) in promoting real time issuer disclosures.

In the March amendments, the Commission also addressed concerns over the effect of failure to file Form 8–K reports with respect to Form S–3 eligibility.[559] The Commission clarified that an untimely filing on Form 8–K of the items covered by the Section 10(b) and Rule 10b–5 safe harbor would not result in loss of Form S–3 eligibility, so long as Form 8–K reporting is current at the time of filing. As noted in Section III.A.3., we are adopting a requirement that reporting obligations regarding other asset-backed securities transactions by the depositor or an affiliated depositor involving the same asset class must be complied with for continued Form S–3 eligibility for new transactions. Consistent with the March amendments, we are clarifying, as proposed, that an untimely filing on Form 8–K regarding one of the items covered by the Section 10(b) and Rule 10b–5 safe harbor for another ABS transaction will not result in loss of Form S–3 for new transactions, so long as the Form 8–K reporting obligations for the prior obligations are current at the time of filing. As noted in Section III.A.3., we also are adding Items 6.01 and 6.05 to the Form S–3 eligibility safe harbor, although we are not adding them to the Section 10(b) and Rule 10b–5 safe harbor.

9. Other Exchange Act Amendments

a. Exclusion From Form 10–Q

As noted above, we are codifying the requirement to file reports tied to distributions on asset-backed securities in lieu of quarterly reporting on Form 10–Q. The non-financial items that are in Form 10–Q will be required in Form 10–D. As with Form 10–K, we do not believe that the financial item requirements of Form 10–Q would be meaningful with respect to issuing entities. Accordingly, as proposed, we are excluding asset-backed securities from quarterly reporting on Form 10–Q.[560]

[557] See paragraph (c) of Exchange Act Rules 13a–11 and 15d–11. The safe harbor only applies to a failure to file a report on Form 8–K. Material misstatements or omissions in a Form 8–K continue to be subject to Section 10(b) and Rule 10b–5. In addition, if a duty to disclose exists for some reason other than the Form 8–K requirement, the safe harbor is not available.

[558] See, *e.g.*, Letters of Am. Bankers and Wells Fargo.

[559] Similar amendments were made with respect to Form S–2 and Securities Act Rule 144 (17 CFR 230.144).

[560] See amendments to Exchange Act Rule 13a–13 and Rule 15d–13.

b. Exemptions From Section 16

Under the modified reporting system, issuers of asset-backed securities are not subject to the disclosure requirements under Section 16(a) of the Exchange Act to report transactions and holdings of directors, officers and principal shareholders. In arguing for no-action relief, incoming requests to the staff indicated that the issuing entity often does not have directors and officers. In addition, the requests advocate that any holders of asset-backed securities representing more than a ten percent interest in the issuing entity would not have access to more information concerning the trust than any other certificate holder, which would alleviate any risk of short-term profits based on inside information proscribed by Section 16.

As proposed, we are exempting asset-backed securities from Section 16 in its entirety.[561] In addition to the reporting requirements in Section 16(a), we believe the other subparts of Section 16 are equally inapplicable to asset-backed issuers given the passive nature of the issuing entity, including the restrictive activities of the issuing entity in connection with the ABS transaction. We believe such an exemption for asset-backed securities is appropriate in the public interest and consistent with the protection of investors.

c. Transition Reports

Current Exchange Act Rules 13a–10 and 15d–10 set forth reporting requirements that may be applicable when an issuer changes its fiscal year end. Transition reports are required to assure a continuous flow of information to investors and the marketplace. Although financial and business information normally required in transition reports may not be relevant to ABS transactions, information on the performance of the asset pool during the transition period is relevant to investors of asset-backed securities.

We are amending our transition report rules to clarify their application to asset-backed issuers.[562] Under the amendments, an asset-backed issuer that changed its fiscal year end will be required to file a transition report on Form 10–K covering the transition period between the closing date of the issuer's most recent fiscal year and the opening date of its new fiscal year.[563] The asset-backed issuer must provide all information required in response to proposed General Instruction J. of Form 10–K, including filing any servicer compliance statements and assessments of compliance and attestation reports regarding compliance with servicing criteria. The servicer compliance statements and assessment reports must reflect the same transition period covered by the transition report. Of course, any obligation to file distribution reports under Form 10–D will continue to apply regardless of a change in fiscal year.

E. Other Miscellaneous Amendments

In addition to our more substantive amendments, we also are adopting several minor and technical amendments to our rules and forms to address the regulatory treatment of ABS. These include:

- Updating references to reflect new definitions and references; [564]
- Removing instructions and references that will no longer be applicable; [565]
- Including cross-references for certain disclosure items in Regulation S–K to items in Regulation AB that clarify their application for asset-backed securities;[566]
- Clarifying that an ABS issuer is not eligible for the disclosure system for ''small business issuers'' with respect to asset-backed securities because that disclosure system, like most of the basic Regulation S–K disclosure system, is not applicable to asset-backed securities;[567] and
- Clarifying that Regulation BTR [568] is not applicable to any acquisition or disposition of an asset-backed security.[569]

F. Transition Period

We received a number of comments urging us to adopt an extended transition period for compliance with the new rules.[570] In particular, these commenters argued that compliance will require changes in procedures and systems, which in some cases may involve multiple parties. Existing master trusts also present difficulties as changes to transaction documents and procedures necessarily will affect prior outstanding ABS because the prior and future ABS are backed by the same asset pool and often are governed by the same transaction documents. As a result of the above, the majority of commenters suggested a twelve month delay before compliance.

Further, asset-backed securities that have been publicly offered and issued before the effective date of the new rules are subject to additional complications due to the fact that such transactions were not undertaken in contemplation of the new rules or the required changes. Because of any of a number of considerations, which could include fee levels, ABS issuers may have less leverage to amend existing contracts with various transaction participants regarding such securities.

We have decided to delay the compliance date beyond that discussed in the Proposing Release so that market participants will have ample time to prepare and satisfy the new requirements. While most of our final amendments codify existing staff and market practice, we recognize that we are adopting several changes that may require implementation time. We believe the extension ultimately will benefit investors because it will help ensure that issuers and market participants have the time to plan for and implement appropriate disclosure processes, including improved Exchange Act reporting processes and more meaningful and relevant disclosure documents. We continue to believe it is appropriate in order to establish consistency and ensure an orderly transition to the new regulatory regime that takedowns off of existing

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[561] See amendments to Exchange Act Rule 3a12–12.

[562] See amendments to Exchange Act Rules 13a–10 and 15d–10.

[563] For example, if an issuer whose most recent fiscal year ended on December 31, 2003 decided to change its fiscal closing date to June 30, 2004, the transition period for which a transition report must be filed under either Rule 13a–10 or 15d–10 would be January 1, 2004 through June 30, 2004. A current report on Form 8–K also would be required announcing the change in fiscal year. See Item 5.03 of Form 8–K. A transition report on Form 10–K will not be required if the transition period covers one month or less and the first annual report for the newly adopted fiscal year covers the transition period as well as the fiscal year. Section 302 certifications are applicable to transition reports on Form 10–K.

[564] See, *e.g.*, amendments to Rules 2–01(c)(7) and 2–07(a) of Regulation S–X; Items 401 and 701 of Regulation S–K; Securities Act Rule 434; Exchange Act Rules 10A–3, 13a–15 and 15d–15; and Rule 100 of Regulation M.

[565] See, *e.g.*, amendments to Items 308 and 406 of Regulation S–B and Items 308 and 406 of Regulation S–K. The amended forms required for ABS clarify that these items are no longer applicable to ABS, thus rendering the instructions unnecessary.

[566] See, *e.g.*, amendments to Items 202, 501 and 503 of Regulation S–K.

[567] See, *e.g.*, amendments to Item 10 of Regulation S–B and Exchange Act Rule 12b–2. The term ''small business issuer'' is defined in Item 10 of Regulation S–B and Exchange Act Rule 12b–2 as a U.S. or Canadian issuer with less than $25 million in revenues and public float that is not an investment company. Such issuers are eligible to use Form 10–KSB (17 CFR 249.310b) for their annual reports and Form 10–QSB (17 CFR 249.308b) for their quarterly reports, both of which are keyed off of disclosure items required by Regulation S–B.

[568] 17 CFR 245.101 through 245.104.

[569] See amendments to 17 CFR 245.101.

[570] See, *e.g.*, Letters of ABA; ASFA; AICPA; Am. Bankers; ASF; Auto Group; BMA; BOA; Capital One; CMSA; FSR; JPMorganChase; MBA; NYCBA; Sallie Mae; TMCC; and Wells Fargo.

registration statements pursuant to Rule 415(a)(1)(x) also must comply after the designated transition period. At the same time, however, we are grandfathering ABS that become subject to Exchange Act reporting obligations before the end of our extended transition period.

Under the compliance dates we are adopting today, any registered offering of asset-backed securities commencing with an initial bona fide offer after December 31, 2005, and the asset-backed securities that are the subject of that registered offering, must comply with the new rules and forms. For any such offerings that rely on Rule 415(a)(1)(x), Securities Act registration statements filed after August 31, 2005 related to such offerings must be pre-effectively or post-effectively amended, as applicable, to make the prospectus included in Part I of the registration statement compliant and to make any required undertakings or other changes for Part II of the registration statement.[571] For Securities Act registration statements that were filed on or before August 31, 2005, the prospectus and prospectus supplement, taken together, relating to such offerings that rely on Rule 415(a)(1)(x) must comply,[572] provided, that, the Securities Act registration statement will need to be post-effectively amended if any new undertakings are required to be made with respect to such offerings in Part II of the registration statement. In addition, these Securities Act registration statements will need to be post-effectively amended to make the prospectus included in Part I of the registration statement compliant, as well as to make changes, if any, to Part II of the registration statement with respect to any registered offering of asset-backed securities under such registration statement commencing with an initial bona fide offer after March 31, 2006.

[571] In addition, for existing shelf registration statements, any prior fee associated with any unsold securities under that registration statement may be offset against the total filing fee due for a subsequent registration statement filed by the registrant. Registrants electing this option should so indicate by adding a note to the ''Calculation of Registration Fee'' table in the subsequent registration statement providing the information specified in Securities Act Rule 457(p) (17 CFR 230.457(p)).

[572] For Form S–3 registration statements, exhibits may be filed on Form 8–K and incorporated by reference. Existing Securities Act Rule 462(d) also provides immediate effectiveness for a post-effective amendment filed solely to add exhibits. Notwithstanding this accommodation, changes requiring post-effective amendments other than to provide disclosure complying with the new rules—for example changes in credit enhancements or structural features since the time of effectiveness—will continue to require post effective amendments.

IV. Paperwork Reduction Act

A. Background

Our amendments contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (PRA).[573] We published a notice requesting comment on the collection of information requirements in the Proposing Release, and we submitted these requirements to the Office of Management and Budget (OMB) for review in accordance with the PRA.[574]

We did not receive any comments on the PRA analysis contained in the Proposing Release. As discussed in Part III, we have made several changes to the proposed rules in response to comments on the substance of the proposals. These changes are designed to avoid potential unintended consequences and reduce possible additional costs or burdens pointed out by commenters. After evaluating the comments and our responsive revisions to address them, we have decided not to change our initial PRA estimates described in the Proposing Release and submitted to OMB.

However, as part of our changes to reduce potential additional burdens, we are extending the availability of filing extensions under Exchange Act Rule 12b–25 to new Form 10–D. Filing extensions under Rule 12b–25 already are available for several other required Exchange Act reports, and we requested comment in the Proposing Release as to whether we should extend the rule to Form 10–D. Filing extensions under Rule 12b–25 are contingent on filing a Form 12b–25 to provide notice to the Commission and the marketplace that registrants will be unable to file a required report in a timely manner. Form 12b–25 is a separate ''collection of information'' under the PRA, and accordingly we are revising our burden estimates for Form 12b–25 to reflect our amendments and new filings for Form 10–D late filings. We are submitting these revised burden estimates for Form 12b–25 to OMB for review in accordance with the PRA, and in this release we are publishing notice and requesting comment on the revised Form 12b–25 ''collection of information'' requirement.

In sum, the titles for all the collections of information affected by these amendments are:

(1) ''Form S–1'' (OMB Control No. 3235–0065);

(2) ''Form S–3'' (OMB Control No. 3235–0073);

(3) ''Form S–11'' (OMB Control No. 3235–0067);

(4) ''Form 10–K'' (OMB Control No. 3235–0063);

(5) ''Form 8–K'' (OMB Control No. 3235–0288);

(6) ''Regulation S–K'' (OMB Control No. 3235–0071);

(7) ''Form 10–D'' (a new collection of information); and

(8) ''Form 12b–25'' (OMB Control No. 3235–0058).

As we explained in the Proposing Release, the regulations and forms listed as Items (1)–(6) were adopted pursuant to the Securities Act and the Exchange Act and set forth the disclosure requirements for registration statements, periodic reports and current reports filed with respect to asset-backed securities and other types of securities to ensure that investors are informed. Form 10–D represents a new form type for distribution reports currently filed under cover of Form 8–K under the modified reporting system for asset-backed securities, or ABS. As noted above, Form 12b–25 provides notice to the Commission and the marketplace that a registrant will be unable to file a required report in a timely manner and is a condition to a filing extension for the underlying Exchange Act report. The hours and costs associated with preparing, filing and sending these forms constitute reporting and cost burdens imposed by each collection of information. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

[573] 44 U.S.C. 3501 *et seq.*

[574] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

B. Summary of Amendments

We are addressing comprehensively the registration, disclosure and reporting requirements for asset-backed securities under the Securities Act and the Exchange Act. This includes providing tailored disclosure requirements and guidance for Securities Act and Exchange Act filings involving asset-backed securities. This information is needed so that security holders can make informed investment decisions regarding asset-backed securities. As we explained in the Proposing Release, ABS issuers and ABS differ from operating companies and their securities. Many of the Commission's existing disclosure and reporting requirements applicable to operating companies generally do not elicit information that is relevant for ABS transactions. Through the staff filing review process and, where necessary, through staff no-action letters and interpretive statements, an informal disclosure and reporting scheme has

developed taking into account evolving industry practices.

With a few exceptions, the amendments consolidate and codify current staff positions and industry practice. We are adopting a new principles-based set of disclosure items, ''Regulation AB,'' as a sub-part of Regulation S–K that will form the basis for disclosure in both Securities Act registration statements and Exchange Act reports. Amendments to the forms referenced above (other than Form S–11[575] and Form 12b–25) specify the menu of disclosure items that apply to asset-backed securities, including items contained in new Regulation AB and a limited number of pre-existing disclosure requirements identified in the forms. As noted above, our amendments to Form 12b–25 extend the availability of filing extensions under Exchange Act Rule 12b–25 to new Form 10–D.

The amendments are designed to establish a tailored registration, disclosure and reporting system for asset-backed securities offerings. Compliance with the revised disclosure requirements will be mandatory. There will be no mandatory retention period for the information disclosed (except with respect to registrants that elect to avail themselves of the Web site filing accommodation for static pool data in prospectuses, which entails a five year record retention requirement), and responses to the disclosure requirements will not be kept confidential.

C. Summary of Comment Letters on the PRA Analysis and Revisions to Proposals

As noted above, we received no comments in response to our request for comment on the PRA analysis in the Proposing Release. We have made several changes in response to comments on the substance of the proposals that are designed to avoid potential unintended consequences and reduce possible additional costs or burdens pointed out by commenters. For example, in response to comment regarding potential additional disclosure burdens regarding the proposed static pool disclosure requirement, we have made responsive revisions to clarify the disclosure required and to provide alternate means to provide the disclosure, including through Internet Web sites. As another example, we have revised the tests for determining financial significance regarding certain derivative instruments in response to comment that the proposed tests would lead to potential additional disclosure burdens. We have revised our proposal regarding an assessment and attestation of compliance with servicing criteria in response to comment that the proposed approach may also result in unintended additional burdens. We also have made several changes to the proposed disclosure items for prospectus and distribution report disclosure to further tailor and clarify the disclosure required, particularly in the areas where we proposed additional disclosure, such as that regarding the background, roles and experience of various transaction parties. As discussed above, we are revising our burden estimates for Form 12b–25 to reflect amendments to extend filing extensions to Form 10–D made in response to comment. These revisions are discussed below.

D. Revisions to PRA Reporting and Cost Burden Estimates

As discussed in the Proposing Release, the existing PRA burden estimates before these amendments for each of the affected collections of information are based on an average of the time and cost incurred by all types of public companies, not just ABS issuers, to prepare a particular information collection. As noted above, however, the existing disclosure and reporting system with respect to ABS that we are codifying recognizes that information relevant to ABS differs substantially from that relevant to other securities.

For purposes of the PRA collection of information requirements discussed in the Proposing Release, we first estimated the average number of hours that an ABS issuer currently spends to complete one of the listed forms.[576] We then estimated the incremental burden change that would result from the amendments. Our final rules include disclosure options for providing static pool information in prospectuses, including through an Internet Web site under certain conditions. These conditions include Web site availability and record retention requirements. We have evaluated these disclosure options and their respective requirements in the context of the collections of information to which they relate (Forms S–1 and S–3), and they are incorporated into the estimates discussed below.

Further, and as discussed in the Proposing Release, we understand that some issuers may experience costs in excess of our average estimates in the first year of compliance, such as revising their systems and practices to adjust to the new rules, but that costs should decrease in subsequent years. The burden also will vary among issuers based on the complexity of the ABS transaction, the number of parties involved (especially parties participating in the servicing function in the case of Form 10–K), the disclosure option they choose for static pool information (in the case of Forms S–1 and S–3), and the nature and level of initial development of their compliance procedures. We considered all of these factors in evaluating our estimates. As discussed above, after evaluating the comments received and our changes to the proposals, we are not revising our estimates overall for each collection of information.

Each entity that files reports with the Commission is assigned a Standard Industrial Classification (SIC) code to indicate the entity's type of business. SIC Code 6189 is used with respect to asset-backed securities. As we explained in the Proposing Release, entities assigned this SIC Code were used as a proxy for estimating the number of responses with respect to ABS issuers. In addition, unless otherwise specified below, all estimates of the number of responses were based on filings made during the Commission's 2003 fiscal year: October 1, 2002 through September 30, 2003.

1. Form S–3

We revised our current burden estimate for Form S–3 for ABS issuers to take into account that ABS issuers do not principally rely on incorporation by reference from separately required Exchange Act reports to provide their disclosure, which is the practice for most non-ABS issuers that use Form S–3. As a result, for ABS we used the same burden estimate for Form S–3 as we estimated for Form S–1 for ABS issuers, which we estimated to be an average of 1,000 hours. We then estimated that completing and filing a Form S–3 under the new disclosure requirements will result in an average increase of approximately 25% to our estimate of the current Form S–3 reporting burden imposed on ABS issuers, or 250 hours per form. We estimated that 25% of the burden is borne by the ABS issuer and that 75% of the burden is borne by outside professionals retained by the issuer at an average cost of $300 per

[575] We are moving all Securities Act registrations of ABS offerings to Form S–1 or Form S–3. Correspondingly, we reduced our estimate of responses on Form S–11.

[576] The staff estimated the average number of hours each ABS issuer currently spends completing the form by contacting a number of issuers and other persons regularly involved in completing the forms.

hour.[577] During our 2003 fiscal year, we received 168 Form S–3 filings related to asset-backed securities. Using our estimates of the percentages of the burden prepared by the issuer and outside professionals, we thus estimated that the amendments will result in an added annual burden of 10,500 hours (168 filings × 250 additional hours × .25) and an added annual cost of $9,450,000 (168 filings × 250 additional hours × .75 × $300 per hour).

2. Form S–1 and Form S–11

As discussed above, we estimated that an ABS Form S–1 filing currently imposes a reporting burden of an average 1,000 hours per response. As with Form S–3, we estimated that completing and filing a Form S–1 under the new disclosure requirements will result in an increase of approximately 25% over the amount of time currently spent by ABS issuers to complete and file the form, resulting in an increase of 250 hours per response over the current reporting burden. As with Form S–3, we estimated that 25% of the burden is borne by the ABS issuer and that 75% of the burden is borne by outside professionals retained by the issuer at an average cost of $300 per hour.

During our 2003 fiscal year, we received 7 Form S–1 filings related to asset-backed securities. In addition, we received 18 filings on Form S–11 related to asset-backed securities. As we explained in the Proposing Release, we are moving all Securities Act registrations of ABS offerings to Form S–1 or Form S–3. Assuming that the filings on Form S–11 could not otherwise be conducted on Form S–3, we estimated that these filings would instead be made on Form S–1. Thus, we estimated there would be 25 ABS offerings registered on Form S–1, and we correspondingly reduced our estimate of responses on Form S–11 by 18 responses. Using our estimates of the percentages of the Form S–1 burden prepared by the issuer and outside professionals, we estimated that the amendments will result in an added annual burden of 1,563 hours (25 filings × 250 additional hours × .25) and an added annual cost of $1,406,250 (25 filings × 250 additional hours × .75 × $300 per hour).

[577] This estimate is consistent with the estimate of the allocation of the burden for non-ABS issuers on Form S–1 where all of the required information must be included in the form. The staff estimated the average hourly rate for outside professionals by contacting a number of issuers and other persons regularly involved in completing the forms.

3. Form 10–K

As with our burden estimates for Securities Act registration statements, we first derived a reporting burden estimate to reflect the substantially different and more limited disclosures ABS issuers provide under the existing modified reporting system. We estimated that currently it takes an ABS issuer an average of 90 hours to prepare a Form 10–K. As we explained in the Proposing Release, the most significant difference between the amendments and the existing system is with respect to the assessment of compliance with servicing criteria. We estimated that completing and filing a Form 10–K under the amendments will result in an average increase of approximately 33% over the amount of time currently spent by entities completing the form, or 30 hours per response. We estimated that 25% of the reporting burden is borne by the ABS issuer and that 75% of the burden is borne by outside professionals retained by the issuer at an average cost of $300 per hour.

Based on filings in our 2003 fiscal year, we estimated 1,200 Form 10–K filings related to asset-backed securities.[578] Using our estimates of the percentages of the burden prepared by the issuer and outside professionals, we thus estimated that the amendments will result in an added annual burden of 9,000 hours (1,200 filings × 30 additional hours × .25) and an added annual cost of $8,100,000 (1,200 filings × 30 additional hours × .75 × $300 per hour).

4. Form 8–K

As we explained in more detail in the Proposing Release, ABS issuers under the existing modified reporting system use Form 8–K to file periodic distribution and pool performance information in addition to reporting current events. To separate this reporting from the disclosure of current events, we proposed and are creating one new form type for asset-backed securities, Form 10–D, to act as the report for the periodic distribution and pool performance information. Form 8–K will continue to prescribe certain reportable events that require current disclosure by ABS issuers. Form 8–K also continues to be available to report any events that an ABS issuer deems to be of importance to security holders.

[578] This estimate was based on the number of final prospectuses filed pursuant to Securities Act Rule 424(b) during this period with respect to asset-backed securities. For most ABS offerings, the filing of the prospectus under Rule 424(b) for a takedown of securities results in a new issuing entity and a separate Exchange Act reporting obligation. However, some issuers had been filing ''combined'' reports of filing one Form 10–K covering multiple issuing entities. We used the Rule 424(b) estimate to reflect the approximate number of Form 10–K filings that would have been made by ABS issuers in the absence of combined reporting.

During our 2003 fiscal year, we received 12,633 Form 8–K filings related to asset-backed securities. We estimated 9,500 of these filings will instead appear as Form 10–D filings under the amendments.[579] Accordingly, we estimated a 9,500 decrease in the total number of Form 8–K filings.

With respect to the use of Form 8–K for required reportable events, we estimated that the time it takes to prepare a Form 8–K for a required reportable event does not vary between an ABS and a non-ABS issuer. Thus, we estimated that an ABS issuer spends, on average, approximately 5 hours completing the form. As with our estimates for non-ABS issuers, we estimated that 75% of the burden is borne by the ABS issuer and that 25% of the burden is borne by outside professionals retained by the issuer at an average cost of $300 per hour.

We estimated that our amendments to the required reportable events on Form 8–K applicable to ABS issuers will cause, on average, an increase of two reports on Form 8–K per ABS issuer per year. Based on our estimate of 1,200 ABS issuers, we estimated an increase of 2,400 Form 8–K filings per year. Using our estimates of the percentages of the burden prepared by the issuer and outside professionals, we thus estimated that the amendments will result in an added annual burden of 9,000 hours (2,400 filings × 5 hours × .75) and an added annual cost of $900,000 (2,400 filings × 5 hours × .25 × $300 per hour).

5. Form 10–D

As discussed above, we estimated there will be 9,500 Form 10–D filings per year. We estimated that, on average, completing and filing a Form 10–D under the amendments will result in a burden of 30 hours per filing. As with our other estimates for Exchange Act reports by non-ABS issuers, we estimated that 75% of the burden is borne by the ABS issuer and that 25% of the burden is borne by outside professionals retained by the issuer at an average cost of $300 per hour. We thus estimated that Form 10–D would result in a total annual burden of 213,750 hours (9,500 filings × 30 hours × .75) and an added annual cost of

[579] This estimate also reflected the approximate number of distribution report filings that would have been made by ABS issuers in the absence of combined reporting.

$21,375,000 (9,500 filings × 30 hours × .25 × $300 per hour).[580]

6. Regulation S–K

Regulation S–K includes the requirements that an issuer must provide in filings under both the Securities Act and the Exchange Act. Our disclosure changes include changes to items under Regulation S–K and the addition of a new subpart to Regulation S–K—Regulation AB—that provides disclosure items particularly tailored to asset-backed securities.[581] However, as noted in the Proposing Release, the filing requirements themselves are included in Forms S–1, S–3, 10–K, 10–D and 8–K, and we reflected the burden for the new requirements in the burden estimates for those forms. The items in Regulation S–K, including Regulation AB, do not impose any separate burden. Consistent with historical practice, we assign one burden hour to Regulation S–K for administrative convenience to reflect the fact that the regulation does not impose any direct burden on companies.

7. Form 12b–25

As discussed above, we are extending Exchange Act Rule 12b–25 and Form 12b–25 to Form 10–D filings. The amendments permit ABS issuers to use Form 12b–25 for the purpose of obtaining a filing extension with respect to a Form 10–D filing. Form 10–D filings previously have been made under Form 8–K, which is not eligible for filing extensions under Rule 12b–25. Hence, we do not have experience with filing extensions or Form 12b–25 filings for the types of reports that will constitute Form 10–D filings. We do know that, based on filings in our 2003 fiscal year, Form 12b–25 filings were made for approximately 20% of Form 10–K and 10–KSB filings and approximately 12% of Form 10–Q and 10–QSB filings. After considering factors such as the frequency, disclosure requirements and relative administrative complexity of Form 10–D filings compared to these other filings, we are estimating that Form 12b–25 filings will be made for approximately 20% of Form 10–D filings. Based on our estimate of 9,500 Form 10–D filings, we thus estimate an increase of 1,900 Form 12b–25 filings. We estimate the time it takes for an ABS issuer to prepare a Form 12b–25 will not vary from that required by a non-ABS issuer, which we have estimated to be, on average, approximately 2.5 hours per form, all of which is borne by the issuer. Accordingly, we estimate that the amendments will result in an added annual burden of 4,750 hours (1,900 filings × 2.5 hours).

E. Request for Comment

We request comment on our amendments to the collection of information requirements for Form 12b–25 in order to (a) evaluate whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (b) evaluate the accuracy of our estimates of the burden of the collection of information; (c) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; (d) evaluate whether there are ways to minimize the burden of the collection of information on those who respond, including through the use of automated collection techniques or other forms of information technology; and (e) evaluate whether the amendments to Form 12b–25 will have any effects on any other collections of information not previously identified in this section.

Any member of the public may direct to us any comments concerning the accuracy of the Form 12b–25 burden estimates and any suggestions for reducing the burdens. Persons who desire to submit comments on the Form 12b–25 collection of information requirements should direct their comments to the OMB, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and send a copy of the comments to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609, with reference to File No. S7–21–04. Requests for materials submitted to the OMB by us with regard to these collections of information should be in writing, refer to File No. S7–21–04, and be submitted to the Securities and Exchange Commission, Records Management, Office of Filings and Information Services, 450 Fifth Street, NW., Washington, DC 20549. Because the OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication, your comments are best assured of having their full effect if the OMB receives them within 30 days of publication.

V. Cost-Benefit Analysis

A. Background and Summary of the Final Rules

The final rules and Regulation AB provide definitive rules for public offerings of asset-backed securities registered under the Securities Act as well as ongoing reporting by asset-backed issuers under the Exchange Act. They mostly codify staff and industry practice for ABS offerings with some incremental changes and responsive changes made to comments on the proposals. The rules and this release also should resolve a number of ambiguities and potential misconceptions regarding application of the federal securities laws to asset-backed securities. We are sensitive to the cost and benefits that result from our rules. In this section, we examine the benefits and costs of our rules.

As discussed in the Proposing Release, the Commission's corporate offering and disclosure rules were not designed to accommodate some of the special characteristics of ABS offerings. The current offering and disclosure process for ABS has developed through no-action letters, staff comment, market practice and informal staff interpretations. This current informal regulatory regime for asset-backed offerings is sub-optimal for a well-developed market that represents a large portion of the U.S. capital markets. The accumulated informal guidance has diminished the transparency of applicable requirements, potentially decreasing efficiency and leading to uncertainty and common problems. Before the Proposing Release, many issuers, investors and other market participants had requested a defined set of regulatory requirements.[582] Many compliance issues may be mitigated and potential issues avoided through clearer and more transparent regulatory requirements. Establishing clear and transparent requirements also could reduce costs of entry into the market. As a result, the final rules to codify staff position and industry practice with incremental changes and responsive changes should clarify and simplify the process of registering an ABS offering. This should lower the overall costs of complying with the federal securities

[580] We noted that this reflection of the burden predominantly consists of codifying the already existing requirements applicable under the modified reporting system where such filings appear under cover of Form 8–K and are offset by our corresponding reduction in our estimated number of Form 8–K's that will be filed.

[581] We also are adopting, as proposed, technical changes to Regulation S–B, which includes the requirements that a small business issuer must provide in the Securities Act and the Exchange Act similar to Regulation S–K. These technical changes are designed to clarify that Regulation S–B is inapplicable to asset-backed securities. Like, Regulation S–K, Regulation S–B does not impose any separate burden. We previously have assigned one burden hour to Regulation S–B for administrative convenience to reflect the fact that the regulation does not impose any direct burden on companies.

[582] See note 57 above.

laws, promote more efficient capital markets, and potentially lower the cost of capital. There also may be secondary effects relating to more efficient securitizations, such as the opportunity for lowered borrowing costs for obligors of the underlying assets, such as consumers.

In order to improve an investor's understanding of an ABS offering, we are adopting incremental enhancements, with modifications in response to comment, to disclosure regarding the participants involved in an ABS transaction and of historical data regarding the performance of the assets backing the current and prior comparable asset-backed offerings, known as static pool data. In addition, we intend to improve the current framework for reporting on compliance with servicing criteria that will operate within a disclosure-based framework and cover the entire spectrum of the servicing function in an ABS transaction. We are retaining the basic approach set forth in our original proposal with a uniform set of criteria, although we are adopting a modification in response to comment that instead of a single ''responsible party,'' reports of compliance with servicing criteria from each party participating in the servicing function, with associated attestation reports from registered public accountants, must be provided.

We also are adopting incremental changes to current staff and industry practice to allow certain lease-backed asset-backed securities immediate access to shelf registration through Form S–3 eligibility, along with disclosure to address the different nature of these offerings. In addition, we are allowing additional asset types to be securitized through master trusts or through transactions using a revolving period, again with disclosure to add transparency to the use of these structures and potential changes to the asset pool over time. We are relaxing restrictions on incorporation by reference for asset-backed securities and codifying alternatives to refer to third party filings to provide more cost-effective options to provide required information. We also are granting foreign ABS issuers access to shelf offerings and Form S–3. Finally, we are providing interpretive guidance in a number of areas in addition to the final rules, such as guidance regarding the preparation of base prospectuses and prospectus supplements and EDGAR reporting, to establish more clear and uniform practices across the ABS market.

Commenters on the proposals overwhelmingly supported establishing a separate framework for the registration and reporting of asset-backed securities.[583] We did not receive any specific comments on our cost-benefit analysis contained in the Proposing Release. Some commenters suggested as a general matter that we should carefully consider each incremental step beyond current market practice to ensure that the perceived benefit to investors is outweighed by the additional burdens that would be imposed, and whether the benefits sought can be achieved in a less intrusive manner.[584] Another commenter also noted on a general matter that, because of the limited recourse special purpose nature of most ABS transactions, the costs of compliance burdens are likely to be passed through to the investor who owns the residual or junior cash flows in the ABS transaction.[585]

As discussed in the Proposing Release, we are aware of potential costs and burdens associated with the incremental changes that we proposed to the existing current market practices for ABS transactions and requested comments on these potential burdens. We have carefully evaluated the concerns expressed by commenters and have made several measured changes in response to comments on the substantive discussion of the proposals that are designed to alleviate potential unintended consequences and reduce possible additional costs or burdens pointed out by commenters. For example, in response to comment regarding potential additional disclosure burdens regarding the proposed static pool disclosure requirement, we have made responsive revisions to clarify the scope of the disclosure required and to provide alternative means to provide disclosure, including through Internet Web sites. We have revised our proposal regarding an assessment and attestation of compliance with servicing criteria in response to comment that the proposed approach may also result in unintended administrative burdens. We also have made several changes to the proposed disclosure items for prospectus and distribution report disclosure to further tailor and clarify the disclosure required. Cumulatively, we believe the final rules, as revised from the proposal, will achieve clearer and more transparent regulatory requirements for both issuers and investors in a less intrusive manner to issuers.

We also have delayed the compliance date beyond that discussed in the Proposing Release in response to requests for an extended transition period. A longer transition period will help to alleviate the immediate impact of any costs and burdens imposed on issuers. We expect investors to benefit from the additional time that we are affording issuers and market participants to implement appropriate disclosure processes, including improved Exchange Act reporting processes and more meaningful and relevant disclosure documents. In addition, we are grandfathering ABS offerings that become subject to Exchange Act reporting obligations before the end of our extended transition period. These allowances should assist various transaction participants in planning for compliance with the new regulatory regime for future ABS offerings, which may reduce uncertainty and support more effective pricing of those asset-backed securities.

B. Parties Eligible To Use the New Regulatory Structure

We continue to take a principles-based approach to the definiton of asset-backed security that allows broad flexibility as to asset types and structures that we believe should be subject to the alternative regulatory regime that we are creating for such securities. The definition of an asset-backed security will no longer be limited to those issuers eligible to register securities on Form S–3 but expanded to any type of security that meets the definition. This is intended to bring all ABS transactions and issuers into an appropriate registration, disclosure and reporting system regardless of what Securities Act form they are eligible to use.

Our amendments codify several clarifying interpretations of existing staff positions to recognize and build upon the operational and structural distinctions between ABS and non-ABS transactions. The current staff position regarding non-performing assets will be incorporated into the definition of an asset-backed security. We have made revisions in response to comment to take a disclosure-based approach to delinquent assets as a less burdensome way to incorporate the current staff position on delinquency into the definition of an asset-backed security. We are adopting, with certain modifications in response to comment, proposed expansions of certain staff positions to allow additional asset types and transaction features to be included. For example, the definition of asset-backed security will be expanded so

[583] See note 27 above.

[584] See Letters of ABA and ASF.

[585] See Letter of AFGI.

that more lease-backed ABS will be eligible to use Form S–3. The rules we are adopting will allow structures such as master trusts and revolving periods, currently allowed by the staff for only certain asset classes, to be used by all asset-backed issuers. In response to comment, we have even further expanded the revolving period. We believe these expansions will result in increased flexibility in structuring transactions that meet market demands. The rules we are adopting will require more disclosure to provide greater transparency of the operations of these structures and changes to pool composition over time.

As discussed in Section III.A., commenters were mixed on our approach to the definition of an asset-backed security. On the one hand, commenters representing investors expressed concern in expanding access to the alternative regulatory regime for asset-backed securities in recognition of the fact that investment decisions on these transactions are being made under more compressed time frames and with less access to information through shelf registration. On the other hand, commenters representing primarily issuers and their representatives would have preferred, in lieu of our approach of codifying exceptions to the definition of an asset-backed security, abandoning many of the core principles of the definition, such as deleting the ''discrete pool'' requirement, which would permit unlimited use of master trusts structures and revolving periods, in order to encourage further innovation. While we recognize that there are instances where some limited exceptions to these general principles would be appropriate and consistent for access to the ABS regulatory regime, and these are reflected in the modifications adopted in the final rules, we agree with the concerns of investors that lack of a ''discrete'' requirement in the definition of an asset-backed security would make it difficult for an investor to make an informed investment decision when the composition of the pool is unknown or could change over time. However, in response to comment, we made several minor revisions to the proposed limits as well as modifications to staff positions relating to delinquent and non-performing assets to reduce the potential costs raised by commenters and to be more consistent with current market practice.

The definition and interpretations we are adopting are intended to establish parameters for the types of securities that are appropriate for our alternative regulatory regime for ABS. The definition does not mean or imply that public offerings of securities outside of these parameters may not be registered, but only that the disclosure and other requirements in the ABS regime are not specifically designed for those securities. Such securities would need to rely on non-ABS form eligibility for registration and additional or alternative disclosures would be required.

Commenters also noted that some securities, most notably synthetic securitizations, may not necessarily meet all of the core principles in the definition of an ''asset-backed security,'' but nonetheless argued it would make it more difficult for market participants to develop such products without continued discussions with the staff if they were not included in our new regulatory regime. We continue to believe the ABS regulatory regime that we are adopting should be appropriately limited to a definable group of asset-backed securities. However, we also recognize that the default application of the existing disclosure regime for corporate issuers might not be most appropriate for synthetic securitization. We encourage issuers and promoters of such securities to continue their interaction with the staff. In addition, we request additional comment about these securities and whether an appropriate alternative regime should be established for these kinds of securities with respect to registration, disclosure and ongoing reporting.

C. Securities Act Registration

We are adopting rules to allow domestic and foreign issuers to use either Form S–1 or Form S–3 to register an offering of asset-backed securities. Some transactions backed by lease pools also will be allowed to use Form S–3 under the final rules. This will provide the benefit of delayed offerings to foreign issuers and many issuers of ABS backed by pools of leases that currently are not S–3 eligible. We believe this will make the offering process less costly for these issuers. We are adopting, substantially as proposed, disclosure requirements for these two types of offerings to provide investors with a clear understanding of the unique issues these offerings raise, which commenters generally supported.

The rules codify current staff position that the depositor is considered the issuer for Securities Act purposes and should sign the registration statement. To remove regulatory uncertainty for issuers, we are codifying a number of current staff positions, including clarifying and streamlining the conditions when a distribution of underlying pool assets must be concurrently registered with the distribution of ABS. We also are codifying, as proposed, the basic concept in existing staff no-action letters that broker-dealers involved in Form S–3 ABS transactions do not need to deliver a copy of the preliminary prospectus 48 hours prior to sending a confirmation of sale. We believe these rules we are adopting for Securities Act registration will increase transparency of the current informal regulatory regime for issuers of asset-backed securities, provide increased flexibility for additional ABS transactions and help the asset-backed securities market function more efficiently.

We are adopting general instructions for Form S–1 and Form S–3 for registered asset-backed offerings substantially as proposed to clarify those items under Regulation S–K that an issuer will be required to disclose, if applicable, and list the items that an issuer may omit due to the different nature of the ABS transactions. The instructions for Form S–1 and Form S–3 also specify the additional disclosure items to be required under Regulation AB, which is a new set of principles-based disclosure requirements for ABS discussed in the next section. We believe the instructions integrate disclosure items for the respective forms, which will reduce compliance costs and provide certainty about the disclosure requirements for issuers while promoting relevant disclosure for investors.

As discussed above, we are adopting limits on the amounts and duration on the codified exceptions to the ''discrete'' requirement in the definition of an ''asset-backed security.'' However, in response to comments describing the current market practice of prefunding accounts and the commercial reality of the use of revolving periods, we are not adopting the proposed additional restrictions for prefunding accounts and revolving periods for Form S–3 eligibility.

As noted in Section III.A., issuers and their representatives generally objected to the proposals requiring Exchange Act reporting compliance for Form S–3 eligibility as being more restrictive than necessary. While recognizing there have been compliance problems with Exchange Act reporting as well as the need to fix the problem with the current staff position, which simply allows a sponsor to establish a new special purpose depositor, most commenters nevertheless requested flexibility and less restrictive alternatives. In response to several commenter suggestions, we are revising the proposal to limit the focus to transactions established by affiliated depositors involving the same

asset class. We believe this revision, while maintaining an emphasis on Exchange Act reporting and proper disclosure for investors, reduces the potential breadth of the proposed application of the reporting compliance requirement for Form S–3 eligibility across all asset classes and avoids commenter concerns about inadvertently linking a person's Form S–3 eligibility to an unrelated party's reporting history. We also are providing several additional accommodations to assist issuers with the requirement, including an extensive transition period to allow issuers to improve their reporting practices from the present state, instituting Rule 12b–25 filing extensions for Form 10–D filings, modifying several Regulation AB disclosure items that could potentially require third party information, and expanding the number of Form 8–K items that need only be current and not timely for Form S–3 eligibility.

The Proposing Release discussed what needs to be included in a market-making prospectus when a broker-dealer is an affiliate of the servicer. As discussed in Section III.A., we received many comments requesting that the Commission revisit staff interpretations regarding the registration of market-making transactions in the ABS context given the costs involved in meeting the market-making prospectus delivery requirements and the limited investor benefits as a result. We are persuaded that the affiliation issue in ABS is not the same as a broker-dealer affiliated with a corporation, such as through significant ownership or board representation, and we will no longer interpret a requirement to register market-making transactions for asset-backed securities. As pointed out by many commenters on this topic, this should result in reduced compliance expenses and risk of shelf disqualification, all without materially affecting investor protections.

D. Disclosure

The disclosure items in Regulation AB that we are adopting provide a disclosure structure tailored to the different nature of ABS. This requirement will assist issuers and investors by clarifying the disclosure requirements. We have made revisions to the proposed disclosure structure as suggested by commenters in recognition of market practice. We continue to provide several illustrative examples for a limited number of disclosure items in response to comment for additional guidance by issuers. In addition, the final rules:

- Confirm that financial statements of the issuing entity are not required for ABS transactions;
- Clarify and revise in response to comment when third party financial information and other descriptive information is required; and
- Codify when third party financial information may be incorporated by reference or referred to in registration statements.

As we noted in Section III.B., commenters generally agreed that the disclosure required under Regulation AB is largely based on market driven disclosure that appears in public filings today. One commenter representing investors believed Regulation AB represents a major step in improving disclosures provided to investors and includes many of the items investors have previously recommended as critical to investors.[586] Most commenters also supported principles-based disclosure requirements in lieu of an exhaustive list of disclosure items for each asset-class. We continue to believe a principles-based approach fosters clarity and comparability for investors without being overly rigid and burdensome for issuers. The emphasis on a materiality-based standard for the new disclosure items attempts to mitigate the possibility that immaterial information may overwhelm the disclosure. The new principles-based set of disclosure based on materiality in Regulation AB gives registrants, underwriters and their advisors the opportunity to balance the need for registrants to have flexibility when drafting disclosure with investors' need for more transparency. As we stated in the Proposing Release, whether they will take advantage of this opportunity is largely their decision.

The disclosure rules require increased disclosure regarding the roles and qualifications of parties involved in the offering and on-going activities of the ABS transaction. As discussed more fully in Section III.B., commenters generally endorsed increasing disclosure beyond current market practice to increase transparency in this area. In particular, investors supported increased disclosure regarding the servicer and its servicing practices. However, commenters representing issuers and their representatives were also concerned with the potential breadth of the disclosure, and we have made responsive revisions to these concerns. In recognition of the importance of the servicer to the ongoing performance of the ABS transaction, we are retaining our proposed approach for a principles-based definition of ''servicer'' that captures the multiple entities that may perform one or more material aspects of the entire servicing function. We believe it would be impractical and ineffective to create separate definitions to describe the many entities used to perform different servicing functions across all classes. However, to reduce potential disclosure burdens regarding unrelated third parties, we have revised the percentage breakpoint for determining when more detailed disclosure would be required for unaffiliated servicers that service individual pool assets from 10 percent to 20 percent. We have made similar changes for required disclosure for unaffiliated originators. Similarly, we have significantly revised the test for determining financial significance for certain derivative instruments in response to comment that the proposed tests would lead to potential additional disclosure burdens. The revised test to determine the maximum probable exposure for these derivatives will reduce the potential burden while still providing disclosure to investors regarding such instruments, including when their financial significance to the transaction increases.

As discussed in Section III.B., investors uniformly supported the proposed requirement for static pool information, emphasizing the importance of the information to them in making informed investment decisions. Further, as we stated in the Proposing Release, we understand many issuers already have static pool information available, although it may have to be subjected to additional procedures and diligence before it is included in the disclosure documents. The most common concern for issuers was the lack of guidance on the scope of the requirement might result in unnecessary and excessive disclosure. These commenters provided a number of suggestions to clarify the scope of the request and tailor it to reduce the issuer's burden.

To provide clarity in determining the material information to be disclosed by issuers, we are adopting separate starting points for disclosure depending on whether the ABS transaction involves an amortizing asset pool or a revolving asset master trust. These flexible starting points should help guide issuers in determining the scope of the static pool data, while still promoting comparability of information across issuers. At the same time, we are revising the requirement in response to comment to include several additional features. For example, we are increasing the amount of data to a minimum of five

[586] See Letter of ICI. See also Letter of CFAI.

years, to the extent material, based upon commenter concerns that the proposed three year requirement may not be sufficient for a meaningful evaluation of trends by asset type. We also are adding prepayment information and, for prior pools and information about the sponsor's portfolio, summary characteristics. These additional features, some of which were suggested by issuers themselves, may impose certain additional marginal costs, but commenters agreed they will significantly increase the usefulness of the data and the resultant benefits to investors and the efficiency of the ABS market. However, we are not adopting several other proposed items as specific line items in the disclosure requirement in response to comment that their potential breadth would be too burdensome and to tailor the disclosure that is material to the transaction. We also are providing a limited safe harbor for static pool data that relate to certain pools and periods before the compliance date to encourage disclosure of such information and minimize the amount of time before investors can begin to incorporate static pool information into their investment decisions.

In response to comment on making the disclosure more functional by taking advantage of the technological advancements of the Internet to enable investors to access and analyze the information, we are providing a filing accommodation that permits issuers to provide the information through an Internet Web site. Commenters confirmed that many issuers already provide performance data through an Internet Web site. Under this accommodation, investors could be assured access to accurate and reliable information since the information provided through the specific Internet Web site is deemed to be a part of the prospectus included in the registration statement for the asset-backed securities. The functionality of this alternative method will assist investors in analyzing the information and remove the burden to issuers of duplicating the information in each prospectus and should ease updating such information. Despite the potential benefits of being able to provide the disclosure in the manner most desirable to investors, issuers electing the Web-based option will incur cost in maintaining and retaining information to satisfy the record retention requirement. There also may be start-up costs in creating or modifying Web sites for disclosure through this accommodation consistent with its required conditions.

Even with the responsive revisions to clarify and tailor the disclosure requirements, we recognize the disclosure under Regulation AB may increase the costs to issuers of asset-backed securities. The final rules are intended to enhance the utility of the disclosure in registration statements and ongoing Exchange Act reports. Issuers may need to reevaluate current disclosure from prior registration statements to determine the scope of additional information. We also encourage issuers to evaluate whether they should eliminate immaterial boilerplate disclosure that is not required under Regulation AB and that does not aid understanding by investors, but that they currently provide. Due to the informal nature of the current requirements, issuers may be unnecessarily including information that is not relevant or helpful to investors. Issuers may need to employ additional resources, including in-house personnel and outside legal counsel, to assist in this evaluation. We anticipate that most of these costs may be short-term or one-time costs in preparing the first registration statement and Exchange Act reports under the new ABS disclosure regime.

We also estimate that issuers may, at least initially, need extra time to prepare the information or obtain such information from the respective parties to the ABS transaction. However, we continue to believe that parties already provide much of this information to rating agencies during the process of obtaining a rating on the offering based on comments we received, and thus such information should be readily available. In addition, we are providing an extended transition period for compliance with the disclosure requirements in Regulation AB to allow issuers additional time to implement processes and procedures to adapt to the new disclosure structure. Therefore, we do not anticipate that issuers should incur significant long-term costs in complying with the new disclosure regime.

For purposes of the Paperwork Reduction Act, we estimated that the incremental burden in preparing the additional Securities Act disclosures would be on average 250 hours per registration statement. Based on our estimated costs of in-house personnel time, we estimated the incremental PRA hour-burden would translate into an approximate cost of $12,967,275.[587] We did not receive any comments on the PRA analysis contained in the Proposing Release and none of the commenters provided any comments to the estimates of increased compliance costs. These additional compliance costs should result in consistent and more tailored information that may assist the capital markets in properly valuing asset-backed securities. These benefits are difficult to quantify.

E. Communications During the Offering Process

In codifying as proposed the existing ability to use written communications outside of the statutory prospectus, we recognize the current beneficial information these communications provide to potential investors in an ABS offering. Under the final rules, issuers and underwriters can communicate with potential investors through additional communications apart from the statutory prospectus to structure the offering. The rules we are adopting clarify further the definition of the written communications that an issuer may use to avoid uncertainty and incrementally expand it by allowing the use of static pool data, the identification of key parties and information about the offering process. The rules also clarify that the scope of the written communications permitted includes data at the individual pool asset level. Loan level data may in some cases assist investors in better understanding the nature of the individual loans included in the pool, which in turn may increase the quality of information available to investors. As we explain in Section III.C., commenters overall supported the proposals although some requested expansion. We are addressing whether additional accommodations to the communications restrictions would be appropriate in connection with the Offering Process Release.

The rules adopted today streamline the filing requirements for the communications allowed by providing that all types of ABS informational and computational material are to be filed in the same timeframe, thus reducing the regulatory uncertainty for issuers as to when to file written communications. The rules eliminate the hardship exemption for filing these materials in paper rather than on EDGAR. While two commenters suggested delaying the electronic filing requirement until the ability to file material in additional format, such as PDF, is allowed,[588] we

[587] We estimated that the additional disclosures for Form S–1 and Form S–3 would result in 12,063 internal burden hours and $10,856,250 in external costs. Assuming a cost of $175/hour for in-house professional staff, the total cost for the internal burden hours would be $2,111,025. Hence the aggregate cost estimate is $12,967,275.

[588] See, *e.g.*, Letters of ASF and BMA.

continue to believe that even under our current system, the filing of ABS information and computational material no longer needs an electronic filing exemption. The rules should increase the uniformity and timeliness of information received by investors as well as disseminated to the marketplace. Since all investors almost uniformly access offering information electronically, these rules should significantly benefit them.

As proposed, we are not changing the scope or liability requirements of the material that may be used from the present state, so our rules should not result in incremental costs from existing requirements. At the request of commenters and in order to provide certainty, we have codified in the final rules our discussion in the Proposing Release that failure by a particular underwriter to cause the filing of materials in connection with an offering will not affect the ability of any underwriter who has complied with the procedures to rely on the exemptions. In addition, we are adding another provision in response to comment that an immaterial or unintentional failure to file will not result in a loss of protection under the exemption. As commenters explained, both of these provisions should further encourage an appropriate free flow of information.

We also are codifying as proposed an existing staff safe harbor regarding the use of research reports published or distributed by a broker or dealer involving ABS. Our rule recognizes the different nature of ABS by providing tailored conditions for ABS research reports. Given that the rule we are adopting is consistent with the existing staff safe harbor, it too should not result in incremental costs.

F. Ongoing Reporting Under the Exchange Act

We are adopting our proposals to integrate and streamline the modified reporting structure currently permitted by scores of no-action letters for issuers of asset-backed securities to meet their reporting obligations under the Exchange Act, which received general support from commenters. The final rules clarify who has the reporting obligation under the Exchange Act and who must file and sign the annual, periodic and current reports. Although the comments we received on this point were mixed, we continue to believe that either the depositor, or the servicer in the alternative, should sign the Exchange Act reports because either the depositor or servicer is the party most able to monitor the ongoing Exchange Act reporting requirements of the ABS transaction. In addition, the final rules provide clarifying guidance on when the reporting obligation begins and when it can be suspended, which commenters overall supported. This will provide certainty to issuers as to when their reporting obligation is suspended as well as provide notice to investors as to when issuers may cease post-issuance reporting under the Exchange Act.

The final rules outline the required disclosure in the Exchange Act reports to ensure uniform reporting by issuers while reducing information asymmetry between issuers and investors. We are codifying the longstanding requirements that periodic information be disclosed based on the periodicity of distributions on the securities and the periodic reports contain the non-financial disclosures in Form 10–Q. Rather than filing these reports on Form 8–K, as they are currently, we are adopting our proposal that issuers use a new form type for ABS, Form 10–D, for reporting periodic distributions to assist investors and the marketplace in distinguishing such distribution reports from the reporting of significant events relevant to the ABS transaction, which commenters supported. We believe the use of the new form will not result in additional costs beyond minimal one-time transition costs. We have made several measured amendments to the disclosure for Form 10–D in response to comment to focus more on statistical disclosures than disclosures that require analysis, which we understand is more consistent with current practice and should ease preparation burden. We do continue to support some additional disclosure to investors, which may be incremental to what is typically provided today, such as disclosure regarding asset pool changes where those changes are the result of external administration instead of the pool converting into cash in accordance with their terms. Here again, however, we have made measured modifications in an attempt to ease administrative complexity. To further remove regulatory uncertainty for issuers, we also clarify when periodic disclosure for significant obligors is required. For purposes of the Paperwork Reduction Act, we continue to estimate that the burden in preparing these incremental disclosures for the Form 10–D would be on average 10 hours per Form 10–D. Based on our estimated costs of in-house staff time, we estimated the incremental PRA hour-burden would translate into an approximate cost of $19,593,750.[589]

The final rules also provide the ability for issuers to obtain a five calendar day filing extension under Exchange Act Rule 12b–25 for Form 10–D filings, similar to the current process available for Form 10–Q filings by corporate issuers. The ability to use the Rule 12b–25 extension, if necessary, should help issuers with the implementation process and with staying timely with their Exchange Act reporting, which is important in order to maintain Form S–3 eligibility for new registration statements. To use the exemption, an issuer must file a Form 12b–25 with respect to the subject report, although we believe the burden is minimal. For purposes of the Paperwork Reduction Act, we estimate that the burden in preparing these Form 12b–25 filings would be an average 2.5 hours of in-house staff time. Based on our estimated cost of in-house staff time, we estimate the incremental PRA hour burden would translate into an approximate cost of $831,250.[590]

We are adopting instructions, substantially as proposed, to specify which of the existing items of Form 8–K will be applicable to ABS issuers. We also are adopting several ABS-specific reportable events for Form 8–K disclosure, again with certain modifications from the proposal to reduce potential additional disclosure burdens pointed out by commenters. The separate filing of reportable events on Form 8–K will accelerate the delivery of information to the capital markets, which should enable investors to better monitor reportable events affecting the asset-backed securities or the relevant parties involved in the ABS transaction. Issuers of asset-backed securities may incur additional costs to report these events under a shorter timeframe; however, these additional costs should be consistent with the costs incurred by corporate issuers of other securities. For purposes of the PRA, we estimated that the proposals may cause, on average, an increase of two reports on Form 8–K per ABS issuer per year. Based on our estimated costs of in-house staff time, we estimated the PRA

[589] We estimated that preparing the incremental disclosures would result in 71,250 internal burden hours and $7,125,000 in external costs. Assuming a cost of $175/hour for in-house professional staff, the total cost for the internal burden hours would be $12,468,750. Hence the aggregate cost estimate is $19,593,750. As Form 10–Q Part II information already is required under the modified reporting system, we do not estimate the codification of that reporting obligation would result in incremental costs.

[590] We estimate that the additional Form 12b–25 filings would result in 4,750 internal burden hours. Assuming a cost of $175/hour for in-house professional staff, the total cost of the internal burden hours would be $831,250.

hour-burden will translate into an approximate cost of $2,475,000.[591]

Under the modified reporting no-action letters, ABS issuers include with their annual report on Form 10–K a report by an independent public accountant attesting to an assertion of compliance with servicing criteria. Under this approach, audited financial statements of the issuing entity and reporting regarding internal control over financial reporting are not required. We are adopting the basic approach set forth in our original proposal, with the one primary modification discussed below, because we continue to believe the costs to provide audited financial statements and reporting regarding internal control over financial reporting are not justified by any minimal benefits obtained from these requirements, which commenters generally supported. We believe the approach we are adopting today is more cost-effective to issuers and beneficial to investors and the market in monitoring ABS transactions.

We are modifying our original assessment and attestation proposal to remove the requirement for a single responsible party in response to comment that such a requirement would be more costly and might be administratively burdensome. Instead, we are adopting a revised approach suggested by commenters that reports on assessments of compliance with servicing criteria from each party participating in the servicing function, along with associated attestation reports from a registered public accountant, be filed as exhibits to the Form 10–K report. To ensure that the investor receives notice as to whether reports evidencing all aspects of the servicing function are in fact provided, we also are requiring that the person who signs the Section 302 certification must certify the required reports from all parties participating in the servicing function have been included as an exhibit to the Form 10–K report, or explain why. The revised approach resolves several concerns and potential complexities raised by commenters regarding a single responsible party approach while still achieving our proposed objective of covering the entire servicing function and clarifying to the investor whether all aspects of the servicing function are covered. When multiple parties are participating in the servicing function, we are providing that no report need be filed for a party that is servicing individual pool assets that comprise only 5% or less of the asset pool. This allowance should reduce time and cost in obtaining reports.

We are adopting, substantially in the form proposed, a single set of transparent and comprehensive servicing criteria regarding an ABS transaction, which should enhance the current framework for reporting on compliance. As discussed in the Proposing Release, the framework generally used today is limited to a specific asset class, covers only limited servicing functions and represents minimum standards. We have attempted to provide flexibility by utilizing servicing criteria that clarify the transaction agreements can expressly provide an alternative timeframe for those servicing criteria that refer to specific timeframes. We continue to believe that the disclosure-based criteria will improve the quality of the assessment of compliance and elicit disclosure that is comparable among different issuers. As we explained in Section III.D., most commenters on this aspect of the proposal commended our initiative to put forward a consistent set of criteria that could be applied across asset types.

As we noted in the Proposing Release, the servicing criteria are designed to be incremental to the current framework and several commenters confirmed that many of the criteria are not new. The servicing criteria is designed to cover the full spectrum of servicing asset-backed securities, thereby facilitating an evaluation of all relevant servicing activities by each party involved in the servicing function. For example, one of the additional components of the servicing criteria that we continue to believe to be critical to the servicing function is the calculation of the payments on the securities, also referred to as the ''flow of funds.'' This improved assessment will enable investors, other parties participating in the transaction and ultimately the marketplace to analyze the operational quality of the entire servicing function, which should improve investor confidence in the overall performance of the asset-backed securities.

The assessment and reporting on the servicing criteria will continue to operate within a disclosure-based framework. For example, because our revised approach requires reports from multiple parties that participate in the servicing function, we have revised the proposed approach to allow a party to exclude a particular criterion from its assessment if it is not applicable to the asserting party based on the types of activities it performs. Disclosure also will be required of any material instances of noncompliance in the reports, if any. The revised approach continues to have the benefit of alerting investors whether all relevant reports covering the entire servicing function have been filed as exhibits to the Form 10–K as well as informing investors of any potential problems regarding a participating party's servicing function. As proposed, disclosure of material non-compliance in the Form 10–K would not result in regulatory restrictions on market access such as Form S–3 eligibility.

We estimate that the servicing criteria may impose new disclosure requirements on compliance assessments that do not presently utilize the current framework. Since the servicing criteria are designed to evaluate servicing compliance, including compliance related to the waterfall, we estimate that the scope of compliance assessments may need to be enhanced to address these new disclosure requirements. To the extent that parties involved in servicing do not maintain compliance with the servicing criteria and do not wish to publicly disclose this fact, the disclosure-based criteria could lead to these parties instituting appropriate procedures to comply with the criteria and thus incur implementation costs. We also understand that additional time and cost may be required to obtain reports from all appropriate parties, including those that may not have provided such reports previously. The extended transition period for compliance with the applicable servicing criteria should help mitigate transition to the new requirements. In addition, we are maintaining the proposed approach of requiring platform level assessments, which as noted in Section III.D., commenters supported as less costly.

Consistent with the modified reporting system, we are adopting the requirement that a registered public accounting firm attest to the assessment of compliance with servicing criteria. As discussed above, each party participating in the servicing function will engage its own independent accountant for the attestation of the party's assessment and the attestation will be required to be filed as an exhibit to the Form 10–K. As we stated in the Proposing Release, the engagement of an independent accountant improves investor confidence by establishing an independent check on the party's assessment of servicing compliance. In addition, the attestation by the independent accountant may detect

[591] We estimated that the additional Form 8–K filings would result in 9,000 internal burden hours and $900,000 in external costs. Assuming a cost of $175/hour for in-house professional staff, the total cost for the internal burden hours would be $1,575,000. Hence the aggregate cost estimate is $2,475,000.

material instances of noncompliance with the servicing criteria that may provide early warning signals to investors. As with the assessments themselves, the attestation of the entire servicing function may increase the accounting costs for those criteria that are incremental to the current framework.

In addition to the assessment of compliance with servicing criteria, we will continue requiring issuers to file a servicer compliance statement regarding compliance with material aspects of the servicing agreement. This rule generally codifies current practice and should not by itself result in any additional costs. The final rules, as proposed, also specify the form and content of the Sarbanes-Oxley Section 302 certification for ABS issuers consistent with existing staff practice, with the one primary modification discussed above regarding the revised assessment of compliance. As proposed, the language of the certification is not to be revised apart from the alternatives specified. Instead, any issues should be addressed through disclosure in the reports. We do not believe these revisions will result in incremental costs and should result in a more uniform and consistent certification process.

For purposes of the Paperwork Reduction Act, we estimated that the incremental burden in preparing the Form 10–K, including the assessment of compliance with servicing criteria, will be on average 30 hours per response. Based on our estimated costs, we estimated the PRA hour-burden will translate into an approximate cost of $9,675,000.[592] We continue to believe this increased burden will result in benefits to the ABS market in terms of an enhanced assessment and disclosure regarding the servicing functions and increased assurance and investor confidence in these disclosures. These benefits are difficult to quantify. Taken together, the total increased cost using PRA estimates is approximately $45,542,275. As noted above, we did not receive any comments on the PRA analysis contained in the Proposing Release and none of the commenters provided any comments to the estimates of increased compliance costs.

Finally, we reiterate the existing staff view that the final prospectus and Exchange Act reports are to be separately filed under the CIK code and file number of the respective issuing entity on EDGAR.[593] While not all commenters agreed, we continue to believe this facilitates access to information relevant to the particular securities involved, which increases transparency of such information for investors as well as the market for these securities. We anticipate that some issuers may incur additional costs by preparing separate Exchange Act reports for each issuing entity because these issuers currently provide combined reports. However, we continue to believe these costs will be limited since issuers are already reporting this information for a particular issuing entity, albeit in a combined report. Some of the issuers that combine reports do so for scores of issuers such that investors may have to sift through hundreds of pages that relate to securities they do not own. Further, combined reporting creates inefficiencies in the storage, retrieval and analysis of EDGAR information.

VI. Consideration of Burden on Competition and Promotion of Efficiency, Competition and Capital Formation

Section 23(a)(2) of the Exchange Act[594] requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. In addition, Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. Furthermore, Section 2(b) of the Securities Act[595] and Section 3(f) of the Exchange Act[596] require us, when engaging in rulemaking where we are required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

The final rules are intended to increase transparency by codifying informal industry and staff practices, along with incremental changes and responsive changes, into a formal regulatory regime for offerings of asset-backed securities under the Securities Act and ongoing reporting under the Exchange Act. We anticipate that these rules will enhance capital formation by simplifying the process of registering an offering of asset-backed securities, thereby allowing parties not fully immersed in the ABS market to ascertain and understand the offering and disclosure requirements. Establishing clear and transparent requirements also should remove barriers to entry for securitizations, thus promoting efficiency and competitiveness of the U.S. capital markets for asset-backed offerings. Commenters overwhelmingly supported our proposed separate framework for the registration and reporting of asset-backed securities due to the growth of the market and inherent differences between asset-backed securities and other securities.[597]

The principles-based disclosure requirements we are adopting will allow great flexibility in implementation for all asset classes while enhancing the quality of disclosure for ABS transactions. Similarly, the servicing criteria we are adopting are intended to provide a comprehensive assessment to evaluate the overall servicing function for the ABS transaction. We anticipate these rules, that have been modified in response to comment, should improve investors' ability to make informed investment decisions about asset-backed offerings as well as help increase investor confidence in the servicing of ABS transactions. Enhanced disclosure should raise investors' expectations regarding material information that issuers must make available to the public. We anticipate this will therefore lead to increased efficiency and competitiveness of the U.S. capital markets. Increased market efficiency and investor confidence also may encourage more efficient capital formation.

In addition, the rules are designed to improve the current framework for reporting on compliance with servicing criteria that will operate within a disclosure-based framework and cover the entire spectrum of the servicing function. We believe the servicing criteria will provide value to the ABS industry in establishing market-wide disclosure benchmarks and promote market efficiency by providing meaningful disclosure regarding each party participating in the servicing function that is attested to by the respective party's independent public accountant. The disclosure-based framework of the servicing criteria will provide information about the entire servicing function to be publicly available for investors, as well as to the

[592] We estimated that the incremental burden would result in 9,000 internal burden hours and $8,100,000 in external costs. Assuming a cost of $175/hour for in-house professional staff, the total cost for the internal burden hours would be $1,575,000. Hence the aggregate cost estimate is $9,675,000.

[593] We also are planning programming changes to the EDGAR system that should significantly reduce some of the technical and compliance issues involved in establishing new transactions under the EDGAR system.

[594] 15 U.S.C. 78w(a)(2).

[595] 15 U.S.C. 77b(b).

[596] 15 U.S.C. 78c(f).

[597] See note 27 above.

marketplace, to monitor the performance of the ABS transaction. This should promote investor confidence and market efficiency by decreasing information asymmetries and promoting more efficient pricing and valuation of the securities. As a result, capital may be allocated more efficiently. In addition, the servicing criteria will promote the comparability of reports of different issuers, thus promoting investor analysis as well as competition among such issuers.

We requested comment on whether the proposals, if adopted, would promote efficiency, competition and capital formation or have an impact or burden on competition. We received no comments on this subject but a few of the comments on other areas touched on these issues. Two commenters thought the requirement to disclose the policies and procedures of the servicer is too broad and would require servicers to disclose competitive information to the public.[598] We have emphasized in the release the materiality-based standard for the new disclosure items in Regulation AB, including disclosure regarding the servicer. This should mitigate the possibility that detailed information about the servicer's operational practices would not subsume the disclosure. However, we continue to believe enhanced material disclosure about the servicer's business practices provides more certainty to investors that they are making investment decisions in a transparent market. All material parties that meet the definition of ''servicer'' will be required to make available to the public the same level of disclosure on their business practices. To reduce potential disclosure burdens regarding unrelated third parties, we have raised the percentage breakpoint for determining when more detailed disclosure would be required for unaffiliated servicers thereby decreasing the number of times disclosure is required.

Commenters also believed there was no compelling reason to propose different bright-line limits for ABS transactions using a prefunding period or revolving period if the transaction is filed on Form S–1 or Form S–3.[599] One group of commenters suggested increasing the proposed limit for revolving periods to an unlimited three-year revolving period would improve efficiency in structuring transactions.[600] In response to comment, we have eliminated the different bright-line percentage tests for ABS offerings utilizing a prefunding period or revolving period and registered on either Form S–1 or Form S–3. We also have further expanded the revolving period to allow an unlimited revolving period for up to three years so long as added assets are of the same general character as the original pool assets. These expansions should allow similar treatment in structuring transactions that meet market demands.

We have made several measured changes in the final rules after carefully balancing issuer concerns of potential burdens with the need for investor protection and market efficiency. For example, we made responsive revisions to the final rules and Regulation AB to assist issuers meet the eligibility requirements to register an offering on Form S–3 to quickly access the ABS market. We are supporting an alternative method of providing disclosure through publicly available Internet Web sites to limit the potential burden of the static pool disclosure requirement for issuers while increasing the efficiency of the disclosure for investors and the market. We also are extending the transition period to assist various transaction participants plan for compliance with the new regulatory regime for future ABS offerings and ensure orderly transition of the alternative disclosure regime for existing ABS transaction with minimal disruption to the ABS market.

The rules could have certain indirect negative effects. For example, if transactions in the private market for ABS or in foreign markets do not result in similar disclosures, issuers could, all things being equal, migrate to those markets to avoid such disclosures. A few commenters mentioned such concerns generally.[601] Conversely, some commenters believed practices in the public markets would influence disclosures in the private market as well.[602] We have made responsive revisions to the proposals to address commenter concerns about potentially adverse unintended consequences from the new requirements. Moreover, there may be limitations on the ability to migrate to other markets given the large size of the U.S. registered ABS market and potential regulatory or investment restrictions on the ability of investors to purchase non-registered ABS. In addition, competitors and markets not subject to the new alternative disclosure regime for asset-backed securities may suffer from decreased investor confidence if the asset-backed offerings lack the transparency of asset-backed offerings that do comply with the new regime. The possibility of these effects and their magnitude if they were to occur are difficult to quantify.

Our specific rules relate only to transactions that meet the definition for an asset-backed security under the Securities Act. The definition and interpretations that we are adopting are intended to establish parameters for the types of securities that are appropriate for our new regulatory regime for ABS. Although the definition for an asset-backed security is flexible as to capture most asset-backed structures, there may be transactions that are fundamentally different from the principles-based definition. However, we continue to believe transactions that do not fit the parameters of the definition will still be able to access the capital markets. These transactions will need to rely on non-ABS form eligibility for registration, and additional disclosures, depending on the type of offering and transaction, will be required.

VII. Regulatory Flexibility Analysis Certification

Under Section 605(b) of the Regulatory Flexibility Act,[603] we certified that, when adopted, the proposals would not have a significant economic impact on a substantial number of small entities. We included this certification in Part VII of the Proposing Release. While we encouraged written comment regarding this certification, none of the commenters responded to this request.

VIII. Statutory Authority and Text of Rule and Form Amendments

We are adopting the new rules, forms and amendments contained in this document under the authority set forth in Sections 6, 7, 8, 10, 19 and 28 of the Securities Act,[604] Sections 3, 10A, 12, 13, 14, 15, 16, 23 and 36 of the Exchange Act,[605] and Sections 3, 302, 306, 404, 406 and 407 of the Sarbanes-Oxley Act.[606]

Text of the Amendments

List of Subjects

17 CFR Part 210

Accountants, Accounting, Reporting and recordkeeping requirements, Securities.

[598] See Letters of JPMorganChase and MBA.

[599] See, *e.g.*, Letters of ASF, Citigroup, and MBNA.

[600] See Letter of Auto Group.

[601] See, *e.g.*, Letter of ABA; Jones Day; and NYCBA.

[602] See, *e.g.*, Letter of A&O.

[603] 5 U.S.C. 605(b).

[604] 15 U.S.C. 77b, 77f, 77g, 77h, 77j, 77q, 77s and 77z-3.

[605] 15 U.S.C. 78c, 78j, 78j-1, 78*l*, 78m, 78n, 78o, 78p, 78w and 78mm.

[606] 15 U.S.C. 7202, 7241, 7244, 7262, 7264 and 7265.

17 CFR Parts 228, 229, 232, 239, 242, 245 and 249

Reporting and recordkeeping requirements, Securities.

17 CFR Part 230

Advertising, Reporting and recordkeeping requirements, Securities.

17 CFR Part 240

Brokers, Reporting and recordkeeping requirements, Securities.

■ In accordance with the foregoing, Title 17, Chapter II of the Code of Federal Regulations is amended as follows:

PART 210—FORM AND CONTENT OF AND REQUIREMENTS FOR FINANCIAL STATEMENTS, SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934, PUBLIC UTILITY HOLDING COMPANY ACT OF 1935, INVESTMENT COMPANY ACT OF 1940, INVESTMENT ADVISERS ACT OF 1940, AND ENERGY POLICY AND CONSERVATION ACT OF 1975

■ 1. The authority citation for Part 210 continues to read as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z–2, 77z–3, 77aa(25), 77aa(26), 78c, 78j–1, 78*l*, 78m, 78n, 78o(d), 78q, 78u–5, 78w(a), 78*ll*, 78mm, 79e(b), 79j(a), 79n, 79t(a), 80a–8, 80a–20, 80a–29, 80a–30, 80a–31, 80a–37(a), 80b–3, 80b–11, 7202 and 7262, unless otherwise noted.

■ 2. Section 210.1–02 is amended by adding paragraph (a)(3) to read as follows:

§ 210.1–02 Definition of terms used in Regulation S–X (17 CFR part 210).

* * * * *

(a)(1) * * *

(3) *Attestation report on assessment of compliance with servicing criteria for asset-backed securities.* The term *attestation report on assessment of compliance with servicing criteria for asset-backed securities* means a report in which a registered public accounting firm, as required by § 240.13a–18(c) or 240.15d–18(c) of this chapter, expresses an opinion, or states that an opinion cannot be expressed, concerning an asserting party's assessment of compliance with servicing criteria, as required by § 240.13a–18(b) or 240.15d–18(b) of this chapter, in accordance with standards on attestation engagements. When an overall opinion cannot be expressed, the registered public accounting firm must state why it is unable to express such an opinion.

* * * * *

■ 3. In 17 CFR Part 210, remove the phrase ''as defined in § 240.13a–14(g) and § 240–15d–14(g) of this chapter'' and add, in its place, the phrase ''as defined in § 229.1101 of this chapter'' in the following places:

■ a. In the introductory text of § 210.2–01(c)(7); and

■ b. In the introductory text of § 210.2–07(a).

■ 4. Amend § 210.2–02 by:

■ a. Revising the section heading; and

■ b. Adding paragraph (g).

The addition and revision read as follows:

§ 210.2–02 Accountants' reports and attestation reports.

* * * * *

(g) *Attestation report on assessment of compliance with servicing criteria for asset-backed securities.* The attestation report on assessment of compliance with servicing criteria for asset-backed securities, as required by § 240.13a–18(c) or 240.15d–18(c) of this chapter, shall be dated, signed manually, identify the period covered by the report and clearly state the opinion of the registered public accounting firm as to whether the asserting party's assessment of compliance with the servicing criteria is fairly stated in all material respects, or must include an opinion to the effect that an overall opinion cannot be expressed. If an overall opinion cannot be expressed, explain why.

PART 228—INTEGRATED DISCLOSURE SYSTEM FOR SMALL BUSINESS ISSUERS

■ 5. The authority citation for Part 228 continues to read in part as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z–2, 77z–3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77jjj, 77nnn, 77sss, 78*l*, 78m, 78n, 78o, 78u–5, 78w, 78*ll*, 78mm, 80a–8, 80a–29, 80a–30, 80a–37, 80b–11, and 7201 *et seq.*; and 18 U.S.C. 1350.

* * * * *

■ 6. Amend § 228.10 by revising paragraph (a)(1)(iii) to read as follows:

§ 228.10 (Item 10) General.

(a) *Application of Regulation S–B.* ***

(1) *Definition of small business issuer.* ***

(iii) Is not an investment company and is not an asset-backed issuer (as defined in § 229.1101 of this chapter); and

* * * * *

■ 7. Amend § 228.308 by revising the ''Instructions to Item 308'' to read as follows:

§ 228.308 (Item 308) Internal control over financial reporting.

* * * * *

Instruction to Item 308. The small business issuer must maintain evidential matter, including documentation, to provide reasonable support for management's assessment of the effectiveness of the small business issuer's internal control over financial reporting.

§ 228.401 [AMENDED]

■ 8. Amend § 228.401, ''Instructions to Item 401(e),'' by removing Instruction 4 and redesignating Instruction 5 as Instruction 4.

§ 228.406 [AMENDED]

■ 9. Amend § 228.406, ''Instructions to Item 406,'' by removing Instruction 3.

PART 229—STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975—REGULATION S–K

■ 10. The authority citation for Part 229 continues to read in part as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z–2, 77z–3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78*l*, 78m, 78n, 78o, 78u–5, 78w, 78*ll*, 78mm, 79e, 79j, 79n, 79t, 80a–8, 80a–9, 80a–20, 80a–29, 80a–30, 80a–31(c), 80a–37, 80a–38(a), 80a–39, 80b–11, and 7201 *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

■ 11. Amend § 229.10, introductory text of paragraph (d), by revising the second sentence to read as follows:

§ 229.10 (Item 10) General.

* * * * *

(d) *Incorporation by reference.** * * Except where a registrant or issuer is expressly required to incorporate a document or documents by reference (or for purposes of Item 1100(c) of Regulation AB (§ 229.1100(c)) with respect to an asset-backed issuer, as that term is defined in Item 1101 of Regulation AB (§ 229.1101)), reference may not be made to any document which incorporates another document by reference if the pertinent portion of the document containing the information or financial statements to be incorporated by reference includes an incorporation by reference to another document.* * *

* * * * *

■ 12. Amend § 229.202 by:

■ a. Removing the authority citation following the section; and

■ b. Adding Instruction 6 to the ''Instructions to Item 202''.

The addition reads as follows.

§ 229.202 (Item 202) Description of registrant's securities.

* * * * *

Instructions to Item 202: * * *

6. For asset-backed securities, *see* also Item 1113 of Regulation AB (§ 229.1113).

■ 13. Amend § 229.308 by revising the ''Instructions to Item 308'' to read as follows:

§ 229.308 (Item 308) Internal control over financial reporting.

* * * * *

Instruction to Item 308. The registrant must maintain evidential matter, including documentation, to provide reasonable support for management's assessment of the effectiveness of the registrant's internal control over financial reporting.

§ 229.401 [Amended]

■ 14. Amend § 229.401 by removing the phrase ''(as defined in § 240.13a–14(g) and § 240.15d–14(g) of this chapter)'' from ''Instruction 4 of the Instructions to Item 401(h)'' and adding, in its place, the phrase ''(as defined in § 229.1101)''.

§ 229.406 [Amended]

■ 15. Amend § 229.406, ''Instructions to Item 406,'' by removing Instruction 3.

■ 16. Amend § 229.501 by adding an Instruction to the end of § 229.501 to read as follows:

§ 229.501 (Item 501) Forepart of registration statement and outside front cover page of prospectus.

* * * * *

Instruction to Item 501. For asset-backed securities, *see* also Item 1102 of Regulation AB (§ 229.1102).

■ 17. Amend § 229.503 by adding an Instruction to the end of § 229.503 to read as follows:

§ 229.503 (Item 503) Prospectus summary, risk factors, and ratio of earnings to fixed charges.

* * * * *

Instruction to Item 503. For asset-backed securities, *see* also Item 1103 of Regulation AB (§ 229.1103).

■ 18. Amend § 229.512 by:

■ a. Adding a paragraph after the paragraph that begins ''*Provided, however,*'' after paragraph (a)(1)(iii); and

■ b. Adding paragraphs (k) and (l).

The revisions read as follows:

§ 229.512 (Item 512) Undertakings.

(a) * * *

(1) * * *

(iii) * * *

*Provided, however,** * *

Provided further, however, that paragraphs (a)(1)(i) and (a)(1)(ii) do not apply if the registration statement is for an offering of asset-backed securities on Form S–1 (§ 239.11 of this chapter) or Form S–3 (§ 239.13 of this chapter), and the information required to be included in a post-effective amendment is provided pursuant to Item 1100(c) of Regulation AB (§ 229.1100(c)).

* * * * *

(k) *Filings regarding asset-backed securities incorporating by reference subsequent Exchange Act documents by third parties.* Include the following if the registration statement incorporates by reference any Exchange Act document filed subsequent to the effective date of the registration statement pursuant to Item 1100(c) of Regulation AB (§ 229.1100(c)):

The undersigned registrant hereby undertakes that, for purposes of determining any liability under the Securities Act of 1933, each filing of the annual report pursuant to section 13(a) or section 15(d) of the Securities Exchange Act of 1934 of a third party that is incorporated by reference in the registration statement in accordance with Item 1100(c)(1) of Regulation AB (17 CFR 229.1100(c)(1)) shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof.

(l) *Filings regarding asset-backed securities that provide certain information through an Internet Web site.* Include the following if the registration statement is to provide information required by Item 1105 of Regulation AB (§ 229.1105) through an Internet Web site in accordance with Rule 312 of Regulation S–T (§ 232.312 of this chapter):

The undersigned registrant hereby undertakes that, except as otherwise provided by Item 1105 of Regulation AB (17 CFR 229.1105), information provided in response to that Item pursuant to Rule 312 of Regulation S–T (17 CFR 232.312) through the specified Internet address in the prospectus is deemed to be a part of the prospectus included in the registration statement. In addition, the undersigned registrant hereby undertakes to provide to any person without charge, upon request, a copy of the information provided in response to Item 1105 of Regulation AB pursuant to Rule 312 of Regulation S–T through the specified Internet address as of the date of the prospectus included in the registration statement if a subsequent update or change is made to the information.

■ 19. Amend § 229.601 by:

■ a. Revising the exhibit table;

■ b. Redesignating the text of paragraph (b)(31) as paragraph (b)(31)(i);

■ c. Adding paragraph (b)(31)(ii); and

■ d. Revising paragraphs (b)(33) through (b)(98).

The revisions read as follows.

§ 229.601 (Item 601) Exhibits.

(a) *Exhibits and index required.** * *

* * * * *

Exhibit Table

Instructions to the Exhibit Table

* * * * *

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EXHIBIT TABLE

	Securities Act Forms										Exchange Act Forms				
	S-1	S-2	S-3	S-4[3]	S-8	S-11	F-1	F-2	F-3	F-4[3]	10	8-K[5]	10-D	10-Q	10-K
(1) Underwriting agreement	X	X	X	X	---	X	X	X	X	X	---	X	---	---	---
(2) Plan of acquisition, reorganization, arrangement, liquidation or succession	X	X	X	X	---	X	X	X	X	X	X	X	---	X	X
(3) (i) Articles of incorporation	X	---	---	X	---	X	X	---	---	X	X	X	X	X	X
(ii) By-laws	X	---	---	X	---	X	X	---	---	X	X	X	X	X	X
(4) Instruments defining the rights of security holders, including indentures	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
(5) Opinion re legality	X	X	X	X	X	X	X	X	X	X	---	---	---	---	---
(6) [Reserved]	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
(7) Correspondence from an independent accountant regarding non-reliance on a previously issued audit report or completed interim review	---	---	---	---	---	---	---	---	---	---	---	X	---	---	---
(8) Opinion re tax matters	X	X	X	X	---	X	X	X	X	X	---	---	---	---	---
(9) Voting trust agreement	X	---	---	X	---	X	X	---	---	X	X	---	---	---	X
(10) Material contracts	X	X	---	X	---	X	X	X	---	X	X	---	X	X	X
(11) Statement re computation of per share earnings	X	X	---	X	---	X	X	X	---	X	X	---	---	X	X
(12) Statements re computation of ratios	X	X	X	X	---	X	X	X	---	X	X	---	---	---	X
(13) Annual report to security holders, Form 10-Q and 10-QSB, or quarterly report to security holders[1]	---	X	---	X	---	---	---	---	---	---	---	---	---	---	X
(14) Code of Ethics	---	---	---	---	---	---	---	---	---	---	---	X	---	---	X
(15) Letter re unaudited interim financial information	X	X	X	X	X	X	X	X	X	X	---	---	---	X	---
(16) Letter re change in certifying accountant[4]	X	X	---	X	---	X	---	---	---	---	X	X	---	---	X
(17) Correspondence on departure of director	---	---	---	---	---	---	---	---	---	---	---	X	---	---	---
(18) Letter re change in accounting principles	---	---	---	---	---	---	---	---	---	---	---	---	---	X	X
(19) Report furnished to security holders	---	---	---	---	---	---	---	---	---	---	---	---	---	X	---
(20) Other documents or statements to security holders	---	---	---	---	---	---	---	---	---	---	---	X	---	---	---
(21) Subsidiaries of the registrant	X	---	---	X	---	X	X	---	---	X	X	---	---	---	X

(22) Published report regarding matters submitted to vote of security holders	---	---	---	---	---	---	---	---	---	---	---	---	X	X	X
(23) Consents of experts and counsel	X	X	X	X	X	X	X	X	X	X	---	X[2]	X[2]	X[2]	X[2]
(24) Power of attorney	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
(25) Statement of eligibility of trustee	X	X	X	X	---	X	X	X	X	X	---	---	---	---	---
(26) Invitations for competitive bids	X	X	X	X	---	---	X	X	X	X	---	---	---	---	---
(27) through (30) [Reserved]															
(31) (i) Rule 13a-14(a)/15d-14(a) Certifications	---	---	---	---	---	---	---	---	---	---	---	---	---	X	X
(ii) Rule 13a-14(d)/15d-14(d) Certifications[6]	---	---	---	---	---	---	---	---	---	---	---	---	---	---	X
(32) Section 1350 Certifications[6]	---	---	---	---	---	---	---	---	---	---	---	---	---	X	X
(33) Report on assessment of compliance with servicing criteria for asset-backed securities	---	---	---	---	---	---	---	---	---	---	---	---	---	---	X
(34) Attestation report on assessment of compliance with servicing criteria for asset-backed securities	---	---	---	---	---	---	---	---	---	---	---	---	---	---	X
(35) Servicer compliance statement	---	---	---	---	---	---	---	---	---	---	---	---	---	---	X
(36) through (98) [Reserved]	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
(99) Additional exhibits	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X

[1] Where incorporated by reference into the text of the prospectus and delivered to security holders along with the prospectus as permitted by the registration statement; or, in the case of the Form 10-K, where the annual report to security holders is incorporated by reference into the text of the Form 10-K.

[2] Where the opinion of the expert or counsel has been incorporated by reference into a previously filed Securities Act registration statement.

[3] An exhibit need not be provided about a company if: (1) with respect to such company an election has been made under Form S-4 or F-4 to provide information about such company at a level prescribed by Form S-2, S-3, F-2 or F-3; and (2) the form, the level of which has been elected under Form S-4 or F-4, would not require such company to provide such exhibit if it were registering a primary offering.

[4] If required pursuant to Item 304 of Regulation S-K.

[5] A Form 8-K Exhibit is required only if relevant to the subject matter reported on the Form 8-K report. For example, if the Form 8-K pertains to the departure of a director, only the exhibit described in paragraph (b)(17) of this section need be filed. A required exhibit may be incorporated by reference from a previous filing.

[6] Pursuant to §§ 240.13a-13(b)(3) and 240.15d-13(b)(3) of this chapter, asset-backed issuers are not required to file reports on Form 10-Q.

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(b) *Description of exhibits.* * * *

(31)(i) * * *

(ii) *Rule 13a–14(d)/15d–14(d) Certifications.* If an asset-backed issuer (as defined in § 229.1101), the certifications required by Rule 13a–14(d) (17 CFR 240.13a–14(d)) or Rule 15d–14(d) (17 CFR 240.15d–14(d)) exactly as set forth below:

Certifications [1]

I, [identify the certifying individual], certify that:

1. I have reviewed this report on Form 10–K and all reports on Form 10–D required to be filed in respect of the period covered by this report on Form 10–K of [identify the issuing entity] (the ''Exchange Act periodic reports'');

2. Based on my knowledge, the Exchange Act periodic reports, taken as a whole, do not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;

3. Based on my knowledge, all of the distribution, servicing and other information required to be provided under Form 10–D for the period covered by this report is included in the Exchange Act periodic reports;

4. [I am responsible for reviewing the activities performed by the servicer(s) and based on my knowledge and the compliance review(s) conducted in preparing the servicer compliance statement(s) required in this report under Item 1123 of Regulation AB, and except as disclosed in the Exchange Act periodic reports, the servicer(s) [has/have] fulfilled [its/their] obligations under the servicing agreement(s); and]

[Based on my knowledge and the servicer compliance statement(s) required in this report under Item 1123 of Regulation AB, and except as disclosed in the Exchange Act periodic reports, the servicer(s) [has/have] fulfilled [its/their] obligations under the servicing agreement(s); and] [2]

5. All of the reports on assessment of compliance with servicing criteria for asset-backed securities and their related attestation reports on assessment of compliance with servicing criteria for asset-backed securities required to be included in this report in accordance with Item 1122 of Regulation AB and Exchange Act Rules 13a–18 and 15d–18 have been included as an exhibit to this report, except as otherwise disclosed in this report. Any material instances of noncompliance described in such reports have been disclosed in this report on Form 10–K.[3]

[In giving the certifications above, I have reasonably relied on information provided to me by the following unaffiliated parties [name of servicer, sub-servicer, co-servicer, depositor or trustee].] [4]

Date: _____

_____

[Signature]

[Title]

[1] With respect to asset-backed issuers, the certification must be signed by either: (1) The senior officer in charge of securitization of the depositor if the depositor is signing the report on Form 10–K; or (2) The senior officer in charge of the servicing function of the servicer if the servicer is signing the report on Form 10–K on behalf of the issuing entity. See Rules 13a–14(e) and 15d–14(e) (§§ 240.13a–14(e) and 240.15d–14(e)). If multiple servicers are involved in servicing the pool assets, the senior officer in charge of the servicing function of the master servicer (or entity performing the equivalent function) must sign if a representative of the servicer is to sign the certification. If there is a master servicer and one or more underlying servicers, the references in the certification relate to the master servicer. A natural person must sign the certification in his or her individual capacity, although the title of that person in the organization of which he or she is an officer may be included under the signature.

[2] The first version of paragraph 4 is to be used when the servicer is signing the report on behalf of the issuing entity. The second version of paragraph 4 is to be used when the depositor is signing the report.

[3] The certification refers to the reports prepared by parties participating in the servicing function that are required to be included as an exhibit to the Form 10–K. See Item 1122 of Regulation AB (§ 229.1122) and Rules 13a–18 and 15d–18 (§§ 240.13a–18 and 240.15d–18 of this chapter). If a report that is otherwise required to be included is not attached, disclosure that the report is not included and an associated explanation must be provided in the Form 10–K report.

[4] Because the signer of the certification must rely in certain circumstances on information provided by unaffiliated parties outside of the signer's control, this paragraph must be included if the signer is reasonably relying on information that unaffiliated trustees, depositors, servicers, sub-servicers or co-servicers have provided.

* * * * *

(33) *Report on assessment of compliance with servicing criteria for asset-backed securities.* Each report on assessment of compliance with servicing criteria required by § 229.1122(a).

(34) *Attestation report on assessment of compliance with servicing criteria for asset-backed securities.* Each attestation report on assessment of compliance with servicing criteria for asset-backed securities required by § 229.1122(b).

(35) *Servicer compliance statement.* Each servicer compliance statement required by § 229.1123.

(36) through (98) [Reserved]

* * * * *

§ 229.701 [Amended]

■ 20. Amend § 229.701(e) by revising the phrase ''Form 10–KSB or Form 10–K (§§ 249.308, 249.308b, 249.308a, 249.310b or 249.310)'' to read ''Form 10–KSB, Form 10–K or Form 10–D (§ 249.308, 249.308b, 249.308a, 249.310b, 249.310 or 249.312)''.

■ 21. Add subpart 229.1100 consisting of §§ 229.1100 through 229.1123 to read as follows:

Subpart 229.1100—Asset-Backed Securities (Regulation AB)

229.1100 (Item 1100) General.
229.1101 (Item 1101) Definitions.
229.1102 (Item 1102) Forepart of registration statement and outside cover page of the prospectus.
229.1103 (Item 1103) Transaction summary and risk factors.
229.1104 (Item 1104) Sponsors.
229.1105 (Item 1105) Static pool information.
229.1106 (Item 1106) Depositors.
229.1107 (Item 1107) Issuing entities.
229.1108 (Item 1108) Servicers.
229.1109 (Item 1109) Trustees.
229.1110 (Item 1110) Originators.
229.1111 (Item 1111) Pool assets.
229.1112 (Item 1112) Significant obligors of pool assets.
229.1113 (Item 1113) Structure of the transaction.
229.1114 (Item 1114) Credit enhancement and other support, except for certain derivatives instruments.
229.1115 (Item 1115) Certain derivatives instruments.
229.1116 (Item 1116) Tax matters.
229.1117 (Item 1117) Legal proceedings.
229.1118 (Item 1118) Reports and additional information.
229.1119 (Item 1119) Affiliations and certain relationships and related transactions.
229.1120 (Item 1120) Ratings.
229.1121 (Item 1121) Distribution and pool performance information.
229.1122 (Item 1122) Compliance with applicable servicing criteria.
229.1123 (Item 1123) Servicer compliance statement.

Subpart 229.1100—Asset-Backed Securities (Regulation AB)

§ 229.1100 (Item 1100) General.

(a) *Application of Regulation AB.* Regulation AB (§§ 229.1100 through 229.1123) is the source of various disclosure items and requirements for ''asset-backed securities'' filings under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) (the ''Securities Act'') and the Securities Exchange Act of 1934 (the ''Exchange Act'') (15 U.S.C. 78a *et seq.*). Unless otherwise specified, definitions to be used in this Regulation AB,

including the definition of ''asset-backed security,'' are set forth in Item 1101.

(b) *Presentation of historical delinquency and loss information.* Several Items in Regulation AB call for the presentation of historical information and data on delinquencies and loss information. In providing such information:

(1) Present delinquency experience in 30 or 31 day increments, as applicable, beginning at least with assets that are 30 or 31 days delinquent, as applicable, through the point that assets are written off or charged off as uncollectable. At a minimum, present such information by number of accounts and dollar amount. Present statistical information in a tabular or graphical format, if such presentation will aid understanding.

(2) Disclose the total amount of delinquent assets as a percentage of the aggregate asset pool.

(3) Present loss and cumulative loss information, as applicable, regarding charge-offs, charge-off rate, gross losses, recoveries and net losses (with a description of how these terms are defined), the number and amount of assets experiencing a loss and the number and amount of assets with a recovery, the ratio of aggregate net losses to average portfolio balance and the average of net loss on all assets that have experienced a net loss.

(4) Categorize all delinquency and loss information by pool asset type.

(5) In a registration statement under the Securities Act or the Exchange Act or in a prospectus to be filed pursuant to § 230.424, describe how delinquencies, charge-offs and uncollectable accounts are defined or determined, addressing the effect of any grace period, re-aging, restructure, partial payments considered current or other practices on delinquency and loss experience.

(6) Describe any other material information regarding delinquencies and losses particular to the pool asset type(s), such as repossession information, foreclosure information and real estate owned (REO) or similar information.

(c) *Presentation of certain third party financial information.* If financial information of a third party is required in a filing by Item 1112(b) of this Regulation AB (Information regarding significant obligors) or Items 1114(b)(2) or 1115(b) of this Regulation AB (Information regarding significant provider of enhancement or other support), such information, in lieu of including such information, may be provided as follows:

(1) *Incorporation by reference.* If the following conditions are met, you may incorporate by reference (by means of a statement to that effect) the reports filed by the third party (or the entity that consolidates the third party) pursuant to section 13(a) or 15(d) of the Exchange Act (15 U.S.C. 78m(a) or 78o(d)):

(i) Such third party or the entity that consolidates the third party is required to file reports with the Commission pursuant to section 13(a) or 15(d) of the Exchange Act.

(ii) Such third party or the entity that consolidates the third party has filed all reports and other materials required to be filed by such requirements during the preceding 12 months (or such shorter period that such party was required to file such reports and materials).

(iii) The reports filed by such third party, or entity that consolidates the third party, include (or properly incorporate by reference) the financial statements of such third party.

(iv) If incorporated by reference into a prospectus or registration statement, the prospectus also states that all documents subsequently filed by such third party, or the entity that consolidates the third party, pursuant to section 13(a) or 15(d) of the Exchange Act prior to the termination of the offering also shall be deemed to be incorporated by reference into the prospectus.

Instructions to Item 1100(c)(1).

1. In addition to the conditions in paragraph (c)(1) of this section, any information incorporated by reference must comply with all applicable Commission rules pertaining to incorporation by reference, such as Item 10(d) of Regulation S–K (§ 229.10(d)), Rule 303 of Regulation S–T (§ 232.303 of this chapter), Rule 411 of Regulation C (§ 230.411 of this chapter), and Rules 12b–23 and 12b–32 under the Exchange Act (§§ 240.12b–23 and 240.12b–32 of this chapter).

2. In addition, any applicable requirements under the Securities Act or the rules and regulations of the Commission regarding the filing of a written consent for the use of incorporated material apply to the material incorporated by reference. *See*, for example, § 230.439 of this chapter.

3. Any undertakings set forth in Item 512 of Regulation S–K (§ 229.512) apply to any material incorporated by reference in a registration statement or prospectus.

4. If neither the third party nor any of its affiliates has had a direct or indirect agreement, arrangement, relationship or understanding, written or otherwise, relating to the ABS transaction, and neither the third party nor any of its affiliates is an affiliate of the sponsor, depositor, issuing entity or underwriter of the ABS transaction, then paragraph (c)(1)(ii) of this section is qualified by the knowledge of the registrant.

5. If you are relying on paragraph (c)(1) of this section to provide information required by Item 1112 of this Regulation AB regarding a significant obligor that is an asset-backed issuer and the pool assets relating to such significant obligor are asset-backed securities, then for purposes of paragraph (c)(1)(iii) of this section, the term ''financial statements'' means the information required by Instruction 3 of Item 1112 of this Regulation AB. Such information required by Instruction 3.a. of Item 1112 of this Regulation AB may be incorporated by reference from a prospectus that contains such information and is included in an effective Securities Act registration statement or filed pursuant to § 230.424 of this chapter.

(2) *Reference information for significant obligors.* If the third party information relates to a significant obligor and the following conditions are met, you may include a reference to the third party's periodic reports (or the third party's parent with respect to paragraph (c)(2)(ii)(C) of this section) under section 13(a) or 15(d) of the Exchange Act (15 U.S.C. 78m(a) or 78o(d)) that are on file with the Commission (or otherwise publicly available with respect to paragraph (c)(2)(ii)(F) of this section), along with a statement of how those reports may be accessed, including the third party's name and Commission file number, if applicable (See, *e.g.*, Item 1118 of this Regulation AB):

(i) Neither the third party nor any of its affiliates has had a direct or indirect agreement, arrangement, relationship or understanding, written or otherwise, relating to the asset-backed securities transaction, and neither the third party nor any of its affiliates is an affiliate of the sponsor, depositor, issuing entity or underwriter of the asset-backed securities transaction.

(ii) To the knowledge of the registrant, any of the following is true:

(A) The third party is eligible to use Form S–3 or F–3 (§ 239.13 or 239.33 of this chapter) for a primary offering of non-investment grade securities pursuant to General Instruction I.B.1 of such forms.

(B) The third party meets the requirements of General Instruction I.A. of Form S–3 or General Instructions 1.A.1, 2, 3, 4 and 6 of Form F–3 and the pool assets relating to such third party are non-convertible investment grade

securities, as described in General Instruction 1.B.2 of Form S–3 or Form F–3.

(C) If the third party does not meet the conditions of paragraph (c)(2)(ii)(A) or (c)(2)(ii)(B) of this section and the pool assets relating to the third party are fully and unconditionally guaranteed by a direct or indirect parent of the third party, General Instruction I.C.3 of Form S–3 or General Instruction I.A.5(iii) of Form F–3 is met with respect to the pool assets relating to such third party and the requirements of Rule 3–10 of Regulation S–X (§ 210.3–10 of this chapter) are satisfied regarding the information in the reports to be referenced.

(D) If the pool assets relating to the third party are guaranteed by a wholly owned subsidiary of the third party and the subsidiary does not meet the conditions of paragraph (c)(2)(ii)(A) or (c)(2)(ii)(B) of this section, the criteria in either paragraph (c)(2)(ii)(A) or paragraph (c)(2)(ii)(B) of this section are met with respect to the third party and the requirements of Rule 3–10 of Regulation S–X (§ 210.3–10 of this chapter) are satisfied regarding the information in the reports to be referenced.

(E) The pool assets relating to such third party are asset-backed securities and the third party is filing reports pursuant to section 12 or 15(d) of the Exchange Act (15 U.S.C. 78*l* or 78o(d)) and has filed all the material that would be required to be filed pursuant to section 13, 14 or 15(d) of the Exchange Act (15 U.S.C. 78m, 78n or 78o(d)) for a period of at least twelve calendar months and any portion of a month immediately preceding the filing referencing the third party's reports (or such shorter period that such third party was required to file such materials).

(F) The third party is a U.S. government-sponsored enterprise, has outstanding securities held by non-affiliates with an aggregate market value of $75 million or more, and makes information publicly available on an annual and quarterly basis, including audited financial statements prepared in accordance with generally accepted accounting principles covering the same periods that would be required for audited financial statements under Regulation S–X (§§ 210.1–01 through 210.12–29 of this chapter) and non-financial information consistent with that required by Regulation S–K (§§ 229.10 through 229.1123).

Instruction to Item 1101(c)(2). If you are relying on paragraph (c)(2)(ii)(E) of this section because the pool assets relating to such third party are asset-backed securities, then for purposes of a registration statement under the Securities Act or the Exchange Act or a prospectus to be filed pursuant to § 230.424 for your securities, you also must include a reference (including Commission reporting number and filing date) to the prospectus for the third party asset-backed securities that: (a) Is either included in an effective Securities Act registration statement or filed pursuant to § 230.424 of this chapter; and

(b) Contains the information required by Instruction 3.a. of Item 1112 of this Regulation AB.

(d) *Other participants to the transaction and pool assets representing interests in certain other asset pools.*

(1) If the asset-backed securities transaction involves additional or intermediate parties not specifically identified in this Regulation AB, the disclosure required by this Regulation AB includes information to the extent material regarding any such party and its role, function and experience in relation to the asset-backed securities and the asset pool. Describe the material terms of any agreement with such party regarding the transaction, and file such agreement as an exhibit.

(2) If the asset pool backing the asset-backed securities includes one or more pool assets representing an interest in or the right to the payments or cash flows of another asset pool, then for purposes of this Regulation AB and §§ 240.13a–18 and 240.15d–18 of this chapter, references to the asset pool and the pool assets of the issuing entity also include the other asset pool and its pool assets if the following conditions are met:

(i) Both the issuing entity for the asset-backed securities and the entity issuing the pool asset to be included in the issuing entity's asset pool were established under the direction of the same sponsor or depositor.

(ii) The pool asset was created solely to satisfy legal requirements or otherwise facilitate the structuring of the asset-backed securities transaction.

Instruction to Item 1100(d)(2).

Reference to the underlying asset pool includes, without limitation, compliance with applicable servicing criteria referenced in §§ 240.13a–18 and 240.15d–18 of this chapter and the servicer compliance statement required by Item 1123 of this Regulation AB. In addition, provide clear and concise disclosure, including by flow chart or other illustration, of the transaction and the various parties involved.

(e) *Foreign asset-backed securities.* If the asset-backed securities are issued by a foreign issuer (as defined in § 230.405 of this chapter), backed by pool assets that are foreign assets, or affected by enhancement or support contemplated by Items 1114 or 1115 of this Regulation AB provided by a foreign entity, then in providing the disclosure required by this Regulation AB (including, but not limited to, Items 1104 and 1110 of this Regulation AB regarding origination and securitization practices, Item 1107 of this Regulation AB regarding the sale or transfer of the pool assets, bankruptcy remoteness and collateral protection, Item 1108 of this Regulation AB regarding servicing, Item 1109 of this Regulation AB regarding the rights, duties and responsibilities of the trustee, Item 1111 of this Regulation AB regarding the terms, nature and treatment of the pool assets and Items 1114 or 1115 of this Regulation AB, as applicable, regarding the enhancement provider), the filing must describe any pertinent governmental, legal or regulatory or administrative matters and any pertinent tax matters, exchange controls, currency restrictions or other economic, fiscal, monetary or potential factors in the applicable home jurisdiction that could materially affect payments on, the performance of, or other matters relating to, the assets contained in the pool or the asset-backed securities. See also Instruction 2 to Item 202 of Regulation S–K (§ 229.202). In addition, in a registration statement under the Securities Act, provide the information required by Item 101(g) of Regulation S–K (§ 229.101(g)). Disclosure also is required in Forms 10–D (§ 249.312 of this chapter) and 10–K (§ 249.310 of this chapter) with respect to the asset-backed securities regarding any material impact caused by foreign legal and regulatory developments during the period covered by the report which have not been previously described in a Form 10–D, 10–K or 8–K (§ 249.308 of this chapter) filed under the Exchange Act.

(f) *Filing of required exhibits.* Where agreements or other documents in this Regulation AB are specified to be filed as exhibits to a Securities Act registration statement, such final agreements or other documents, if applicable, may be incorporated by reference as an exhibit to the registration statement, such as by filing a Form 8–K in the case of offerings registered on Form S–3 (§ 239.13 of this chapter).

§ 229.1101 (Item 1101) Definitions.

The following definitions apply to the terms used in Regulation AB (§§ 229.1100 through 229.1123), unless specified otherwise:

(a) *ABS informational and computational material* means a written

communication consisting solely of one or some combination of the following:

(1) Factual information regarding the asset-backed securities being offered and the structure and basic parameters of the securities, such as the number of classes, seniority, payment priorities, terms of payment, the tax, Employment Retirement Income Security Act of 1974, as amended, (29 U.S.C. 1001 *et seq.*) (''ERISA'') or other legal conclusions of counsel, and descriptive information relating to each class (*e.g.*, principal amount, coupon, minimum denomination, anticipated price, yield, weighted average life, credit enhancements, anticipated ratings, and other similar information relating to the proposed structure of the offering);

(2) Factual information regarding the pool assets underlying the asset-backed securities, including origination, acquisition and pool selection criteria, information regarding any prefunding or revolving period applicable to the offering, information regarding significant obligors, data regarding the contractual and related characteristics of the underlying pool assets (*e.g.*, weighted average coupon, weighted average maturity, delinquency and loss information and geographic distribution) and other factual information concerning the parameters of the asset pool appropriate to the nature of the underlying assets, such as the type of assets comprising the pool and the programs under which the loans were originated;

(3) Identification of key parties to the transaction, such as servicers, trustees, depositors, sponsors, originators and providers of credit enhancement or other support, including a brief description of each such party's roles, responsibilities, background and experience;

(4) Static pool data, as referenced in Item 1105 of this Regulation AB, such as for the sponsor's and/or servicer's portfolio, prior transactions or the asset pool itself;

(5) Statistical information displaying for a particular class of asset-backed securities the yield, average life, expected maturity, interest rate sensitivity, cash flow characteristics, total rate of return, option adjusted spread or other financial or statistical information relating to the class or classes under specified prepayment, interest rate, loss or other hypothetical scenarios. Examples of such information under the definition include:

(i) Statistical results of interest rate sensitivity analyses regarding the impact on yield or other financial characteristics of a class of securities from changes in interest rates at one or more assumed prepayment speeds;

(ii) Statistical information showing the cash flows that would be associated with a particular class of asset-backed securities at a specified prepayment speed; and

(iii) Statistical information reflecting the financial impact of losses based on a variety of loss or default experience, prepayment, interest rate and related assumptions.

(6) The names of underwriters participating in the offering of the securities, and their additional roles, if any, within the underwriting syndicate;

(7) The anticipated schedule for the offering (including the approximate date upon which the proposed sale to the public will begin) and a description of marketing events (including the dates, times, locations, and procedures for attending or otherwise accessing them); and

(8) A description of the procedures by which the underwriters will conduct the offering and the procedures for transactions in connection with the offering with an underwriter or participating dealer (including procedures regarding account-opening and submitting indications of interest and conditional offers to buy).

(b) *Asset-backed issuer* means an issuer whose reporting obligation results from either the registration of an offering of asset-backed securities under the Securities Act, or the registration of a class of asset-backed securities under section 12 of the Exchange Act (15 U.S.C. 78*l*).

(c)(1) *Asset-backed security* means a security that is primarily serviced by the cash flows of a discrete pool of receivables or other financial assets, either fixed or revolving, that by their terms convert into cash within a finite time period, plus any rights or other assets designed to assure the servicing or timely distributions of proceeds to the security holders; provided that in the case of financial assets that are leases, those assets may convert to cash partially by the cash proceeds from the disposition of the physical property underlying such leases.

(2) The following additional conditions apply in order to be considered an *asset-backed security:*

(i) Neither the depositor nor the issuing entity is an investment company under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) nor will become an investment company as a result of the asset-backed securities transaction.

(ii) The activities of the issuing entity for the asset-backed securities are limited to passively owning or holding the pool of assets, issuing the asset-backed securities supported or serviced by those assets, and other activities reasonably incidental thereto.

(iii) No non-performing assets are part of the asset pool as of the measurement date.

(iv) Delinquent assets do not constitute 50% or more, as measured by dollar volume, of the asset pool as of the measurement date.

(v) With respect to securities that are backed by leases, the portion of the securitized pool balance attributable to the residual value of the physical property underlying the leases, as determined in accordance with the transaction agreements for the securities, does not constitute:

(A) For motor vehicle leases, 65% or more, as measured by dollar volume, of the securitized pool balance as of the measurement date.

(B) For all other leases, 50% or more, as measured by dollar volume, of the securitized pool balance as of the measurement date.

(3) Notwithstanding the requirement in paragraph (c)(1) of this section that the asset pool be a discrete pool of assets, the following are considered to be a discrete pool of assets for purposes of being considered an *asset-backed security:*

(i) *Master trusts.* The offering related to the securities contemplates adding additional assets to the pool that backs such securities in connection with future issuances of asset-backed securities backed by such pool. The offering related to the securities also may contemplate additions to the asset pool, to the extent consistent with paragraphs (c)(3)(ii) and (c)(3)(iii) of this section, in connection with maintaining minimum pool balances in accordance with the transaction agreements for master trusts with revolving periods or receivables or other financial assets that arise under revolving accounts.

(ii) *Prefunding periods.* The offering related to the securities contemplates a prefunding account where a portion of the proceeds of that offering is to be used for the future acquisition of additional pool assets, if the duration of the prefunding period does not extend for more than one year from the date of issuance of the securities and the portion of the proceeds for such prefunding account does not involve in excess of:

(A) For master trusts, 50% of the aggregate principal balance of the total asset pool whose cash flows support the securities; and

(B) For other offerings, 50% of the proceeds of the offering.

(iii) *Revolving periods.* The offering related to the securities contemplates a revolving period where cash flows from the pool assets may be used to acquire additional pool assets, provided, that, for securities backed by receivables or other financial assets that do not arise under revolving accounts, the revolving period does not extend for more than three years from the date of issuance of the securities and the additional pool assets are of the same general character as the original pool assets.

Instructions to Item 1101(c).

1. For purposes of determining non-performing, delinquency and residual value thresholds, the ''measurement date'' means either:

a. The designated cut-off date for the transaction (*i.e.*, the date on and after which collections on the pool assets accrue for the benefit of asset-backed security holders), if applicable; or

b. In the case of master trusts, the date as of which delinquency and loss information or securitized pool balance information, as applicable, is presented in the prospectus for the asset-backed securities to be filed pursuant to § 230.424(b) of this chapter.

2. Non-performing and delinquent assets that are not funded or purchased by proceeds from the securities and that are not considered in cash flow calculations for the securities need not be considered as part of the asset pool for purposes of determining non-performing and delinquency thresholds.

3. For purposes of determining non-performing, delinquency and residual value thresholds for master trusts, calculations are to be measured against the total asset pool whose cash flows support the securities.

4. For purposes of determining residual value thresholds, residual values need not be included in measuring against the thresholds to the extent a separate party is obligated for such amounts (*e.g.*, through a residual value guarantee, residual value insurance or where the lessee is obligated to cover any residual losses).

(d) *Delinquent*, for purposes of determining if a pool asset is delinquent, means if a pool asset is more than 30 or 31 days or a single payment cycle, as applicable, past due from the contractual due date, as determined in accordance with any of the following:

(1) The transaction agreements for the asset-backed securities;

(2) The delinquency recognition policies of the sponsor, any affiliate of the sponsor that originated the pool asset or the servicer of the pool asset; or

(3) The delinquency recognition policies applicable to such pool asset established by the primary safety and soundness regulator of any entity listed in paragraph (d)(2) of this section or the program or regulatory entity that oversees the program under which the pool asset was originated.

(e) *Depositor* means the depositor who receives or purchases and transfers or sells the pool assets to the issuing entity. For asset-backed securities transactions where there is not an intermediate transfer of the assets from the sponsor to the issuing entity, the term depositor refers to the sponsor. For asset-backed securities transactions where the person transferring or selling the pool assets is itself a trust, the depositor of the issuing entity is the *depositor* of that trust.

(f) *Issuing entity* means the trust or other entity created at the direction of the sponsor or depositor that owns or holds the pool assets and in whose name the asset-backed securities supported or serviced by the pool assets are issued.

(g) *Non-performing*, for purposes of determining if a pool asset is non-performing, means a pool asset if any of the following is true:

(1) The pool asset would be treated as wholly or partially charged-off under the requirements in the transaction agreements for the asset-backed securities;

(2) The pool asset would be treated as wholly or partially charged-off under the charge-off policies of the sponsor, an affiliate of the sponsor that originates the pool asset or a servicer that services the pool asset; or

(3) The pool asset would be treated as wholly or partially charged-off under the charge-off policies applicable to such pool asset established by the primary safety and soundness regulator of any entity listed in paragraph (g)(2) of this section or the program or regulatory entity that oversees the program under which the pool asset was originated.

(h) *NRSRO* has the same meaning as the term ''nationally recognized statistical rating organization'' as used in § 240.15c3–1(c)(2)(vi)(F) of this chapter.

(i) *Obligor* means any person who is directly or indirectly committed by contract or other arrangement to make payments on all or part of the obligations on a pool asset.

(j) *Servicer* means any person responsible for the management or collection of the pool assets or making allocations or distributions to holders of the asset-backed securities. The term *servicer* does not include a trustee for the issuing entity or the asset-backed securities that makes allocations or distributions to holders of the asset-backed securities if the trustee receives such allocations or distributions from a servicer and the trustee does not otherwise perform the functions of a servicer.

(k) *Significant obligor* means any of the following:

(1) An obligor or a group of affiliated obligors on any pool asset or group of pool assets if such pool asset or group of pool assets represents 10% or more of the asset pool.

(2) A single property or group of related properties securing a pool asset or a group of pool assets if such pool asset or group of pool assets represents 10% or more of the asset pool.

(3) A lessee or group of affiliated lessees if the related lease or group of leases represents 10% or more of the asset pool.

Instructions to Item 1101(k).

1. Regarding paragraph (k)(3) of this section, the calculation must focus on the leases whose cash flow supports the asset-backed securities directly or indirectly (including the residual value of the physical property underlying the leases if a portion of the securitized pool balance is attributable to the residual value of such property), regardless of whether the asset pool contains the leases themselves, mortgages on properties that are the subject of the leases or other assets related to the leases.

2. If separate pool assets, or properties underlying pool assets, are cross-defaulted and/or cross-collateralized, such pool assets are to be aggregated and considered together in determining concentration levels.

3. If the pool asset is a mortgage or lease relating to real estate, the pool asset is non-recourse to the obligor, and the obligor does not manage the property or does not own other assets and has no other operations, then the obligor need not be considered a separate significant obligor from the real estate. Otherwise, the obligor is a separate significant obligor.

4. The determination of significant obligors is to be made as of the designated cut-off date for the transaction (*i.e.*, the date on and after which collections on the pool assets accrue for the benefit of asset-backed security holders), provided, that, in the case of master trusts, the determination is to be made as of the cut-off date (or issuance date if there is not a cut-off date) for each issuance of asset-backed securities backed by the same asset pool. In addition, if disclosure is required pursuant to either Item 6.05 of Form 8–K (17 CFR 249.308) or in a Form 10–D (17 CFR 249.312) pursuant to Item

1121(b) of this Regulation AB, the determination of significant obligors is to be made against the asset pool described in such report. However, if the percentage concentration regarding an obligor falls below 10% subsequent to the determination dates discussed in this Instruction, the obligor no longer need be considered a significant obligor.

(l) *Sponsor* means the person who organizes and initiates an asset-backed securities transaction by selling or transferring assets, either directly or indirectly, including through an affiliate, to the issuing entity.

§ 229.1102 (Item 1102) Forepart of registration statement and outside cover page of the prospectus.

In addition to the information required by Item 501 of Regulation S–K (§ 229.501), provide the following information on the outside front cover page of the prospectus. Present information regarding multiple classes in tables if doing so will aid understanding. If information regarding multiple classes cannot appear on the cover page due to space limitations, include the information in the summary or in an immediately preceding separate table.

(a) Identify the sponsor, the depositor and the issuing entity (if known).

(b) In identifying the title of the securities, include the series number, if applicable. If there is more than one class of securities offered, state the class designations of the securities offered.

(c) Identify the asset type(s) being securitized.

(d) Include a statement, if applicable and appropriately modified to the transaction, that the securities represent the obligations of the issuing entity only and do not represent the obligations of or interest in the sponsor, depositor or any of their affiliates.

(e) Identify the aggregate principal amount of all securities offered and the principal amount, if any, of each class of securities offered. If a class has no principal amount, disclose that fact, and, if applicable, state the notional amount, clearly identifying that the amount is a notional one. If the amounts are approximate, disclose that fact.

(f) Indicate the interest rate or specified rate of return of each class of security offered. If a class of securities does not bear interest or a specified return, disclose that fact. If the rate is based on a formula or is calculated in reference to a generally recognized interest rate index, such as a U.S. Treasury securities index, either provide the formula on the cover, or indicate that the rate is variable, indicate the index upon which the rate is based and indicate that further disclosure of how the rate is determined is included in the transaction summary.

(g) Identify the distribution frequency, by class or series where applicable, and the first expected distribution date for the asset-backed securities.

(h) Briefly describe any credit enhancement or other support for the transaction and identify any enhancement or support provider referenced in Items 1114(b) or 1115 of this Regulation AB.

Instruction to Item 1102. Also see Item 1113(f)(2) of this Regulation AB regarding the title of any class of securities with an optional redemption or termination feature that may be exercised when 25% or more of the original principal balance of the pool assets are still outstanding.

§ 229.1103 (Item 1103) Transaction summary and risk factors.

(a) *Prospectus summary.* In providing the information required by Item 503(a) of Regulation S–K (§ 229.503(a)), provide the following information in the prospectus summary, as applicable. Present information regarding multiple classes in tables if doing so will aid understanding. Consider using diagrams to illustrate the relationships among the parties, the structure of the securities offered (including, for example, the flow of funds or any subordination features) and any other material features of the transaction.

(1) Identify the participants in the transaction, including the sponsor, depositor, issuing entity, trustee and servicers contemplated by Item 1108(a)(2) of this Regulation AB, and their respective roles. Describe the roles briefly if they are not apparent from the title of the role. Identify any originator contemplated by Item 1110 of this Regulation AB and any significant obligor.

(2) Briefly identify the pool assets and summarize briefly the size and material characteristics of the asset pool. Identify the cut-off date or similar date for establishing the composition of the asset pool, if applicable.

(3) State briefly the basic terms of each class of securities offered. In particular:

(i) Identify the classes offered by the prospectus and any classes issued in the same transaction or residual or equity interests in the transaction that are not being offered by the prospectus.

(ii) State the interest rate or rate of return on each class of securities offered, to the extent that the rates on any class of securities were not disclosed in full on the prospectus cover page.

(iii) State the expected final and final scheduled maturity or principal distribution dates, if applicable, of each class of securities offered.

(iv) Identify the denominations in which the securities may be issued.

(v) Identify the distribution frequency on the securities.

(vi) Summarize the flow of funds, payment priorities and allocations among the classes of securities offered, the classes of securities that are not offered, and fees and expenses, to the extent necessary to understand the payment characteristics of the classes that are offered by the prospectus.

(vii) Identify any events in the transaction agreements that can trigger liquidation or amortization of the asset pool or other performance triggers that would alter the transaction structure or the flow of funds.

(viii) Identify any optional or mandatory redemption or termination features.

(ix) Identify any credit enhancement or other support for the transaction, as referenced in Items 1114(a) and 1115 of this Regulation AB, and briefly describe what protection or support is provided by the enhancement. Identify any enhancement provider referenced in Items 1114(b) and 1115 of this Regulation AB. Summarize how losses not covered by credit enhancement or support will be allocated to the securities.

(4) Identify any outstanding series or classes of securities that are backed by the same asset pool or otherwise have claims on the pool assets. In addition, state if additional series or classes of securities may be issued that are backed by the same asset pool and briefly identify the circumstances under which those additional securities may be issued. Specify if security holder approval is necessary for such issuances and if security holders will receive notice of such issuances.

(5) If the transaction will include prefunding or revolving periods, indicate:

(i) The term or duration of the prefunding or revolving period.

(ii) For prefunding periods, the amount of proceeds to be deposited in the prefunding account.

(iii) For revolving periods, the maximum amount of additional assets that may be acquired during the revolving period, if applicable.

(iv) The percentage of the asset pool and any class or series of the asset-backed securities represented by the prefunding account or the revolving period, if applicable.

(v) Any limitation on the ability to add pool assets.

(vi) The requirements for assets that may be added to the pool.

(6) If pool assets can otherwise be added, removed or substituted (for example, in the event of a breach in representations or warranties regarding pool assets), summarize briefly the circumstances under which such actions can occur.

(7) Summarize the amount or formula for calculating the fee that the servicer will receive for performing its duties, and identify from what source those fees will be paid and the distribution priority of those fees.

(8) Summarize the federal income tax issues material to investors of each class of securities offered.

(9) Indicate whether the issuance or sale of any class of offered securities is conditioned on the assignment of a rating by one or more rating agencies. If so, identify each rating agency and the minimum rating that must be assigned.

(b) *Risk factors.* In providing the information required by Item 503(c) of Regulation S–K (§ 229.503(c)), identify any risks that may be different for investors in any offered class of asset-backed securities, and if so, identify such classes and describe such difference(s).

§ 229.1104 (Item 1104) Sponsors.

Provide the following information about the sponsor:

(a) State the sponsor's name and describe the sponsor's form of organization.

(b) Describe the general character of the sponsor's business.

(c) Describe the sponsor's securitization program and state how long the sponsor has been engaged in the securitization of assets. The description must include, to the extent material, a general discussion of the sponsor's experience in securitizing assets of any type as well as a more detailed discussion of the sponsor's experience in and overall procedures for originating or acquiring and securitizing assets of the type included in the current transaction. Include to the extent material information regarding the size, composition and growth of the sponsor's portfolio of assets of the type to be securitized and information or factors related to the sponsor that may be material to an analysis of the origination or performance of the pool assets, such as whether any prior securitizations organized by the sponsor have defaulted or experienced an early amortization triggering event.

(d) Describe the sponsor's material roles and responsibilities in its securitization program, including whether the sponsor or an affiliate is responsible for originating, acquiring, pooling or servicing the pool assets, and the sponsor's participation in structuring the transaction.

§ 229.1105 (Item 1105) Static pool information.

(a) For amortizing asset pools, unless the registrant determines that such information is not material:

(1) Provide static pool information, to the extent material, regarding delinquencies, cumulative losses and prepayments for prior securitized pools of the sponsor for that asset type.

(2) If the sponsor has less than three years of experience securitizing assets of the type to be included in the offered asset pool, consider providing instead static pool information, to the extent material, regarding delinquencies, cumulative losses and prepayments by vintage origination years regarding originations or purchases by the sponsor, as applicable, for that asset type. A vintage origination year represents assets originated during the same year.

(3) In providing the information required by paragraphs (a)(1) and (a)(2) of this section:

(i) Provide the requested information for prior pools or vintage origination years, as applicable, relating to the following time period, to the extent material:

(A) Five years, or

(B) For so long as the sponsor has been either securitizing assets of the same asset type (in the case of paragraph (a)(1) of this section) or making originations or purchases of assets of the same asset type (in the case of paragraph (a)(2) of this section) if less than five years.

(ii) Present delinquency, cumulative loss and prepayment data for each prior securitized pool or vintage origination year, as applicable, in periodic increments (*e.g.*, monthly or quarterly), to the extent material, over the life of the prior securitized pool or vintage origination year. The most recent periodic increment for the data must be as of a date no later than 135 days of the date of first use of the prospectus.

(iii) Provide summary information for the original characteristics of the prior securitized pools or vintage origination years, as applicable and material. While the material summary characteristics may vary, these characteristics may include, among other things, the following: number of pool assets; original pool balance; weighted average initial pool balance; weighted average interest or note rate; weighted average original term; weighted average remaining term; weighted average and minimum and maximum standardized credit score or other applicable measure of obligor credit quality; product type; loan purpose; loan-to-value information; distribution of assets by loan or note rate; and geographic distribution information.

(b) For revolving asset master trusts, unless the registrant determines that such information is not material, provide, to the extent material, data regarding delinquencies, cumulative losses, prepayments, payment rate, yield and standardized credit scores or other applicable measure of obligor credit quality in separate increments based on the date of origination of the pool assets. While the material increments may vary, consider presenting such data at a minimum in 12-month increments through the first five years of the account's life (*e.g.*, 0–12 months, 13–24 months, 25–36 months, 37–48 months, 49–60 months and 61 months or more).

(c) If the information that would otherwise be required by paragraph (a)(1), (a)(2) or (b) of this section is not material, but alternative static pool information would provide material disclosure, provide such alternative information instead. Similarly, information contemplated by paragraph (a)(1), (a)(2) or (b) of this section regarding a party or parties other than the sponsor may be provided in addition to or in lieu of such information regarding the sponsor if appropriate to provide material disclosure. In addition, other explanatory disclosure, including disclosure explaining the absence of any static pool information, may be provided.

(d) The following information provided in response to this section shall not be deemed to be a prospectus or part of a prospectus for the asset-backed securities nor shall such information be deemed to be part of the registration statement for the asset-backed securities:

(1) With respect to information regarding prior securitized pools of the sponsor that do not include the currently offered pool, information regarding prior securitized pools that were established before January 1, 2006; and

(2) With respect to information regarding the currently offered pool, information about the pool for periods before January 1, 2006.

(e) For prospectuses to be filed pursuant to § 230.424 of this chapter that include information specified in paragraph (d)(1) or (d)(2) of this section, the prospectus shall disclose that such information is not deemed to be part of that prospectus or the registration

statement for the asset-backed securities.

(f) If any of the information identified in paragraph (d)(1) or (d)(2) of this section that is to be provided in response to this section is unknown and not available to the registrant without unreasonable effort or expense, such information may be omitted, provided the registrant provides the information on the subject it possesses or can acquire without unreasonable effort or expense, and the registrant includes a statement in the prospectus showing that unreasonable effort or expense would be involved in obtaining the omitted information.

§ 229.1106 (Item 1106) Depositors.

If the depositor is not the same entity as the sponsor, provide separately the information regarding the depositor called for by paragraphs (a) and (b) of Item 1104 of this Regulation AB, and, to the extent the information would be material and materially different from the sponsor, paragraphs (c) and (d) of Item 1104 of this Regulation AB. In addition, provide the following information:

(a) The ownership structure of the depositor.

(b) The general character of any activities the depositor is engaged in other than securitizing assets and the time period during which it has been so engaged.

(c) Any continuing duties of the depositor after issuance of the asset-backed securities being registered regarding the asset-backed securities or the pool assets.

§ 229.1107 (Item 1107) Issuing entities.

Provide the following information about the issuing entity:

(a) State the issuing entity's name and describe the issuing entity's form of organization, including the State or other jurisdiction under whose laws the issuing entity is organized. File the issuing entity's governing documents as an exhibit.

(b) Describe the permissible activities and restrictions on the activities of the issuing entity under its governing documents, including any restrictions on the ability to issue or invest in additional securities, to borrow money or to make loans to other persons. Describe any provisions in the issuing entity's governing documents allowing for modification of the issuing entity's governing documents, including its permissible activities.

(c) Describe any specific discretionary activities with regard to the administration of the asset pool or the asset-backed securities, and identify the person or persons authorized to exercise such discretion.

(d) Describe any assets owned or to be owned by the issuing entity, apart from the pool assets, as well as any liabilities of the issuing entity, apart from the asset-backed securities. Disclose the fiscal year end of the issuing entity.

(e) If the issuing entity has executive officers, a board of directors or persons performing similar functions, provide the information required by Items 401, 402, 403 and 404 of Regulation S-K (§§ 229.401, 229.402, 229.403 and 229.404) for the issuing entity.

(f) Describe the terms of any management or administration agreement regarding the issuing entity. File any such agreement as an exhibit.

(g) Describe the capitalization of the issuing entity and the amount or nature of any equity contribution to the issuing entity by the sponsor, depositor or other party.

(h) Describe the sale or transfer of the pool assets to the issuing entity as well as the creation (and perfection and priority status) of any security interest in favor of the issuing entity, the trustee, the asset-backed security holders or others, including the material terms of any agreement providing for such sale, transfer or creation of a security interest. File any such agreements as an exhibit. In addition to an appropriate narrative description, also provide this information graphically or in a flow chart if it will aid understanding.

(i) If the pool assets are securities, as defined under the Securities Act, state the market price of the securities and the basis on which the market price was determined.

(j) If expenses incurred in connection with the selection and acquisition of the pool assets are to be payable from offering proceeds, disclose the amount of such expenses. If such expenses are to be paid to the sponsor, servicer contemplated by Item 1108(a)(2) of this Regulation AB, depositor, issuing entity, originator contemplated by Item 1110 of this Regulation AB, underwriter, or any affiliate of the foregoing, separately identify the type and amount of expenses paid to each such party.

(k) Describe to the extent material any provisions or arrangements included to address any one or more of the following issues:

(1) Whether any security interests granted in connection with the transaction are perfected, maintained and enforced.

(2) Whether declaration of bankruptcy, receivership or similar proceeding with respect to the issuing entity can occur.

(3) Whether in the event of a bankruptcy, receivership or similar proceeding with respect to the sponsor, originator, depositor or other seller of the pool assets, the issuing entity's assets will become part of the bankruptcy estate or subject to the bankruptcy control of a third party.

(4) Whether in the event of a bankruptcy, receivership or similar proceeding with respect to the issuing entity, the issuing entity's assets will become subject to the bankruptcy control of a third party.

(l) If applicable law prohibits the issuing entity from holding the pool assets directly (for example, an ''eligible lender'' trustee must hold student loans originated under the Federal Family Education Loan Program of the Higher Education Act of 1965 (20 U.S.C. 1001 *et seq.*)), describe the arrangements instituted to hold the pool assets on behalf of the issuing entity. Include disclosure regarding the arrangements taken, as applicable, regarding the items in paragraph (k) of this section with respect to any such additional entity that holds such assets on behalf of the issuing entity.

§ 229.1108 (Item 1108) Servicers.

Provide the following information for the servicer.

(a) *Multiple servicers.* Where servicing of the pool assets utilizes multiple servicers (*e.g.*, master servicers that oversee the actions of other servicers, primary servicers that have primary contact with the obligor, or special servicers for specific servicing functions):

(1) Provide a clear introductory description of the roles, responsibilities and oversight requirements of the entire servicing structure and the parties involved. In addition to an appropriate narrative discussion of the allocation of servicing responsibilities, also consider presenting the information graphically if doing so will aid understanding.

(2) Identify:

(i) Each master servicer;

(ii) Each affiliated servicer;

(iii) Each unaffiliated servicer that services 10% or more of the pool assets; and

(iv) Any other material servicer responsible for calculating or making distributions to holders of the asset-backed securities, performing work-outs or foreclosures, or other aspect of the servicing of the pool assets or the asset-backed securities upon which the performance of the pool assets or the asset-backed securities is materially dependent.

(3) Provide the information in paragraphs (b), (c) and (d) of this

section, as applicable depending on the servicer's role, for each servicer identified in paragraphs (a)(2)(i), (ii) and (iv) of this section and each unaffiliated servicer identified in paragraph (a)(2)(iii) of this section that services 20% or more of the pool assets

(b) *Identifying information and experience.* (1) State the servicer's name and describe the servicer's form of organization.

(2) State how long the servicer has been servicing assets. Provide, to the extent material, a general discussion of the servicer's experience in servicing assets of any type as well as a more detailed discussion of the servicer's experience in, and procedures for the servicing function it will perform in the current transaction for assets of the type included in the current transaction. Include to the extent material information regarding the size, composition and growth of the servicer's portfolio of serviced assets of the type included in the current transaction and information on factors related to the servicer that may be material to an analysis of the servicing of the assets or the asset-backed securities, as applicable.

(3) Describe any material changes to the servicer's policies or procedures in the servicing function it will perform in the current transaction for assets of the same type included in the current transaction during the past three years.

(4) Provide information regarding the servicer's financial condition to the extent that there is a material risk that the effect on one or more aspects of servicing resulting from such financial condition could have a material impact on pool performance or performance of the asset-backed securities.

(c) *Servicing agreements and servicing practices.* (1) Describe the material terms of the servicing agreement and the servicer's duties regarding the asset-backed securities transaction. File the servicing agreement as an exhibit.

(2) Describe to the extent material the manner in which collections on the assets will be maintained, such as through a segregated collection account, and the extent of commingling of funds that occurs or may occur from the assets with other funds, serviced assets or other assets of the servicer.

(3) Describe to the extent material any special or unique factors involved in servicing the particular type of assets included in the current transaction, such as subprime assets, and the servicer's processes and procedures designed to address such factors.

(4) Describe to the extent material the terms of any arrangements whereby the servicer is required or permitted to provide advances of funds regarding collections, cash flows or distributions, including interest or other fees charged for such advances and terms of recovery by the servicer of such advances. To the extent material, provide statistical information regarding servicer advances on the pool assets and the servicer's overall servicing portfolio for the past three years.

(5) Describe to the extent material the servicer's process for handling delinquencies, losses, bankruptcies and recoveries, such as through liquidation of the underlying collateral, note sale by a special servicer or borrower negotiation or workouts.

(6) Describe to the extent material any ability of the servicer to waive or modify any terms, fees, penalties or payments on the assets and the effect of any such ability, if material, on the potential cash flows from the assets.

(7) If the servicer has custodial responsibility for the assets, describe material arrangements regarding the safekeeping and preservation of the assets, such as the physical promissory notes, and procedures to reflect the segregation of the assets from other serviced assets. If no servicer has custodial responsibility for the assets, disclose that fact, identify the party that has such responsibility and provide the information called for by this paragraph for such party.

(8) Describe any limitations on the servicer's liability under the transaction agreements regarding the asset-backed securities transaction.

(d) *Back-up servicing.* Describe the material terms regarding the servicer's removal, replacement, resignation or transfer, including:

(1) Provisions for selection of a successor servicer and financial or other requirements that must be met by a successor servicer.

(2) The process for transferring servicing to a successor servicer.

(3) Provisions for payment of expenses associated with a servicing transfer and any additional fees charged by a successor servicer. Specify the amount of any funds set aside for a servicing transfer.

(4) Arrangements, if any, regarding a back-up servicer for the assets and the identity of any such back-up servicer.

§ 229.1109 (Item 1109) Trustees.

Provide the following information for each trustee:

(a) State the trustee's name and describe the trustee's form of organization.

(b) Describe to what extent the trustee has had prior experience serving as a trustee for asset-backed securities transactions involving similar pool assets, if applicable.

(c) Describe the trustee's duties and responsibilities regarding the asset-backed securities under the governing documents and under applicable law. In addition, describe any actions required by the trustee, including whether notices are required to investors, rating agencies or other third parties, upon an event of default, potential event of default (and how defined) or other breach of a transaction covenant and any required percentage of a class or classes of asset-backed securities that is needed to require the trustee to take action.

(d) Describe any limitations on the trustee's liability under the transaction agreements regarding the asset-backed securities transaction.

(e) Describe any indemnification provisions that entitle the trustee to be indemnified from the cash flow that otherwise would be used to pay the asset-backed securities.

(f) Describe any contractual provisions or understandings regarding the trustee's removal, replacement or resignation, as well as how the expenses associated with changing from one trustee to another trustee will be paid.

Instruction to Item 1109. If multiple trustees are involved in the transaction, provide a description of the roles and responsibilities of each trustee.

§ 229.1110 (Item 1110) Originators.

(a) Identify any originator or group of affiliated originators, apart from the sponsor or its affiliates, that originated, or is expected to originate, 10% or more of the pool assets.

(b) Provide the following information for any originator or group of affiliated originators, apart from the sponsor or its affiliates, that originated, or is expected to originate, 20% or more of the pool assets:

(1) The originator's form of organization.

(2) To the extent material, a description of the originator's origination program and how long the originator has been engaged in originating assets. The description must include a discussion of the originator's experience in originating assets of the type included in the current transaction. In providing the description, include, if material, information regarding the size and composition of the originator's origination portfolio as well as information material to an analysis of the performance of the pool assets, such as the originator's credit-granting or underwriting criteria for the asset types being securitized.

§ 229.1111 (Item 1111) Pool assets.

Describe the pool assets, including the information required by this Item 1111. Present statistical information in tabular or graphical format, if such presentation will aid understanding. Present statistical information in appropriate distributional groups or incremental ranges in addition to presenting appropriate overall pool totals, averages and weighted averages, if such presentation will aid in the understanding of the data. In addition to presenting the number, amount and percentage of pool assets by distributional group or range, also provide statistical information for each group or range by variables, to the extent material, such as, average balance, weighted average coupon, average age and remaining term, average loan-to-value or similar ratio and weighted average standardized credit score or other applicable measure of obligor credit quality. These variables are just examples and should be tailored to the particular asset class backing the asset-backed securities. Consider providing minimums and maximums when presenting averages on an aggregate basis and within each group or range. In addition, provide historical data on the pool assets as appropriate (*e.g.*, the lesser of three years or the time such assets have existed) to allow material evaluation of the pool data. In making any calculations regarding overall pool balances, disregard any funds set aside for a prefunding account.

(a) *General information regarding pool asset types and selection criteria.* Provide the following information:

(1) A brief description of the type or types of pool assets to be securitized.

(2) A general description of the material terms of the pool assets.

(3) A description of the solicitation, credit-granting or underwriting criteria used to originate or purchase the pool assets, including, to the extent known, any changes in such criteria and the extent to which such policies and criteria are or could be overridden.

(4) The method and criteria by which the pool assets were selected for the transaction.

(5) The cut-off date or similar date for establishing the composition of the asset pool, if applicable.

(6) If legal or regulatory provisions (such as bankruptcy, consumer protection, predatory lending, privacy, property rights or foreclosure laws or regulations) may materially affect pool asset performance or payments or expected payments on the asset-backed securities, briefly identify these provisions and their effects on such items.

Instruction to Item 1111(a)(6). Unless a material concentration of assets exists, it is not necessary to provide details of the laws in each jurisdiction. Even in that case, a legalistic description or recitation of the laws or regulations in a particular jurisdiction is not required.

(b) *Pool characteristics.* Describe the material characteristics of the asset pool. Provide appropriate introductory and explanatory information to introduce the characteristics, the methodology used in determining or calculating the characteristics and any terms or abbreviations used. While the material characteristics will vary depending on the nature of the pool assets, such characteristics may include, among other things:

(1) Number of each type of pool assets.

(2) Asset size, such as original balance and outstanding balance as of a designated cut-off date.

(3) Interest rate or rate of return, including type of interest rate if the pool includes different types, such as fixed and floating rates.

(4) Capitalized or uncapitalized accrued interest.

(5) Age, maturity, remaining term, average life (based on different prepayment assumptions), current payment/prepayment speeds and pool factors, as applicable.

(6) Servicer distribution, if different servicers service different pool assets.

(7) If a loan or similar receivable:

(i) Amortization period.

(ii) Loan purpose (*e.g.*, whether a purchase or refinance) and status, if applicable (*e.g.*, repayment or deferment).

(iii) Loan-to-value (LTV) ratios and debt service coverage ratios (DSCR), as applicable.

(iv) Type and/or use of underlying property, product or collateral (*e.g.*, occupancy type for residential mortgages or industry sector for commercial mortgages).

(8) If a receivable or other financial asset that arises under a revolving account, such as a credit card receivable:

(i) Monthly payment rate.

(ii) Maximum credit lines.

(iii) Average account balance.

(iv) Yield percentages.

(v) Type of asset.

(vi) Finance charges, fees and other income earned.

(vii) Balance reductions granted for refunds, returns, fraudulent charges or other reasons.

(viii) Percentage of full-balance and minimum payments made.

(9) If the asset pool includes commercial mortgages, the following information, to the extent material:

(i) For all commercial mortgages:

(A) The location and present use of each mortgaged property.

(B) Net operating income and net cash flow information, as well as the components of net operating income and net cash flow, for each mortgaged property.

(C) Current occupancy rates for each mortgaged property.

(D) The identity, square feet occupied by and lease expiration dates for the three largest tenants at each mortgaged property.

(E) The nature and amount of all other material mortgages, liens or encumbrances against such properties and their priority.

(ii) For each commercial mortgage that represents, by dollar value, 10% or more of the asset pool, as measured as of the cut-off date:

(A) Any proposed program for the renovation, improvement or development of such properties, including the estimated cost thereof and the method of financing to be used.

(B) The general competitive conditions to which such properties are or may be subject.

(C) Management of such properties.

(D) Occupancy rate expressed as a percentage for each of the last five years.

(E) Principal business, occupations and professions carried on in, or from the properties.

(F) Number of tenants occupying 10% or more of the total rentable square footage of such properties and principal nature of business of such tenant, and the principal provisions of the leases with those tenants including, but not limited to: rental per annum, expiration date, and renewal options.

(G) The average effective annual rental per square foot or unit for each of the last three years prior to the date of filing.

(H) Schedule of the lease expirations for each of the ten years starting with the year in which the registration statement is filed (or the year in which the prospectus supplement is dated, as applicable), stating:

(*1*) The number of tenants whose leases will expire.

(*2*) The total area in square feet covered by such leases.

(*3*) The annual rental represented by such leases.

(*4*) The percentage of gross annual rental represented by such leases.

Instruction to Item 1111(b)(9). What is required is information material to an investor's understanding of the asset-backed securities. Detailed descriptions

of the physical characteristics of individual properties or legal descriptions by metes and bounds are not required.

(10) Whether the pool asset is secured or unsecured, and if secured, the type(s) of collateral.

(11) Standardized credit scores of obligors and other information regarding obligor credit quality.

(12) Billing and payment procedures, including frequency of payment, payment options, fees, charges and origination or payment incentives.

(13) Information about the origination channel and origination process for the pool assets, such as originator information (and how acquired) and the level of origination documentation required, as applicable.

(14) Geographic distribution, such as by state or other material geographic region. If 10% or more of the pool assets are or will be located in any one state or other geographic region, describe any economic or other factors specific to such state or region that may materially impact the pool assets or pool asset cash flows.

Instruction to Item 1111(b)(14). For most assets, such as credit card accounts, motor vehicle leases, trade receivables and student loans, the location of the asset is the underlying obligor's billing address. For assets involving real estate, such as mortgages, the location of the asset is where the physical property underlying the asset is located.

(15) Other concentrations material to the asset type (*e.g.*, school type for student loans). If material, provide information required by paragraph (b)(14) of this section regarding such concentrations, as applicable.

(c) *Delinquency and loss information.* Provide delinquency and loss information for the asset pool, including statistical information regarding delinquencies and losses.

(d) *Sources of pool cash flow.* If the cash flows from the pool assets that are to be used to support the asset-backed securities are to come from more than one source (such as separate cash flows from lease payments and from the sale of the residual asset at the termination of the lease), provide the following information:

(1) Disclose the specific sources of funds that will be used to make the payments and distributions on the asset-backed securities, and, if applicable, provide information on the relative amount and percentage of funds that are to be derived from each source, including a description of any assumptions, data, models and methodology used to derive such amounts. If payments on different classes or different categories of payments on or related to the asset-backed securities (*e.g.*, principal, interest or expenses) are to come from different or segregated cash flows from the pool assets or other sources, disclose the source of funds that will be used for such payments.

(2) *Residual value information.* If the asset pool includes leases or other assets where a portion of the securitized pool balance is attributable to the residual value of the underlying physical property underlying the leases, disclose the following:

(i) How the residual values used to structure the transaction were estimated, including an explanation of any material discount rates, models or assumptions used and who selected such rates, models or assumptions.

(ii) Any material procedures or requirements incorporated to preserve residual values during the term of the lease, such as lessee responsibilities, prohibitions on subletting, indemnification or required insurance or guarantees.

(iii) The procedures by which the residual values will be realized and by whom those procedures will be carried out, including information on the experience of such party, any affiliations with a party described in Item 1119(a) of this Regulation AB and the compensation arrangements with such party.

(iv) Whether the pool assets are open-end leases (*e.g.*, where the lessee is required to cover the shortfall between the residual value of the leased property and the sale proceeds) or closed-end leases (*e.g.*, where the lessor is responsible for such shortfalls), and where both types of leases are included in the asset pool, the percentage of each.

(v) To the extent material, any lessor obligations that are required under the leases, and the effect or potential effect on the asset-backed securities from failure by the lessor to perform its obligations.

(vi) Statistical information regarding estimated residual values for the pool assets.

(vii) Summary historical statistics on turn-in rates, if applicable, and residual value realization rates by the party responsible for such process over the past three years, or such longer period as is material to an evaluation of the pool assets.

(viii) The effect on security holders if not enough cash flow is received from the realization of the residual values, whether there are any provisions to address this contingency, and how any cash flow greater than that necessary to pay security holders will be allocated.

(e) *Representations and warranties and repurchase obligations regarding pool assets.* Summarize any representations and warranties made concerning the pool assets by the sponsor, transferor, originator or other party to the transaction, and describe briefly the remedies available if those representations and warranties are breached, such as repurchase obligations.

(f) *Claims on pool assets.* Describe any material direct or contingent claim that parties other than the holders of the asset-backed securities have on any pool assets. Also, describe any material cross-collateralization or cross-default provisions relating to the pool assets.

(g) *Revolving periods, prefunding accounts and other changes to the asset pool.* If the transaction contemplates a prefunding or revolving period, provide the following information, as applicable. Provide similar information regarding any other circumstances where pool assets may be added, substituted or removed from the asset pool, such as in the event of additional issuances of asset-backed securities in a master trust or a breach of a pool asset representation or warranty:

(1) The term or duration of any prefunding or revolving period.

(2) For prefunding periods, the amount of proceeds to be deposited in the prefunding account.

(3) For revolving periods, the maximum amount of additional assets that may be acquired during the revolving period, if applicable.

(4) The percentage of the asset pool and any class or series of the asset-backed securities represented by the prefunding account or the revolving account, if applicable.

(5) Triggers or events that would trigger limits on or terminate the prefunding or revolving period and the effects of such triggers. In particular for a revolving period, describe the operation of the revolving period and the amortization period.

(6) When and how new pool assets may be acquired during the prefunding or revolving period, and if, when and how pool assets can be removed or substituted. Describe any limits on the amount, type or speed with which pool assets may be acquired, substituted or removed.

(7) The acquisition or underwriting criteria for additional pool assets to be acquired during the prefunding or revolving period, including a description of any differences from the criteria used to select the current asset pool.

(8) Which party has the authority to add, remove or substitute assets from the asset pool or determine if such pool assets meet the acquisition or underwriting criteria for additional pool assets. In addition, disclose whether or not there will be any independent verification of such person's exercise of authority or determinations.

(9) Any requirements to add or remove minimum amounts of pool assets and any effects of not meeting those requirements.

(10) If applicable, the procedures and standards for the temporary investment of funds in a prefunding or revolving account pending use (including the disposition of gains and losses on pending funds) and a description of the financial products or instruments eligible for such accounts.

(11) The circumstances under which funds in a prefunding or revolving account will be returned to investors or otherwise disposed of.

(12) A statement of whether, and if so, how, investors will be notified of changes to the asset pool.

§ 229.1112 (Item 1112) Significant obligors of pool assets.

(a) *Descriptive information.* Provide the following information for each significant obligor:

(1) The name of the obligor.

(2) The organizational form and general character of the business of the obligor.

(3) The nature of the concentration of the pool assets with the obligor.

(4) The material terms of the pool assets and the agreements with the obligor involving the pool assets.

(b) *Financial information.* (1) If the pool assets relating to a significant obligor represent 10% or more, but less than 20%, of the asset pool, provide selected financial data required by Item 301 of Regulation S–K (§ 229.301) for the significant obligor, provided, however, that for a significant obligor under Item 1101(k)(2) of this Regulation AB, only net operating income for the most recent fiscal year and interim period is required.

(2) If pool assets relating to a significant obligor represent 20% or more of the asset pool, provide financial statements meeting the requirements of Regulation S–X (§§ 210.1–01 through 210.12–29 of this chapter), except § 210.3–05 of this chapter and Article 11 of Regulation S–X (§§ 210.11–01 through 210.11–03 of this chapter), of the significant obligor. Financial statements of such obligor and its subsidiaries consolidated (as required by § 240.14a–3(b) of this chapter) shall be filed under this item.

Instructions to Item 1112(b).

1. No information need be provided pursuant to paragraph (b) of this section if the obligations of the significant obligor as they relate to the pool assets are backed by the full faith and credit of the United States.

2. No information need be provided pursuant to paragraph (b) of this section if the obligations of the significant obligor as they relate to the pool assets are backed by the full faith and credit of a foreign government (as defined in § 240.3b–4(a) of this chapter) if the pool assets are investment grade securities as defined in Item I.B.2 of Form S–3 (§ 239.13 of this chapter). If the pool assets are not investment grade securities, information required by paragraph (5) of Schedule B of the Securities Act (15 U.S.C. 77aa) regarding the foreign government may be incorporated by reference from a Commission filing in lieu of providing the financial information required pursuant to paragraph (b) of this section.

3. If the significant obligor is an asset-backed issuer and the pool assets relating to the significant obligor are asset-backed securities, provide the following information in lieu of the information required by paragraph (b) of this section:

a. For a registration statement under the Securities Act or the Exchange Act or a prospectus to be filed pursuant to § 230.424 of this chapter, the information required by Items 1104 through 1115, 1117 and 1119 of this Regulation AB regarding such asset-backed securities; and

b. For an Exchange Act report on Form 10–K or Form 10–D (§ 249.310 or 249.312 of this chapter), the information required by General Instruction J. of Form 10–K regarding such asset-backed securities for the period for which the last Form 10–K of the asset-backed securities was due (or would have been due if such asset-backed securities are not required to file reports with the Commission pursuant to section 13(a) or 15(d) of the Exchange Act (15 U.S.C. 78m(a) or 78o(d)).

4. If the significant obligor is a foreign business (as defined § 210.1–02 of this chapter):

a. Paragraph (b)(1) of this section may be complied with by providing the information required by Item 3.A. of Form 20–F (§ 249.220f of this chapter). If a reconciliation to U.S. generally accepted accounting principles called for by Instruction 2. to Item 3.A. of Form 20–F is unavailable or not obtainable without unreasonable cost or expense, at a minimum provide a narrative description of all material variations in accounting principles, practices and methods used in preparing the non-U.S. GAAP financial statements used as a basis for the selected financial data from those accepted in the U.S.

b. Paragraph (b)(2) of this section may be complied with by providing financial statements meeting the requirements of Item 17 of Form 20–F for the periods specified by Item 8.A. of Form 20–F.

§ 229.1113 (Item 1113) Structure of the transaction.

(a) *Description of the securities and transaction structure.* In providing the information required by Item 202 of Regulation S–K (§ 229.202), address the following specific factors relating to the asset-backed securities, as applicable:

(1) The types or categories of securities that may be offered, such as interest-weighted or principal-weighted classes (including IO (interest only) or PO (principal only) securities), planned amortization or companion classes or residual or subordinated interests.

(2) The flow of funds for the transaction, including the payment allocations, rights and distribution priorities among all classes of the issuing entity's securities, and within each class, with respect to cash flows, credit enhancement or other support and any other structural features designed to enhance credit, facilitate the timely payment of monies due on the pool assets or owing to security holders, adjust the rate of return on the asset-backed securities, or preserve monies that will or might be distributed to security holders. In addition to an appropriate narrative discussion of the allocation and priority structure of pool cash flows, present the flow of funds graphically if doing so will aid understanding. In the flow of funds discussion, provide information regarding any requirements directing cash flows from the pool assets (such as to reserve accounts, cash collateral accounts or expenses) and the purpose and operation of such requirements.

(3) In describing the interest rate or rate of return on the asset-backed securities and how such amounts are payable, explain how the rate is determined and how frequently it will be determined. If the rate to be paid can be a combination of two or more rates (such as the lesser of a variable rate or the actual weighted average net coupon on the pool assets), provide clear information regarding each rate and when each rate applies.

(4) How principal, if any, will be paid on the asset-backed securities, including maturity dates, amortization or principal distribution schedules, principal distribution dates, formulas for calculating principal distributions

from the cash flows and other factors that will affect the timing or amount of principal payments for each class of securities.

(5) The denominations in which the asset-backed securities may be issued.

(6) Any specified changes to the transaction structure that would be triggered upon a default or event of default (such as a change in distribution priority among classes).

(7) Any liquidation, amortization, performance or similar triggers or events, and the rights of investors or changes to the transaction structure or flow of funds if such events were to occur.

(8) Whether the servicer or other party is required to provide periodic evidence of the absence of a default or of compliance with the terms of the transaction agreements.

(9) If applicable, the extent, expressed as a percentage, the transaction is overcollateralized or undercollateralized as measured by comparing the principal balance of the asset-backed securities to the asset pool.

(10) Any provisions contained in other securities that could result in a cross-default or cross-collateralization.

(11) Any minimum standards, restrictions or suitability requirements regarding potential investors in purchasing the securities or any restrictions on ownership or transfer of the securities.

(12) Security holder vote required to amend the transaction documents and allocation of voting rights among security holders.

(b) *Distribution frequency and cash maintenance.* (1) Disclose the frequency of distribution dates for the asset-backed securities and the collection periods for the pool assets.

(2) Describe how cash held pending distribution or other uses is held and invested. Also describe the length of time cash will be held pending distributions to security holders. Identify the party or parties with access to cash balances and the authority to invest cash balances. Specify who determines any decisions regarding the deposit, transfer or disbursement of pool asset cash flows and whether there will be any independent verification of the transaction accounts or account activity.

(c) *Fees and expenses.* Provide in a separate table an itemized list of all fees and expenses to be paid or payable out of the cash flows from the pool assets. In itemizing the fees and expenses, also indicate their general purpose, the party receiving such fees or expenses, the source of funds for such fees or expenses (if different from other fees or expenses or if such fees or expenses are to be paid from a specified portion of the cash flows) and the distribution priority of such expenses. If the amount of such fees or expenses is not fixed, provide the formula used to determine such fees or expenses. The tabular presentation should be accompanied by footnotes or other accompanying narrative disclosure to the extent necessary for an understanding of the timing or amount of such fees or expenses, such as any restrictions or limits on fees or whether the estimate may change in certain instances, such as in an event of default (and how the fees would change in such an instance or the factors that would affect the change). In addition, through footnote or other accompanying narrative disclosure, describe if any, and if so how, such fees or expenses can be changed without notice to, or approval by, security holders and any restrictions on the ability to change a fee or expense amount, such as due to a change in transaction party.

(d) *Excess cash flow.* (1) Describe the disposition of residual or excess cash flows. Identify who owns any residual or retained interests to the cash flows if such person is affiliated with the sponsor, depositor, issuing entity or any entity identified in Item 1119(a) of this Regulation AB or if such person has rights that may alter the transaction structure beyond receipt of residual or excess cash flows. Describe such rights, as material.

(2) Disclose any requirements in the transaction agreements to maintain a minimum amount of excess cash flow or spread from, or retained interest in, the transaction and any actions that would be required or changes to the transaction structure that would occur if such requirements were not met.

(3) To the extent material to an understanding of the asset-backed securities, disclose any features or arrangements to facilitate a securitization of the excess cash flow or retained interest from the transaction, including whether any material changes to the transaction structure may be made without the consent of asset-backed security holders in connection with these securitizations.

(e) *Master trusts.* If one or more additional series or classes have been or may be issued that are backed by the same asset pool, provide information regarding the additional securities to the extent material to an understanding of their effect on the securities being offered, including the following:

(1) Relative priority of such additional securities to the securities being offered and rights to the underlying pool assets and their cash flows.

(2) Allocation of cash flow from the asset pool and any expenses or losses among the various series or classes.

(3) Terms under which such additional series or classes may be issued and pool assets increased or changed.

(4) The terms of any security holder approval or notification of such additional securities.

(5) Which party has the authority to determine whether such additional securities may be issued. In addition, if there are conditions to such additional issuance, disclose whether or not there will be an independent verification of such person's exercise of authority or determinations.

(f) *Optional or mandatory redemption or termination.* (1) If any class of the asset-backed securities includes an optional or mandatory redemption or termination feature, provide the following information:

(i) Terms for triggering the redemption or termination.

(ii) The identity of the party that holds the redemption or termination option or obligation, as well as whether such party is an affiliate of the sponsor, depositor, issuing entity or any entity identified in Item 1119(a) of this Regulation AB.

(iii) The amount of the redemption or repurchase price or formula for determining such amount.

(iv) The procedures for redemption or termination, including any notices to security holders.

(v) If the amount allocated to security holders is reduced by losses, the policy regarding any amounts recovered after redemption or termination.

(2) The title of any class of securities with an optional redemption or termination feature that may be exercised when 25% or more of the original principal balance of the pool assets is still outstanding must include the word ''callable,'' *provided, however*, that in the case of a master trust, a title of a class of securities must include the word ''callable'' when an optional redemption or termination feature may be exercised when 25% or more of the original principal balance of the particular series in which the class was issued is still outstanding.

(g) *Prepayment, maturity and yield considerations.* (1) Describe any models, including the related material assumptions and limitations, used as a means to identify cash flow patterns with respect to the pool assets.

(2) Describe to the extent material the degree to which each class of securities is sensitive to changes in the rate of payment on the pool assets (*e.g.*, prepayment or interest rate sensitivity),

and describe the consequences of such changing rate of payment. Provide statistical information of such effects, such as the effect of prepayments on yield and weighted average life.

(3) Describe any special allocations of prepayment risks among the classes of securities, and whether any class protects other classes from the effects of the uncertain timing of cash flow.

§ 229.1114 (Item 1114) Credit enhancement and other support, except for certain derivatives instruments.

(a) *Descriptive information.* To the extent material, describe the following, including a clear discussion of the manner in which each potential item is designed to affect or ensure timely payment of the asset-backed securities:

(1) Any external credit enhancement designed to ensure that the asset-backed securities or pool assets will pay in accordance with their terms, such as bond insurance, letters of credit or guarantees.

(2) Any mechanisms to ensure that payments on the asset-backed securities are timely, such as liquidity facilities, lending facilities, guaranteed investment contracts and minimum principal payment agreements.

(3) Any derivatives whose primary purpose is to provide credit enhancement related to pool assets or the asset-backed securities.

(4) Any internal credit enhancement as a result of the structure of the transaction that increases the likelihood that payments will be made on one or more classes of the asset-backed securities in accordance with their terms, such as subordination provisions, overcollateralization, reserve accounts, cash collateral accounts or spread accounts.

Instructions to Item 1114(a).

1. Include a description of the material terms of any enhancement or support described, including any limits on the timing or amount of the enhancement or support or any conditions that must be met before the enhancement or support can be accessed. The enhancement or support agreement is to be filed as an exhibit. Also describe any provisions regarding the substitution of enhancement or support.

2. This Item should not be construed as allowing anything other than an asset-backed security whose payment is based primarily by reference to the performance of the receivables or other financial assets in the asset pool

(b) *Information regarding significant enhancement providers*—(1) *Descriptive information.* If an entity or group of affiliated entities providing enhancement or other support described in paragraph (a) of this section is liable or contingently liable to provide payments representing 10% or more of the cash flow supporting any offered class of asset-backed securities, provide the following information:

(i) The name of such enhancement provider.

(ii) The organizational form of enhancement provider.

(iii) The general character of the business of such enhancement provider.

(2) *Financial information.* (i) If any entity or group of affiliated entities providing enhancement or other support described in paragraph (a) of this section is liable or contingently liable to provide payments representing 10% or more, but less than 20%, of the cash flow supporting any offered class of the asset-backed securities, provide financial data required by Item 301 of Regulation S–K (§ 229.301) for each such entity or group of affiliated entities.

(ii) If any entity or group of affiliated entities providing enhancement or other support described in paragraph (a) of this section is liable or contingently liable to provide payments representing 20% or more of the cash flow supporting any offered class of the asset-backed securities, provide financial statements meeting the requirements of Regulation S–X (§§ 210.1–01 through 210.12–29 of this chapter), except § 210.3–05 of this chapter and Article 11 of Regulation S–X (§§ 210.11–01 through 210.11–03 of this chapter), of such entity or group of affiliated entities. Financial statements of such enhancement provider and its subsidiaries consolidated (as required by § 240.14a–3(b) of this chapter) shall be filed under this item.

Instructions to Item 1114.

1. The requirements in paragraph (b) of this section apply to all providers of external credit enhancement or other support, other than those described in Item 1115 of this Regulation AB. Enhancement may support payment on the pool assets or payments on the asset-backed securities themselves.

2. No information need be provided pursuant to paragraph (b)(2) of this section if the obligations of the enhancement provider are backed by the full faith and credit of the United States.

3. No information need be provided pursuant to paragraph (b)(2) of this section if the obligations of the enhancement provider are backed by the full faith and credit of a foreign government (as defined in § 240.3b–4(a) of this chapter) if the enhancement provider has an investment grade credit rating, as the term investment grade is used in Item I.B.2 of Form S–3 (§ 239.13 of this chapter). If the enhancement provider does not have an investment grade credit rating, information required by paragraph (5) of Schedule B of the Securities Act (15 U.S.C. 77aa) regarding the foreign government may be incorporated by reference from a Commission filing in lieu of providing the financial information required pursuant to paragraph (b)(2) of this section.

4. If the pool assets are student loans originated under the Federal Family Education Loan Program of the Higher Education Act of 1965 (20 U.S.C. 1001 *et seq.*)) and the enhancement provider for the pool assets is a guarantee agency as defined under the Higher Education Act, then the following information may be provided in lieu of providing financial information required pursuant to paragraph (b)(2) of this section:

a. The number of pool assets and aggregate outstanding principal balance of pool assets guaranteed by the guarantee agency (both by number and percentage of the asset pool as of the cut-off date or other applicable date).

b. Disclosure of the following with respect to the guarantee agency, as applicable, including a brief description regarding the method of calculation, covering at least five federal fiscal years:

i. Aggregate principal amount of all student loans guaranteed.

ii. Reserve ratio.

iii. Recovery rate.

iv. Loss rate.

v. Claims rate.

5. If the enhancement provider is a foreign business (as defined § 210.1–02 of this chapter):

a. Paragraph (b)(2)(i) of this section may be complied with by providing the information required by Item 3.A. of Form 20–F (§ 249.220f of this chapter). If a reconciliation to U.S. generally accepted accounting principles called for by Instruction 2. to Item 3.A. of Form 20–F is unavailable or not obtainable without unreasonable cost or expense, at a minimum provide a narrative description of all material variations in accounting principles, practices and methods used in preparing the non-U.S. GAAP financial statements used as a basis for the selected financial data from those accepted in the U.S.

b. Paragraph (b)(2)(ii) of this section may be complied with by providing financial statements meeting the requirements of Item 17 of Form 20–F for the periods specified by Item 8.A. of Form 20–F.

§ 229.1115 (Item 1115) Certain derivatives instruments.

This item relates to derivative instruments, such as interest rate and

currency swap agreements, that are used to alter the payment characteristics of the cashflows from the issuing entity and whose primary purpose is not to provide credit enhancement related to the pool assets or the asset-backed securities. For purposes of this section, the ''significance estimate'' of the derivative instrument is to be determined based on a reasonable good-faith estimate of maximum probable exposure, made in substantially the same manner as that used in the sponsor's internal risk management process in respect of similar instruments. The ''significance percentage'' is the percentage that the amount of the significance estimate represents of the aggregate principal balance of the pool assets, provided, that if the derivative instrument relates only to one or more classes of the asset-backed securities, the ''significance percentage'' is the percentage that the amount of the significance estimate represents of the aggregate principal balance of such classes.

(a) *Descriptive information.* (1) Describe the following regarding the external counterparty:

(i) The name of the derivative counterparty.

(ii) The organizational form of the derivative counterparty.

(iii) The general character of the business of the derivative counterparty.

(2) Describe the operation and material terms of the derivative instrument, including any limits on the timing or amount of payments or any conditions to payments.

(3) Describe any material provisions regarding substitution of the derivative instrument.

(4) At a minimum, disclose whether the significance percentage, as calculated in accordance with this section, is less than 10%, at least 10% but less than 20%, or 20% or more.

(5) File the agreement relating to the derivative instrument as an exhibit.

(b) *Financial information.* (1) If the aggregate significance percentage related to any entity or group of affiliated entities providing derivative instruments contemplated by this section is 10% or more, but less than 20%, provide financial data required by Item 301 of Regulation S–K (§ 229.301) for such entity or group of affiliated entities.

(2) If the aggregate significance percentage related to any entity or group of affiliated entities providing derivative instruments contemplated by this section is 20% or more, provide financial statements meeting the requirements of Regulation S–X (§§ 210.1–01 through 210.12–29 of this chapter), except § 210.3–05 of this chapter and Article 11 of Regulation S–X (§§ 210.11–01 through 210.11–03 of this chapter), of such entity or group of affiliated entities. Financial statements of such entity and its subsidiaries consolidated (as required by § 240.14a–3(b) of this chapter) shall be filed under this item.

Instructions to Item 1115.

1. Instructions 2, 3 and 5 to Item 1114 of this Regulation AB apply to the information contemplated by paragraph (b) of this item.

2. This Item should not be construed as allowing anything other than an asset-backed security whose payment is based primarily by reference to the performance of the receivables or other financial assets in the asset pool.

§ 229.1116 (Item 1116) Tax matters.

Provide a brief, clear and understandable summary of:

(a) The tax treatment of the asset-backed securities transaction under federal income tax laws.

(b) The material federal income tax consequences of purchasing, owning and selling the asset-backed securities. If any of the material federal income tax consequences are not expected to be the same for investors in all classes offered by the registration statement, describe the material differences.

(c) The substance of counsel's tax opinion, including identification of the material consequences upon which counsel has not been asked, or is unable, to opine.

§ 229.1117 (Item 1117) Legal proceedings.

Describe briefly any legal proceedings pending against the sponsor, depositor, trustee, issuing entity, servicer contemplated by Item 1108(a)(3) of this Regulation AB, originator contemplated by Item 1110(b) of this Regulation AB, or other party contemplated by Item 1100(d)(1) of this Regulation AB, or of which any property of the foregoing is the subject, that is material to security holders. Include similar information as to any such proceedings known to be contemplated by governmental authorities.

§ 229.1118 (Item 1118) Reports and additional information.

(a) *Reports required under the transaction documents.*

Describe the reports or other documents provided to security holders required under the transaction agreements, including information included, schedule and manner of distribution or other availability, and the entity or entities that will prepare and provide the reports.

(b) *Reports to be filed with the Commission.* (1) Specify the names, and if available, the Commission file numbers of the entity or entities under which reports about the asset-backed securities will be filed with the Securities and Exchange Commission. Identify the reports and other information filed with the Commission.

(2) State that the public may read and copy any materials filed with the Commission at the Commission's Public Reference Room at 450 Fifth Street, NW., Washington, DC 20549. State that the public may obtain information on the operation of the Public Reference Room by calling the Securities and Exchange Commission at 1–800–SEC–0330. State that the Commission maintains an Internet site that contains reports, proxy and information statements, and other information regarding issuers that file electronically with the Commission and state the address of that site (*http://www.sec.gov*).

(c) *Web site access to reports.* (1) State whether the issuing entity's annual reports on Form 10–K (§ 249.310 of this chapter), distribution reports on Form 10–D (§ 249.312 of this chapter), current reports on Form 8–K (§ 249.308 of this chapter), and amendments to those reports filed or furnished pursuant to section 13(a) or 15(d) of the Exchange Act (15 U.S.C. 78m(a) or 78o(d)) will be made available on the Web site of a specified transaction party (*e.g.*, the sponsor, depositor, servicer, issuing entity or trustee) as soon as reasonably practicable after such material is electronically filed with, or furnished to, the Commission.

(2) Disclose whether other reports to security holders or information about the asset-backed securities will be made available in this manner.

(3) If filings and other reports will be made available in this manner, disclose the Web site address where such filings may be found.

(4) If filings and other reports will not be made available in this manner, describe the reasons why they will not and whether an identified transaction party voluntarily will provide electronic or paper copies of those filings and other reports free of charge upon request.

§ 229.1119 (Item 1119) Affiliations and certain relationships and related transactions.

(a) Describe if so, and how, the sponsor, depositor or issuing entity is an affiliate (as defined in § 230.405 of this chapter) of any of the following parties as well as, to the extent known and material, if so, and how, any of the

following parties are affiliates of any of the other following parties:

(1) Servicer contemplated by Item 1108(a)(3) of this Regulation AB.

(2) Trustee.

(3) Originator contemplated by Item 1110 of this Regulation AB.

(4) Significant obligor contemplated by Item 1112 of this Regulation AB.

(5) Enhancement or support provider contemplated by Items 1114 or 1115 of this Regulation AB.

(6) Any other material parties related to the asset-backed securities contemplated by Item 1100(d)(1) of this Regulation AB.

(b) Describe whether there is, and if so the general character of, any business relationship, agreement, arrangement, transaction or understanding that is entered into outside the ordinary course of business or is on terms other than would be obtained in an arm's length transaction with an unrelated third party, apart from the asset-backed securities transaction, between the sponsor, depositor or issuing entity and any of the parties in paragraphs (a)(1) through (a)(6) of this section, or any affiliates of such parties, that currently exists or that existed during the past two years and that is material to an investor's understanding of the asset-backed securities.

Instruction to Item 1119(b). What is required is information material to an investor's understanding of the asset-backed securities. A detailed description or itemized listing of all commercial relationships among the parties is not required. Instead, the disclosure should indicate whether any relationships outside of the asset-backed securities transaction do exist that are outside the normal course and the general character of those relationships.

(c) Notwithstanding paragraph (b) of this section, describe, to the extent material, any specific relationships involving or relating to the asset-backed securities transaction or the pool assets, including the material terms and approximate dollar amount involved, between the sponsor, depositor or issuing entity and any of the parties in paragraphs (a)(1) through (a)(6) of this section, or any affiliates of such parties, that currently exists or that existed during the past two years.

Instruction to Item 1119. With respect to disclosure in an annual report on Form 10–K, information required by this Item 1119 may be omitted to the extent that substantially the same information had been provided previously in an annual report on Form 10–K (§ 249.310) for the asset-backed securities or in an effective registration statement under the Securities Act or a prospectus timely filed pursuant to § 230.424 of this chapter under the same Central Index Key (CIK) code as the current annual report on Form 10–K.

§ 229.1120 (Item 1120) Ratings.

Disclose whether the issuance or sale of any class of offered securities is conditioned on the assignment of a rating by one or more rating agencies, whether or not NRSROs. If so, identify each rating agency and the minimum rating that must be assigned. Describe any arrangements to have such rating monitored while the asset-backed securities are outstanding.

§ 229.1121 (Item 1121) Distribution and pool performance information.

(a) Describe the distribution for the related distribution period and the performance of the asset pool during the distribution period. Provide appropriate introductory and explanatory information to introduce any material terms, parties or abbreviations used (or a cross-reference to a Commission filing where such information may be found). Present statistical information in tabular or graphical format, if such presentation will aid understanding. While the material information regarding the related distribution and pool performance will vary depending on the nature of the transaction, such information may include, among other things:

(1) Any applicable record dates, accrual dates, determination dates for calculating distributions and actual distribution dates for the distribution period.

(2) Cash flows received and the sources thereof for distributions, fees and expenses (including portfolio yield, if applicable).

(3) Calculated amounts and distribution of the flow of funds for the period itemized by type and priority of payment, including:

(i) Fees or expenses accrued and paid, with an identification of the general purpose of such fees and the party receiving such fees or expenses.

(ii) Payments accrued or paid with respect to enhancement or other support identified in Item 1114 of this Regulation AB (such as insurance premiums or other enhancement maintenance fees), with an identification of the general purpose of such payments and the party receiving such payments.

(iii) Principal, interest and other distributions accrued and paid on the asset-backed securities by type and by class or series and any principal or interest shortfalls or carryovers.

(iv) The amount of excess cash flow or excess spread and the disposition of excess cash flow.

(4) Beginning and ending principal balances of the asset-backed securities.

(5) Interest rates applicable to the pool assets and the asset-backed securities, as applicable. Consider providing interest rate information for pool assets in appropriate distributional groups or incremental ranges.

(6) Beginning and ending balances of transaction accounts, such as reserve accounts, and material account activity during the period.

(7) Any amounts drawn on any credit enhancement or other support identified in Item 1114 of this Regulation AB, as applicable, and the amount of coverage remaining under any such enhancement, if known and applicable.

(8) Number and amount of pool assets at the beginning and ending of each period, and updated pool composition information, such as weighted average coupon, weighted average life, weighted average remaining term, pool factors and prepayment amounts. For asset-backed securities backed by leases where a portion of the securitized pool balance is attributable to residual values of the physical property underlying the leases, this information also would include turn-in rates and residual value realization rates.

(9) Delinquency and loss information for the period. In addition, describe any material changes to the information specified in Item 1100(b)(5) of this Regulation AB regarding the pool assets.

(10) Information on the amount, terms and general purpose of any advances made or reimbursed during the period, including the general use of funds advanced and the general source of funds for reimbursements.

(11) Any material modifications, extensions or waivers to pool asset terms, fees, penalties or payments during the distribution period or that have cumulatively become material over time.

(12) Material breaches of pool asset representations or warranties or transaction covenants.

(13) Information on ratio, coverage or other tests used for determining any early amortization, liquidation or other performance trigger and whether the trigger was met.

(14) Information regarding any new issuance of asset-backed securities backed by the same asset pool, any pool asset changes (other than in connection with a pool asset converting into cash in accordance with its terms), such as additions or removals in connection with a prefunding or revolving period and pool asset substitutions and

repurchases (and purchase rates, if applicable), and cash flows available for future purchases, such as the balances of any prefunding or revolving accounts, if applicable. Disclose any material changes in the solicitation, credit-granting, underwriting, origination, acquisition or pool selection criteria or procedures, as applicable, used to originate, acquire or select the new pool assets.

(b) During a prefunding or revolving period, or if there has been a new issuance of asset-backed securities backed by the same pool under a master trust during the fiscal year of the issuing entity, provide the information required by Items 1110, 1111 and 1112 of this Regulation AB applied taking the revised pool composition into account in the Form 10–D report (§ 249.312 of this chapter) for the last required distribution of the fiscal year of the issuing entity. In addition, provide such updated information in the first Form 10–D report for the period in which the prefunding or revolving period ends (if applicable). However, no disclosure need be provided by this paragraph if the information has not materially changed from that previously provided in an Exchange Act report relating to the asset-backed securities or in an effective registration statement under the Securities Act or a prospectus timely filed pursuant to § 230.424 of this chapter under the same Central Index Key (CIK) code regarding a subsequent issuance of asset-backed securities backed by a pool of assets that includes the pool assets that are the subject of this paragraph.

§ 229.1122 (Item 1122) Compliance with applicable servicing criteria.

(a) *Reports on assessment of compliance with servicing criteria for asset-backed securities.* As required by paragraph (b) of § 240.13a–18 or 240.15d–18 of this chapter, provide as an exhibit from each party participating in the servicing function a report on an assessment of compliance with the servicing criteria set forth in paragraph (d) of this section that contains the following:

(1) A statement of the party's responsibility for assessing compliance with the servicing criteria applicable to it;

(2) A statement that the party used the criteria in paragraph (d) of this section to assess compliance with the applicable servicing criteria;

(3) The party's assessment of compliance with the applicable servicing criteria as of and for the period ending the end of the fiscal year covered by the Form 10–K report (§ 249.310 of this chapter). This discussion must include disclosure of any material instance of noncompliance identified by the party; and

(4) A statement that a registered public accounting firm has issued an attestation report on the party's assessment of compliance with the applicable servicing criteria as of and for the period ending the end of the fiscal year covered by the Form 10–K report.

(b) *Registered public accounting firm attestation reports.* Provide the registered public accounting firm's attestation report required by paragraph (c) of § 240.13a–18 or 240.15d–18 of this chapter on the party's assessment of compliance with the applicable servicing criteria as an exhibit.

(c) *Additional disclosure for the Form 10–K report.*

(1) If any party's report on assessment of compliance with servicing criteria required by paragraph (a) of this section, or related registered public accounting firm attestation report required by paragraph (b) of this section, identifies any material instance of noncompliance with the servicing criteria, identify the material instance of noncompliance in the report on Form 10–K.

(2) If any party's report on assessment of compliance with servicing criteria required by paragraph (a) of this section, or related registered public accounting firm attestation report required by paragraph (b) of this section, is not included as an exhibit to the Form 10–K report, disclosure that the report is not included and an associated explanation must be provided in the report on Form 10–K.

(d) *Servicing criteria*—(1) *General servicing considerations.* (i) Policies and procedures are instituted to monitor any performance or other triggers and events of default in accordance with the transaction agreements.

(ii) If any material servicing activities are outsourced to third parties, policies and procedures are instituted to monitor the third party's performance and compliance with such servicing activities.

(iii) Any requirements in the transaction agreements to maintain a back-up servicer for the pool assets are maintained.

(iv) A fidelity bond and errors and omissions policy is in effect on the party participating in the servicing function throughout the reporting period in the amount of coverage required by and otherwise in accordance with the terms of the transaction agreements.

(2) *Cash collection and administration.* (i) Payments on pool assets are deposited into the appropriate custodial bank accounts and related bank clearing accounts no more than two business days of receipt, or such other number of days specified in the transaction agreements.

(ii) Disbursements made via wire transfer on behalf of an obligor or to an investor are made only by authorized personnel.

(iii) Advances of funds or guarantees regarding collections, cash flows or distributions, and any interest or other fees charged for such advances, are made, reviewed and approved as specified in the transaction agreements.

(iv) The related accounts for the transaction, such as cash reserve accounts or accounts established as a form of overcollateralization, are separately maintained (*e.g.*, with respect to commingling of cash) as set forth in the transaction agreements.

(v) Each custodial account is maintained at a federally insured depository institution as set forth in the transaction agreements. For purposes of this criterion, ''federally insured depository institution'' with respect to a foreign financial institution means a foreign financial institution that meets the requirements of § 240.13k-1(b)(1) of this chapter.

(vi) Unissued checks are safeguarded so as to prevent unauthorized access.

(vii) Reconciliations are prepared on a monthly basis for all asset-backed securities related bank accounts, including custodial accounts and related bank clearing accounts. These reconciliations:

(A) Are mathematically accurate;

(B) Are prepared within 30 calendar days after the bank statement cutoff date, or such other number of days specified in the transaction agreements;

(C) Are reviewed and approved by someone other than the person who prepared the reconciliation; and

(D) Contain explanations for reconciling items. These reconciling items are resolved within 90 calendar days of their original identification, or such other number of days specified in the transaction agreements.

(3) *Investor remittances and reporting.* (i) Reports to investors, including those to be filed with the Commission, are maintained in accordance with the transaction agreements and applicable Commission requirements. Specifically, such reports:

(A) Are prepared in accordance with timeframes and other terms set forth in the transaction agreements;

(B) Provide information calculated in accordance with the terms specified in the transaction agreements;

(C) Are filed with the Commission as required by its rules and regulations; and

(D) Agree with investors' or the trustee's records as to the total unpaid principal balance and number of pool assets serviced by the servicer.

(ii) Amounts due to investors are allocated and remitted in accordance with timeframes, distribution priority and other terms set forth in the transaction agreements.

(iii) Disbursements made to an investor are posted within two business days to the servicer's investor records, or such other number of days specified in the transaction agreements.

(iv) Amounts remitted to investors per the investor reports agree with cancelled checks, or other form of payment, or custodial bank statements.

(4) *Pool asset administration.* (i) Collateral or security on pool assets is maintained as required by the transaction agreements or related pool asset documents.

(ii) Pool assets and related documents are safeguarded as required by the transaction agreements.

(iii) Any additions, removals or substitutions to the asset pool are made, reviewed and approved in accordance with any conditions or requirements in the transaction agreements.

(iv) Payments on pool assets, including any payoffs, made in accordance with the related pool asset documents are posted to the applicable servicer's obligor records maintained no more than two business days after receipt, or such other number of days specified in the transaction agreements, and allocated to principal, interest or other items (*e.g.*, escrow) in accordance with the related pool asset documents.

(v) The servicer's records regarding the pool assets agree with the servicer's records with respect to an obligor's unpaid principal balance.

(vi) Changes with respect to the terms or status of an obligor's pool asset (*e.g.*, loan modifications or re-agings) are made, reviewed and approved by authorized personnel in accordance with the transaction agreements and related pool asset documents.

(vii) Loss mitigation or recovery actions (*e.g.*, forbearance plans, modifications and deeds in lieu of foreclosure, foreclosures and repossessions, as applicable) are initiated, conducted and concluded in accordance with the timeframes or other requirements established by the transaction agreements.

(viii) Records documenting collection efforts are maintained during the period a pool asset is delinquent in accordance with the transaction agreements. Such records are maintained on at least a monthly basis, or such other period specified in the transaction agreements, and describe the entity's activities in monitoring delinquent pool assets including, for example, phone calls, letters and payment rescheduling plans in cases where delinquency is deemed temporary (*e.g.*, illness or unemployment).

(ix) Adjustments to interest rates or rates of return for pool assets with variable rates are computed based on the related pool asset documents.

(x) Regarding any funds held in trust for an obligor (such as escrow accounts):

(A) Such funds are analyzed, in accordance with the obligor's pool asset documents, on at least an annual basis, or such other period specified in the transaction agreements;

(B) Interest on such funds is paid, or credited, to obligors in accordance with applicable pool asset documents and state laws; and

(C) Such funds are returned to the obligor within 30 calendar days of full repayment of the related pool asset, or such other number of days specified in the transaction agreements.

(xi) Payments made on behalf of an obligor (such as tax or insurance payments) are made on or before the related penalty or expiration dates, as indicated on the appropriate bills or notices for such payments, provided that such support has been received by the servicer at least 30 calendar days prior to these dates, or such other number of days specified in the transaction agreements.

(xii) Any late payment penalties in connection with any payment to be made on behalf of an obligor are paid from the servicer's funds and not charged to the obligor, unless the late payment was due to the obligor's error or omission.

(xiii) Disbursements made on behalf of an obligor are posted within two business days to the obligor's records maintained by the servicer, or such other number of days specified in the transaction agreements.

(xiv) Delinquencies, charge-offs and uncollectable accounts are recognized and recorded in accordance with the transaction agreements.

(xv) Any external enhancement or other support, identified in Item 1114(a)(1) through (3) or Item 1115 of this Regulation AB, is maintained as set forth in the transaction agreements.

Instructions to Item 1122.

1. If certain servicing criteria are not applicable to the asserting party based on the activities it performs with respect to asset-backed securities transactions taken as a whole involving such party and that are backed by the same asset type backing the class of asset-backed securities, the inapplicability of the criteria must be disclosed in that asserting party's and the related registered public accounting firm's reports.

2. If multiple parties are participating in the servicing function, a separate assessment report and attestation report must be included for each party participating in the servicing function. A party participating in the servicing function means any entity (*e.g.*, master servicer, primary servicers, trustees) that is performing activities that address the criteria in paragraph (d) of this section, unless such entity's activities relate only to 5% or less of the pool assets.

3. If the asset pool backing the asset-backed securities includes a pool asset representing an interest in or the right to the payments or cash flows of another asset pool and both the issuing entity for the asset-backed securities and the entity issuing the asset to be included in the issuing entity's asset pool were established under the direction of the same sponsor and depositor, see also Item 1100(d)(2) of this Regulation AB.

§ 229.1123 (Item 1123) Servicer compliance statement.

Provide as an exhibit a statement of compliance from the servicer, signed by an authorized officer of such servicer, to the effect that:

(a) A review of the servicer's activities during the reporting period and of its performance under the applicable servicing agreement has been made under such officer's supervision.

(b) To the best of such officer's knowledge, based on such review, the servicer has fulfilled all of its obligations under the agreement in all material respects throughout the reporting period or, if there has been a failure to fulfill any such obligation in any material respect, specifying each such failure known to such officer and the nature and status thereof.

Instruction to Item 1123. If multiple servicers are involved in servicing the pool assets, a separate servicer compliance statement is required from each servicer that meets the criteria in Item 1108(a)(2)(i) through (iii) of this Regulation AB.

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

■ 22. The authority citation for Part 230 continues to read in part as follows:

Authority: 15 U.S.C. 77b, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z–3, 77sss, 78c, 78d, 78j, 78l, 78m, 78n, 78o, 78t, 78w, 78ll(d),

78mm, 79t, 80a–8, 80a–24, 80a–28, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

* * * * *

■ 23. Add § 230.139a to read as follows:

§ 230.139a Publications by brokers or dealers distributing asset-backed securities.

The publication or distribution by a broker or dealer of information, an opinion or a recommendation with respect to asset-backed securities meeting the criteria of General Instruction I.B.5 of Form S–3 (§ 239.13 of this chapter) (''S–3 ABS'') shall not be deemed to constitute an offer for sale or offer to sell S–3 ABS registered or proposed to be registered for purposes of sections 2(a)(10) and 5(c) of the Act (15 U.S.C. 77b(a)(10) and 77e(c)) (the ''registered securities''), even if such broker or dealer is or will be a participant in the distribution of the registered securities, if the following conditions are met:

(a) The broker or dealer shall have previously published or distributed with reasonable regularity information, opinions or recommendations relating to S–3 ABS backed directly (or, with respect to securitizations of other securities, indirectly) by substantially similar collateral as that directly or indirectly backing S–3 ABS that is the subject of the information, opinion or recommendation that is proposed to be published or distributed.

(b) If the registered securities are proposed to be offered, offered or part of an unsold allotment or subscription, the information, opinion or recommendation shall not:

(1) Identify the registered securities;

(2) Give greater prominence to specific structural or collateral-related attributes of the registered securities than it gives to the same attributes of other asset-backed securities that it mentions; or

(3) Contain any *ABS informational and computational material* (as defined in § 229.1101 of this chapter) relating to the registered securities.

(c) If the material published by the broker or dealer identifies a specific asset-backed security of a specific issuer and specifically recommends that such asset-backed security be purchased, sold or held by persons receiving such material, then a recommendation as favorable or more favorable as to such asset-backed security shall have been published by the broker or dealer in the last publication of such broker or dealer addressing such asset-backed security prior to the commencement of its participation in the distribution of the registered securities.

(d) Sufficient information is available from one or more public sources to provide a reasonable basis for the view expressed by the broker or dealer with respect to the asset-backed securities that are the subject of the information, opinion or recommendation.

(e) If the material published by the broker or dealer identifies asset-backed securities backed directly or indirectly by substantially similar collateral as that directly or indirectly backing the registered securities and specifically recommends that such asset-backed securities be preferred over other asset-backed securities backed by different types of collateral, then the material shall explain in reasonable detail the reasons for such preference.

■ 24. Add § 230.167 to read as follows:

§ 230.167 Communications in connection with certain registered offerings of asset-backed securities.

Preliminary Note: This section is available only to communications in connection with certain offerings of asset-backed securities. The exemption does not apply to communications that may be in technical compliance with this section, but have the primary purpose or effect of conditioning the market for another transaction or are part of a plan or scheme to evade the requirements of section 5 of the Act (15 U.S.C. 77e).

(a) In an offering of asset-backed securities meeting the requirements of General Instruction I.B.5 of Form S–3 (§ 239.13 of this chapter) and registered under the Act on Form S–3 pursuant to § 230.415, *ABS informational and computational material* regarding such securities used after the effective date of the registration statement and before the sending or giving to investors of a final prospectus that meets the requirements of section 10(a) of the Act (15 U.S.C. 77j(a)) regarding such offering is exempt from section 5(b)(1) of the Act (15 U.S.C. 77e(b)(1)), if the conditions in paragraph (b) of this section are met.

(b) *Conditions.* To rely on paragraph (a) of this section:

(1) The communications shall be filed to the extent required pursuant to § 230.426.

(2) Every communication used pursuant to this section shall include prominently on the cover page or otherwise at the beginning of such communication:

(i) The issuing entity's name and the depositor's name, if applicable;

(ii) The Commission file number for the related registration statement;

(iii) A statement that such communication is *ABS informational and computational material* used in reliance on Securities Act Rule 167 (§ 230.167); and

(iv) A legend that urges investors to read the relevant documents filed or to be filed with the Commission because they contain important information. The legend also shall explain to investors that they can get the documents for free at the Commission's Web site and describe which documents are available free from the issuer or an underwriter.

(c) This section is applicable not only to the offeror of the asset-backed securities, but also to any other participant that may need to rely on and complies with this section in communicating about the transaction. A participant for purposes of this section is any person or entity that is a party to the asset-backed securities transaction and any persons authorized to act on their behalf.

(d) Failure by a particular underwriter to cause the filing of a prospectus described in this section will not affect the ability of any other underwriter who has complied with the procedures to rely on the exemption.

(e) An immaterial or unintentional failure to file or delay in filing a prospectus described in this section will not result in a violation of section 5(b)(1) of the Act (15 U.S.C. 77e(b)(1)), so long as:

(1) A good faith and reasonable effort was made to comply with the filing requirement; and

(2) The prospectus is filed as soon as practicable after discovery of the failure to file.

(f) Terms used in this section have the same meaning as in Item 1101 of Regulation AB (§ 229.1101 of this chapter).

■ 25. Add §§ 230.190 and 230.191 to read as follows:

§ 230.190 Registration of underlying securities in asset-backed securities transactions.

(a) In an offering of asset-backed securities where the asset pool includes securities of another issuer (''underlying securities''), unless the underlying securities are themselves exempt from registration under section 3 of the Act (15 U.S.C. 77c), the offering of the relevant underlying securities itself must be registered as a primary offering of such securities in accordance with paragraph (b) of this section unless all of the following are true. Terms used in this section have the same meaning as in Item 1101 of Regulation AB (§ 229.1101 of this chapter).

(1) Neither the issuer of the underlying securities nor any of its affiliates has a direct or indirect agreement, arrangement, relationship or

understanding, written or otherwise, relating to the underlying securities and the asset-backed securities transaction;

(2) Neither the issuer of the underlying securities nor any of its affiliates is an affiliate of the sponsor, depositor, issuing entity or underwriter of the asset-backed securities transaction; and

(3) The depositor would be free to publicly resell the underlying securities without registration under the Act. For example:

(i) If the underlying securities are restricted securities, as defined in § 230.144(a)(3), the underlying securities must meet the conditions set forth in § 230.144(k) for the sale of restricted securities; and

(ii) The offering of the asset-backed security does not constitute part of a distribution of the underlying securities. An offering of asset-backed securities with an asset pool containing underlying securities that at the time of the purchase for the asset pool are part of a subscription or unsold allotment would be a distribution of the underlying securities. For purposes of this section, in an offering of asset-backed securities involving a sponsor, depositor or underwriter that was an underwriter or an affiliate of an underwriter in a registered offering of the underlying securities, the distribution of the asset-backed securities will not constitute part of a distribution of the underlying securities if the underlying securities were purchased at arm's length in the secondary market at least three months after the last sale of any unsold allotment or subscription by the affiliated underwriter that participated in the registered offering of the underlying securities.

(b) If all of the conditions in paragraph (a) of this section are not met, the offering of the relevant underlying securities itself must be registered as a primary offering of such securities in accordance with the following:

(1) If the offering of asset-backed securities is registered on Form S–3 (§ 239.13 of this chapter), the offering of the underlying securities itself must be eligible to be registered under Form S–3 or F–3 (§ 239.33 of this chapter) as a primary offering of such securities;

(2) The plan of distribution in the registration statement for the offering of the underlying securities contemplates this type of distribution at the time of the commencement of the offering of the asset-backed securities;

(3) The prospectus for the asset-backed securities offering describes the plan of distribution for both the underlying securities and the asset-backed securities;

(4) The prospectus relating to the offering of the underlying securities is delivered simultaneously with the delivery of the prospectus relating to the offering of the asset-backed securities, and the prospectus for the asset-backed securities includes disclosure that the prospectus for the offering of the underlying securities will be delivered along with, or is combined with, the prospectus for the offering of the asset-backed securities;

(5) The prospectus for the asset-backed securities offering identifies the issuing entity, depositor, sponsor and each underwriter for the offering of the asset-backed securities as an underwriter for the offering of the underlying securities;

(6) Neither prospectus disclaims or limits responsibility by the issuing entity, sponsor, depositor, trustee or any underwriter for information regarding the underlying securities; and

(7) If the offering of the asset-backed securities and the underlying securities is not made on a firm commitment basis, the issuing entity or the underwriters for the offering of the asset-backed securities must distribute a preliminary prospectus for both the underlying securities offering and the asset-backed securities offering that identifies the issuer of the underlying securities and the expected amount of the issuer's underlying securities that is to be included in the asset pool to any person who is expected to receive a confirmation of sale of the asset-backed securities at least 48 hours prior to sending such confirmation.

(c) Notwithstanding paragraphs (a) and (b) of this section, if the asset pool for the asset-backed securities includes a pool asset representing an interest in or the right to the payments or cash flows of another asset pool, then that pool asset is not considered an ''underlying security'' for purposes of this section (although its distribution in connection with the asset-backed securities transaction may need to be separately registered) if the following conditions are met:

(1) Both the issuing entity for the asset-backed securities and the entity issuing the pool asset were established under the direction of the same sponsor and depositor;

(2) The pool asset is created solely to satisfy legal requirements or otherwise facilitate the structuring of the asset-backed securities transaction;

(3) The pool asset is not part of a scheme to avoid registration or the requirements of this section; and

(4) The pool asset is held by the issuing entity and is a part of the asset pool for the asset-backed securities.

§ 230.191 Definition of ''issuer'' in section 2(a)(4) of the Act in relation to asset-backed securities.

The following applies with respect to asset-backed securities under the Act. Terms used in this section have the same meaning as in Item 1101 of Regulation AB (§ 229.1101 of this chapter).

(a) The depositor for the asset-backed securities acting solely in its capacity as depositor to the issuing entity is the ''issuer'' for purposes of the asset-backed securities of that issuing entity.

(b) The person acting in the capacity as the depositor specified in paragraph (a) of this section is a different ''issuer'' from that same person acting as a depositor for another issuing entity or for purposes of that person's own securities.

■ 26. Amend § 230.411 by:

■ a. Removing the authority citation following the section; and

■ b. Revising the first sentence of paragraph (a).

The revision reads as follows:

§ 230.411 Incorporation by reference.

(a) *Prospectuses.* Except as provided by this section, Item 1100(c) of Regulation AB (§ 229.1100(c) of this chapter) for registered offerings of asset-backed securities, or unless otherwise provided in the appropriate form, information shall not be incorporated by reference in a prospectus. ***

* * * * *

■ 27. Add § 230.426 to read as follows:

§ 230.426 Filing of certain prospectuses under § 230.167 in connection with certain offerings of asset-backed securities.

(a) All written communications made in reliance on § 230.167 are prospectuses that must be filed with the Commission in accordance with paragraphs (b) and (c) of this section on Form 8–K (§ 249.308 of this chapter) and incorporated by reference to the related registration statement for the offering of asset-backed securities. Each prospectus filed under this section must identify the Commission file number of the related registration statement on the cover page of the related Form 8–K in addition to any other information required by that form. The information contained in any such prospectus shall be deemed to be a part of the registration statement as of the earlier of the time of filing of such information or the time of the filing of the final prospectus that meets the requirements of section 10(a) of the Act (15 U.S.C.

77j(a)) relating to such offering pursuant to § 230.424(b).

(b) Except as specified in paragraph (c) of this section, *ABS informational and computational material* made in reliance on § 230.167 that meet the conditions in paragraph (b)(1) of this section must be filed within the time frame specified in paragraph (b)(2) of this section.

(1) *Conditions for which materials must be filed.* The materials are provided to prospective investors under the following conditions:

(i) If a prospective investor has indicated to the issuer or an underwriter that it will purchase all or a portion of the class of asset-backed securities to which such materials relate, all materials relating to such class that are or have been provided to such prospective investor; and

(ii) For any other prospective investor, all materials provided to such prospective investor after the final terms have been established for all classes of the offering.

(2) *Time frame to file the materials.* The materials must be filed by the later of:

(i) The due date for filing the final prospectus relating to such offering that meets the requirements of section 10(a) of the Act (15 U.S.C. 77j(a)) pursuant to § 230.424(b); or

(ii) Two business days after first use.

(c) Notwithstanding paragraphs (a) and (b) of this section, the following need not be filed under this section:

(1) *ABS informational and computational material* that relate to abandoned structures or that are furnished to a prospective investor prior to the time the final terms have been established for all classes of the offering where such prospective investor has not indicated to the issuer or an underwriter its intention to purchase the asset-backed securities.

(2) Any *ABS informational and computational material* if a prospectus that meets the requirements of section 10(a) of the Act (15 U.S.C. 77j(a)) relating to the offering of such asset-backed securities accompanies or precedes the use of such material.

(3) Any *ABS informational and computational material* that does not contain new or different information from that which was previously disclosed and filed under this section.

(4) Any written communication that is limited to the information specified in § 230.134, 230.135 or 230.135c.

(5) Any research report used in reliance on § 230.137, 230.138, 230.139 or 230.139a.

(6) Any confirmation described in § 240.10b–10 of this chapter.

(7) Any prospectus filed under § 230.424.

(d) Terms used in this section have the same meaning as in Item 1101 of Regulation AB (§ 229.1101 of this chapter).

Instruction to § 230.426.

The issuer may aggregate data presented in *ABS informational and computational material* that are to be filed and file such data in consolidated form. Any such aggregation, however, must not result in either the omission of any information contained in such material otherwise to be filed, or a presentation that makes the information misleading.

§ 230.434 [Amended]

■ 28. Amend § 230.434 by removing the phrase ''General Instruction 1.B.5. of Form S–3 (§ 239.13 of this chapter)'' in paragraph (f) and adding, in its place, the phrase ''§ 229.1101 of this chapter''.

PART 232—REGULATION S–T—GENERAL RULES AND REGULATIONS FOR ELECTRONIC FILINGS

■ 29. The authority citation for Part 232 is revised to read as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 77sss(a), 78c(b), 78*l*, 78m, 78n, 78o(d), 78w(a), 78*ll*(d), 79t(a), 80a–8, 80a–29, 80a–30, 80a–37, and 7201 *et seq.*; and 18 U.S.C. 1350.

* * * * *

§ 232.311 [Amended]

■ 30. Amend § 232.311 by removing paragraph (j).

■ 31. Add § 232.312 to read as follows:

§ 232.312 Accommodation for certain information in filings with respect to asset-backed securities.

(a) For filings with respect to asset-backed securities filed on or before December 31, 2009, the information provided in response to Item 1105 of Regulation AB (§ 229.1105 of this chapter) may be provided under the following conditions on an Internet Web site for inclusion in the prospectus for the asset-backed securities, and will be deemed to be included in the prospectus included in the registration statement, in lieu of reproducing the information in the electronically filed version of that document. Terms used in this section have the same meaning as in Item 1101 of Regulation AB (§ 229.1101 of this chapter).

(1) The prospectus in the registration statement at the time of effectiveness shall disclose the intention to provide such information through a Web site and the prospectus to be filed pursuant to § 230.424 of this chapter shall provide the specific Internet address where the information is posted.

(2) Such information shall be provided through the Web site unrestricted as to access and free of charge.

(3) Such information shall remain available on the Web site for a period of not less than five years. If a subsequent update or change is made to the information, the date of such update or change shall be clearly indicated on the Web site.

(4) The registrant shall retain all versions of such information provided through the Web site for a period of not less than five years in a form that permits delivery to an investor or the Commission. Upon request, the registrant shall furnish to the Commission or its staff a copy of any or all information retained pursuant to this requirement.

(5) The registration statement shall contain the undertakings required by Item 512(l) of Regulation S–K (§ 229.512(l) of this chapter) that:

(i) Except as otherwise provided by this section, such information provided through the specified Internet address is deemed to be a part of the prospectus included in the registration statement for the asset-backed securities.

(ii) The registrant shall provide to any person without charge, upon request, a copy of such information provided through the specified Internet address as of the date of the prospectus included in the registration statement if a subsequent update or change is made to that information.

Note to paragraph (a). With respect to paragraphs (a)(3) and (a)(4) of this section, the five-year period shall commence from the filing date of the prospectus filed pursuant to § 230.424 of this chapter, or the date of first use of the prospectus, whichever is earlier.

(b) This section does not affect any obligation to provide any other information in the filing electronically on EDGAR.

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

■ 32. The authority citation for Part 239 continues to read in part as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z–2, 77sss, 78c, 78*l*, 78m, 78n, 78o(d), 78u–5, 78w(a), 78*ll*(d), 79e, 79f, 79g, 79j, 79*l*, 79m, 79n, 79q, 79t, 80a–8, 80a–24, 80a–26, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

* * * * *

■ 33. Amend Form S–1 (referenced in § 239.11) by adding General Instruction VI. to read as follows:

Note: The text of Form S–1 does not, and this amendment will not, appear in the Code of Federal Regulations.

Form S–1

* * * * *

General Instructions

* * * * *

VI. Offerings of Asset-Backed Securities.

The following applies if a registration statement on this Form S–1 is being used to register an offering of asset-backed securities. Terms used in this General Instruction VI. have the same meaning as in Item 1101 of Regulation AB (17 CFR 229.1101).

A. *Items That May Be Omitted.*

Such registrants may omit the information called for by Item 11, Information with Respect to the Registrant.

B. *Substitute Information To Be Included.*

In addition to the Items that are otherwise required by this Form, the registrant must furnish in the prospectus the information required by Items 1102 through 1120 of Regulation AB (17 CFR 229.1102 through 229.1120).

C. *Signatures.*

The registration statement must be signed by the depositor, the depositor's principal executive officer or officers, principal financial officer and controller or principal accounting officer, and by at least a majority of the depositor's board of directors or persons performing similar functions.

* * * * *

■ 34. Amend § 239.12 by adding paragraph (i) to read as follows:

§ 239.12 Form S–2, for registration under the Securities Act of 1933 of securities of certain issuers.

* * * * *

(i) *Asset-backed securities.* This form shall not be used for an offering of asset-backed securities, as defined in § 229.1101 of this chapter.

■ 35. Amend Form S–2 (referenced in § 239.12) by adding paragraph I. to General Instruction I to read as follows:

Note: The text of Form S–2 does not, and this amendment will not, appear in the Code of Federal Regulations.

Form S–2

* * * * *

General Instructions

I. Eligibility Requirements for Use of Form S–2.

* * * * *

I. *Asset-backed securities.* This form shall not be used for an offering of asset-backed securities, as defined in § 229.1101 of this chapter.

* * * * *

■ 36. Amend § 239.13 by:

■ a. Revising the phrase ''2.06 or 4.02(a) of Form 8–K'' in paragraph (a)(3)(ii) to read ''2.06, 4.02(a), 6.01, 6.03 or 6.05 of Form 8–K''; and

■ b. Revising paragraphs (a)(4) and (b)(5).

The revisions read as follows.

§ 239.13 Form S–3, for registration under the Securities Act of 1933 of securities of certain issuers offered pursuant to certain types of transactions.

* * * * *

(a) * * *

(4) The provisions of paragraphs (a)(2) and (a)(3)(i) of this section do not apply to any registered offerings of securities described in paragraph (b)(5) of this section. However, for such offerings of asset-backed securities, to the extent the depositor or any issuing entity previously established, directly or indirectly, by the depositor or any affiliate of the depositor (as defined in § 229.1101 of this chapter) are or were at any time during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement on this Form subject to the requirements of section 12 or 15(d) of the Exchange Act (15 U.S.C. 78*l* or 78o(d)) with respect to a class of asset-backed securities involving the same asset class, such depositor and each such issuing entity must have filed all material required to be filed regarding such asset-backed securities pursuant to section 13, 14 or 15(d) of the Exchange Act (15 U.S.C. 78m, 78n or 78o(d)) for such period (or such shorter period that each such entity was required to file such materials). In addition, such material must have been filed in a timely manner, other than a report that is required solely pursuant to Item 1.01, 1.02, 2.03, 2.04, 2.05, 2.06, 4.02(a), 6.01, 6.03 or 6.05 of Form 8–K (§ 249.308 of this chapter). If § 240.12b–25(b) of this chapter was used during such period with respect to a report or a portion of a report, that report or portion thereof has actually been filed within the time period prescribed by that section. Regarding an affiliated depositor that became an affiliate as a result of a business combination transaction during such period, the filing of any material prior to the business combination transaction relating to asset-backed securities of an issuing entity previously established, directly or indirectly, by such affiliated depositor is excluded from this section, provided such business combination transaction was not part of a plan or scheme to evade the requirements of the Securities Act or the Exchange Act. See the definition of ''affiliate'' in § 230.405 of this chapter.

* * * * *

(b) * * *

(5) *Offerings of investment grade asset-backed securities.* (i) Asset-backed securities (as defined in § 229.1101 of this chapter) to be offered for cash that meet the conditions in General Instruction I.B.5 of Form S–3; and

(ii) Securities relating to an offering of asset-backed securities registered in accordance with paragraph (b)(5)(i) of this section where those securities represent an interest in or the right to the payments of cash flows of another asset pool and meet the requirements of § 230.190(c)(1) through (4) of this chapter.

* * * * *

■ 37. Amend Form S–3 (referenced in § 239.13) by:

■ a. Revising the phrase ''2.06 or 4.02(a) of Form 8–K'' in General Instruction I.A.3.(b) to read ''2.06, 4.02(a), 6.01, 6.03 or 6.05 of Form 8–K'';

■ b. Revising General Instructions I.A.4. and I.B.5.; and

■ c. Adding General Instruction V.

The revisions and addition reads as follows.

Note: The text of Form S–3 does not, and this amendment will not, appear in the Code of Federal Regulations.

Form S–3

* * * * *

General Instructions

* * * * *

I. Eligibility Requirements for Use of Form S–3

* * * * *

A. *Registrant Requirements.* * * *

4. The provisions in paragraphs A.2. and A.3.(a) above do not apply to any registered offerings of securities described in I.B.5 below. However, for such offerings of asset-backed securities, to the extent the depositor or any issuing entity previously established, directly or indirectly, by the depositor or any affiliate of the depositor (as defined in Item 1101 of Regulation AB (17 CFR 229.1101)) are or were at any time during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement on this Form subject to the requirements of section 12 or 15(d) of the Exchange Act (15 U.S.C. 78*l* or 78o(d)) with respect to a class of asset-backed securities involving the same asset class, such depositor and each

such issuing entity must have filed all material required to be filed regarding such asset-backed securities pursuant to section 13, 14 or 15(d) of the Exchange Act (15 U.S.C. 78m, 78n or 78o(d)) for such period (or such shorter period that each such entity was required to file such materials). In addition, such material must have been filed in a timely manner, other than a report that is required solely pursuant to Item 1.01, 1.02, 2.03, 2.04, 2.05, 2.06, 4.02(a), 6.01, 6.03 or 6.05 of Form 8-K (17 CFR 249.308). If Rule 12b–25(b) (17 CFR 240.12b–25(b)) under the Exchange Act was used during such period with respect to a report or a portion of a report, that report or portion thereof has actually been filed within the time period prescribed by that rule. Regarding an affiliated depositor that became an affiliate as a result of a business combination transaction during such period, the filing of any material prior to the business combination transaction relating to asset-backed securities of an issuing entity previously established, directly or indirectly, by such affiliated depositor is excluded from this section, provided such business combination transaction was not part of a plan or scheme to evade the requirements of the Securities Act or the Exchange Act. See the definition of ''affiliate'' in Securities Act Rule 405 (17 CFR 230.405).

* * * * *

B. *Transaction Requirements.* * * *

5. *Offerings of Investment grade Asset-backed Securities.*

(a) Asset-backed securities (as defined in 17 CFR 229.1101) to be offered for cash, provided:

(i) The securities are ''investment grade securities,'' as defined in I.B.2 above (Primary Offerings of Non-convertible Investment Grade Securities);

(ii) Delinquent assets do not constitute 20% or more, as measured by dollar volume, of the asset pool as of the measurement date; and

(iii) With respect to securities that are backed by leases other than motor vehicle leases, the portion of the securitized pool balance attributable to the residual value of the physical property underlying the leases, as determined in accordance with the transaction agreements for the securities, does not constitute 20% or more, as measured by dollar volume, of the securitized pool balance as of the measurement date.

Instruction. For purposes of making the determinations required by paragraphs (a)(ii) and (a)(iii) of this General Instruction I.B.5, refer to the Instructions to Item 1101(c) of Regulation AB (17 CFR 229.1101(c)).

(b) Securities relating to an offering of asset-backed securities registered in accordance with paragraph (a) of this General Instruction I.B.5 where those securities represent an interest in or the right to the payments of cash flows of another asset pool and meet the requirements of Securities Act Rule 190(c)(1) through (4) (17 CFR 240.190(c)(1) through (4)).

* * * * *

V. Offerings of Asset-Backed Securities

The following applies if a registration statement on this Form S–3 is being used to register an offering of asset-backed securities. Terms used in this General Instruction V. have the same meaning as in Item 1101 of Regulation AB (17 CFR 229.1101).

A. *Disclosure.*

1. For a registration statement on this Form S–3 relating to an offering of asset-backed securities, in addition to the Items that are otherwise required by this Form, the registrant must furnish in the prospectus the information required by Items 1102 through 1120 of Regulation AB (17 CFR 229.1102 through 229.1120).

2. For registered offerings pursuant to Securities Act Rule 415(a)(1)(x) (17 CFR 230.415(a)(1)(x)) that include a base prospectus and form of prospectus supplement, a separate base prospectus and form of prospectus supplement must be presented for each asset class that may be securitized in a discrete pool in a takedown of asset-backed securities under the registration statement. A separate base prospectus and form of prospectus supplement also must be presented for each country of origin or country of property securing pool assets that may be securitized in a discrete pool in a takedown of asset-backed securities under the registration statement. For both separate asset classes and jurisdictions of origin or property, a separate base prospectus and form of supplement is not required for transactions that principally consist of a particular asset class or jurisdiction which also describe one or more potential additional asset classes or jurisdictions, so long as the pool assets for the additional classes or jurisdictions in the aggregate are below 10% of the pool, as measured by dollar volume, for any particular takedown. When a preliminary prospectus is required under this Form pursuant to Securities Act Rule 190(b)(7) (17 CFR 230.190(b)(7)), the information to be included in the base prospectus and prospectus supplement is to be substantially similar to that which would be included if the preliminary prospectus was required under Form S–1 (17 CFR 239.11) pursuant to such rules.

B. *Signatures.*

The registration statement must be signed by the depositor, the depositor's principal executive officer or officers, principal financial officer and controller or principal accounting officer, and by at least a majority of the depositor's board of directors or persons performing similar functions.

* * * * *

■ 38. Amend § 239.18 by adding a sentence to the end of the section to read as follows:

§ 239.18 Form S–11, for registration under the Securities Act of 1933 of securities of certain real estate companies.

* * * In addition, this form shall not be used for an offering of asset-backed securities, as defined in § 229.1101 of this chapter.

■ 39. Amend Form S–11 (referenced in § 239.18) by adding a sentence to the end of General Instruction A. to read as follows:

Note: The text of Form S–11 does not, and this amendment will not, appear in the Code of Federal Regulations.

Form S–11

* * * * *

General Instructions

A. Rule as to Use of Form S–11.

* * * In addition, this form shall not be used for an offering of asset-backed securities, as defined in 17 CFR 229.1101.

* * * * *

■ 40. Amend § 239.31 by adding a sentence to the end of paragraph (a) to read as follows:

§ 239.31 Form F–1, registration statement under the Securities Act of 1933 for securities of certain foreign private issuers.

(a) * * * In addition, this form shall not be used for an offering of asset-backed securities, as defined in § 229.1101 of this chapter.

* * * * *

■ 41. Amend Form F–1 (referenced in § 239.31) by adding a sentence to the end of General Instruction I.A. to read as follows:

Note: The text of Form F–1 does not, and this amendment will not, appear in the Code of Federal Regulations.

Form F–1

* * * * *

General Instructions

I. Eligibility Requirements for Use of Form F–1

A. * * * In addition, this form shall not be used for an offering of asset-backed securities, as defined in 17 CFR 229.1101.

* * * * *

■ 42. Amend § 239.32 by adding paragraph (i) to read as follows:

§ 239.32 Form F–2, for registration under the Securities Act of 1933 for securities of certain foreign private issuers.

* * * * *

(i) *Asset-backed securities.* This form shall not be used for an offering of asset-backed securities, as defined in § 229.1101 of this chapter.

■ 43. Amend Form F–2 (referenced in § 239.32) by adding paragraph I. to General Instruction I. to read as follows:

Note: The text of Form F–2 does not, and this amendment will not, appear in the Code of Federal Regulations.

Form F–2

* * * * *

General Instructions

I. Eligibility Requirements for Use of Form F–2

* * * * *

I. *Asset-backed securities:* This form shall not be used for an offering of asset-backed securities, as defined in 17 CFR 229.1101.

* * * * *

■ 44. Add a sentence to the end of the introductory text of § 239.33 to read as follows:

§ 239.33 Form F–3, for registration under the Securities Act of 1933 of securities of certain foreign private issuers offered pursuant to certain types of transactions.

* * * In addition, this Form shall not be used for an offering of asset-backed securities, as defined in § 229.1101 of this chapter.

* * * * *

■ 45. Amend Form F–3 (referenced in § 239.33) by adding a sentence to the end of the introductory text of General Instruction I to read as follows:

Note: The text of Form F–3 does not, and this amendment will not, appear in the Code of Federal Regulations.

Form F–3

* * * * *

General Instructions

I. Eligibility Requirements for Use of Form F–3

* * * In addition, this Form shall not be used for an offering of asset-backed securities, as defined in 17 CFR 229.1101.

* * * * *

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 46. The authority citation for Part 240 continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l*, 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78*ll*, 78mm, 79q, 79t, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

■ 47. Add § 240.3a12–12 to read as follows:

§ 240.3a12–12 Exemption from certain provisions of section 16 of the Act for asset-backed securities.

Asset-backed securities, as defined in § 229.1101 of this chapter, are exempt from section 16 of the Act (15 U.S.C. 78p).

■ 48. Add § 240.3b–19 to read as follows:

§ 240.3b–19 Definition of ''issuer'' in section 3(a)(8) of the Act in relation to asset-backed securities.

The following applies with respect to asset-backed securities under the Act. Terms used in this section have the same meaning as in Item 1101 of Regulation AB (§ 229.1101 of this chapter).

(a) The depositor for the asset-backed securities acting solely in its capacity as depositor to the issuing entity is the ''issuer'' for purposes of the asset-backed securities of that issuing entity.

(b) The person acting in the capacity as the depositor specified in paragraph (a) of this section is a different ''issuer'' from that same person acting as a depositor for another issuing entity or for purposes of that person's own securities.

§ 240.10A–3 [Amended]

■ 49. Amend § 240.10A–3 by removing the phrase ''(as defined in § 240.13a–14(g) and § 240.15d–14(g))'' from paragraph (c)(6)(i) and adding, in its place, the phrase ''(as defined in § 229.1101 of this chapter)''.

§ 240.12b–2 [Amended]

■ 50. Amend § 240.12b–2 by revising paragraph (3) of the definition of *Small Business Issuer* to read as follows:

§ 240.12b–2 Definitions.

* * * * *

Small Business Issuer. * * *

(3) Is not an investment company and is not an asset-backed issuer (as defined in § 229.1101 of this chapter); and

* * * * *

■ 51. Amend § 240.12b–15 by adding a sentence after the sixth sentence to read as follows:

§ 240.12b–15 Amendments.

* * * An amendment to any report required to include the certifications as specified in § 240.13a–14(d) or § 240.15d–14(d) must include a new certification by an individual specified in § 240.13a–14(e) or § 240.15d–14(e), as applicable. * * *

■ 52. Amend § 240.12b–25 by revising the section heading and paragraphs (a) and (b)(2)(ii) to read as follows:

§ 240.12b–25 Notification of inability to timely file all or any required portion of a Form 10–K, 10–KSB, 20–F, 11–K, N–SAR, N–CSR, 10–Q, 10–QSB or 10–D.

(a) If all or any required portion of an annual or transition report on Form 10–K, 10–KSB, 20–F or 11–K (17 CFR 249.310, 249.310b, 249.220f or 249.311), a quarterly or transition report on Form 10–Q or 10–QSB (17 CFR 249.308a or 249.308b), or a distribution report on Form 10–D (17 CFR 249.312) required to be filed pursuant to section 13 or 15(d) of the Act (15 U.S.C. 78m or 78o(d)) and rules thereunder, or if all or any required portion of a semi-annual, annual or transition report on Form N–CSR (17 CFR 249.331; 17 CFR 274.128) or Form N–SAR (17 CFR 249.330; 17 CFR 274.101) required to be filed pursuant to section 13 or 15(d) of the Act or section 30 of the Investment Company Act of 1940 (15 U.S.C. 80a–29) and the rules thereunder, is not filed within the time period prescribed for such report, the registrant, no later than one business day after the due date for such report, shall file a Form 12b–25 (17 CFR 249.322) with the Commission which shall contain disclosure of its inability to file the report timely and the reasons therefor in reasonable detail.

(b) * * *

(2) * * *

(ii) The subject annual report, semi-annual report or transition report on Form 10–K, 10–KSB, 20–F, 11–K, N–SAR, or N–CSR, or portion thereof, will be filed no later than the fifteenth calendar day following the prescribed due date; or the subject quarterly report

or transition report on Form 10–Q or 10–QSB or distribution report on Form 10–D, or portion thereof, will be filed no later than the fifth calendar day following the prescribed due date; and

* * * * *

■ 53. Amend § 240.13a–10 by adding paragraph (k) before the Notes to read as follows:

§ 240.13a–10 Transition reports.

* * * * *

(k)(1) Paragraphs (a) through (g) of this section shall not apply to asset-backed issuers.

(2) Every asset-backed issuer that changes its fiscal closing date shall file a report covering the resulting transition period between the closing date of its most recent fiscal year and the opening date of its new fiscal year. In no event shall a transition report cover a period longer than 12 months.

(3) The report for the transition period shall be filed on Form 10–K (§ 249.310 of this chapter) responding to all items to which such asset-backed issuer is required to respond pursuant to General Instruction J. of Form 10–K. Such report shall be filed within 90 days after the later of either the close of the transition period or the date on which the issuer made the determination to change the fiscal closing date.

(4) Notwithstanding the foregoing in paragraphs (k)(2) and (k)(3) of this section, if the transition period covers a period of one month or less, an asset-backed issuer need not file a separate transition report if the first annual report for the newly adopted fiscal year covers the transition period as well as the fiscal year.

(5) Any obligation of the asset-backed issuer to file distribution reports pursuant to § 240.13a–17 will continue to apply regardless of a change in the asset-backed issuer's fiscal closing date.

* * * * *

§ 240.13a–11 [Amended]

■ 54. Amend § 240.13a–11 by revising the phrase ''2.06 or 4.02(a) of Form 8–K'' in paragraph (c) to read ''2.06, 4.02(a) or 6.03 of Form 8–K''.

■ 55. Amend § 240.13a–13 by:

■ a. Removing the authority citation following § 240.13a–13;

■ b. Removing the period at the end of paragraph (b)(2) and adding, in its place, ''; and''; and

■ c. Adding paragraph (b)(3).

The addition reads as follows.

§ 240.13a–13 Quarterly reports on Form 10–Q and Form 10–QSB (§ 249.308a and § 249.308b of this chapter).

* * * * *

(b) * * *

(3) Asset-backed issuers required to file reports pursuant to § 240.13a–17.

* * * * *

■ 56. Amend § 240.13a–14 by:

■ a. Removing the phrase ''(as defined in paragraph (g) of this section)'' in the first sentence of paragraph (a) and adding, in its place, the phrase ''(as defined in § 229.1101 of this chapter)'';

■ b. Revising the reference to ''paragraph (a) or (b)'' in paragraph (c) to read ''paragraph (a), (b) or (d)'';

■ c. Revising paragraphs (d) and (e); and

■ d. Removing paragraphs (f) and (g).

The revisions read as follows:

§ 240.13a–14 Certification of disclosure in annual and quarterly reports.

* * * * *

(d) Each annual report and transition report filed on Form 10–K (§ 249.310 of this chapter) by an asset-backed issuer under section 13(a) of the Act (15 U.S.C. 78m(a)) must include a certification in the form specified in the applicable exhibit filing requirements of such report and such certification must be filed as an exhibit to such report. Terms used in paragraphs (d) and (e) of this section have the same meaning as in Item 1101 of Regulation AB (§ 229.1101 of this chapter).

(e) With respect to asset-backed issuers, the certification required by paragraph (d) of this section must be signed by either:

(1) The senior officer in charge of securitization of the depositor if the depositor is signing the report; or

(2) The senior officer in charge of the servicing function of the servicer if the servicer is signing the report on behalf of the issuing entity. If multiple servicers are involved in servicing the pool assets, the senior officer in charge of the servicing function of the master servicer (or entity performing the equivalent function) must sign if a representative of the servicer is to sign the report on behalf of the issuing entity.

§ 240.13a–15 [Amended]

■ 57. Amend § 240.13a–15 by removing the phrase ''(as defined in § 240.13a–14(g))'' and adding, in its place, the phrase ''(as defined in § 229.1101 of this chapter)'' in paragraph (a).

■ 58. Amend § 240.13a–16 by:

■ a. Removing the word ''or'' at the end of paragraph (a)(2);

■ b. Removing the period at the end of paragraph (a)(3) and adding, in its place, ''; or''; and

■ c. Adding paragraph (a)(4).

The addition reads as follows.

§ 240.13a–16 Reports of foreign private issuers on Form 6–K (17 CFR 249.306).

(a) * * *

(4) Asset-backed issuers, as defined in § 229.1101 of this chapter.

* * * * *

■ 59. Add §§ 240.13a–17 and 240.13a–18 to read as follows:

§ 240.13a–17 Reports of asset-backed issuers on Form 10–D (§ 249.312 of this chapter).

Every asset-backed issuer subject to § 240.13a–1 shall make reports on Form 10–D (§ 249.312 of this chapter). Such reports shall be filed within the period specified in Form 10–D.

§ 240.13a–18 Compliance with servicing criteria for asset-backed securities.

(a) This section applies to every class of asset-backed securities subject to the reporting requirements of section 13(a) of the Act (15 U.S.C. 78m(a)). Terms used in this section have the same meaning as in Item 1101 of Regulation AB (§ 229.1101 of this chapter).

(b) *Reports on assessments of compliance with servicing criteria for asset-backed securities required.* With regard to a class of asset-backed securities subject to the reporting requirements of section 13(a) of the Act, the annual report on Form 10–K (§ 249.308 of this chapter) for such class must include from each party participating in the servicing function a report regarding its assessment of compliance with the servicing criteria specified in paragraph (d) of Item 1122 of Regulation AB (§ 229.1122(d) of this chapter), as of and for the period ending the end of each fiscal year, with respect to asset-backed securities transactions taken as a whole involving the party participating in the servicing function and that are backed by the same asset type backing the class of asset-backed securities (including the asset-backed securities transaction that is to be the subject of the report on Form 10–K for that fiscal year).

(c) *Attestation reports on assessments of compliance with servicing criteria for asset-backed securities required.* With respect to each report included pursuant to paragraph (b) of this section, the annual report on Form 10–K must also include a report by a registered public accounting firm that attests to, and reports on, the assessment made by the asserting party. The attestation report on assessment of compliance with servicing criteria for asset-backed securities must be made in accordance with standards for attestation engagements issued or adopted by the Public Company Accounting Oversight Board.

Note to § 240.13a–18. If multiple parties are participating in the servicing function, a separate assessment report and attestation report must be included for each party participating in the servicing function. A party participating in the servicing function means any entity (*e.g.*, master servicer, primary servicers, trustees) that is performing activities that address the criteria in paragraph (d) of Item 1122 of Regulation AB (§ 229.1122(d) of this chapter), unless such entity's activities relate only to 5% or less of the pool assets.

■ 60. Amend § 240.15c2–8 by:
■ a. Removing the phrase ''paragraphs (b) through (g)'' in paragraph (a) and adding, in its place, the phrase ''paragraphs (b) through (h)'' and
■ b. Adding a sentence to the end of paragraph (b).

The revisions read as follows:

§ 240.15c2–8 Delivery of prospectus.

(a) ***

(b) *** This paragraph (b) does not apply with respect to asset-backed securities (as defined in § 229.1101 of this chapter) that meet the requirements of General Instruction I.B.5 of Form S–3 (§ 239.13 of this chapter).

* * * * *

■ 61. Amend § 240.15d–10 by adding paragraph (k) before the *Notes* to read as follows:

§ 240.15d–10 Transition reports.

* * * * *

(k)(1) Paragraphs (a) through (g) of this section shall not apply to asset-backed issuers.

(2) Every asset-backed issuer that changes its fiscal closing date shall file a report covering the resulting transition period between the closing date of its most recent fiscal year and the opening date of its new fiscal year. In no event shall a transition report cover a period longer than 12 months.

(3) The report for the transition period shall be filed on Form 10–K (§ 249.310 of this chapter) responding to all items to which such asset-backed issuer is required to respond pursuant to General Instruction J. of Form 10–K. Such report shall be filed within 90 days after the later of either the close of the transition period or the date on which the issuer made the determination to change the fiscal closing date.

(4) Notwithstanding the foregoing in paragraphs (k)(2) and (k)(3) of this section, if the transition period covers a period of one month or less, an asset-backed issuer need not file a separate transition report if the first annual report for the newly adopted fiscal year covers the transition period as well as the fiscal year.

(5) Any obligation of the asset-backed issuer to file distribution reports pursuant to § 240.15d–17 will continue to apply regardless of a change in the asset-backed issuer's fiscal closing date.

§ 240.15d–11 [Amended]

■ 62. Amend § 240.15d–11 by revising the phrase ''2.06 or 4.02(a) of Form 8–K'' in paragraph (c) to read ''2.06, 4.02(a) or 6.03 of Form 8–K''.
■ 63. Amend § 240.15d–13 by:
■ a. Removing the authority citation following § 240.15d–13;
■ b. Removing the period at the end of paragraph (b)(2) and adding, in its place, ''; and''; and
■ c. Adding paragraph (b)(3).

The addition reads as follows:

§ 240.15d–13 Quarterly reports on Form 10–Q and Form 10–QSB (§ 249.308a and § 249.308b of this chapter).

* * * * *

(b) * * *

(3) Asset-backed issuers required to file reports pursuant to § 240.15d–17.

* * * * *

■ 64. Amend § 240.15d–14 by:
■ a. Removing the phrase ''(as defined in paragraph (g) of this section)'' in the first sentence of paragraph (a) and adding, in its place, the phrase ''(as defined in § 229.1101 of this chapter)'';
■ b. Revising the reference to ''paragraph (a) or (b)'' in paragraph (c) to read ''paragraph (a), (b) or (d)'';
■ c. Revising paragraphs (d) and (e); and
■ d. Removing paragraphs (f) and (g).

The revisions read as follows:

§ 240.15d–14 Certification of disclosure in annual and quarterly reports.

* * * * *

(d) Each annual report and transition report filed on Form 10–K (§ 249.310 of this chapter) by an asset-backed issuer under section 15(d) of the Act (15 U.S.C. 78o(d)) must include a certification in the form specified in the applicable exhibit filing requirements of such report and such certification must be filed as an exhibit to such report. Terms used in paragraphs (d) and (e) of this section have the same meaning as in Item 1101 of Regulation AB (§ 229.1101 of this chapter).

(e) With respect to asset-backed issuers, the certification required by paragraph (d) of this section must be signed by either:

(1) The senior officer in charge of securitization of the depositor if the depositor is signing the report; or

(2) The senior officer in charge of the servicing function of the servicer if the servicer is signing the report on behalf of the issuing entity. If multiple servicers are involved in servicing the pool assets, the senior officer in charge of the servicing function of the master servicer (or entity performing the equivalent function) must sign if a representative of the servicer is to sign the report on behalf of the issuing entity.

§ 240.15d–15 [Amended]

■ 65. Amend § 240.15d–15 by removing the phrase ''(as defined in § 240.15d–14(g)'' and adding, in its place, the phrase ''(as defined in § 229.1101'' in paragraph (a).
■ 66. Amend § 240.15d–16 by:
■ a. Removing the period at the end of paragraph (a)(2) and adding, in its place, ''; or''; and
■ b. Adding paragraph (a)(3).

The addition reads as follows:

§ 240.15d–16 Reports of foreign private issuers on Form 6–K [17 CFR 249.306].

(a) * * *

(3) Asset-backed issuers, as defined in § 229.1101 of this chapter.

* * * * *

■ 67. Add § 240.15d–17 to read as follows:

§ 240.15d–17 Reports of asset-backed issuers on Form 10–D (§ 249.312 of this chapter).

Every asset-backed issuer subject to § 240.15d–1 shall make reports on Form 10–D (§ 249.312 of this chapter). Such reports shall be filed within the period specified in Form 10–D.

■ 68. Add § 240.15d–18 before the undesignated center heading to read as follows:

§ 240.15d–18 Compliance with servicing criteria for asset-backed securities.

(a) This section applies to every class of asset-backed securities subject to the reporting requirements of section 15(d) of the Act (15 U.S.C. 78o(d)). Terms used in this section have the same meaning as in Item 1101 of Regulation AB (§ 229.1101 of this chapter).

(b) *Reports on assessments of compliance with servicing criteria for asset-backed securities required.* With regard to a class of asset-backed securities subject to the reporting requirements of section 15(d) of the Act, the annual report on Form 10–K (§ 249.308 of this chapter) for such class must include from each party participating in the servicing function a report regarding its assessment of compliance with the servicing criteria specified in paragraph (d) of Item 1122 of Regulation AB (§ 229.1122(d) of this chapter), as of and for the period ending the end of each fiscal year, with respect to asset-backed securities transactions taken as a whole involving the party participating in the servicing function and that are backed by the same asset

type backing the class of asset-backed securities (including the asset-backed securities transaction that is to be the subject of the report on Form 10–K for that fiscal year).

(c) *Attestation reports on assessments of compliance with servicing criteria for asset-backed securities required.* With respect to each report included pursuant to paragraph (b) of this section, the annual report on Form 10–K must also include a report by a registered public accounting firm that attests to, and reports on, the assessment made by the asserting party. The attestation report on assessment of compliance with servicing criteria for asset-backed securities must be made in accordance with standards for attestation engagements issued or adopted by the Public Company Accounting Oversight Board.

Note to § 240.15d–18. If multiple parties are participating in the servicing function, a separate assessment report and attestation report must be included for each party participating in the servicing function. A party participating in the servicing function means any entity (*e.g.*, master servicer, primary servicers, trustees) that is performing activities that address the criteria in paragraph (d) of Item 1122 of Regulation AB (§ 229.1122(d) of this chapter), unless such entity's activities relate only to 5% or less of the pool assets.

■ 69. Add §§ 240.15d–22 and 240.15d–23 to read as follows:

§ 240.15d–22 Reporting regarding asset-backed securities under section 15(d) of the Act.

(a) With respect to an offering of asset-backed securities registered pursuant to § 230.415(a)(1)(x) of this chapter, annual and other reports need not be filed pursuant to section 15(d) of the Act (15 U.S.C. 78o(d)) regarding any class of securities to which such registration statement relates until the first bona fide sale in a takedown of securities under the registration statement.

(b) Regarding any class of asset-backed securities in a takedown off of a registration statement pursuant to § 230.415(a)(1)(x) of this chapter, no annual and other reports need be filed pursuant to section 15(d) of the Act regarding such class of securities as to any fiscal year, other than the fiscal year within which the takedown occurred, if at the beginning of such fiscal year the securities of each class in the takedown are held of record by less than three hundred persons.

(c) Paragraph (a) or (b) of this section does not affect any other reporting obligation applicable with respect to any classes of securities from additional takedowns under the same or different registration statements or any reporting obligation that may be applicable pursuant to section 12 of the Act (15 U.S.C. 78*l*).

§ 240.15d–23 Reporting regarding certain securities underlying asset-backed securities under section 15(d) of the Act.

(a) Regarding a class of asset-backed securities, if the asset pool for the asset-backed securities includes a pool asset representing an interest in or the right to the payments or cash flows of another asset pool, then no separate annual and other reports need be filed pursuant to section 15(d) of the Act (15 U.S.C. 78o(d)) because of the separate registration of the distribution of the pool asset under the Securities Act (15 U.S.C. 77a *et seq.*), if the following conditions are met:

(1) Both the issuing entity for the asset-backed securities and the entity that issued the pool asset were established under the direction of the same sponsor and depositor;

(2) The pool asset was created solely to satisfy legal requirements or otherwise facilitate the structuring of the asset-backed securities transaction;

(3) The pool asset is not part of a scheme to avoid the registration or reporting requirements of the Act;

(4) The pool asset is held by the issuing entity and is a part of the asset pool for the asset-backed securities; and

(5) The offering of the asset-backed securities and the offering of the pool asset were both registered under the Securities Act (15 U.S.C. 77a *et seq.*).

(b) Paragraph (a) of this section does not affect any reporting obligation applicable with respect to the asset-backed securities or any other reporting obligation that may be applicable with respect to the pool asset or any other securities by the issuer of that pool asset pursuant to section 12 or 15(d) of the Act (15 U.S.C. 78*l* or 78o(d)).

(c) This section does not affect any obligation to provide information regarding the pool asset or the asset pool underlying the pool asset in a filing with respect to the asset-backed securities. See Item 1100(d) of Regulation AB (§ 229.1100(d) of this chapter).

(d) Terms used in this section have the same meaning as in Item 1101 of Regulation AB (§ 229.1101 of this chapter).

PART 242—REGULATIONS M, SHO, ATS, AND AC AND CUSTOMER MARGIN REQUIREMENTS FOR SECURITY FUTURES

■ 70. 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.

■ 71. Amend § 242.100 by revising the definition of *Asset-backed security* in paragraph (b) to read as follows:

§ 242.100 Preliminary note; definitions.

* * * * *

(b) * * *

Asset-backed security has the meaning contained in § 229.1101 of this chapter.

* * * * *

PART 245—REGULATION BLACKOUT TRADING RESTRICTION (Regulation BTR—Blackout Trading Restriction)

■ 72. The authority citation for part 245 continues to read in part as follows:

Authority: 15 U.S.C. 78w(a), unless otherwise noted.

* * * * *

■ 73. Amend § 245.101 by:

■ a. Removing the period at the end of paragraph (c)(2) and in its place adding a semi-colon;

■ b. Removing ''and'' at the end of paragraph (c)(9);

■ c. Removing the period at the end of paragraph (c)(10) and in its place adding ''; and''; and

■ d. Adding paragraph (c)(11).

The addition reads as follows:

§ 245.101 Prohibition of insider trading during pension fund blackout periods.

* * * * *

(c) * * *

(11) Any acquisition or disposition of an asset-backed security, as defined in § 229.1101 of this chapter.

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

■ 74. 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.

* * * * *

■ 75. Amend Form 8–K (referenced in § 249.308) by:

■ a. Adding General Instruction G.;

■ b. Adding Instruction 3 to Item 1.01;

■ c. Adding Instruction 3 to Item 1.02;

■ d. Revising the phrase ''*Instruction*'' in Item 1.03 to read ''*Instructions*'', redesignating the existing Instruction as Instruction 1, and adding Instruction 2;

■ e. Adding Instruction 5 to Item 2.04;

■ f. Revising the phrase ''*Instruction to Item 5.03*'' in Item 5.03 to read ''*Instructions*'', redesignating the existing Instruction as Instruction 1, and adding Instruction 2; and

■ g. Adding Section 6.

The revisions and addition read as follows.

Note: The text of Form 8–K does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 8–K

* * * * *

General Instructions

* * * * *

G. Use of This Form by Asset-Backed Issuers.

The following applies to registrants that are asset-backed issuers. Terms used in this General Instruction G. have the same meaning as in Item 1101 of Regulation AB (17 CFR 229.1101).

1. *Reportable Events That May Be Omitted.* The registrant need not file a report on this Form upon the occurrence of any one or more of the events specified in the following:

(a) Item 2.01, Completion of Acquisition or Disposition of Assets;

(b) Item 2.02, Results of Operations and Financial Condition;

(c) Item 2.03, Creation of a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement of a Registrant;

(d) Item 2.05, Costs Associated with Exit or Disposal Activities;

(e) Item 2.06, Material Impairments;

(f) Item 3.01, Notice of Delisting or Failure to Satisfy a Continued Listing Rule or Standard; Transfer of Listing;

(g) Item 3.02, Unregistered Sales of Equity Securities;

(h) Item 4.01, Changes in Registrant's Certifying Accountant;

(i) Item 4.02, Non-Reliance on Previously Issued Financial Statements or a Related Audit Report or Completed Interim Review;

(j) Item 5.01, Changes in Control of Registrant;

(k) Item 5.02, Departure of Directors or Principal Officers; Election of Directors; Appointment of Principal Officers;

(*l*) Item 5.04, Temporary Suspension of Trading Under Registrant's Employee Benefit Plans; and

(m) Item 5.05, Amendments to the Registrant's Code of Ethics, or Waiver of a Provision of the Code of Ethics.

2. *Additional Disclosure for the Form 8–K Cover Page.* Immediately after the name of the issuing entity on the cover page of the Form 8–K, as separate line items, identify the exact name of the depositor as specified in its charter and the exact name of the sponsor as specified in its charter.

3. *Signatures.* The Form 8–K must be signed by the depositor. In the alternative, the Form 8–K may be signed on behalf of the issuing entity by a duly authorized representative of the servicer. If multiple servicers are involved in servicing the pool assets, a duly authorized representative of the master servicer (or entity performing the equivalent function) must sign if a representative of the servicer is to sign the report on behalf of the issuing entity.

* * * * *

Information To Be Included in the Report

* * * * *

Item 1.01 Entry Into a Material Definitive Agreement.

* * * * *

Instructions. * * *

3. With respect to asset-backed securities, as defined in Item 1101 of Regulation AB (17 CFR 229.1101), disclosure is required under this Item 1.01 regarding the entry into or an amendment to a definitive agreement that is material to the asset-backed securities transaction, even if the registrant is not a party to such agreement (*e.g.*, a servicing agreement with a servicer contemplated by Item 1108(a)(3) of Regulation AB (17 CFR 229.1108(a)(3)).

Item 1.02 Termination of a Material Definitive Agreement.

* * * * *

Instructions. * * *

3. With respect to asset-backed securities, as defined in Item 1101 of Regulation AB (17 CFR 229.1101), disclosure is required under this Item 1.02 regarding the termination of a definitive agreement that is material to the asset-backed securities transaction (otherwise than by expiration of the agreement on its stated termination date or as a result of all parties completing their obligations under such agreement), even if the registrant is not a party to such agreement (*e.g.*, a servicing agreement with a servicer contemplated by Item 1108(a)(3) of Regulation AB (17 CFR 229.1108(a)(3)).

* * * * *

Item 1.03 Bankruptcy or Receivership.

* * * * *

Instructions. * * *

2. With respect to asset-backed securities, disclosure also is required under this Item 1.03 if the depositor (or servicer if the servicer signs the report on Form 10–K (17 CFR 249.310) of the issuing entity) becomes aware of any instances described in paragraph (a) or (b) of this Item with respect to the sponsor, depositor, servicer contemplated by Item 1108(a)(3) of Regulation AB (17 CFR 229.1108(a)(3)), trustee, significant obligor, enhancement or support provider contemplated by Items 1114(b) or 1115 of Regulation AB (17 CFR 229.1114(b) or 229.1115) or other material party contemplated by Item 1101(d)(1) of Regulation AB (17 CFR 1101(d)(1)). Terms used in this Instruction 2 have the same meaning as in Item 1101 of Regulation AB (17 CFR 229.1101).

* * * * *

Item 2.04 Triggering Events That Accelerate or Increase a Direct Financial Obligation or an Obligation Under an Off-Balance Sheet Arrangement.

* * * * *

Instructions. * * *

5. With respect to asset-backed securities, as defined in 17 CFR 229.1101, disclosure also is required under this Item 2.04 if an early amortization, performance trigger or other event, including an event of default, has occurred under the transaction agreements for the asset-backed securities that would materially alter the payment priority or distribution of cash flows regarding the asset-backed securities or the amortization schedule for the asset-backed securities. In providing the disclosure required by this Item, identify the changes to the payment priorities, flow of funds or asset-backed securities as a result. Disclosure is required under this Item whether or not the registrant is a party to the transaction agreement that results in the occurrence identified.

* * * * *

Item 5.03 Amendments to Articles of Incorporation or Bylaws; Change in Fiscal Year.

* * * * *

Instructions. * * *

2. With respect to asset-backed securities, as defined in 17 CFR 229.1101, disclosure is required under this Item 5.03 regarding any amendment to the governing documents of the issuing entity, regardless of whether the class of asset-backed securities is reporting under Section 13 or 15(d) of the Exchange Act.

* * * * *

Section 6—Asset-Backed Securities

The Items in this Section 6 apply only to asset-backed securities. Terms used in this Section 6 have the same meaning as in Item 1101 of Regulation AB (17 CFR 229.1101).

Item 6.01 ABS Informational and Computational Material.

Report under this Item any ABS informational and computational material filed in, or as an exhibit to, this report.

Item 6.02 Change of Servicer or Trustee.

If a servicer contemplated by Item 1108(a)(2) of Regulation AB (17 CFR 229.1108(a)(2)) or a trustee has resigned or has been removed, replaced or substituted, or if a new servicer contemplated by Item 1108(a)(2) of Regulation AB or trustee has been appointed, state the date the event occurred and the circumstances surrounding the change. In addition, provide the disclosure required by Item 1108(d) of Regulation AB (17 CFR 229.1108(c)), as applicable, regarding the servicer or trustee change. If a new servicer contemplated by Item 1108(a)(3) of this Regulation AB or a new trustee has been appointed, provide the information required by Item 1108(b) through (d) of Regulation AB regarding such servicer or Item 1109 of Regulation AB (17 CFR 229.1109) regarding such trustee, as applicable.

Instruction. To the extent that any information called for by this Item regarding such servicer or trustee is not determined or is unavailable at the time of the required filing, the registrant shall include a statement to this effect in the filing and then must file an amendment to its Form 8–K filing under this Item 6.02 containing such information within four business days after the information is determined or becomes available.

Item 6.03 Change in Credit Enhancement or Other External Support.

(a) *Loss of existing enhancement or support.* If the depositor (or servicer if the servicer signs the report on Form 10–K (17 CFR 249.310) of the issuing entity) becomes aware that any material enhancement or support specified in Item 1114(a)(1) through (3) of Regulation AB (17 CFR 229.1114(a)(1) through (3)) or Item 1115 of Regulation AB (17 CFR 229.1115) that was previously applicable regarding one or more classes of the asset-backed securities has terminated other than by expiration of the contract on its stated termination date or as a result of all parties completing their obligations under such agreement, then disclose:

(1) The date of the termination of the enhancement;

(2) The identity of the parties to the agreement relating to the enhancement or support;

(3) A brief description of the terms and conditions of the enhancement or support that are material to security holders;

(4) A brief description of the material circumstances surrounding the termination; and

(5) Any material early termination penalties paid or to be paid out of the cash flows backing the asset-backed securities.

(b) *Addition of new enhancement or support.* If the depositor (or servicer if the servicer signs the report on Form 10–K (17 CFR 249.310) of the issuing entity) becomes aware that any material enhancement specified in Item 1114(a)(1) through (3) of Regulation AB (17 CFR 229.1114(a)(1) through (3)) or Item 1115 of Regulation AB (17 CFR 229.1115) has been added with respect to one or more classes of the asset-backed securities, then provide the date of addition of the new enhancement or support and the disclosure required by Items 1114 or 1115 of Regulation AB, as applicable, with respect to such new enhancement or support.

(c) *Material change to enhancement or support.* If the depositor (or servicer if the servicer signs the report on Form 10–K (17 CFR 249.310) of the issuing entity) becomes aware that any existing material enhancement or support specified in Item 1114(a)(1) through (3) of Regulation AB or Item 1115 of Regulation AB with respect to one or more classes of the asset-backed securities has been materially amended or modified, disclose:

(1) The date on which the agreement or agreements relating to the enhancement or support was amended or modified;

(2) The identity of the parties to the agreement or agreements relating to the amendment or modification; and

(3) A brief description of the material terms and conditions of the amendment or modification.

Instructions. 1. Disclosure is required under this Item whether or not the registrant is a party to any agreement regarding the enhancement or support if the loss, addition or modification of such enhancement or support materially affects, directly or indirectly, the asset-backed securities, the pool assets or the cash flow underlying the asset-backed securities.

2. To the extent that any information called for by this Item regarding the enhancement or support is not determined or is unavailable at the time of the required filing, the registrant shall include a statement to this effect in the filing and then must file an amendment to its Form 8–K filing under this Item 6.03 containing such information within four business days after the information is determined or becomes available.

3. The instructions to Items 1.01 and 1.02 of this Form apply to this Item.

4. Notwithstanding Items 1.01 and 1.02 of this Form, disclosure regarding changes to material enhancement or support is to be reported under this Item 6.03 in lieu of those Items.

Item 6.04 Failure To Make a Required Distribution.

If a required distribution to holders of the asset-backed securities is not made as of the required distribution date under the transaction documents, and such failure is material, identify the failure and state the nature of the failure to make the timely distribution.

Item 6.05 Securities Act Updating Disclosure.

Regarding an offering of asset-backed securities registered on Form S–3 (17 CFR 239.13), if any material pool characteristic of the actual asset pool at the time of issuance of the asset-backed securities differs by 5% or more (other than as a result of the pool assets converting into cash in accordance with their terms) from the description of the asset pool in the prospectus filed for the offering pursuant to Securities Act Rule 424 (17 CFR 230.424), disclose the information required by Items 1111 and 1112 of Regulation AB (17 CFR 229.1111 and 17 CFR 229.1112) regarding the characteristics of the actual asset pool. If applicable, also provide information required by Items 1108 and 1110 of Regulation AB (17 CFR 229.1108 and 17 CFR 229.1110) regarding any new servicers or originators that would be required to be disclosed under those items regarding the pool assets.

Instruction. No report is required under this Item if substantially the same information is provided in a post-effective amendment to the Securities Act registration statement or in a subsequent prospectus filed pursuant to Securities Act Rule 424 (17 CFR 230.424).

* * * * *

■ 76. Amend § 249.220f by revising paragraph (a) to read as follows:

§ 249.220f Form 20–F, registration of securities of foreign private issuers pursuant to section 12(b) or (g) and annual and transition reports pursuant to sections 13 and 15(d).

(a) Any foreign private issuer, other than an asset-backed issuer (as defined in § 229.1101 of this chapter), may use this form as a registration statement under section 12 (15 U.S.C. 78l) of the Securities Exchange Act of 1934 (the

''Exchange Act'') (15 U.S.C. 77a *et seq.*) or as an annual or transition report filed under section 13(a) or 15(d) of the Exchange Act (15 U.S.C. 78m(a) or 78o(d)).

* * * * *

■ 77. Amend Form 20–F (referenced in § 249.220f) by:

■ a. Adding the phrase '', other than an asset-backed issuer (as defined in 17 CFR 229.1101),'' after the phrase ''foreign private issuer'' in the first sentence of paragraph (a) of General Instruction A;

■ b. Revising the heading ''Instructions to Item 15'' to read ''Instruction to Item 15'';

■ c. Removing Instruction 2 to Item 15;

■ b. Removing Instruction 4 to Item 16A;

■ c. Removing Instruction 4 to Item 16B;

■ d. Redesignating Instructions 5, 6 and 7 to Item 16B as Instructions 4, 5 and 6 to Item 16B;

■ g. Revising the heading ''Instructions to Item 16C'' to read ''Instruction to Item 16C''; and

■ h. Removing Instruction 2 to Item 16C.

Note: The text of Form 20–F does not, and this amendment will not, appear in the Code of Federal Regulations.

■ 78. Amend Form 10–K (referenced in § 249.310) by:

■ a. Removing ''and'' at the end of General Instruction I.(1)(b);

■ b. Removing the period at the end of General Instruction I.(1)(c) and in its place adding ''; and'';

■ c. Adding paragraph (d) to General Instruction I.(1);

■ d. Adding General Instruction J.;

■ e. Adding an Instruction to Item 9B; and

■ f. Removing the Instruction to Item 14.

The revisions read as follows.

Note: The text of Form 10–K does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 10–K

* * * * *

General Instructions

* * * * *

I. Omission of Information by Certain Wholly-Owned Subsidiaries.

* * * * *

(1) * * *

(d) The registrant is not an asset-backed issuer, as defined in Item 1101 of Regulation AB (17 CFR 229.1101).

* * * * *

J. Use of this Form by Asset-Backed Issuers.

The following applies to registrants that are asset-backed issuers. Terms used in this General Instruction J. have the same meaning as in Item 1101 of Regulation AB (17 CFR 229.1101).

(1) *Items that May be Omitted.* Such registrants may omit the information called for by the following otherwise required Items:

(a) Item 1, Business;

(b) Item 2, Properties;

(c) Item 3, Legal Proceedings;

(d) Item 4, Submission of Matters to a Vote of Security Holders;

(e) Item 5, Market for Registrant's Common Equity and Related Stockholder Matters;

(f) Item 6, Selected Financial Data;

(g) Item 7, Management's Discussion and Analysis of Financial Condition and Results of Operations;

(h) Item 7A, Quantitative and Qualitative Disclosures About Market Risk;

(i) Item 8, Financial Statements and Supplementary Data;

(j) Item 9, Changes in and Disagreements With Accountants on Accounting and Financial Disclosure;

(k) Item 9A, Controls and Procedures;

(l) If the issuing entity does not have any executive officers or directors, Item 10, Directors and Executive Officers of the Registrant, Item 11, Executive Compensation, Item 12, Security Ownership of Certain Beneficial Owners and Management, and Item 13, Certain Relationships and Related Transactions; and

(m) Item 14, Principal Accountant Fees and Services.

(2) *Substitute Information to be Included.* In addition to the Items that are otherwise required by this Form, the registrant must furnish in the Form 10–K the following information:

(a) Immediately after the name of the issuing entity on the cover page of the Form 10–K, as separate line items, the exact name of the depositor as specified in its charter and the exact name of the sponsor as specified in its charter.

(b) Item 1112(b) of Regulation AB;

(c) Items 1114(b)(2) and 1115(b) of Regulation AB;

(d) Item 1117 of Regulation AB;

(e) Item 1119 of Regulation AB;

(f) Item 1122 of Regulation AB; and

(g) Item 1123 of Regulation AB.

(3) *Signatures.* The Form 10–K must be signed either:

(a) On behalf of the depositor by the senior officer in charge of securitization of the depositor; or

(b) On behalf of the issuing entity by the senior officer in charge of the servicing function of the servicer. If multiple servicers are involved in servicing the pool assets, the senior officer in charge of the servicing function of the master servicer (or entity performing the equivalent function) must sign if a representative of the servicer is to sign the report on behalf of the issuing entity.

* * * * *

Form 10–K

* * * * *

Item 9B. Other Information.

* * * * *

Instruction. With respect to a report on this Form regarding a class of asset-backed securities, the relevant period where disclosure is required is the period since the last required distribution report on Form 10–D (17 CFR 249.312).

* * * * *

■ 79. Amend Form 10–KSB (referenced in § 249.310b) by removing the Instruction to Item 14.

Note: The text of Form 10–KSB does not, and this amendment will not, appear in the Code of Federal Regulations.

■ 80. Amend Form 40–F (referenced in § 249.240f) by:

■ a. Revising the heading ''Instructions to paragraphs (b), (c), (d) and (e) of General Instruction B.6.'' to read ''Instruction to paragraphs (b), (c), (d) and (e) of General Instruction B.(6).'' and removing Instruction 2;

■ b. Removing Note 4 of the Notes to Paragraph (8) of General Instruction B;

■ c. Removing Note 4 of the Notes to Paragraph (9) of General Instruction B;

■ d. Redesignating Notes 5, 6 and 7 of the Notes to Paragraph (9) of General Instruction B as Notes 4, 5 and 6 of the Notes to Paragraph (9) of General Instruction B; and

■ e. Revising ''Notes to Instruction B.(10)'' to read ''Note to Instruction B.(10)'' and removing Note 2.

Note: The text of Form 40–F does not, and this amendment will not, appear in the Code of Federal Regulations.

■ 81. Add § 249.312 and Form 10–D to read as follows:

§ 249.312 Form 10–D, periodic distribution reports by asset-backed issuers.

This form shall be used by asset-backed issuers to file periodic distribution reports pursuant to § 240.13a–17 or 240.15d–17 of this chapter. A distribution report on this form pursuant to § 240.13a–17 or 240.15d–17 of this chapter shall be filed within 15 days after each required distribution date on the asset-backed securities, as specified in the governing documents for such securities.

Note: The text of Form 10–D does not, and this addition will not, appear in the Code of Federal Regulations.

United States Securities and Exchange Commission

Washington, D.C. 20549

Form 10–D

Asset-Backed Issuer Distribution Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934

General Instructions

A. Rule as to Use of Form 10–D

(1) This Form shall be used for distribution reports by asset-backed issuers pursuant to Rule 13a–17 or Rule 15d–17 (17 CFR 240.13a–17 or 17 CFR 240.15d–17) of the Securities Exchange Act of 1934 (the ''Act''). Such a report is required to be filed even though the sponsor or depositor also files reports pursuant to Section 13(a) or 15(d) of the Act (15 U.S.C. 78m(a) or 78o(d)) with respect to classes of securities other than the asset-backed securities. See Rule 3b–19 (17 CFR 240.3b–19). Terms used in this Form have the same meaning as in Item 1101 of Regulation AB (17 CFR 229.1101).

(2) Reports on this Form shall be filed within 15 days after each required distribution date on the asset-backed securities, as specified in the governing documents for such securities.

B. Application of General Rules and Regulations

(1) The General Rules and Regulations under the Act contain certain general requirements which are applicable to reports on any form under the Act. These general requirements should be carefully read and observed in the preparation and filing of reports on this Form, except that any provision in this Form or in these instructions is controlling.

(2) Particular attention is directed to Regulation 12B (17 CFR 240.12b–1 *et seq.*), which contains general requirements regarding filing reports under the Act. The definitions contained in Rule 12b–2 should be especially noted. See also Regulations 13A (17 CFR 240.13a–1 *et seq.*) and 15D (17 CFR 240.15d–1 *et seq.*).

C. Preparation of Report

(1) This Form is not to be used as a blank form to be filled in, but only as a guide in preparing the report in accordance with Rules 12b–11 (17 CFR 240.12b–11), 12b–12 (17 CFR 240.12b–12) and 12b–13 (17 CFR 240.12b–13). The Commission does not furnish blank copies of this Form to be filled in for filing.

(2) These general instructions are not to be filed with the report. The instructions to the various captions of the Form are also to be omitted from the report as filed.

(3) Any item which is inapplicable or to which the answer is negative may be omitted and no reference need be made in the report. If substantially the same information has been previously reported by the asset-backed issuer, an additional report of the information on this Form need not be made. The term ''previously reported'' is defined in Rule 12b–2 (17 CFR 240.12b–2).

(4) Attention is directed to Rule 12b–20 (17 CFR 240.12b–20), which states: ''In addition to the information expressly required to be included in a statement or report, there shall be added such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made not misleading.''

D. Incorporation by Reference

(1) If the asset-backed issuer makes available to the holders of its securities or otherwise publishes, within the period prescribed for filing the report on this Form, a press release or other document or statement containing information meeting some or all of the requirements of this Form, the information called for may be incorporated by reference to such published document or statement, in answer or partial answer to any item or items of this Form, provided copies thereof are filed as an exhibit to the report on this Form.

(2) All information incorporated by reference must comply with the requirements of this Form and the following rules on incorporation by reference:

(a) Item 10(d) of Regulation S–K (17 CFR 229.10(d)) (general rules on incorporation by reference, which, among other things, prohibit, unless specifically required by this Form, incorporating by reference a document that includes incorporation by reference to another document);

(b) Item 1100(c) of Regulation AB (17 CFR 229.1100(c)) (additional requirements for incorporating information by reference in filings by asset-backed issuers);

(c) Rule 303 of Regulation S–T (17 CFR 232.303) (specific requirements for electronically filed documents); and

(d) Exchange Act Rules 12b–23 and 12b–32 (17 CFR 240.12b–23 and 240.12b-32) (additional rules on incorporation by reference for reports filed pursuant to Sections 13 and 15(d) of the Act).

E. Signature and Filing of Report

(1) The report on this Form must be signed by the depositor. In the alternative, the report on this Form may be signed on behalf of the issuing entity by a duly authorized representative of the servicer. If multiple servicers are involved in servicing the pool assets, a duly authorized representative of the master servicer (or entity performing the equivalent function) must sign if a representative of the servicer is to sign the report on behalf of the issuing entity.

(2) The name and title of each person who signs the report shall be typed or printed beneath his or her signature. Attention is directed to Rule 12b–11 (17 CFR 240.12b–11) concerning manual signatures.

(3) An asset-backed issuer must submit the report on this Form in electronic format via the Commission's Electronic Data Gathering, Analysis, and Retrieval (EDGAR) system in accordance with the EDGAR rules set forth in Regulation S–T (17 CFR Part 232), except as discussed below. An issuer submitting the report in electronic format must provide the signatures required for the report in accordance with Regulation S–T Rule 302 (17 CFR 232.302). For assistance with technical questions about EDGAR or to request an access code, call the EDGAR Filer Support Office at (202) 942–8900. For assistance with the EDGAR rules, call the Office of EDGAR and Information Analysis at (202) 942–2940.

(4) If the report is filed in paper pursuant to a hardship exemption from electronic filing provided by Regulation S–T Rule 201 or 202 (17 CFR 232.201 or 232.202), or as otherwise permitted by the Commission, eight copies of the report must be filed with the Commission. An issuer also must file at least one complete copy of the report with each national securities exchange on which any security of the issuer is listed and registered under Section 12(b) of the Act (15 U.S.C. 78*l*(b)). At least one complete copy of the report filed with the Commission and one such copy filed with each exchange must be manually signed. Copies not manually signed must bear typed or printed signatures. When submitting a report in paper under a hardship exemption, an issuer must provide the legend required by Regulation S–T Rule 201(a)(2) or 202(c) (17 CFR 232.201(a)(2) or 232.202(c)) on the cover page of the report. When submitting the report in electronic format to the Commission, an issuer may submit a paper copy containing typed signatures to each national securities exchange in

accordance with Regulation S–T Rule 302(c) (17 CFR 232.302(c)).

BILLING CODE 8010–01–P

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 10-D

ASSET-BACKED ISSUER
DISTRIBUTION REPORT PURSUANT TO SECTION 13 OR 15(d) OF
THE SECURITIES EXCHANGE ACT OF 1934

For the [identify distribution frequency (e.g., monthly/quarterly)] distribution period from _____, 20__ to _____, 20__

Commission File Number of issuing entity: _____

_____
(Exact name of issuing entity as specified in its charter)

Commission File Number of depositor: _____

_____
(Exact name of depositor as specified in its charter)

_____
(Exact name of sponsor as specified in its charter)

_____	_____
(State or other jurisdiction of incorporation or organization of the issuing entity)	(I.R.S. Employer Identification No.)
_____	_____
(Address of principal executive offices of the issuing entity)	(Zip Code)

_____
(Telephone number, including area code)

_____
(Former name, former address, if changed since last report)

Title of class	Registered/reporting pursuant to (check one) Section 12(b)	Section 12(g)	Section 15(d)	Name of exchange (If Section 12(b))
_____	[___]	[___]	[___]	_____
_____	[___]	[___]	[___]	_____

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes ..... No .....

Part I—Distribution Information

Item 1. Distribution and Pool Performance Information.

Provide the information required by Item 1121 of Regulation AB (17 CFR 229.1121), and attach as an exhibit to this report the distribution report delivered to the trustee or security holders, as the case may be, pursuant to the transaction agreements for the distribution period covered by this report. Any information required by Item 1121 of Regulation AB that is provided in the attached distribution report need not be repeated in this report. However, taken together, the attached distribution report and the information provided under this Item must contain the information required by Item 1121 of Regulation AB.

Part II—Other Information

Item 2. Legal Proceedings.

Provide the information required by Item 1117 of Regulation AB (17 CFR 229.1117). As to such proceedings which have been terminated during the period covered by the report, provide similar information, including the date of termination and a description of the disposition thereof.

Instruction. A legal proceeding need only be reported in the report on this Form filed for the distribution period in which it first became a reportable event and in subsequent reports on this Form in which there have been material developments.

Item 3. Sales of Securities and Use of Proceeds.

Provide the information required by Item 2 of Part II of Form 10–Q (17 CFR 249.308a) with respect to the period covered by this report. With respect to the information required by Item 2(a) of Part II of Form 10–Q:

(a) Provide this information regarding any sale of securities that are either backed by the same asset pool or are otherwise issued by the issuing entity, regardless of whether the transaction was registered under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) during the period covered by the report.

(b) Also provide the information required by paragraph (e) of Item 1113 of Regulation AB (17 CFR 229.1113(e)) regarding such securities.

(c) No information required by Item 701(c) of Regulation S–K need be provided with respect to securities which were not registered under the Securities Act.

Item 4. Defaults Upon Senior Securities.

Provide the information required by Item 3 of Part II of Form 10–Q with respect to the period covered by this report.

Item 5. Submission of Matters to a Vote of Security Holders.

Provide the information required by Item 4 of Part II of Form 10–Q with respect to the period covered by this report.

Item 6. Significant Obligors of Pool Assets.

Provide the information required by Item 1112(b) of Regulation AB (17 CFR 229.1112(b)).

Instruction. Such information need only be reported in the report on this Form filed for the distribution period in which updated information regarding the significant obligor is required pursuant to Item 1112(b) of Regulation AB. See also Item 1100(c) of Regulation AB (17 CFR 229.1100(c)) regarding the presentation of such information in certain instances.

Item 7. Significant Enhancement Provider Information.

Provide the information required by Items 1114(b)(2) and 1115(b) of Regulation AB (17 CFR 229.1114(b)(2) and 229.1115(b)).

Instruction. Such information need only be reported in the report on this Form filed for the distribution period in which updated information regarding the enhancement provider is required pursuant to Items 1114(b)(2) or 1115(b) of Regulation AB. See also Item 1100(c) of Regulation AB (17 CFR 229.1100(c)) regarding the presentation of such information in certain instances.

Item 8. Other Information.

The registrant must disclose under this Item any information required to be disclosed in a report on Form 8–K during the period covered by the report on this Form, but not reported, whether or not otherwise required by this Form. If disclosure of such information is made under this Item, it need not be repeated in a report on Form 8–K which would otherwise be required to be filed with respect to such information or in a subsequent report on this Form.

Item 9. Exhibits.

(a) List the documents filed as a part of the report.

(b) File, as exhibits to this report, the exhibits required by this Form and Item 601 of Regulation S–K (17 CFR 229.601).

Signatures*

Pursuant to the requirements of the Securities Exchange Act of 1934, the registrant has duly caused this report to be signed on its behalf by the undersigned thereunto duly authorized.

_____
(Depositor)
Date: _____

_____
(Signature)**
[or]

_____
(Issuing entity)
Date: _____
By:
(Servicer)

_____
(Signature)**

*See General Instruction E to Form 10–D.

**Print the name and title of each signing officer under his or her signature.

■ 82. Amend § 249.322 by revising paragraph (a) to read as follows:

§ 249.322 Form 12b–25—Notification of late filing.

(a) This form shall be filed pursuant to § 240.12b–25 of this chapter by issuers who are unable to file timely all or any required portion of an annual or transition report on Form 10–K and Form 10–KSB, 20–F, or 11–K (§ 249.310, 249.310b, 249.220f or 249.311), a quarterly or transition report on Form 10–Q and Form 10–QSB (§§ 249.308a and 249.308b), or a distribution report on Form 10–D (§ 249.312) pursuant to section 13 or 15(d) of the Act (15 U.S.C. 78m or 78o(d)) or a semi-annual, annual, or transition report on Form N–SAR (§§ 249.330; 274.101) or Form N–CSR (§§ 249.331; 274.128) pursuant to section 13 or 15(d) of the Act or section 30 of the Investment Company Act of 1940 (15 U.S.C. 80a–29). The filing shall consist of a signed original and three conformed copies, and shall be filed with the Commission at Washington, DC 20549, no later than one business day after the due date for the periodic report in question. Copies of this form may be obtained from ''Publications,'' Securities and Exchange Commission, 450 5th Street, NW., Washington, DC 20549 and at our Web site at *http://www.sec.gov.*

* * * * *

■ 83. Amend Form 12b–25 (referenced in § 249.322) by:
■ a. Revising the preamble;
■ b. Revising paragraph (b) of Part II; and
■ c. Revising Part III.
The revisions read as follows.

Note: The text of Form 12b–25 does not, and this amendment will not, appear in the Code of Federal Regulations.

United States Securities and Exchange Commission

Washington, DC 20549

Form 12b–25

Notification of Late Filing

(Check One):____Form 10–K____Form 20–F____Form 11–K____Form 10–Q____Form 10–D____Form N–SAR____Form N–CSR

* * * * *

Part II—Rules 12b–25(b) and (c)

* * * * *

(b) The subject annual report, semi-annual report, transition report on Form 10–K, Form 20–F, Form 11–K, Form N–SAR or Form N–CSR, or portion thereof, will be filed on or before the fifteenth calendar day following the prescribed due date; or the subject quarterly report or transition report on Form 10–Q or subject distribution report on Form 10–D, or portion thereof, will be filed on or before the fifth calendar day following the prescribed due date; and

* * * * *

Part III—Narrative

State below in reasonable detail why Forms 10–K, 20–F, 11–K, 10–Q, 10–D, N–SAR, N–CSR, or the transition report or portion thereof, could not be filed within the prescribed time period.

* * * * *

By the Commission.

Dated: December 22, 2004.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 05–53 Filed 1–6–05; 8:45 am]

BILLING CODE 8010–01–P

Federal Register

Friday,

January 7, 2005

Part III

Department of Transportation

Federal Aviation Administration

14 CFR Part 65

Process for Requesting Waiver of Mandatory Separation Age for Certain Federal Aviation Administration (FAA) Air Traffic Control Specialists; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 65

[Docket No. FAA–2004–17334; SFAR No. 103]

RIN 2120–AI18

Process for Requesting Waiver of Mandatory Separation Age for Certain Federal Aviation Administration (FAA) Air Traffic Control Specialists

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments.

SUMMARY: This final rule establishes procedures and some standards by which an air traffic controller in a flight service station, en route or terminal facility, or at the David J. Hurley Air Traffic Control System Command Center may request a waiver of the mandatory separation age. By taking this action, the Secretary of the Department of Transportation (DOT) implements congressional authority to issue such exemptions.

DATES: This final rule is effective January 7, 2005. Comments must be submitted on or before February 7, 2005.

ADDRESSES: You may send comments (identified by Docket Number FAA–2004–17334) 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.
- Governmentwide 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: 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.

For more information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

Privacy: We will post all comments we receive, without change, to *http://dms.dot.gov,* including any personal information you provide. For more information, see the Privacy Act discussion in the **SUPPLEMENTARY INFORMATION** section of this document.

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

FOR FURTHER INFORMATION CONTACT: Wanda Reyna, ATO Workforce Services (ATO–A) Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267–3056.

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA is adopting this final rule without prior notice and prior public comment in light of Congressional direction to issue this final rule by March 1, 2004. The Regulatory Policies and Procedures of the Department of Transportation (DOT) (44 FR 1134; February 26, 1979), however, provide that, to the maximum extent possible, operating administrations for the DOT should provide an opportunity for public comment on regulations issued without prior notice. Accordingly, we invite interested persons to participate in this rulemaking by submitting such written data, views, or arguments, as they may desire. We also invite comments relating to environmental, energy, federalism, or international trade impacts that might result from this amendment.

Please include the regulatory docket or amendment number and send two copies to the address above. 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.

Privacy Act: Using the search function of our docket Web site, anyone can find and read the comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment 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 (65 FR 19477–78), or you may visit *http://dms.dot.gov.*

The FAA will consider all comments received on or before the closing date for comments. We will consider late comments to the extent practicable. We may amend this final rule in light of the comments received.

Commenters who want the FAA to acknowledge receipt of their comments submitted in response to this final rule must include a preaddressed, stamped postcard with those comments on which the following statement is made: ''Comments to Docket No. FAA–2004–17334.'' The postcard will be date-stamped by the FAA and mailed to the commenter.

Availability of Final Rule

You can get an electronic copy using the Internet by:

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

(2) Visiting the Office of Rulemaking's Web page at *http://www.faa.gov/avr/arm/index.cfm;* or

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

You can also get a copy by submitting a request to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267–9680. Be sure to identify the docket number, notice number, or amendment number of this rulemaking.

Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 requires FAA to comply with small entity requests for information or advice about compliance with statutes and regulations within its jurisdiction. Therefore, any small entity that has a question regarding this document may contact their local FAA official, or the person listed under **FOR FURTHER INFORMATION CONTACT**. You can find out more about SBREFA on the Internet at our site, *http://www.gov/avr/arm/sbrefa.htm.* For more information on SBREFA, e-mail us *9-AWA-SBREFA@faa.gov.*

Background

Section 8335(a) of Title 5 of the United States Code mandates that the Secretary, under such regulations as he may prescribe may exempt a controller having exceptional skills and experience as a controller from the automatic separation provisions or mandatory separation provisions of the statute until that controller becomes 61 years of age. This direction to the Secretary to create regulations, in consultation with the Administrator of the Federal Aviation Administration, to allow individual air traffic controllers to delay mandatory separation was restated in the Transportation, Treasury,

and Independent Agencies Appropriations Act for fiscal year 2004, H.R. 2673, 108th Cong. (2004). Pursuant to this direction, this final rule establishes procedures by which an air traffic control specialist may request a waiver of the mandatory separation age.

FAA air traffic control II specialists in flight service stations, enroute and terminal facilities, and at the David J. Hurley Air Traffic Control System Command Center seeking to waive the mandatory separation age must submit a written request through their official chain of command. The request must be received no earlier than the twelfth and no later than the sixth month prior to the month in which the employee turns 56. Recommendation to approve or deny a request by the specified deciding officials in the individual's chain of command will be forwarded to the Administrator. The Administrator will issue the final decision, pursuant to delegation from the Secretary. This delegation is published in 49 CFR 1.47. The decision to grant a waiver is discretionary and is to be treated as the exception as opposed to the rule. There is no right to appeal or grieve a denial or termination of a waiver.

Paperwork Reduction Act

There are no new requirements for information collection associated with this amendment.

International Compatibility

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to comply with International Civil Aviation Organization (ICAO) Standards and Recommended Practices to the maximum extent practicable. The FAA determined that there are no ICAO Standards and Recommended Practices that correspond to these proposed regulations.

Good Cause for Immediate Adoption Without Notice and Comment

Sections 553(b)(3)(A) of the Administrative Procedures Act (APA) (5 U.S.C. section 553(b)(3)(A) authorizes agencies to dispense with certain notice procedures for rules of agency organization, procedure, or practice. These regulations describe the process for agency employees applying for a waiver of the mandatory separation age for air traffic controllers. Therefore, notice and comment procedures are not required by the Administrative Procedure Act.

Section 553(d)(3) allows an agency, upon finding good cause, to make a rule effective immediately, thereby avoiding the 30-day delayed effective date requirement in section 553. The FAA has determined that good cause exists for adopting these regulations without delay so that FAA air traffic controllers who are approaching mandatory retirement can be made aware of these procedures immediately. The FAA anticipates using the waiver process to help address projected air traffic staffing requirements that may arise in the next few years.

Executive Order 12866 and DOT Regulatory Policies and Procedures

Executive Order 12866, Regulatory Planning and Review, directs the FAA to assess both the costs and benefits of a regulatory change. We are not allowed to propose or adopt a regulation unless we make a reasoned determination that the benefits of the intended regulation justify its costs. Our assessment of this proposal indicates that its economic impact is minimal. Since its costs and benefits do not make it a ''significant regulatory action'' as defined in the Order, we have not prepared a ''regulatory impact analysis.'' Similarly, we have not prepared a ''regulatory evaluation,'' which is the written cost/benefit analysis ordinarily required for all rulemaking proposals under the DOT Regulatory and Policies and Procedures. We do not need to do the latter analysis where the economic impact of a proposal is minimal.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) of 1980, 5 U.S.C. 601–612, directs the FAA to fit regulatory requirements to the scale of the business, organizations, and governmental jurisdictions subject to the regulation. We are required to determine whether a proposed or final action will have a ''significant economic impact on a substantial number of small entities'' defined in the RFA. If we find that the action will have a significant impact, we must do a ''regulatory flexibility analysis.''

This final rule informs FAA employees of an available administrative process. It involves no small entities within the meaning of the RFA. Therefore, we certify that this action will not have a significant economic impact on a substantial number of small entities.

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 has assessed the potential effect of this rulemaking and has determined that it will have only a domestic impact and therefore no effect on any trade-sensitive activity.

Unfunded Mandates Assessment

The Unfunded Mandates Reform Act of 1995 (the Act), enacted as Public Law 104–4 on March 22, 1995, is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of the Act requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in a $100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a ''significant regulatory action.''

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

Executive Order 13132, Federalism

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

Environmental Analysis

FAA Order 10501D defines FAA actions that may be categorically excluded from preparation of a National Environmental Policy Act (NEPA) environmental impact statement. In accordance with FAA Order 1050.1D, appendix 4, paragraph 4(j) this rulemaking action qualifies for a categorical exclusion.

List of Subjects in 14 CFR Part 65

Air traffic controllers, Aircraft, Airmen, Airports, Alcohol abuse, Drug abuse, Reporting and recordkeeping requirements.

The Amendment

■ For the reasons set forth above, the Federal Aviation Administration amends 14 CFR part 65 as follows:

PART 65—CERTIFICATION: AIRMEN OTHER THAN FLIGHT CREWMEMBERS

■ 1. The authority citation for part 65 is revised to read as follows:

Authority: 5 U.S.C. 8335(a); 49 U.S.C. 106(g); 49 U.S.C. 40113; 49 U.S.C. 44701–44703; 49 U.S.C. 44707; 49 U.S.C. 44709–44711; 49 U.S.C. 45102–45103; 49 U.S.C. 45301–45302.

■ 2. Add Special Federal Aviation Regulation Number 103 (SFAR No. 103) to part 65 to read as follows:

Special Federal Aviation Regulation No. 103—Process for Requesting Waiver of Mandatory Separation Age for a Federal Aviation Administration Air Traffic Control Specialist In Flight Service Stations, Enroute or Terminal Facilities, and the David J. Hurley Air Traffic Control System Command Center

1. *To whom does this SFAR apply?* This Special Federal Aviation Regulation (SFAR) applies to you if you are an air traffic control specialist (ATCS) employed by the FAA in flight service stations, enroute facilities, terminal facilities, or at the David J. Hurley Air Traffic Control System Command Center who wishes to obtain a waiver of the mandatory separation age as provided by 5 U.S.C. section 8335(a).

2. *When must I file for a waiver?* No earlier than the beginning of the twelfth month before, but no later than the beginning of the sixth month before, the month in which you turn 56, your official chain-of-command must receive your written request asking for a waiver of mandatory separation.

3. *What if I do not file a request before six months before the month in which I turn 56?* If your official chain-of-command does not receive your written request for a waiver of mandatory separation before the beginning of the sixth month before the month in which you turn 56, your request will be denied.

4. *How will the FAA determine if my request meets the filing time requirements of this SFAR?*

a. We consider your request to be filed in a timely manner under this SFAR if your official chain-of-command receives it or it is postmarked:

i. After 12 a.m. on the first day of the twelfth month before the month in which you turn 56; and

ii. Before 12 a.m. of the first day of the sixth month before the month in which you turn 56.

b. If you file your request by mail and the postmark is not legible, we will consider it to comply with paragraph a.2 of this section if we receive it by 12 p.m. of the fifth day of the sixth month before the month in which you turn 56.

c. If the last day of the time period specified in paragraph a.2 or paragraph b falls on a Saturday, Sunday, or Federal holiday, we will consider the time period to end at 12 p.m. of the next business day.

5. *Where must I file my request for waiver and what must it include?*

a. You must file your request for waiver of mandatory separation in writing with the Air Traffic Manager in flight service stations, enroute facilities, terminal facilities, or the David J. Hurley Air Traffic Control System Command Center in which you are employed.

b. Your request for waiver must include all of the following:

i. Your name.

ii. Your current facility.

iii. Your starting date at the facility.

iv. A list of positions at the facility that you are certified in and how many hours it took to achieve certification at the facility.

v. Your area of specialty at the facility.

vi. Your shift schedule.

vii. Your statement that you have not been involved in an operational error, operational deviation or runway incursion in the last 5 years while working a control position;

viii. A list of all facilities where you have worked as a certified professional controller (CPC) including facility level and dates at each facility;

ix. Evidence of your exceptional skills and experience as a controller; and

x. Your signature.

6. *How will my waiver request be reviewed?*

a. Upon receipt of your request for waiver, the Air Traffic Manager of your facility will make a written recommendation that the Administrator either approve or deny your request. If the manager recommends approval of your request, he or she will certify in writing the accuracy of the information you provided as evidence of your exceptional skills and experience as a controller.

b. The Air Traffic Manager will then forward the written recommendation with a copy of your request to the senior executive manager in the Air Traffic Manager's regional chain-of-command.

c. The senior executive manager in the regional chain-of-command will make a written recommendation that the Administrator either approve or deny your request. If the senior executive manager recommends approval of your request, he or she will certify in writing the accuracy of the information you have provided as evidence of exceptional skills and experience.

d. The senior executive manager in the regional chain-of-command will then forward his or her recommendation with a copy of your request to the appropriate Vice President at FAA Headquarters. Depending on the facility in which you are employed, the request will be forwarded to either the Vice President for Flight Services, the Vice President for Enroute and Oceanic Services, the Vice President for Terminal Services or the Vice President for Systems Operations. For example, if you work at a flight service station at the time that you request a waiver, the request will be forwarded to the Vice President for Flight Services.

e. The appropriate Vice President will review your request and make a written recommendation that the Administrator either approve or deny your request, which will be forwarded to the Administrator.

f. The Administrator will issue the final decision on your request.

7. *If I am granted a waiver, when will it expire?*

a. Waivers will be granted for a period of one year.

b. No later than 90-days prior to expiration of a waiver, you may request that the waiver be extended using the same process identified in section 6.

c. If you timely request an extension of the waiver and it is denied, you will receive a 60-day advance notice of your separation date simultaneously with notification of the denial.

d. If you do not request an extension of the waiver granted, you will receive a 60-day advance notice of your separation date.

e. Action to separate you from your covered position becomes effective on the last day of the month in which the 60-day notice expires.

8. *Under what circumstances may my waiver be terminated?*

a. The FAA/DOT may terminate your waiver under the following circumstances:

i. The needs of the FAA; or

ii. If you are identified as a primary contributor to an operational error/deviation or runway incursion.

b. If the waiver is terminated for either of the reasons identified in paragraph 1 of this section, the air traffic control specialist will receive a 60-day advance notice.

c. Action to separate you from your covered position becomes effective on the last day of the month in which the 60-day notice expires.

9. *Appeal of denial or termination of waiver request:* The denial or termination of a waiver of mandatory separation request is neither appealable nor grievable.

Issued in Washington, DC on December 29, 2004.

Marion Blakey,

Administrator.

[FR Doc. 05–233 Filed 1–6–05; 8:45 am]

BILLING CODE 4910–13–P

Federal Register

Friday,

January 7, 2005

Part IV

Environmental Protection Agency

40 CFR Parts 51 and 52

Revisions to the California State Implementation Plan and Revision to the Definition of Volatile Organic Compounds (VOC)—Removal of VOC Exemptions for California's Aerosol Coating Products Reactivity-Based Regulation; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51 and 52

[OAR–2003–0200; FRL–7857–6]

Revisions to the California State Implementation Plan and Revision to the Definition of Volatile Organic Compounds (VOC)—Removal of VOC Exemptions for California's Aerosol Coating Products Reactivity-Based Regulation

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA is proposing to approve a new consumer products regulation as part of the California State Implementation Plan (SIP) for ozone under the Clean Air Act (CAA) as amended in 1990. This California regulation adopts an innovative approach to reduce ozone formation from volatile organic compounds (VOC) in aerosol coating products. The EPA is also proposing to approve the use of California's Tables of Maximum Incremental Reactivity (MIR) to allow implementation of the new regulation in California. We are also proposing to revise EPA's definition of VOCs so that compounds which we previously identified as negligibly reactive and exempt from EPA's regulatory definition of VOCs will now count towards a product's reactivity-based VOC limit for the purpose of California's aerosol coatings regulation. We are taking comments on this proposal and we plan to follow with a final action.

DATES: Comments must be received on or before March 8, 2005.

ADDRESSES: Submit your comments, identified by Docket ID No. OAR–2003–0200, by one of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- Agency Web site: *http://www.epa.gov/edocket.* EDOCKET, EPA's electronic public docket and comment system, is EPA's preferred method for receiving comments. Follow the on-line instructions for submitting comments.
- E-mail: *a-and-r-Docket@epa.gov.*
- Fax: 202–566–1741.
- Mail: OAR Docket: OAR–2003–0200, Environmental Protection Agency, Mailcode: 6102T, 1200 Pennsylvania Ave., NW., Washington, DC 20460.
- Hand Delivery: EPA/DC, Public Reading Room, Room B102, EPA West Building, 1301 Constitution Avenue, NW., Washington, DC. 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 Docket ID No. OAR–2003–0200. 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.epa.gov/edocket,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through EDOCKET, regulations.gov, or e-mail. The EPA EDOCKET and the federal regulations.gov websites are ''anonymous access'' systems, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through EDOCKET or regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit EDOCKET on-line or see the **Federal Register** of May 31, 2002 (67 FR 38102).

For additional instructions on submitting comments, go to Unit I of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: All documents in the docket are listed in the EDOCKET index at *http://www.epa.gov/edocket.* Although listed in the index, some information is not publicly available, *i.e.*, 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 EDOCKET or in hard copy at the OAR Docket, OAR–2003–0200, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OAR Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Stanley Tong, Rulemaking Office (AIR–4), Environmental Protection Agency, Region IX, 75 Hawthorne St., San Francisco, CA 94105; telephone number: (415) 947–4122; fax number: (415) 947–3579; e-mail address: *tong.stanley@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through EDOCKET, regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI). In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

i. Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns, and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

ix. Please strictly limit comments to the subject matter of this proposal, the scope of which is discussed below. Please identify the section/subsection on which you are commenting so we can group similar comments together and better understand the context of your comment.

x. EPA requests that you also send a copy of your comments to: Andrew Steckel, Rulemaking Office Chief (AIR–4), U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901.

3. *Docket Copying Costs.* A reasonable fee may be charged for copying.

B. How Do I Request a Public Hearing?

If you wish to request a public hearing to submit comments concerning this proposal please contact Mr. Stanley Tong, Rulemaking Office (AIR–4), U.S. Environmental Protection Agency, 75 Hawthorne Street, San Francisco, CA 94105, telephone (415) 947–4122. Requests for a public hearing must be made by January 27, 2005. The EPA will publish a notice of a hearing, if a hearing is requested, in the **Federal Register**. Because the State has already held a public notice and comment period for its aerosol coatings rule, any EPA hearing will be strictly limited to the proposed EPA approval of the rule and its inclusion in the California SIP and to the proposed change in the definition of VOCs for 40 CFR 51.100(s). The hearing will not cover the reactivity limits or other specifics of California's rule. If a public hearing is requested, it will be held near our Region IX office in San Francisco, CA.

C. Throughout This Document, ''We,'' ''Us'' and ''Our'' Refer to EPA

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

1. In addition to accessing the official public docket at *http://www.epa.gov/edocket/*, you can also inspect copies of the submitted SIP revision at our Region IX office during normal business hours. EPA requests that you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. You may also see copies of the submitted SIP revision during normal business hours by appointment at the California Air Resources Board, Stationary Source Division, Rule Evaluation Section, 1001 ''I'' Street, Sacramento, CA 95814.

2. A copy of California's aerosol coating products regulation can also be downloaded from the following internet addresses. Please be advised that these are not EPA Web sites and may not contain the same version of the regulations that were submitted to EPA. *http://www.arb.ca.gov/consprod/regs/aeropnt.pdf http://www.arb.ca.gov/consprod/regs/Aeropnt.doc*

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I. The State's Submittal

A. What Regulations Did the State Submit?

Table 1 lists the regulations addressed by this proposal with the date that they were adopted and submitted to EPA by the California Air Resources Board (CARB).

TABLE 1.—SUBMITTED REGULATIONS

Regulation title	Adopted	Submitted
Aerosol Coating Products	5/1/2001	3/13/2002
Tables of Maximum Incremental Reactivity (MIR) Values	5/1/2001	3/13/2002

On May 7, 2002, we found that this submittal meets the completeness criteria in 40 CFR Part 51, Appendix V, as required before formal EPA review.

B. Are There Other Versions of This Regulation?

There is no previous version of the aerosol coating products regulation approved by EPA into the SIP, although CARB adopted an earlier version of this regulation on March 23, 1995, and submitted it to us on December 18, 1998. On November 19, 1998, CARB adopted amendments to this earlier regulation. The CARB did not submit these amendments to us as a SIP revision. There is no previous stand-alone version of the Tables of MIR values in the SIP applicable to aerosol coatings. Today, we are proposing approval of the CARB aerosol coatings rule submitted to us on March 13, 2002. While we can act on only the most recently submitted version of this regulation, we have reviewed materials CARB provided with the previous SIP submittals for informational purposes. Thus, this version of the aerosol coatings rule replaces the earlier versions developed by CARB and, if we approve it, will be the first such rule in the California SIP.

C. What Is the Purpose of the Submitted CARB Regulation?

The regulation covers aerosol coatings, aerosol clear coatings, and aerosol stains. It applies to any person who sells, supplies, offers for sale, applies, or manufactures for use in California any aerosol coating subject to the limits in the regulation. The regulation imposes reactivity-based VOC limits on these products for purposes of reducing ozone caused by VOC emissions.

In the current SIP submittal, CARB has developed a new approach for regulating VOC emissions from aerosol coatings. Traditionally, the VOC emissions from aerosol and other coatings have been controlled by limiting the mass of all VOCs in a product, and VOC content limits of aerosol coatings were expressed as a maximum percent by mass of all VOC. The new approach taken by CARB incorporates the concept of VOC photochemical reactivity. This concept relies on the fact that the same weight/amount of some VOCs (*e.g.*, xylene) has the potential to form more ozone, or to form ozone more quickly, than the same weight/amount of other VOCs (*e.g.*, propane) once they are emitted into the ambient air under the same conditions.

The CARB estimates that its previous mass-based VOC control rule for aerosol coatings resulted in statewide aerosol coating VOC emissions reductions of 9

tons per day (tpd) from the 1989 baseline estimated VOC emissions of 30 tpd of VOC. The CARB calculates that the new reactivity-based aerosol coatings rule in the current submittal would achieve the ''equivalent'' of an additional 3.1 tpd of VOC mass-based reductions statewide. In other words, CARB estimates that this rule will achieve reactivity-based VOC reductions that would be the equivalent of 12.1 tons of mass-based VOC reductions from the 1989 baseline, measured in terms of ozone reduction. The CARB intends its new regulation to encourage manufacturers to reduce use of VOCs with higher reactivity, thereby achieving more ozone reductions than through traditional VOC mass-based regulations.

III. EPA's Evaluation and Action

A. How Is EPA Evaluating the Regulation?

Generally, SIP regulations must be enforceable (see section 110(a)(2)(A) of the CAA), must at a minimum require Reasonably Available Control Technology (RACT) and Reasonably Available Control Measures (RACM) in nonattainment areas (see, for example, sections 172(c)(1), 182(a)(2)(A) and 182(b)(2)), must not interfere with attainment and reasonable further progress or any other applicable requirement of the CAA, and must achieve the pollution reduction requirements of the CAA (see section 110(l)). The CARB's aerosol coatings regulation applies to both ozone attainment and non-attainment areas statewide. Because this regulation covers nonmajor area sources that are not covered by a Control Techniques Guidelines (CTG) document, it is not subject to the RACT requirements for ozone nonattainment areas (CAA, section 182(b)(2)).

Guidance and policy documents that we used to help evaluate enforceability requirements includes: Issues Relating to VOC Regulation Cutpoints, Deficiencies, and Deviations; Clarification to Appendix D of November 24, 1987 **Federal Register,**'' (Blue Book), May 25, 1988, (revised 1/11/90), Office of Air Quality Planning and Standards. We also relied on several technical reports and journals to evaluate CARB's SIP submittal. These reports and journals are referenced in footnotes in the body of this proposal and are included in the docket for this proposal.

B. Does the Regulation Meet the Evaluation Criteria?

We believe that the aerosol coatings rule will improve the SIP by establishing stringent VOC limits for this product category, by improving enforcement through labeling and reporting requirements, and by creating an incentive for the use of solvents with relatively low contribution to ozone formation. The regulation is generally consistent with relevant policy and guidance regarding enforceability. Our approval of the rule would also be consistent with CAA section 110(l), because there is no prior version of the aerosol coatings regulation in the SIP and ozone reductions resulting from the approval of this regulation into the SIP will help in the State's efforts to achieve attainment with the national ambient air quality standard (NAAQS) for ozone. RACT requirements do not apply to the source category covered by the CARB rule because RACT applies to major stationary sources in nonattainment areas and source categories covered by a CTG. Because of their widespread use in relatively small amounts, aerosol coatings are considered area sources rather than major stationary sources. EPA has not issued a CTG or a rule for this category. However, even though federal RACT or consumer product requirements do not yet apply, CARB took the initiative in 1995 to go beyond basic federally mandated VOC reduction requirements by adopting an aerosol coatings regulation with two tiers of aggressive mass-based VOC limits. In its current SIP submittal, CARB is amending its existing regulation by replacing the mass-based limits with reactivity-based limits intended to achieve additional ozone reduction benefits.

Although CARB's existing mass-based aerosol coatings regulation has significantly reduced emissions from aerosol coatings, CARB has concluded that more reductions are needed to help reduce the high ozone concentrations in Southern California and the Central Valley. The CARB also believes that some VOC mass-based limits in the previous version of the rule presented particularly difficult reformulation challenges for manufacturers of water-based coatings,[1] and the State concluded that it may not be feasible to achieve additional VOC reductions from a traditional VOC mass-based program. The current SIP submittal relies on the relative reactivity concept, that is, the fact that individual species of VOC react in the atmosphere to form different amounts of ozone or to form ozone at different rates. The CARB hopes to target VOC emission reductions to better control a product's contribution to ozone formation by encouraging reductions of higher reactivity VOCs, rather than by treating all VOCs in a product alike through a mass-based rule. The submitted regulation therefore consists of reactivity-based limits that replace the existing mass-based VOC limits for aerosol spray coatings.

Although EPA is supportive of reactivity-based programs, we recognize that they may be more complex to develop, enforce, and evaluate than mass-based programs. As a result, it is particularly important for us to evaluate the State agency's ability to implement such programs. The CARB has addressed these concerns partly through an extensive public process spanning over 3 years in the development of the aerosol coatings rule. The CARB held eight public workshops and over 20 meetings with industry, leading scientists, local air districts, and EPA. The CARB also gathered detailed information on the sales and composition of aerosol coatings, funded extensive research on VOC reactivity scales and their applicability to environmental conditions in California, and took steps intended to ensure that no backsliding would occur from adoption of the relative-reactivity approach. To account for potential changes in MIR values as scientific knowledge improves, CARB also committed to improve and update its program by including in its Board resolution [2] the provision ''[t]o review the Tables of Maximum Incremental Reactivity (MIR) Values 18 months after the effective date of the amendments, and every 18 months thereafter, to determine if modifications to the MIR values are warranted.'' The CARB will also ''[r]eview the reactivity-based limits before January 1, 2007 to determine if modifications are necessary to reflect changes to the MIR values and return to the Board with any recommended modifications to the reactivity-based limits.'' [3]

Additional details about the comparison of reactivity-based reductions to VOC mass-based reductions, the appropriateness of CARB's reactivity research to areas outside of California, and the evaluation of the effectiveness of CARB's regulation are provided in the Background section below.

[1] California Air Resources Board, ''Initial Statement of Reasons for the Proposed Amendments to the Regulation for Reducing Volatile Organic Compound Emissions from Aerosol Coating Products,'' Chapter VII, page 60, May 5, 2000.

[2] State of California Air Resources Board Resolution 00–22, June 22, 2000, Agenda Item No. 00–6–1.

[3] State of California Air Resources Board Resolution 00–22, June 22, 2000, Agenda Item No. 00–6–1.

Information normally found in a Technical Support Document (TSD) is incorporated into this proposed rule. A separate TSD has not been written for this proposed rulemaking.

C. Public Comment and Final Action

Because EPA believes the submitted aerosol coatings regulation fulfills all relevant requirements, we are proposing to approve it into the California SIP as authorized in section 110(k)(3) of the CAA. We are also proposing to approve the use of CARB's Tables of MIR values in California for the purpose of implementation of the aerosol coatings regulation. We intend to grant SIP credit for the ozone equivalent VOC mass-based reductions that are achieved by CARB's reactivity-based regulation. Details on the methodology CARB used to determine the equivalent VOC mass-based tonnage reduction achieved by its reactivity regulation is discussed in the CARB staff report.[4]

Currently, EPA's regulatory definition of VOC (40 CFR 51.100(s)) excludes certain compounds, such as methane and ethane, which EPA has determined to have negligible photochemical reactivity with respect to the formation of ozone. California's reactivity-based regulation, however, requires the inclusion of the assigned MIR scale reactivity value of each organic compound present in the volatile portion of a product, even if the compound's reactivity value is so low that EPA has previously determined it to be negligibly reactive and therefore exempt.

In order to approve CARB's aerosol coatings rule, EPA proposes to modify our regulatory definition of VOC so that compounds previously excluded will now be counted towards a product's reactivity-based VOC limit for the limited purpose of CARB's aerosol coatings reactivity-based regulation. Under 40 CFR 51.100(s), EPA has excluded compounds from the definition of VOC in recognition of the fact that individual organic compounds differ with respect to their incremental contribution to ozone formation. EPA's exemption-based system separates organic compounds into reactive and negligibly reactive compounds. The CARB's reactivity-based regulation makes this distinction unnecessary because CARB's rule assigns each compound a reactivity factor that accounts for its relative contribution to ozone formation. These previously exempted compounds will continue to be excluded from the Federal definition of VOCs for other purposes.

We will accept comments from the public on this proposed approval of the CARB aerosol rule into the SIP and the proposed modification of our definition of VOC for the next 60 days. Unless we receive convincing new information during the comment period, we intend to publish a final approval action that will incorporate the regulations listed in Table 1 into the federally enforceable SIP and modify our definition of VOC to support CARB's aerosol coating rule.

The EPA, with CARB's assistance, intends to evaluate the performance of this reactivity-based regulation in 3 years. This will allow time to compile data on the implementation of, and compliance with, the regulation, and will allow time to conduct additional technical analysis such as modeling efforts needed to evaluate the effect of the regulation on ambient ozone levels. We encourage CARB to use this time to collect data on the costs and effectiveness of this regulation, both to the regulated entities and to the regulators. In particular, EPA is interested in how implementation of this regulation affects the development of detailed emission inventories, as well as industry compliance costs, including recordkeeping and compliance testing, manufacturing or material costs, product quality and price. Towards this goal, we are relying upon CARB's Board resolution [5] which ''[d]irects the Executive Officer to take the following actions: (1) Monitor the progress of manufacturers in meeting the reactivity-based VOC limits, (2) propose any future regulatory modifications that may be appropriate, and (3) continue to evaluate emerging technologies for aerosol coatings to determine if additional ozone reductions will be feasible in the future.''

The proposed approval of CARB's aerosol coatings regulation based upon VOC reactivity is limited to this source category for this State. EPA believes that relative reactivity-based regulations may help provide the flexibility necessary to achieve further emissions reductions from some source categories to address persistent ozone nonattainment problems in areas of the country that need further reductions in VOC emissions to come into attainment with federal ozone standards. EPA is committed to continuing its support of research on the suitability of relative reactivity-based regulations to other geographic regions and to other source categories through the national Reactivity Research Working Group (RRWG) of which CARB and EPA are members.[6] The purpose of the RRWG is to encourage and sponsor research on scientific questions concerning VOC reactivity which may be of interest to regulators. This group is affiliated with NARSTO (formerly known as the North American Research Strategy for Tropospheric Ozone) and is a voluntary organization currently composed of industry, government and academic representatives. The group has an open membership and anyone may attend the meetings and participate.

The EPA is specifically seeking public comment on how reactivity-based programs might affect industry compliance and recordkeeping costs to support effective implementation and enforcement, and how industry and regulatory agency costs and staff requirements might change with respect to emission inventories.

We are not seeking comments on the reactivity limits or other specifics of CARB's rule; nor are we seeking comments on EPA's VOC exemption process. The EPA has previously published in 63 FR 48792 (September 11, 1998) its views on reactivity as it relates to the regulation of VOC emissions from consumer products pursuant to CAA § 183(e) and this proposal should not be construed as a change in the Agency's interpretation of that provision. When commenting, please indicate which section of this proposal you are commenting on so we can group similar comments together.

III. Background Information

A. Why Was This Regulation Submitted?

Ground level ozone, commonly referred to as ''smog,'' is a serious air pollutant that harms human health and the environment. Ground level ozone is a complex problem that is difficult to control in part because ozone is not emitted directly by specific sources. It forms in the air when there are chemical reactions between nitrogen oxides (NO_X) and VOCs in the presence of heat and sunlight. Therefore, one way to reduce ozone levels in many areas is to control emissions of VOCs. Section 110(a) of the CAA requires States to submit regulations that control VOC emissions as part of the State's SIP.

B. What Is Photochemical Reactivity?

There are thousands of individual species of VOC chemicals that can

[4] California Air Resources Board, ''Initial Statement of Reasons for the Proposed Amendments to the Regulation for Reducing Volatile Organic Compound Emissions from Aerosol Coating Products,'' Chapter II, page 37, May 5, 2000.

[5] State of California Air Resources Board Resolution 00–22, June 22, 2000, Agenda Item No. 00–6–1.

[6] See ''VOC Reactivity'' at *http://www.cgenv.com/Narsto/*.

combine with NO_X and the energy from sunlight to form ozone. The impact of a given VOC on formation of ground-level ozone is sometimes referred to as its ''reactivity.'' It is generally understood that not all VOCs are equal in their effects on ground-level ozone formation. Some VOCs react extremely slowly and changes in their emissions have limited effects on ozone pollution episodes. Some VOCs form ozone more quickly, or they may form more ozone than other VOCs. Others not only form ozone themselves, but also enhance ozone formation from other VOCs. By distinguishing between more reactive and less reactive VOCs, however, it should be possible to decrease ozone concentrations further or more efficiently than by controlling all VOCs equally.

Assigning a value to the reactivity of a compound is not straightforward. Reactivity is not simply a property of the compound itself; it is a property of both the compound and the environment in which the compound is found. The reactivity of a single compound varies with VOW–NO_X ratios, meteorological conditions, the mix of other VOCs in the atmosphere, and the time interval of interest. Designing an effective regulation that takes account of these interactions is difficult, and implementing and enforcing such a regulation carries the extra burden of characterizing and tracking the full chemical composition of VOC emissions.

1. History of EPA's VOC Policy

Historically, EPA's general approach to regulation of VOC emissions has been based upon control of total VOCs by mass, without distinguishing between individual species of VOC. EPA considered the regulation of VOCs by mass to be the most effective and practical approach based upon the scientific and technical information available when EPA developed its VOC control policy.

EPA issued the first version of its VOC control policy in 1971, as part of EPA's SIP preparation guidance.[7] In that guidance, EPA emphasized the need to reduce the total mass of VOC emissions, but it also suggested that substitution of one compound for another might be useful when it would result in a clearly evident decrease in reactivity and thus tend to reduce photochemical oxidant formation. This latter statement encouraged States to promulgate SIPs with VOC emission substitution provisions similar to the Los Angeles County Air Pollution Control District's (LACAPCD) Rule 66,[8] which allowed some VOCs that were believed to have low to moderate reactivity to be exempted from control. The exempt status of many of those VOCs was questioned a few years later, when research results indicated that, although some of those compounds do not produce much ozone close to the source, they may produce significant amounts of ozone after they are transported downwind from urban areas.[9]

In 1977, this research led EPA to issue the second version of its VOC policy under the title ''Recommended Policy on Control of Volatile Organic Compounds,'' (42 FR 35314, July 8, 1977) offering its own, more limited list of exempt organic compounds. The 1977 policy identified four compounds that have very low photochemical reactivity and determined that their contribution to ozone formation and accumulation could be considered negligible. The policy exempted these ''negligibly reactive'' compounds from VOC emissions limitations in programs designed to meet the ozone NAAQS. Since 1977, the EPA has added other compounds to the list of negligibly reactive compounds based on new information as it has been developed. In 1992, the EPA adopted a formal regulatory definition of VOC for use in SIPs, which explicitly excludes compounds that have been identified as negligibly reactive [40 CFR 51.100(s)]. To date, EPA has exempted 53 compounds or classes of compounds in this manner.

In effect, EPA's current VOC exemption policy has resulted in a two-bin system in which most compounds are treated equally as VOCs and are controlled and a separate smaller group of compounds are treated as negligibly reactive and are exempt from VOC control.[10] This approach was intended to encourage the reduction of emissions of all VOCs that participate in ozone formation. From one perspective, it appears that this approach has been relatively successful. EPA estimates that, between 1970 and 2003, VOC emissions from man-made sources nationwide have declined by 54 percent. This decline in VOC emissions has helped to decrease average ozone concentration by 29 percent (based on 1-hour averages) and 21 percent (based on 8-hour averages) between 1980 and 2003. These reductions have occurred even though, between 1970 and 2003, population, vehicle miles traveled, and gross domestic product have risen 39 percent, 155 percent and 176 percent respectively. [Latest Findings on National Air Quality: 2002 Status and Trends, EPA 454/K–03–001, August 2003; and The Ozone Report Measuring Progress through 2003, EPA 454/K–04–001, April 2004; Environmental Protection Agency, Office of Air Quality Planning and Standards, Research Triangle Park, North Carolina]

On the other hand, some have argued that a reactivity-based approach for reducing VOC emissions would be more effective than the current mass-based approach. One group of researchers conducted a detailed modeling study of the Los Angeles area and concluded that, compared to the current approach, a reactivity-based approach could achieve the same reductions in ozone concentrations at significantly less cost—or for a given cost, could achieve a significantly greater reduction in ozone concentrations.[11] EPA recognizes that, in theory, a well designed reactivity-based program, in which each individual VOC is regulated more or less stringently based on its actual contribution to ozone formation, would be more efficient than the current approach. On the other hand, there are significant practical difficulties involved in designing, implementing, and enforcing such a program. We believe that the CARB program we are proposing to approve today will help EPA and other States to evaluate whether the benefits of a reactivity-based approach are sufficient to outweigh these practical difficulties.

We also recognize that, in spite of the progress that most parts of the country

[7] U.S. Environmental Protection Agency. ''Requirements for Preparation, Adoption, and Submittal of Implementation Plans.'' **Federal Register,** 36 FR 15486–15506 (1971).

[8] County of Los Angles, Air Pollution Control District (1972). Rules and Regulations. Rule 66 (1966). Amended November 2, 1972.

[9] Dimitriades, B. ''Oxidant/03 Air Quality Benefits from Emission Substitution.'' In: ''Proceedings. Hydrocarbon Control Feasibility. Its Impact on Air Quality'' (and references herein). Speciality Conference, Air Pollution Control Association, April, 1977.

[10] It should be noted that EPA has also taken VOC reactivity into consideration in other ways, such as the development of the consumer and commercial product regulations under CAA § 183(e). EPA considered VOC reactivity as a factor in developing the federal consumer products program as directed by the statute, and EPA's approach was confirmed by the courts. *See, Allied Local & Regional Mfrs. Caucus* v. *EPA,* 215 F.3d 61 (D.C. Cir. 2000), cert. denied 532 U.S. 1018 (2001). The EPA plans to develop its own regulation for aerosol coating products under CAA § 183(e). Our future regulation may differ from CARB's regulation. If this turns out to be the case, a process will need to be developed to verify that the State's requirements and limits are at least as stringent as those in the national standard.

[11] A. Russell, J. Milford, M. S. Bergin, S. McBride, L. McNair, Y. Yang, W. R. Stockwell, B. Croes, ''Urban Ozone Control and Atmospheric Reactivity of Organic Gases,'' Science, 269: 491–495, (1995).

have made in reducing ozone concentrations, further reductions in VOC emissions will likely be needed to bring a number of areas into attainment with the 8-hour ozone standard. In particular, in areas where significant VOC emission controls are already in place, further mass-based emission reductions may be difficult or very expensive to achieve. In such situations, regulations that distinguish between individual VOCs and create an incentive to shift production and use from more reactive VOCs to less reactive VOCs may provide the flexibility necessary to continue progress towards attainment of the ozone NAAQS.

2. History of CARB's Reactivity Work

Regulatory authorities in California have been experimenting with the concept of reactivity-based regulations for some time. The first regulation in California that took reactivity into account was Rule 66,[12] adopted in the mid 1960s by LACAPCD. This rule restricted emissions of certain classes of compounds which were defined by the rule as photochemically reactive based on their chemical structure (*e.g.,* compounds having olefinic type of unsaturation) to 40 pounds per day, but allowed up to 3000 pounds per day emissions for many other organic compounds which were not defined by the rule as photochemically reactive. In other words, Rule 66 sought to regulate certain VOCs more than others, based on the assumption that some VOCs participate more in ozone formation. Rule 66 was very influential at the time and versions of it were adopted by several other States. However, the VOC control approach taken by Rule 66 has been superseded by EPA's definition of VOC (57 FR 3941, February 3, 1992), which was based on the 1977 EPA policy statement and which only exempted a smaller number of negligibly reactive compounds.

Like EPA's 1977 policy, Rule 66 was really a ''two bin'' system which tightly controlled certain compounds, which were defined as more photochemically reactive, and applied a much lesser level of control to a large class of compounds, which were regarded as less reactive. The main difference between Rule 66 and the later EPA VOC definition approach was the criteria for classifying compounds as exempt (or subject to lesser control), with the EPA definition allowing a much smaller group of compounds to be considered non-reactive or exempt.

In 1991 California adopted regulations intended to differentiate between species of VOC based upon a reactivity scale, instead of a two bin system. The 1991 rules were the Low-Emission Vehicles and Clean Fuels regulations that CARB intended to reduce VOC emissions by mass from motor vehicles generally, but which also took into account VOC reactivity differences in organic gas when comparing the emissions from alternatively fueled vehicles (AFVs).[13] [14] Although not a full-blown attempt to regulate VOCs by their relative reactivity, CARB nonetheless began the exploration of the MIR scale as a mechanism to distinguish between VOCs and encourage reduction of more reactive VOCs.

Today's proposal addresses CARB's most recent effort to utilize the concept of VOC relative reactivity and the MIR scale to regulate VOC emissions. This rule reflects a major shift from the traditional mass-based control strategies for reduction of VOC emissions and introduces this concept in a far more significant way than in CARB's previous actions. In connection with the SIP submittal for this aerosol coatings rule, CARB has provided additional supporting information in the form of journal articles and reports which describe VOC reactivity research efforts.

3. What Research Has Been Conducted in Reactivity?

Much of the work on reactivity scales that CARB used as a basis for its aerosol coatings rule was done at the University of California at Riverside by William P. L. Carter. Carter investigated 18 different ozone reactivity scales.[15] All of these scales are based on chamber studies intended to evaluate the impact of a given VOC on ozone formation under certain assumed conditions. The three most prominent scales he developed were:

i. Maximum Incremental Reactivity (MIR) scale—an ozone yield scale derived by adjusting the NO_X emissions in a base case to yield the highest incremental reactivity of the base reactive organic gas mixture.[16]

ii. Maximum Ozone Incremental Reactivity (MOIR) scale—an ozone yield scale derived by adjusting the NO_X emission in a base case to yield the highest peak ozone concentration.

iii. Equal Benefit Incremental Reactivity (EBIR) scale—an ozone yield scale derived by adjusting the NO_X emissions in a base case scenario so VOC and NO_X reductions are equally effective in reducing ozone.

In addition to Carter's work, there have been other attempts to create reactivity scales. One such effort is the work of R. G. Derwent and M. E. Jenkins, who have published articles on a scale called the photochemical ozone creation potential (POCP) scale.[17] This scale was derived for the conditions prevalent in Europe. The POCP scale is roughly consistent with those of Carter although, as expected, there are some differences because the POCP scale is based on European conditions.

The CARB has relied most heavily on Carter's research for its regulatory development and CARB has used the MIR scale for development of the aerosol coating regulation.[18] The MIR scale is designed using certain assumptions about meteorological and environmental conditions where ozone production is most sensitive to changes in hydrocarbon emissions and, therefore, is intended to represent conditions where VOC emission controls will be most effective. The MIR scale is expressed as grams of ozone formed per gram of organic compound reacted. Each compound is assigned an individual MIR value, which enables the reactivities of different compounds to be compared quantitatively. Individual MIR values now exist for many commonly used compounds, and a list of these individual values comprises a scale.

To evaluate reactivity scales and ensure that VOC reactivity is used appropriately in its proposals, CARB created the Reactivity Scientific Advisory Committee (RSAC), a group of leading researchers in the field of atmospheric science. This group reviews CARB's reactivity related work

[12] The South Coast Air Quality Management District (SCAQMD), the successor agency to LACAPCD, renamed this Rule 442.

[13] California Air Resources Board ''Proposed Regulations for Low-Emission Vehicles and Clean Fuels-Staff report and Technical Support Document,'' State of California, Air Resources Board, Sacramento, CA, August 13, 1990.

[14] California Air Resources Board ''Proposed Regulations for Low-Emission Vehicles and Clean Fuels-Final Statement of Reasons,'' State of California, Air Resources Board, July, 1991.

[15] Carter, William P. L., ''Development of Ozone Reactivity Scales for Volatile Organic Compounds,'' J. Air & Waste Manage. Assoc., 44: 881–899, (1994).

[16] The CARB's reactivity regulation defines the term Reactive Organic Compound (ROC) as any compound that has the potential, once emitted to contribute to ozone formation in the troposphere. ROCs include compounds which are excluded from EPA's definition of VOCs as found in 40 CFR 51.100(s).

[17] See, for example, R. G. Derwent and M.E. Jenkin, ''Hydrocarbons and the Long-Range Transport of Ozone and PAN Across Europe,'' Atmospheric Environment, 25A, No. 8, 1661–1678, (1991).

[18] California Air Resources Board, ''Initial Statement of Reasons for the Proposed Amendments to the Regulation for Reducing Volatile Organic Compound Emissions from Aerosol Coating Products,'' Chapter II, page 12, May 5, 2000.

and convenes periodically in meetings which are open to the public to comment on CARB's work.

The EPA has been closely following the scientific literature on reactivity scales, and is interested in how such reactivity scales might be applied to national programs or programs in other States. Because reactivity depends on the characteristics of the environment as well as the compound, scales are developed to represent a particular set of environmental conditions in certain geographic locations. It is not clear whether a single scale can represent actual ozone formation over the whole country where meteorological and environmental conditions vary considerably. Many scales, including the MIR scale are derived for ozone formed during one day of reaction time. The EPA is interested in whether such scales adequately represent the ozone formation from VOCs during multi-day stagnation events or long-range transport of pollutants, in such places as those seen in the Northeast section of the country, which may take place over several days.

To help answer such questions, EPA and CARB are participating in the RRWG, which sponsored three atmospheric photochemical modeling studies to examine how changing the reactivity of the mix of VOC emissions might affect ozone formation across wide geographical areas over time. The three areas that researchers studied were the Houston area, North Carolina, and the eastern half of the United States. The EPA anticipates that these three studies and follow-up efforts will help to answer many questions about the potential use of relative reactivity in developing, implementing, and enforcing VOC regulatory programs.

C. Why Is Use of the Relative Reactivity Concept Appropriate in California's Aerosol Coatings Rule?

There are five classes of nonattainment for the 1-hour ozone standard, ranging from marginal to extreme. The Los Angeles—South Coast Air Basin Area and the San Joaquin Valley—San Joaquin Valley Air Basin in California are currently the only areas in the nation in the worst category of extreme nonattainment (40 CFR 81.305 and 69 FR 20550). Under the 8-hour standard, there are no areas classified under the ''extreme'' ozone non-attainment category. South Coast is classified as severe non-attainment and San Joaquin is classified as serious non-attainment under the 8-hour standard. Because of the elevated ozone levels in Los Angeles, the San Joaquin Valley and elsewhere in California, CARB has adopted many innovative rules and regulations to help reduce ozone precursor emissions. These efforts include adopting regulations which go beyond current federally-mandated VOC reduction requirements, such as regulating a wider variety of area and mobile sources and establishing aggressive emission standards that force development of new low-emission technologies.

As one such effort, CARB already adopted a statewide regulation in 1995 limiting the VOC mass content of 35 categories of aerosol coatings. This regulation contained two tiers of VOC limits and a provision to extend the compliance deadline for up to 5 years for each aerosol coating category if it was determined that the limits were not feasible. On November 19, 1998, CARB amended the regulation to relax the limits for 12 coating categories after determining that the original limits were not feasible even with the 5-year extension. CARB made limits for 11 other categories more stringent. The CARB also extended the compliance date to January 1, 2002, for all 35 product categories covered by the aerosol coating rule to provide time for manufacturers to comply with the new limits.

In the current SIP submittal, CARB has determined that even with the extended compliance date, some of the VOC content limits remain technologically challenging. In order to preserve the air quality benefits of its 1998 rule, while at the same time allowing manufacturers greater flexibility in reformulating their products, CARB is replacing its pre-existing mass-based VOC limits for aerosol spray coatings with reactivity-based limits that are designed to achieve equivalent air quality benefits. The CARB's explicit goal was to develop reactivity-based limits that would ensure that the ozone reduction commitment from its second tier mass-based VOC limits would not be compromised.[19] For the reasons set forth below, EPA believes that CARB's amended aerosol spray coating regulation achieves this goal.

1. Equivalency of Air Quality Benefits

i. Sufficient information about the source category. In order to determine equivalent ozone reductions and set appropriate limits, CARB collected detailed product speciation information and sales data from manufacturers. For the aerosol coatings category, CARB found that over 80 percent of the species of VOCs typically used as ingredients were well-studied and an additional 17 percent of the species typically used would need only minor adjustment for uncertainty in their MIR values. In other words, CARB concluded that the reactivity values of over 95 percent of the VOCs generally used in the specific category of aerosol coatings were fairly well-studied and understood.[20] The accuracy and completeness of the VOC inventory, and the availability of scientifically reviewed and published reactivity values for those VOCs used in aerosol coatings may not be available for other consumer product categories. The CARB's reactivity regulation defines the term ''reactive organic compound'', or ''ROCs,'' as any compound that has the potential, once emitted, to contribute to ozone formation in the troposphere. The ROCs include compounds which EPA has excluded from the regulatory definition of VOCs found in 40 CFR 51.100(s). To minimize confusion to the reader, we will continue to use the term ''VOC'' in the remainder of this proposal, instead of ''ROC.'' When the term ''VOC'' is used in the context of CARB's reactivity-based aerosol coatings rule, the reader should remember that this refers to all VOCs, including those compounds that are excluded from EPA's regulatory definition of VOC. The accurate identification and measurement of individual VOC compounds and development of accurate MIR values is crucial to the effectiveness of a reactivity program.[21]

ii. Sufficient information about the reactivity scale and its applicability to California. In conjunction with this SIP submittal, CARB provided a listing of approximately 50 research articles to help support its conclusion that this aerosol coatings regulation based upon VOC relative reactivity is appropriate for conditions in California and that the MIR scale chosen by CARB is the most appropriate scale for this regulation.

As stated earlier, CARB relies on the work of Carter in the development of the scale for the aerosol coatings rule. Carter investigated 18 different ozone reactivity scales and concluded ''[t]hat the MIR scale (or a scale similar to it,

[19] California Air Resources Board, ''Initial Statement of Reasons for the Proposed Amendments to the Regulation for Reducing Volatile Organic Compound Emissions from Aerosol Coating Products,'' Executive Summary, page 2, May 5, 2000.

[20] California Air Resources Board, ''Initial Statement of Reasons for the Proposed Amendments to the Regulation for Reducing Volatile Organic Compound Emissions from Aerosol Coating Products,'' Chapter IV, page 36, May 5, 2000.

[21] B.J. Finlayson-Pitts, J.N. Pitts Jr, ''Atmospheric Chemistry of Tropospheric Ozone Formation: Scientific and Regulatory Implications,'' J. Air Waste Manage. Assoc. 43:1091–1100, (1993).

such as one based on integrated ozone over the standard) is appropriate for regulatory applications where a reactivity scale is required.'' [22] He determined that, while different reactivity scales might give different reactivity orderings of VOCs, for most VOC species the general rankings among the different scales were very similar. He also found that even relatively large variations in the base ROG mixture [23] had, in most cases, only a small effect on relative reactivity. For example, a two-fold increase in the amount of aromatics in the base mixture of VOCs in the chamber study resulted in less than a 20 percent change in the relative MIR reactivity. From this it could be inferred that significant changes in the ambient mixture of VOCs in the atmosphere would not significantly change the relative MIR value.

The various studies conducted to date show good agreement in reactivity values for most VOC species between normalized reactivity scales generated by airshed models and Carter's box-modeled calculations. For example, Bergin *et al.*,[24] summarized a number of papers comparing reactivity scales predicted by airshed models to those predicted by Carter using a box-model. Most of the papers are based on simulations conducted with the Carnegie Mellon/California Institute of Technology model (CIT) for Los Angeles using the ozone episode of August 27–29, 1987. Bergin reports that airshed model-derived spatially weighted results behave similarly to MIRs.[25] The report further states that the greatest differences were found for formaldehyde and other compounds whose reactivities were highly dependent on photolytic reactions, and in general, airshed model results for Los Angeles agree well with MIRs, and further show that individual organics have very different ozone formation impacts.

While Bergin's reactivity assessment indicates a general support for the concept of relative reactivity, she also points out that gaps exist in the current knowledge base of the scientific community and points to areas where further investigation is needed. For example, Bergin acknowledges that although airshed model results for Los Angeles agree well with MIRs, such a study has not been conducted for other regions. Also, Bergin suggested that additional work is needed to examine the effects of aromatics under several different conditions, and that Eastern transport conditions should also be examined in a multi-day scenario. The RRWG is currently reviewing studies which examine the reactivities in the eastern half of the United States which will help to answer some of these questions.

Similarly, recent work by Martien and Harley found that ''[f]or most species studied'' * * * ''[r]eactivity scales developed by 3-D modeling resulted in similar rankings of individual VOC when compared to reactivity scales developed by Carter using a box model.'' [26] They also point out that ''[S]ite-to-site differences (in reactivity values) can be large when absolute reactivity scales are considered. The variation in reactivity across sites is reduced when reactivity is measured on a relative rather than absolute scale. Differences in relative reactivity may still occur as a function of location, with differences likely to be magnified where absolute reactivities are low.''

One study submitted by CARB to EPA attempts to address the issue of whether the MIR scale adequately represents VOC reactivity in transport scenarios. Kaduwela and his associates [27] assessed for the first time whether box-model based scales are applicable to regional-scale domains, which include transport of pollutants through urban and rural areas. They did this by conducting grid-based photochemical simulations in a regional domain in central California for five compounds and found a linear correlation between box-model based scales and regional grid-based scales. These studies indicate a correlation between box-model scales used in Carter's work and the more detailed scales. Therefore, CARB concludes that the box-model's lack of physical detail and shorter episode time does not limit the suitability of the MIR values with respect to concerns about transport within California.

During an October 1999 RSAC meeting, a member of the public asked the RSAC whether the scenarios used to calculate MIRs are realistic. The RSAC committee ''[r]esponded that the relative reactivity doesn't change between scenarios and that, in a study which examined an exposure metric calculated by a 3-D model, the relative reactivities correlated well with MIRs.'' [28] At the same meeting, a member of the public also asked the RSAC if MIR conditions were appropriate for California. The committee's response was that whether MIR conditions were appropriate for California was a policy decision. The CARB's SIP submittal states [29] that ''[w]hile the MIR scale has been extensively tested as appropriate for use in California, we caution that our research has focused on California atmospheric conditions only. As such, the suitability of using the MIR scale for regulatory purposes in other parts of the United States has not been demonstrated, and may not be appropriate.''

iii. Approach to Uncertainty. Although the MIR values are calculated with what a peer reviewed report [30] describes as a ''state-of-the-science'' chemical mechanism, the reactivity values of some VOCs are still uncertain,[31] while those of other VOCs have been more thoroughly studied and will not likely change with further research. To account for this uncertainty, CARB has applied Carter's uncertainty ranking which defines 6 categories or ''bins'' to describe the ''certainty'' of the chemical mechanism used to determine the MIR values. The uncertainty scale is subjective, but it is described as Carter's best judgment of the certainty scientists currently have of an organic compound's chemical

[22] W.P.L. Carter, ''Development of Ozone Reactivity Scales for Volatile Organic Compounds,'' J. Air Waste Manage. Assoc. 44:881–899, (1994).

[23] From Carter's article on ''Development of Ozone Reactivity Scales for Volatile Organic Compounds,'' the term ''base ROG mixture'' means the mixture of Reactive Organic Gases (ROGs) initially present or emitted in the Empirical Kinetic Modeling Approach (EKMA) scenarios except for biogenic VOCs, VOCs present aloft, or VOCs added for the purpose of calculating their incremental reactivities.

[24] M. Bergin, W.P.L. Carter, J. Milford, P.J. Ostrowski, A.G. Russell, Reactivity Assessments, Reactivity Research Working Group (May 5, 1999). (*ftp://ftp.cgenv.com/pub/downloads/RRWGdoc/assess-2.pdf*).

[25] M. Bergin, W.P.L. Carter, J. Milford, P.J. Ostrowski, A.G. Russell, Reactivity Assessments, Reactivity Research Working Group, Page 12, (May 5, 1999). (*ftp://ftp.cgenv.com/pub/downloads/RRWGdoc/assess-2.pdf*).

[26] P. Martien, R.Harley, ''Development of Reactivity Scales via 3-D Grid Modeling of California Ozone Episodes,'' Final report prepared for California Air Resources Board, May 2002.

[27] A. Kaduwela, V. Hughes, L. Woodlouse, P. Allen, J. DaMassa, A. Ranzieri, ''Photochemical Reactivity of Organic Compounds in Central California: A Grid-Based Modeling Study,'' Presented at Stanford University, CA July 26–28, 1999.

[28] Minutes of the Reactivity Scientific Advisory Committee, October 8, 1999, *http://www.arb.ca.gov/research/reactivity/rsac/oct99-min.html*.

[29] State Implementation Plan (SIP) Submittal letter from Michael Kenny (CARB) to Wayne Nastri (US EPA, Region IX), March 13, 2002.

[30] W.R. Stockwell, ''Review of the Updated Maximum Incremental Reactivity Scale of Dr. William Carter,'' Prepared for the California Air Resources Board, Page 151, November 29, 1999—A copy can be found in section 4N of CARB's SIP submittal for this rule.

[31] California Air Resources Board, ''Initial Statement of Reasons for the Proposed Amendments to the Regulation for Reducing Volatile Organic Compound Emissions from Aerosol Coating Products,'' Chapter II, Page 13, May 5, 2000.

reaction mechanism and its effect on that compound's estimated MIR value [32]. If the MIR value of a compound is relatively certain or if there are some uncertainties but the MIR value is not expected to change significantly, the compound is assigned to bin one. If the current mechanism is probably incorrect and biases in atmospheric reactivity predictions are uncertain, the compound is assigned to bin six. When calculating an equivalent ozone reduction, CARB identifies which of the 6 bins a compound is in, and then multiplies the compound's MIR value with a factor of between 1 and 2 to compensate for the uncertainty of that MIR value. The uncertainty factors associated with each bin were developed by CARB with input from Carter. The CARB applies an uncertainty factor of 1.0 to compounds classified within uncertainty bins one and two; a factor of 1.25 to compounds in bin three; a factor of 1.5 to compounds in bin four; and a factor of 2.0 for compounds in bins five and six. For certain hydrocarbon solvents defined under the regulation, CARB uses an uncertainty factor of 1.15. The CARB also developed a methodology for those compounds used in aerosol coatings that did not have published MIR values. The methodology, which was reviewed by the RSAC, provides an estimate for the presumed upper limit MIR value. No adjustment factor is applied to the upper limit MIRs as the method infers the highest reactivity of the chemical.[33]

Other researcher [34] [35] [36] looking into the aspects of uncertainties in chemical reaction rate parameters, used in the model to calculate MIRs, believe that the uncertainties in the chemical rate parameters have directionally similar effects on the reactivities of most compounds. That is, if compound ''a'' had a higher reactivity value than compound ''b,'' then after taking into account the uncertainties in their chemical rate parameters, compound ''a'' would generally still have a higher reactivity value than compound ''b.'' These researchers conclude that the significance of these uncertainties could be minimized by using reactivities in a relative sense, as CARB has done in this rule.

iv. Do Federal VOC exemptions apply to CARB's program?

Because CARB's regulation attempts to account for the actual contribution to ozone formation by each organic compound, it does not exempt any reactive compounds, including those that EPA has exempted from the definition of VOC pursuant to 40 CFR 51.100(s). In order to get a more accurate calculation of a product's impact on ozone formation, CARB uses the assigned reactivity value of each compound, however high or low its MIR value. Therefore, compounds such as acetone, which are excluded from EPA's definition of VOCs in 40 CFR 51.100(s), are counted towards the compliance limit under CARB's reactivity-based regulation.

v. No backsliding. In developing the proposed reactivity limits, one of CARB's goals was to ensure that the ozone reduction commitment from the existing mass-based VOC limits for aerosol spray coatings would not be compromised. In certain situations, however, a reactivity-based regulation could result in increased ozone concentrations over a traditional VOC mass-based regulation. For instance, because the MIR scale is based on a 1-day simulation, during a multi-day episode, a manufacturer could substitute the proper amount or too much of a lower reacting compound for a higher reacting one and thereby increase ozone formation over longer periods of time.

While we believe there are circumstances under which ozone formation could potentially increase because of use of reactivity-based VOC limits, we also recognize that the same unintended consequences can occur with current mass-based VOC rules. The CARB reported [37] that one company intended to comply with stricter CARB VOC mass-based limits by using less total VOC, but also by increasing the amount of much more reactive VOCs to compensate for solvency needs in the product. The CARB also reported that another large company indicated that its compliance strategy with more stringent VOC mass limits would be to increase the aromatic content (increasing reactivity) in its products. In these instances, CARB points out that the increased reactivity of the VOC emissions likely reduces the benefits of the lower mass of VOC emissions. There is no evidence to suggest, however, that regulated entities will always choose to use smaller amounts of higher reactivity compounds in place of lower reactivity compounds when a product's mass-based VOC limit is reduced. In any event, it is impossible to predict whether the use of smaller amounts of more reactive VOCs will result in more ozone without knowing how the identity and proportions of the other VOC ingredients in the product will change. While we acknowledge that there is the potential for this unintended consequence of mass-based controls, we generally believe that achieving significant mass reductions of VOCs is directionally correct in most situations. As noted above, however, EPA believes that reactivity-based approaches such as the one developed by CARB may be a promising alternative to mass-based approaches in some cases where additional VOC controls are necessary.

Revisions to the SIP should contribute to progress towards reaching attainment with the NAAQS and not relax emission standards or retreat from emission reduction goals already achieved. Towards these goals, CARB has assured EPA that there will be no backsliding as a result of the use of the relative reactivity approach. With assistance from CARB, EPA intends to monitor the effectiveness of the aerosol coatings rule to ensure that the rule obtains the intended and required reductions in ambient ozone levels.

2. Evaluation and Revision

The development, maintenance, evaluation, and revision of a reactivity-based VOC regulation requires significant resources and technical expertise. The CARB's commitment to the reactivity concept is evidenced by funding, between 1989 to the present, over $4,000,000 worth of research on reactivity related projects including modeling, chemical mechanism development, atmospheric chemistry and VOC speciation.

Similarly, we believe that additional resources and technical expertise are needed to implement and enforce a reactivity-based regulation than for a traditional mass-based regulation. For example, under a mass-based VOC regulation, analysis of a coating to

[32] W.R. Stockwell, ''Review of the Updated Maximum Incremental Reactivity Scale of Dr. William Carter,'' Prepared for the California Air Resources Board, Page 122, November 29, 1999—A copy can be found in section 4N of CARB's SIP submittal for this rule.

[33] California Air Resources Board, ''Initial Statement of Reasons for the Proposed Amendments to the Regulation for Reducing Volatile Organic Compound Emissions from Aerosol Coating Products,'' Chapter IV, pages 32–37, May 5, 2000.

[34] Y. Yang, W.R. Stockwell, J.B. Milford, ''Uncertainties in Incremental Reactivities of Volatile Organic Compounds,'' Environ. Sci. Technol., 29, 1336–1345, (1995).

[35] M.S. Bergin, A.G. Russell, J.B. Milford, ''Effects of Chemical Mechanism Uncertainties on the Reactivity Quantification of Volatile Organic Compounds Using a Three-Dimensional Air Quality Model,'' Environ. Sci. Technol., 32, 694–703, (1998).

[36] N.L. Kelly, T.Y. Chang, ''An experimental Investigation of Incremental Reactivities of Volatile Organic Compounds,'' Atmospheric Environment, 33, 2101–2110, (1999).

[37] California Air Resources Board letter from Michael Kenny to Deborah Jordan, U.S. EPA, Region IX, dated July 24, 2000.

determine compliance largely requires simply determining the weight difference of a sample before and after heating it in an oven [38]. This testing is relatively easy and inexpensive, thereby facilitating enforcement by the regulating authority or others.

In contrast, determining compliance of the same product with a reactivity-based regulation is more complex and consequently more expensive. Here, the laboratory needs to identify and quantify each individual VOC present in the sample, possibly with multiple gas chromatography with mass spectrometry (GC/MS) runs. In order to determine compliance, the regulatory agency then must multiply the concentration of each compound in the aerosol coating by its MIR value and then sum the results to determine the product's total MIR value. In some cases, the MIR values for isomers of compounds are different, such as for ortho, meta and para xylenes (MIR = 7.49, 10.61, and 4.25 respectively). Speciation of isomers increases the complexity of the analysis. In addition, the identification of hydrocarbon solvents by boiling point range and aromatic content will add an additional step to the analysis. The CARB laboratory staff routinely uses GC/MS techniques to analyze products for a relatively small number of compounds excluded from EPA's regulatory definition of VOC which may be in consumer products, so CARB has some experience with these analytical techniques. Further, CARB is ''[f]ully prepared to vigorously enforce this regulation'' and their ''[e]nforcement inspectors and laboratory staff have expertise and resources to collect and test aerosol coating products to verify compliance with the regulation.'' [39]

Because any complex regulation can potentially multiply the opportunities for non-compliance, whether intentional or inadvertent, EPA believes that an intensive program to monitor and enforce compliance is a critical element to any VOC reactivity-based regulation.

D. Are California's Relative Reactivity-Based Regulations Appropriate for Areas Outside of California?

1. The CARB's technical support for this program in California does not necessarily demonstrate that VOC reactivity-based programs would be appropriate or effective in other areas or for other regulatory programs. The CARB's SIP submittal cautions that its research has focused only on California atmospheric conditions and that the suitability of the MIR scale for regulatory purposes in other areas has not been demonstrated. The CARB further states [40] that VOC relative ''[r]eactivity needs to be examined for the rest of the country.'' and that they ''[s]upport these investigations and plan to continue CARB's participation in the RRWG.''

EPA is aware that only recently has there been published, coordinated scientific research to attempt to address questions concerning the use of VOC reactivity-based regulations in other locations. For example, a recent NARSTO report describes limitations to ozone control using a VOC reactivity-based approach. The NARSTO report suggested that the approach might only be effective when the ambient conditions are ''[V]OC limited and where natural hydrocarbon emissions are not dominant.'' [41] In addition, the NARSTO report states that ''[t]he reactivity of specific VOCs can change from locale to locale, and thus the specifics of the approach must be regionally tailored.'' As noted earlier, the RRWG has sponsored a series of recent studies exploring these issues.

One of the concerns with the representativeness of MIR values is that they are based on a model which simulates reactions over a single day and may not account for slower reacting compounds which might continue to form ozone over several days. These slower reactions could result in more ozone formation than is predicted by the MIR scale in areas experiencing multi-day stagnation events or increased ozone formation in downwind areas due to pollutant transport.

The MIR scale is basically a reduced-form model, or a model of a model, which attempts to characterize in a single number the relative contribution of individual compounds to the formation and accumulation of ozone in a complex atmospheric system. Thus, a particular chemical mechanism and set of assumed environmental conditions are implicit in the MIR scale. The purpose of comparing the MIR scale to reactivities calculated using an airshed model is to evaluate whether the MIR scale, as a reduced-form model, adequately represents the behavior of the more complex airshed model, which takes into account spatially and temporally varying meteorology and emissions. If comparisons show a disagreement between the MIR values and the airshed derived values, that may suggest that it may not be appropriate to try to capture the behavior of the system in the single scale. If comparisons do show an agreement, this would suggest that the MIR scale can reproduce the behavior of the complex system, at least for the set of conditions considered.

Several researchers have performed such comparisons, including Bergin, Derwent and Stockwell. Bergin *et al.*,[42] calculated reactivity values using a more detailed three-dimensional photochemical model and compared their results against the values calculated by the simpler model used to develop CARB's reactivity program for their alternative fuels program. Bergin found that results were well correlated between Carter's simpler model and their more detailed model. However, these researchers also found that toluene, ethylbenzene, two xylene species, and some aldehydes had lower reactivity values predicted by the more detailed model as compared to the simpler model. Bergin concluded that differences in the predicted reactivity values were possibly due to multi-day simulation periods and the inclusion of cloud cover by the more detailed model.

Derwent [43] also reports that single-day or multi-day conditions appear to be important in establishing quantitative reactivity scales for the less reactive organic compounds. Stockwell,[44] who completed the peer review of Carter's reactivity mechanism, states that single-day scenarios are used to calculate incremental reactivities by definition, but even relatively unreactive organic compounds may have a non-negligible effect on ozone concentrations if multiple-day scenarios are considered. When he calculated incremental reactivities for multiple-days for polluted European conditions, he found that ethane's MIR value increased over 6 times from a MIR value of 0.19 on the first day to 1.17 on the 6th day. He also found that Dimethyoxymethane's MIR

[38] *See* 40 CFR 60, appendix A Reference Method 24.

[39] State Implementation Plan submittal letter from Michael Kenny (CARB) to Wayne Nastri (U.S. EPA, Region IX), March 13, 2002.

[40] State Implementation Plan Submittal letter from Michael Kenny (CARB) to Wayne Nastri (US EPA Region IX), March 13, 2002.

[41] The NARSTO, An Assessment of Tropospheric Ozone Pollution—A North American Perspective, page 3–19, July 2000.

[42] M.S. Bergin, A.G. Russell, J.B. Milford, ''Quantification of Individual VOC Reactivities Using a Chemically Detailed, Three-Dimensional Photochemical Model,'' Environ. Sci. Technol., 29, 3029–3037, (1995).

[43] R.G. Derwent, M.E. Jenkin, S.M. Saunders, M.J. Pilling, ''Characterization of the Reactivities of Volatile Organic Compounds Using a Master Chemical Mechanism,'' J. Air and Waste Manage. Assoc., 51, 699–707, (2001).

[44] W.R. Stockwell, H. Geiger, K.H. Becker, ''Estimation of Incremental Reactivities for Multiple Day Scenarios: An Application to Ethane and Dimethyoxymethane,'' Atmospheric Environment, 35, 929–939, (2001).

value increased as the length of the simulation period increased.

While we are uncertain whether results based on European conditions might generally apply to conditions found in California or the United States, these studies raise two questions. First, is the increase in MIR values during a multi-day stagnation event mainly a concern for slower reacting compounds or a more widespread issue, and second, should any changes be made to MIR scale values to account for the apparent increases in reactivity values in multi-day stagnation scenarios. Additional research may be needed in this area to understand more fully the impacts of multi-day scenarios on relative reactivity values and the prevalence of transport and multi-day stagnation conditions on a regional scale within California's ozone nonattainment areas and ozone nonattainment areas in other parts of the country. While we have some concerns about the greater level of effort required to develop, implement, and enforce reactivity-based programs, we believe that California has the resources and technical expertise needed to develop and maintain a complex program such as this one.

E. How Will the Effectiveness of This Reactivity-Based Program Be Evaluated?

1. We plan to evaluate the effectiveness of the aerosol coatings rule in 3 years. Areas we may review include changes in the composition and quantity of VOC emissions, which would require establishing a baseline of current emissions.

2. We are also interested in evaluating changes in ambient air quality that result from the use of the relative reactivity approach in this rule. We recognize that currently available computer models have limitations in their ability to evaluate the actual ambient effects of reducing emissions of specific VOC species from a particular product category. Also, while it is possible to show an air quality benefit of substituting individual VOCs with lower reactivity for more reactive ones using a three-dimensional photochemical model, it is not clear that current photochemical modeling systems are adequate to predict the impacts of the wide variety of simultaneous substitutions that may occur under an MIR-weighted regulatory program. The EPA, with CARB's assistance, plans to investigate possible modeling enhancements to evaluate the effects of the aerosol coatings rule, and hopes to identify modeling ''experiments'' to further test the MIR's predictive performance.

While a VOC reactivity-based regulation may result in a more efficient regulation in terms of more flexible reformulation options for manufacturers and an additional control strategy to reduce tropospheric ozone, we are also interested in how costs under a reactivity-based regulation might change for monitoring and recordkeeping. Under a reactivity-based program, emission inventory efforts may increase for industry periodically to provide fully speciated product information and for regulatory agencies to input this information into emission inventory data bases. We are interested in the public's comment on how the industry's and regulatory agency's costs and staff requirements might change with respect to emission inventories.

3. As stated earlier, CARB intends to keep up to date on VOC reactivity research through a review of the MIR values every 18 months and a review of the reactivity limits before January 1, 2007.

F. How Has CARB Addressed Concerns About Air Toxics and Ozone-Depleting Substances?

The CARB's aerosol coatings regulation prohibits the use of three toxic air contaminants: Methylene chloride, perchloroethylene and trichloroethylene. While the regulation does not ban the use of other compounds listed as ''hazardous air pollutants'' that are commonly used in aerosol coatings such as xylene and toluene, CARB believes that emissions of these other toxic compounds are likely to be reduced through the overall emission limits imposed on the individual product categories. Regulated entities will have an incentive to use less of compounds like toluene and xylene because of their higher reactivity, and this will outweigh the interest in choosing VOCs based solely upon their cost.

The CARB's regulation also prohibits the sale, supply, application, or manufacture for use in California, of any aerosol coating product which contains a stratospheric ozone-depleting substance. Existing product formulations which contain an ozone-depleting substance that complies with the reactivity limits and was sold in California during 1997 or product formulations containing an ozone-depleting substance that was sold in California during 1997 that is reformulated to meet the reactivity limits, as long as the content of the ozone-depleting substances in the reformulated product does not increase, are exempted from this provision.

G. What Changes in Enforcement Strategies Will Likely Occur Due to This Relative Reactivity-Based Regulation?

1. How will testing for compliance change under CARB's aerosol coatings regulation? As discussed earlier, under a traditional mass-based regulation, analysis of a coating to determine compliance is performed using EPA Reference Method 24.[45] This method involves heating the sample in an oven and determining the weight difference of the sample before and after heating. Additional analysis is needed to account for the propellant and, if present in the sample, compounds which are excluded from EPA's definition of VOCs. Under a mass-based rule, the laboratory does not need to know which individual hydrocarbons are present in order to perform Method 24, other than to identify if a limited number of excluded compounds are present in the coating. Manufacturers are generally willing to reveal the proportions of exempt substances because that helps to demonstrate compliance with the mass-based VOC limits.

Determining compliance under a reactivity-based regulation is more complex, but still within the capabilities of CARB's laboratory. Specifically, the regulator must perform expensive and complex GC/MS analysis to identify and quantify each VOC present in the product in order to calculate the product weighted MIR. To facilitate this compliance determination, CARB's aerosol coatings rule allows CARB to request manufacturers to provide a listing of the VOCs and their concentrations in each product so the laboratory knows which VOCs to analyze for and their target concentrations. While laboratories could perform the analysis without such a listing, it would be substantially more difficult, time-consuming, and expensive. This increased difficulty in assuring compliance is among the reasons that EPA is concerned that CARB allocate sufficient resources to monitor and enforce the reactivity-based limits.

2. How does a reactivity regulation affect the availability of emissions data? In the past, determining compliance with emission limits under a mass-based VOC rule such as CARB's aerosol coatings rule did not raise concerns about confidential business information (CBI) because one could determine compliance with the product's VOC limit without ever having to know all of the individual VOC ingredients present

[45] See 40 CFR 60, appendix A, Reference Method 24.

in the product. However, under a reactivity-based rule, one would need to know the specific VOCs in a product and their proportions (*i.e.,* the product formulation) in order to determine compliance with its reactivity-based VOC limit. Because this information is an integral part of determining compliance with the product's reactivity-based limit, the list of VOCs would be considered ''emissions data,'' which must generally be available to the public.[46] However, industry may view the release of such detailed VOC information to the general public or to their business competitors as a major concern because of the potential for release of trade secrets and propriety CBI.

To help resolve these competing issues, we note that aerosol coatings are composed of a VOC portion and a portion made up of various non-reactive compounds such as resins and solids which, based on CARB's aerosol coatings regulation, do not contribute to ozone formation and are assigned an MIR value of zero. Consistent with section 114(c) of the CAA, and our regulations concerning the release of emissions data at 40 CFR § 2.301, we believe the public's right to emissions data is satisfied by assuring access to the portion of the data which comprises the VOCs alone. Information on the non-reactive compounds, *i.e.,* those that do not contribute to ozone formation, would not need to be released, thereby preserving potential trade secrets.

The CARB and the aerosol coatings industry held discussions and reached an agreement that CARB VOC testing results and company-supplied formulation data required to be submitted by Section 94526 of CARB's aerosol coatings regulation would be made available to the public, upon request, to allow others to verify compliance with the reactivity-based aerosol coating regulation. It was further agreed that non-reactive compounds in each product formulation would be ''lumped'' or aggregated to protect confidentiality.[47]

Both CARB and EPA will retain their authority to access all ingredient information, including non-VOC ingredients or information otherwise claimed to be CBI, in order to determine compliance with the regulation.

The availability to the public of VOC ingredient information constituting emissions data only applies to information gathered to confirm compliance with CARB's aerosol coatings rule. Confidential information such as survey data submitted by companies under Section 94524 of CARB's aerosol coatings regulation to CARB and EPA in support of any future rule development efforts, will continue to be handled in accordance with applicable CBI regulations.

We believe that this compromise between the competing objectives of disclosure of emissions data and protection of CBI provides a basis for approving CARB's innovative reactivity-based regulation into the SIP. We also believe that the compromise is consistent with the purpose of CAA § 114(c) and EPA's regulations defining emissions data.

IV. Summary of CARB's Aerosol Coatings Regulation

A. What Does CARB's Regulation Require?

The CARB has previously controlled VOC emissions from aerosol coatings in California by limiting the mass of VOCs in the product, with limits expressed as maximum allowable percent by mass of VOC. CARB's new approach relies on the fact that individual VOCs may form different amounts of ozone, or form ozone more quickly, once they are emitted into the air. The CARB is implementing a regulation that would limit ozone formation by taking into account the relative reactivity of different VOC ingredients.

The CARB's aerosol coatings regulation contains sections on applicability, definitions, limits and requirements, exemptions, administrative requirements, variances, test methods, Federal enforceability and references tables of MIR values for different compounds including hydrocarbon solvents.

1. What Does CARB's Aerosol Coatings Regulation Cover?

This section contains a very brief summary of key portions of CARB's regulation. The reader should refer to the actual regulation [48] for additional details.

The regulation applies to aerosol coatings, aerosol clear coatings and aerosol stains. It applies to any person who sells, supplies, offers for sale, applies or manufactures for use in California any aerosol coating subject to the limits in the regulation. The regulation prohibits the commercial application of non-complying aerosol coating products.

The regulation does not apply to aerosol lubricants, mold releases, automotive underbody coatings, electrical coatings, cleaners, belt dressings, anti-static sprays, layout fluids and removers, adhesives, maskants, rust converters, dyes, inks, and leather preservatives or cleaners. The regulation also does not apply to aerosol coating products manufactured in California for shipment and use outside of California.

Aerosol coating products manufactured beginning June 1, 2002, for general coating categories as defined in the regulation and January 1, 2003, for specialty coatings need to comply with the reactivity-based VOC limits specified in the regulation. Aerosol products manufactured before the effective dates must comply with the existing mass-based VOC limits. However, products labeled with the applicable reactivity-based VOC limit, must meet that limit. The regulation contains a sell-through provision whereby products manufactured prior to the effective date can be sold, supplied, offered for sale, or applied up to 3 years after the effective date.

The regulation prohibits the use of the toxic air contaminates methylene chloride, trichloroethylene, and perchloroethylene. It also prohibits the use of stratospheric ozone-depleting substances in aerosol coating products except in limited situations allowed by the regulation.

The regulation contains labeling and reporting requirements, and provisions for a regulated entity to request a variance from the VOC reactivity limits if the entity cannot comply due to extraordinary reasons beyond reasonable control. The test method section specifies that CARB Method 310 is to be used to determine compliance with the regulation. Alternative test methods may be used which are shown to identify and quantify accurately each ingredient, after approval in writing by the CARB Executive Officer. However, as stated in the aerosol coatings regulation,[49] for purposes of Federal enforceability, EPA is not bound by approval determinations made by the CARB Executive Officer for variances or test methods. While EPA believes CARB would not approve major test method modifications that might compromise the integrity of a test result, or grant a variance request that would adversely

[46] Emissions data is defined in 40 CFR 2.301(a)(2)(i).

[47] The CARB letter from Michael Kenny to Jack Broadbent, U.S. EPA, Region IX, dated May 16, 2002.

[48] *http://www.arb.ca.gov/consprod/regs/aeropnt.pdf http://www.arb.ca.gov/consprod/regs/Aeropnt.doc* or California Code of Regulations, Title 17, Division 3, Chapter 1, Subchapter 8.5, Article 3.

[49] California Code of Regulations, Title 17, Division 3, Chapter 1, Subchapter 8.5, Article 3, § 94528.

impact an approved attainment demonstration, EPA can pursue separate action to ensure that test results are enforceable, accurate, and reproducible, and that a variance does not adversely impact attainment.

Variances and major modifications to test methods must be submitted to EPA and must be approved into the SIP before they can be Federally enforceable. For the purposes of Federal enforceability, facilities operating under a variance or modified test method approved by the CARB Executive Officer must continue to comply with the original regulation until the variance or major test method modification is also approved by EPA into the SIP. The EPA does not normally approve Executive Officer discretion in regulations submitted for SIP approval as this would allow potentially significant modifications to a regulation or test method without subsequent review and approval by EPA.

We are proposing to approve this Executive Officer provision in this rule because this is a new and innovative program and, as such, may require a temporary variance or an unanticipated modification to the test method in the short term, and the regulation states that EPA is not bound by the decisions of the Executive Officer. The EPA intends to monitor CARB's implementation of these rule provisions and we will review test method modifications and variance requests on a case-by-base basis.

V. Future Actions

A. What Action Will Be Taken To Determine if This Reactivity-Based Regulation Is Effective?

The EPA will continue to work with CARB to evaluate how VOC emissions from this source category change in response to the regulation and how these emission changes will affect ambient air quality. We will also continue to work with CARB to evaluate the appropriateness of MIR values for VOC reactivity ranking under the environmental conditions of interest in California. The EPA's proposed approval of CARB's aerosol coatings regulation is predicated, in part, on CARB's commitment to ensuring that the regulation in fact achieves the intended environmental goals. The CARB's SIP submittal letter[50] states that CARB officials ''[i]ntend to follow the implementation of this regulation closely to ensure the air quality benefits predicted are fully achieved. If they are not, CARB is obligated to identify and secure additional regulatory measures to meet our SIP commitments.'' ''[M]oreover, if in fact the aerosol coating regulation is not as effective as predicted, we are fully prepared to reevaluate the source category to determine how best to achieve the most stringent limits that are technologically and commercially feasible.''

B. How Will Future Uses of Relative Reactivity Be Evaluated?

The CARB views the aerosol coatings rule as a means to determine the feasibility of additional reactivity-based measures for other source categories.[51] The EPA is working as a participant in the RRWG to explore whether reactivity-based approaches are appropriate and useful for other source categories and in other parts of the country. Members of the RRWG have a variety of research projects underway to provide needed information about the utility and effectiveness of relative reactivity-based VOC controls. The EPA is committed to the process begun under the RRWG of assuring that future applications of the relative reactivity approaches are based on a sound scientific foundation and are practical, enforceable, and effective.

VI. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866, (58 FR 51735, October 4, 1993) the Agency must determine whether the regulatory action is ''significant'' and therefore subject to the Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Order defines ''significant regulatory action'' as one that is likely to result in a rule that may:

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

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

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

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

For the change in definition of VOCs, EPA has determined that this proposed rule is not a ''significant regulatory action'' under the terms of Executive Order 12866 and is therefore not subject to OMB review. For the proposed approval of CARB's rule into the SIP, OMB has exempted this regulatory action from Executive Order 12866 review.

B. Paperwork Reduction Act

For the change in the definition of VOCs, this proposed rule does not contain any information collection requirements subject to OMB review under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

For the proposed approval of CARB's regulation into the SIP, this proposed action does not contain any information collection requirements that would require any person to provide information to EPA, however CARB's regulation contains requirements for the aerosol coating industry to provide information to CARB.

C. Regulatory Flexibility Act (RFA)

The RFA generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

After considering the economic impacts of today's proposed rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities.

This proposed rule will not impose any requirements on small entities. Today's change to the definition of VOC does not directly regulate any entities. The RFA analysis does not consider impacts on entities which the action in question does not regulate. *See Motor & Equipment Manufacturers Ass'n* v. *Nichols,* 142 F. 3d 449, 467 (D.C. Cir. 1998); *United Distribution Cos.* v. *FERC,* 88 F. 3d 1105, 1170 (D.C. Cir. 1996), cert. denied, 520 U.S. 1224 (1997).

For the proposed approval of CARB's regulation into the SIP, this proposed rule will not have a significant impact on a substantial number of small entities because SIP approvals under section 110 and subchapter I, part D of the CAA

[50] SIP submittal letter from Michael Kenny (CARB) to Wayne Nastri (U.S. EPA, Region IX), March 13, 2002.

[51] California Air Resources Board, ''Initial Statement of Reasons for the Proposed Amendments to the Regulation for Reducing Volatile Organic Compound Emissions from Aerosol Coating Products,'' Chapter II, page 18, May 5, 2000.

do not create any new requirements but simply act on requirements that the State is already imposing. Therefore, because the Federal SIP approval does not create any new requirements, I certify that this action will not have a significant economic impact on a substantial number of small entities.

Moreover, due to the nature of the Federal-State relationship under the CAA, preparation of flexibility analysis would constitute Federal inquiry into the economic reasonableness of State action. The CAA forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co.* v. *U.S. EPA,* 427 U.S. 246, 255–66 (1976); 42 U.S.C. 7410(a)(2).

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures by State, local, and tribal governments, in the aggregate, or the private sector, of $100 million or more in any 1 year. Before promulgating an EPA rule for which a written statement is needed, section 205 of UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

For the proposed change in the definition of VOCs, today's rulemaking contains no Federal mandates (under the regulatory provisions of title II of the UMRA) for State, local, or tribal governments or the private sector.

For the proposed approval of CARB's regulation into the SIP, EPA has determined that the proposed approval action does not include a Federal mandate that may result in estimated costs of $100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This Federal action proposes to approve pre-existing requirements under State or local law, and imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

Thus, today's rule is not subject to the requirements of sections 202 and 205 of UMRA.

In addition, EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments in accordance with section 203 of UMRA.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

This proposed rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. Today's proposed rule does not impose any new mandates on State or local governments. The change to the definition of VOCs merely assists CARB in implementing its aerosol coatings reactivity regulation. The proposed approval of this regulation into the SIP acts on a State regulation implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the CAA. Thus, Executive Order 13132 does not apply to this rule.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically solicits comment on this proposed rule from State and local officials.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' This proposed rule does not have tribal implications, as specified in Executive Order 13175. The proposed change to the definition of VOCs merely assists CARB in implementing its aerosol coatings reactivity regulation and does not impose any direct compliance costs. The proposed approval of CARB's regulation into the SIP acts on a State regulation and does not alter the relationship between the Federal government and Indian Tribes, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this rule. The EPA specifically solicits additional comment on this proposed rule from tribal officials.

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

Executive Order 13045: ''Protection of Children from Environmental Health and Safety Risks'' (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

While this proposed rule is not subject to the Executive Order because it is not economically significant as defined in Executive Order 12866, we have reason to believe that ozone has a disproportionate effect on active children who play outdoors. (See 62 FR 38856 and 38859 July 18, 1997). However, we do not expect today's proposed approval of CARB's regulation into the SIP to result in an adverse

impact, as it is intended to be an ozone neutral action. The CARB has indicated that they have designed their new reactivity-based limits to achieve the same ozone reductions as the mass-based limits they supplant. Also, we do not expect today's proposed change to the definition of VOC to result in any adverse impact, because it increases the number of compounds subject to regulation as VOCs for the purpose of California's aerosol coatings reactivity-based regulation.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This rule is not subject to Executive Order 13211, ''Actions That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer Advancement Act

Section 12(d) of the National Technology Transfer Advancement Act of 1995 (''NTTAA''), Public Law No. 104–113, § 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

For the change in definition of VOCs, this proposed rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards. For the proposed approval of CARB's regulation into the SIP, the State regulation references standard test methods and makes modifications to American Society for Testing and Materials (ASTM) D3074–94, D3063–94 and D2879–97 to support the regulatory objectives.

The EPA welcomes comments on this aspect of the proposed rulemaking and, specifically, invites the public to identify potentially-applicable voluntary consensus standards and to explain why such standards should be used in this regulation.

List of Subjects

40 CFR Part 51

Environmental protection, Administrative practice and procedure, Air pollution control, Carbon monoxide, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compound.

40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Ozone, Reporting and recordkeeping requirements, Volatile organic compound.

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

Dated: December 29, 2004.

Michael O. Leavitt,

Administrator.

PART 51—REQUIREMENTS FOR PREPARATION, ADOPTION, AND SUBMITTAL OF IMPLEMENTATION PLANS.

1. The authority citation for part 51 continues to read as follows:

Authority: 42 U.S.C. 7401, 7411, 7412, 7413, 7414, 7470–7479, 7501–7508, 7601, and 7602.

2. Section 51.100 is proposed to be amended by adding paragraph (s)(6) as follows:

§ 51.100 Definitions.

* * * * *

(s) * * *

(6) For the purposes of determining compliance with California's aerosol coatings reactivity-based regulation, (as described in the California Code of Regulations, Title 17, Division 3, Chapter 1, Subchapter 8.5, Article 3), any organic compound in the volatile portion of an aerosol coating is counted towards that product's reactivity-based limit. Therefore, the compounds identified in this section [*i.e.*, §51.100 (s)] as negligibly reactive and excluded from EPA's definition of VOCs are to be counted towards a product's reactivity limit for the purposes of determining compliance with California's aerosol coatings reactivity-based regulation.

* * * * *

[FR Doc. 05–346 Filed 1–6–05; 8:45 am]

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  - Mortgages in default; revisions; comments due by 1-10-05; published 11-10-04 [FR 04-24989]

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- Chemical mixtures; exemption of List II chemicals acetone, etc.;

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2003 Annual Product Review, 2002 Annual Country Practices Review, and previously deferred product decisions; petitions disposition; Open for comments until further notice; published 7-6-04 [FR 04-15361]

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Class E airspace; comments due by 1-10-05; published 11-30-04 [FR 04-26345]

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.J. Res. 102/P.L. 108–479

Recognizing the 60th anniversary of the Battle of Peleliu and the end of Imperial Japanese control of Palau during World War II and urging the Secretary of the Interior to work to protect the historic sites of the Peleliu Battlefield National Historic Landmark and to establish commemorative programs honoring the Americans who fought there. (Dec. 21, 2004; 118 Stat. 3905)

H.R. 2457/P.L. 108–480

To authorize funds for an educational center for the Castillo de San Marcos National Monument, and for other purposes. (Dec. 23, 2004; 118 Stat. 3907)

H.R. 2619/P.L. 108–481

Kilauea Point National Wildlife Refuge Expansion Act of 2004 (Dec. 23, 2004; 118 Stat. 3910)

H.R. 3632/P.L. 108–482

Intellectual Property Protection and Courts Amendments Act of 2004 (Dec. 23, 2004; 118 Stat. 3912)

H.R. 3785/P.L. 108–483

To authorize the exchange of certain land in Everglades National Park. (Dec. 23, 2004; 118 Stat. 3919)

H.R. 3818/P.L. 108–484

Microenterprise Results and Accountability Act of 2004 (Dec. 23, 2004; 118 Stat. 3922)

H.R. 4027/P.L. 108–485

To authorize the Secretary of Commerce to make available to the University of Miami property under the administrative jurisdiction of the National Oceanic and Atmospheric Administration on Virginia Key, Florida, for use by the University for a Marine Life Science Center. (Dec. 23, 2004; 118 Stat. 3932)

H.R. 4116/P.L. 108–486

American Bald Eagle Recovery and National Emblem Commemorative Coin Act (Dec. 23, 2004; 118 Stat. 3934)

H.R. 4548/P.L. 108–487

To authorize appropriations for fiscal year 2005 for intelligence and intelligence-related activities of the United States Government, the Community Management Account, and the Central Intelligence Agency Retirement and Disability System, and for other purposes. (Dec. 23, 2004; 118 Stat. 3939)

H.R. 4569/P.L. 108–488

To provide for the development of a national plan for the control and management of Sudden Oak Death, a tree disease caused by the fungus-like pathogen Phytophthora ramorum, and for other purposes. (Dec. 23, 2004; 118 Stat. 3964)

H.R. 4657/P.L. 108–489

District of Columbia Retirement Protection Improvement Act of 2004 (Dec. 23, 2004; 118 Stat. 3966)

H.R. 5204/P.L. 108–490

To amend section 340E of the Public Health Service Act (relating to children's hospitals) to modify provisions regarding the determination of the amount of payments for indirect expenses associated with operating approved graduate medical residency training programs. (Dec. 23, 2004; 118 Stat. 3972)

H.R. 5363/P.L. 108–491

To authorize salary adjustments for Justices and judges of the United States for fiscal year 2005. (Dec. 23, 2004; 118 Stat. 3973)

H.R. 5382/P.L. 108–492

Commercial Space Launch Amendments Act of 2004 (Dec. 23, 2004; 118 Stat. 3974)

H.R. 5394/P.L. 108–493

To amend the Internal Revenue Code of 1986 to modify the taxation of arrow components. (Dec. 23, 2004; 118 Stat. 3984)

H.R. 5419/P.L. 108–494

To amend the National Telecommunications and Information Administration Organization Act to facilitate the reallocation of spectrum from governmental to commercial users; to improve, enhance, and promote the Nation's homeland security, public safety, and citizen activated emergency response capabilities through the use of enhanced 911 services, to further upgrade Public Safety Answering Point capabilities and related functions in receiving E-911 calls, and to support in the construction and operation of a ubiquitous and reliable citizen activated system; and to provide that funds received as universal service contributions under section 254 of the Communications Act of 1934 and the universal service support programs established pursuant thereto are not subject to certain provisions of title 31, United States Code, commonly known as the Antideficiency Act, for a period of time. (Dec. 23, 2004; 118 Stat. 3986)

S. 1301/P.L. 108–495

Video Voyeurism Prevention Act of 2004 (Dec. 23, 2004; 118 Stat. 3999)

S. 2657/P.L. 108–496

Federal Employee Dental and Vision Benefits Enhancement Act of 2004 (Dec. 23, 2004; 118 Stat. 4001)

S. 2781/P.L. 108–497

Comprehensive Peace in Sudan Act of 2004 (Dec. 23, 2004; 118 Stat. 4012)

S. 2856/P.L. 108–498

To limit the transfer of certain Commodity Credit Corporation funds between conservation programs for technical assistance for the programs. (Dec. 23, 2004; 118 Stat. 4020)

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