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

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DEPARTMENT OF JUSTICE

8 CFR Parts 1003 and 1208

[EOIR No. 140I; AG Order No. 2755–2005]

RIN 1125–AA44

Background and Security Investigations in Proceedings Before Immigration Judges and the Board of Immigration Appeals

AGENCY: Executive Office for Immigration Review, Justice.

ACTION: Interim rule with request for comments.

SUMMARY: This rule amends Department regulations governing removal and other proceedings before immigration judges and the Board of Immigration Appeals when a respondent has applied for particular forms of immigration relief allowing the alien to remain in the United States (including, but not limited to, asylum, adjustment of status to that of a lawful permanent resident, cancellation of removal, and withholding of removal), in order to ensure that the necessary identity, law enforcement, and security investigations are promptly initiated and have been completed by the Department of Homeland Security prior to the granting of such relief.

DATES: *Effective date:* This rule is effective April 1, 2005.

Comment date: Written comments must be submitted on or before April 1, 2005.

Request for Comments: Please submit written comments to MaryBeth Keller, General Counsel, Executive Office for Immigration Review (EOIR), 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 22041. To ensure proper handling, please reference RIN No. 1125–AA44 on your correspondence. You may view an electronic version of this rule at *http://www.regulations.gov*. You may also comment via the Internet to EOIR at *eoir.regs@usdoj.gov* or by using the *http://www.regulations.gov* comment form for this regulation. When submitting comments electronically, you must include RIN No. 1125–AA44 in the subject box. Comments are available for public inspection at the above address by calling (703) 305–0470 to arrange for an appointment.

FOR FURTHER INFORMATION CONTACT: MaryBeth Keller, General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 22041, telephone (703) 305–0470.

SUPPLEMENTARY INFORMATION: An immigration judge or the Board of Immigration Appeals (Board) may grant relief from removal under a variety of provisions of the Immigration and Nationality Act (Act). Among the common forms of relief are adjustment of status to lawful permanent resident (LPR) status, asylum, waivers of inadmissibility, cancellation of removal, withholding of removal, and deferral of removal under the Convention Against Torture.[1] In considering an application for relief the applicant bears the burden of establishing his or her eligibility for the relief sought and, for discretionary forms of relief, that he or she merits a favorable exercise of discretion. For almost all forms of relief from removal, it must be established that the applicant has not been convicted of particular classes of crimes, and that he or she is not otherwise inadmissible or ineligible under the relevant standards.

The Department of Homeland Security (DHS) conducts a variety of identification, law enforcement, and security investigations and examinations to determine whether an alien in proceedings has been convicted of any disqualifying crime, poses a national security threat to the United States, or is subject to other investigations. Since September 11, 2001, DHS and its predecessor agencies have expanded the scope of identity, law enforcement, and security investigations and examinations before granting of immigration status to aliens. Moreover, because circumstances are subject to change over time, DHS may be required to update the results of its background investigations if the current determinations have expired. As the National Commission on Terrorist Attacks upon the United States (''9/11 Commission'') has emphasized, ''[t]he challenge for national security in an age of terrorism is to prevent the very few people who may pose overwhelming risks from entering or remaining in the United States undetected.'' *The 9/11 Commission Report*, ed. W.W. Norton & Co. (2004), at 383. The Attorney General agrees with the Secretary's determination that the expanded background and security checks on aliens who seek to come to or remain in this country are essential to meet this challenge, regardless of whether the alien applies affirmatively with DHS or seeks immigration relief during removal proceedings within EOIR's jurisdiction.

In general, these investigations and examinations can be completed in a timely fashion so as to permit the adjudication of adjustment and other applications before the immigration judges without delay. Because DHS initiates the immigration proceedings, in most cases DHS has ample time to undertake the necessary investigations if it has obtained the alien's biometric[2] and other biographical information[3] prior to or at the time of filing of the Notice to Appear (NTA). In the instance when an NTA has been issued without biometrics and other biographical information having been taken at all (such as when DHS's U.S. Citizenship and Immigration Services (USCIS) issues the NTA upon denial of a petition or application for change of nonimmigrant status at a service center

[1] Withholding of removal under 241(b)(3) of the Act and CAT deferral are not forms of ''relief from removal'' per se, but instead are restrictions on or protection from removal of an alien to a country where he or she would be threatened or tortured. In this **SUPPLEMENTARY INFORMATION**, the Department uses the term ''relief from removal,'' and appropriate variations, to include withholding and CAT deferral, for the ease of the reader.

[2] Biometrics currently include digital fingerprints, photographs, signature, and in the future may include other digital technology that can assist in determining an individual's identity and conducting background investigations.

[3] Other biographical information refers to data which may include such items as an individual's name; address; place of birth; date of birth; marital status; social security number (if any); alien registration number (if any); prior employment authorization (if any); date of last entry into the United States; place of last entry; manner of last entry; current immigration status and eligibility category. Currently, such biographical information is required by the DHS Form I–765, Application for Employment Authorization, or other DHS or EOIR forms. In the future, other information may be required by DHS in order to complete identity, law enforcement, or security investigations or examinations.

or when an applicant fails to appear for a scheduled biometrics fingerprinting appointment with USCIS), this rule contemplates that DHS will be given the opportunity to obtain respondent's biometrics and other biographical information from the respondent before a merits hearing. In addition, particularly when substantial time may have elapsed during the pendency of immigration proceedings, the validity of a fingerprint response received by USCIS may have elapsed and, under current arrangements with outside law enforcement and investigative agencies, fingerprints may need to be taken again by DHS to complete updated background checks.

When an alien in proceedings files an application for relief, such as an application for asylum or adjustment of status, DHS is on notice that further inquiry into criminal and national security records may be required. Because the immigration judges schedule in advance the date of the hearing on the merits of the alien's application, a time that is ascertainable from the hearing notices served on the government counsel, DHS is routinely on notice of the date by which these inquiries, investigations and examinations must be completed in time for a final decision by the immigration judge on the pending applications for relief. When an alien files an application in immigration proceedings for relief from removal, the immigration judge ordinarily will be able to consider the time that DHS indicates it will likely require to conduct the background and security inquiries and investigations before setting the date for the merits hearing. The immigration judge also can take into consideration that DHS's ability to obtain full results from the law enforcement and intelligence agencies that are not within its control may require additional time beyond that initially indicated by the government.

There are, as noted, occasions where an investigation being conducted or updated by DHS requires additional time. Historically, DHS has had the ability to file a motion for a continuance under the rules applicable to proceedings before immigration judges, 8 CFR 1003.29, but that general provision leaves numerous questions unanswered in the complicated area of criminal history checks and national security investigations. The current regulations are also unclear as to the scope of an immigration judge's authority to act to grant relief in situations where a background investigation is ongoing.

The national security requires that immigration judges or the Board should not grant applications for adjustment to LPR status, asylum, or other forms of immigration relief without being advised by DHS of the results of the investigations, including criminal and intelligence indices checks. The Department and DHS recognize the need for coordination of processes so as to permit these appropriate identity, background, and security investigations to be completed by DHS prior to the granting of immigration relief that is within the jurisdiction of the immigration judges and the Board. This rule provides a means to ensure that the immigration judges and the Board will not grant relief before DHS has completed its investigations.

The Department and DHS also recognize that the need to protect national security and public safety must be balanced against the desire for law abiding aliens to have their requests for immigration relief adjudicated in a prompt and timely fashion. However, there have been instances when aliens in removal proceedings were granted some form of immigration relief but USCIS did not automatically and immediately learn about their need for an immigration document. Furthermore, DHS determined that in some cases the law enforcement checks were not completed prior to the grant. Since USCIS must run background checks on any alien who will receive an immigration document reflecting the alien's immigration status or authorization to work, this process creates a waiting period for aliens that in most cases could have been avoided. This process also is not acceptable to the grantees, some of whom have been named or represented in litigation against the government complaining of delays. Recent cases include *Santillan* v. *Ashcroft*, No 04–2686 (N.D. Cal.) (requesting relief for proposed nationwide class); *Padilla* v. *Ridge*, No. M–03–126 (S.D. Tex.) (requesting relief for proposed class of aliens in three districts of Texas). The Department and DHS have determined that the best method for avoiding these delays is to run law enforcement checks prior to immigration relief being granted. Further, these checks should be conducted in advance of any scheduled merits hearing before the immigration judge wherever possible.

This rule enables and requires immigration judges to cooperate with DHS in: (1) Instructing aliens on how to comply with biometric processing requirements for law enforcement checks; (2) considering information resulting from law enforcement checks; and (3) instructing aliens who have been granted some form of immigration relief regarding the procedures by which to obtain documents from DHS. This rule also creates a more efficient process, saving time for the immigration judge, respondent, and others, by implementing a process that enables the Department to adjust its hearing calendars when the required law enforcement checks have not been completed prior to a scheduled hearing. This improvement to the system is immediately necessary to reduce the time that grantees must wait to receive their documents after the completion of immigration proceedings, and decrease the chances that an alien who is a danger to public safety or national security will be granted relief from removal.

Systems Utilized To Conduct Identity, Background and Security Checks

There is no need for this rule to specify the exact types of background and security checks that DHS may conduct with respect to aliens in proceedings. DHS and other agencies are actively involved in streamlining and enhancing the systems of information that contain information on terrorist and other serious criminal threats.

Generally, however, the majority of required checks are returned in a matter of days or weeks. Yet there are instances where another agency may inform DHS that a check reveals some sort of positive ''indicia'' on an individual, and it may take a longer period of time for those agencies to complete their investigations and convey this information to DHS for a determination of relevancy under the immigration laws. Additional time may be required if it is necessary to obtain additional fingerprints. In other instances, the ''indicia'' may require that DHS obtain or provide notice to the individual that he or she must obtain and present DHS with all records of court proceedings. A longer period of time may also be necessary to complete background checks where individuals have common names that may require individualized reviews of the records of all similarly named individuals or where there are variations in the spelling of names due to translation discrepancies. Finally, there may be demands on DHS to conduct a disproportionate number of investigations in a short time based upon current events, such as an emergent mass migration, that may have an impact on various agencies' capacity to conduct identity, background and security investigations in a timely manner.

Requirement for Aliens in Proceedings To Provide Biometrics and Other Biographical Information

The Act imposes a general obligation on aliens who are applicants for admission to demonstrate clearly and beyond doubt that they are entitled to admission and are not inadmissible under section 212(a) of the Act (8 U.S.C. 1182(a)). Almost all of the various forms of relief from removal require the applicant to demonstrate either that he or she is admissible under applicable legal standards, or that he or she has not been convicted of certain disqualifying offenses or engaged in other specified conduct. The results of the DHS background and security checks are obviously quite relevant to a determination of an alien's admissibility or eligibility with respect to the requested immigration relief. Moreover, an applicant for any form of immigration relief in proceedings bears the burdens of proof—*i.e.*, the burden of proceeding and the burden of persuasion—in demonstrating that he or she is eligible for such relief and, if relevant, that he or she merits a favorable exercise of discretion for the granting of such relief. 8 CFR 1240.8(d); *see, e.g., Matter of Lennon*, 15 I&N Dec. 9, 16 (BIA 1974), remanded on other grounds sub nom. *Lennon* v. *INS*, 527 F.2d 187 (2d Cir. 1975) (adjustment of status to that of a lawful permanent resident).

For adjustment of status, section 245(a) of the Act requires that an applicant meet three conditions in addition to a favorable exercise of discretion: (1) He or she must make an application for adjustment of status; (2) he or she must be eligible to receive a visa and be admissible for permanent residence; and (3) an immigrant visa must be immediately available at the time of application. Thus, it is first and foremost the applicant's responsibility to file a complete application for adjustment of status (DHS Form I–485) and submit the required supporting documentation (including the respondent's biometric and other biographical information) to establish eligibility to receive a visa and admissibility to the United States. Other forms of relief such as asylum, withholding of removal, or cancellation of removal also place the burden of proof on the alien, and require the alien to file the proper application for relief and submit all of the necessary supporting documentation in the proceedings before the immigration judge, as provided in 8 CFR 1240.8(d).[4]

The rule therefore specifically provides that applicants for immigration relief in proceedings before the immigration judges have the obligation to comply with applicable requirements to provide biometrics and other biographical information.

For aliens who are not in proceedings and who seek to apply for asylum or for adjustment of status or some other status, the alien files the appropriate form directly with USCIS, and USCIS then informs the alien when and where the alien (and any covered family members) should go to provide biometrics and other biographical information. Fingerprints normally are taken by USCIS at an Application Support Center (ASC).

However, a different approach is needed where the respondent in proceedings applies for asylum, adjustment of status, or other forms of relief that are available in removal proceedings, such as cancellation or withholding of removal. In these instances, where the immigration proceedings have already begun, respondents file the appropriate application forms and related documents in the proceedings before the immigration judge, rather than with USCIS.

At a master calendar hearing or other hearing at which the immigration judge addresses issues relating to whether a respondent is removable, the immigration judge normally reviews with the respondent possible forms of relief from removal, including asylum, adjustment of status, cancellation of removal, or other forms of relief or protection, if the respondent is potentially eligible. 8 CFR 1240.11. At that hearing, or at a subsequent master hearing, the immigration judge normally establishes a date by which the application must be filed with the immigration judge and served on DHS, and a later date for a hearing at which the immigration judge will consider the application.

This rule provides that applications for adjustment of status, cancellation or withholding of removal, or other forms of relief covered by this rule will be deemed to be abandoned for adjudication if, after notice of the requirement to provide biometrics or other biographical information to DHS, the applicant fails without good cause to provide the necessary biometrics and other biographical information to DHS by the date specified by the immigration judge. As noted, in many cases, the alien will already have provided biometrics or other biographical information in connection with the removal proceedings prior to the master calendar hearing or other hearing at which the alien indicates an intention to seek immigration relief. However, in those instances where the respondent has not yet provided biometrics or other biographical information to enable DHS to conduct those checks or where DHS notifies the immigration judge or the Board that checks have expired and need to be updated, it is clear that the application cannot be granted by the immigration judge or the Board.

In those instances, until the respondent and any covered family members appear at the appropriate location to provide DHS their biometrics or other biographical information, the application cannot be granted or may be found to be abandoned if there is a failure to comply without good cause by the date specified by the immigration judge. Thereafter, once the biometric and other biographical information is provided as required, DHS should be allowed an adequate time to complete the appropriate identity, law enforcement, and security investigations before the application is scheduled for decision by the immigration judge.

This approach clearly places the responsibility for taking the initiative to provide biometrics or other biographical information in a timely manner on the respondent who is seeking relief, consistent with the respondent's burdens of proceeding and persuasion. By requiring the respondent to provide biometrics or other biographical information to DHS in a timely manner or risk a finding that the application has been abandoned, this rule will facilitate the prompt adjudication of cases.

In general, aliens in proceedings who are obligated to provide biometrics or other biographical information can do

[4] For asylum applicants, the current regulations at 8 CFR 1208.10 and the instructions to the Form I–589, Application for Asylum and for Withholding of Removal, already provide notice that an individual and any included family members 14 years of age and older cannot be granted asylum until the required identity, background, and security checks have been conducted. The regulations at 8 CFR 1208.10 and the instructions to the Form I–589 at Part 1, IX, page 9, clearly notify asylum applicants before an immigration judge that failure to comply with fingerprint and other biometrics requirements will make the applicant ineligible for asylum and may delay eligibility for work authorization. The regulations at 8 CFR 1208.3 (Form of application) and the Form I–589 Instructions, Part 1, sections V, VI, VII, X, XI and XII at pages 5 through 10, also specify what constitutes a complete application for asylum and for withholding of removal or protection under the Convention Against Torture. The results of the background and security checks are relevant for an alien's eligibility for withholding of removal, and for determining whether an alien seeking protection under the Convention Against Torture is eligible only for deferral of removal under 8 CFR 1208.17.

so by making appropriate arrangements with local DHS offices. In many cases, this will involve visiting an ASC, the same place to which an applicant would be directed if he or she had filed an affirmative application for asylum or adjustment of status directly with USCIS.

Upon the applicant's filing of an application for relief with the immigration court or USCIS's referral of the application to an immigration judge, unless DHS informs the immigration judge that new biometrics are not required, DHS will provide the alien with a standard biometrics appointment notice prepared by an appropriate DHS office. USCIS District Directors and Immigration and Customs Enforcement Counsel, in consultation with the Office of the Chief Immigration Judge, will develop scheduling procedures and standardized appointment notices for each location. The DHS fingerprint notice will be hand-delivered to the alien by DHS and the notice may be used for multiple family members, but the notice must contain at least the alien registration number, receipt number (if any), name, and the form number pertaining to the relief being sought for each person listed. Locally established procedures will ensure that applicants for relief from removal receive biometrics services in a time period compatible with DHS resources and the scheduled immigration proceedings. The immigration judge shall specify for the record when the respondent receives the notice and the consequences for failing to comply with biometrics processing. On the other hand, aliens who are currently in detention—either immigration custody under section 236 of the Act (or other provision of law) during the pendency of the removal proceedings, or in a federal, state, or local correctional facility based on a criminal conviction—will not have such flexibility. In the case of any detained alien, DHS will make the necessary arrangements to obtain biometrics and other biographical information if that has not already been collected in a manner that can be re-used by DHS for updating checks.

Failure To File a Complete Application for Relief in a Timely Fashion

The rule also codifies the existing Board precedent that failure to file or to complete an application in a timely fashion constitutes abandonment of the application. Where an immigration judge has set a deadline for filing an application for relief, the respondent has already in fact appeared at a hearing. His statutory right to be present has been fulfilled. The Board has long held that applications for relief under the Act are properly denied as abandoned when the alien fails to timely file them. *See Matter of Jean*, 17 I&N Dec. 100 (BIA 1979) (asylum), *modified, Matter of R-R-*, 20 I&N Dec. 547 (BIA 1992); *Matter of Jaliawala*, 14 I&N Dec. 664 (BIA 1974) (adjustment of status); *Matter of Pearson*, 13 I&N Dec. 152 (BIA 1969) (visa petition); *see also Matter of Nafi*, 19 I&N Dec. 430 (BIA 1987) (exclusion proceedings). Accordingly, the rule specifies that the immigration judge shall issue an appropriate order denying or pretermitting the requested relief if the application is not timely filed or is not completed in a timely manner.

With respect to a failure to provide biometrics or other biographical information, the rule allows an immigration judge to excuse the failure to comply with these requirements within the time allowed if the applicant demonstrates that such failure was the result of good cause. This language is taken from the current provision in 8 CFR 1208.10 pertaining to applications for asylum and is consistent with the general obligation placed on the alien to satisfy this requirement. For detained aliens, though, it is the obligation of DHS to obtain the necessary biometrics and other biographical information.

Covered Forms of Immigration Relief

The Department notes that current law prohibits the immigration judges from granting asylum to any alien prior to the completion of identity, law enforcement, and security investigations. Section 208(d)(5)(A)(i) of the Act (8 U.S.C. 1158(d)(5)(A)(i)), expressly provides that

> asylum cannot be granted until the identity of the applicant has been checked against all appropriate records or databases maintained by the Attorney General [or the Secretary of Homeland Security] and by the Secretary of State, including the Automated Visa Lookout System, to determine any grounds on which the alien may be inadmissible to or deportable from the United States, or ineligible to apply for or be granted asylum.

Since the applicants have the obligation to submit a complete application and supporting documentation for the requested immigration relief, as discussed above, and the results of the DHS background and security checks are obviously of great relevance in evaluating issues relating to admissibility, qualifications, and discretion, the Attorney General has concluded that it is sound public policy to impose the procedural requirements of this rule relating to submission of biometric and other biographical information and completion of the DHS background and security checks prior to the granting of adjustment to LPR status, cancellation or withholding of removal, or other forms of relief permitting the alien to remain in the United States. Granting permanent resident status is an important step with substantial benefits that has special procedures for rescinding such status under section 246 of the Act (8 U.S.C. 1256). Other forms of relief allow the alien to remain legally in the United States and should not be granted, as a matter of sound public policy, until the applicant has complied with applicable requirements relating to biometrics and other biographical information, and until DHS has had the opportunity to complete the necessary identity, law enforcement, and security investigations that are relevant to a determination of whether the alien should be granted the requested immigration relief.

Accordingly, the rule provides a procedural requirement that the immigration judges or the Board may not grant any form of immigration relief allowing the alien to reside in the United States without ensuring that DHS has completed the identification, law enforcement, and security investigations and examinations first. This will ensure that the results of such background checks or other investigations have been reported to and considered by the immigration judges or the Board before the issuance of any order granting an alien's application for immigration relief that permits him or her to remain in the United States. The rule does not expand the circumstances in which the immigration judges or the Board have authority to grant relief, but is applicable in any case to the extent they do have such authority. Section 1003.47(b) identifies the principal forms of immigration relief covered by this rule, including:

- Asylum under section 208 of the Act;
- Adjustment of status to that of an LPR under section 209 or 245 of the Act (8 U.S.C. 1159, 1255) or any other provision of law; [5]

[5] Section 245 of the Act is the principal provision relating to adjustment of status, but section 209 provides the exclusive procedure for adjustment of status for refugees and asylees. *See* 8 CFR 1209.1, 1209.2; *Matter of Jean*, 23 I&N Dec. 373, 376 n.7, 381 (A.G. 2002). Among the other laws relating to adjustment of status are the following, although the immigration judges do not exercise authority at present over all of them: Cuban Adjustment Act, Public Law 89–732, §§ 1–5, 80 Stat. 1161 *et seq.* (Nov. 2, 1966); Indochinese Adjustment Act, Public Law 95–145, §§ 101–107, 91 Stat. 122 (Oct. 28, 1977); Virgin Islands Adjustment Act, Public Law 97–271, 76 Stat. 1157 (Sept. 30, 1982); Soviet and Indochinese Parolees Adjustment Act, Public Law 101–167, § 599E, 101 Stat. 1263 (Nov. 21, 1989); H–1 Nonimmigrant Nurses Adjustment Act, Public

• Conditional permanent resident status or the removal of the conditional basis of such status under section 216 or 216A of the Act (8 U.S.C. 1186a, 1186b);

• Waivers of inadmissibility or deportability under sections 209(c), 212, or 237 of the Act (8 U.S.C. 1159, 1182, 1227) or other provisions of law;

• Cancellation of removal under section 240A of the Act (8 U.S.C. 1229b), suspension of deportation under former section 244 of the Act, relief from removal under former section 212(c) of the Act, or any similar form of relief; [6]

• Withholding of removal under section 241(b)(3) of the Act (8 U.S.C. 1231) or withholding or deferral of removal under the Convention Against Torture;

• Registry under section 249 of the Act (8 U.S.C. 1259); and

• Conditional grants relating to the above, such as for applications seeking asylum pursuant to section 207(a)(5) of the Act or cancellation of removal in light of section 240A(e) of the Act.

In addition to those provisions specifically listed, this rule covers any other form of relief granted by the immigration judges or the Board that allows the alien to remain in the United States.

Allowing Time for DHS To Complete Background Checks and Investigations

The Department wishes to avoid unnecessary delays that may frustrate the timely adjudication of any case simply because of a failure to conduct or complete the investigations or indices checks. This rule provides a means to ensure that DHS will have an appropriate opportunity to conduct the necessary investigations including an alien's submission of his or her biometric or other biographical information, before the application is granted by the immigration judge. This rule does not impose a unilateral definition of what the investigations and examinations will constitute in every case; it remains the province of DHS to determine what identity, law enforcement, and security investigations and indices checks are required (this may vary over time and from case to case) and when those investigations and indices checks are complete. After providing a reasonable period of time for DHS to initiate the necessary investigations and to await the results from other law enforcement and intelligence agencies, as necessary, the immigration judge will then be able to address the requested forms of immigration relief on the merits. The Department recognizes that DHS cannot always know the exact period of time that will be required to complete all checks and investigations because the information often is within the control of non-DHS agencies, such as the Federal Bureau of Investigation or the Central Intelligence Agency. The national security of the country and public safety of its residents depend on swift responses, as does the efficient administration of the immigration laws.

If, for any reason, DHS is not ready to present the results of its identity, law enforcement, and security investigations by the time of the scheduled final hearing, then it will be up to DHS to make a request for a continuance (in advance of the hearing if possible) and to explain, to the extent practical, the time needed for completion. In some cases for example, where DHS is conducting an ongoing investigation of the respondent's identity or issues raised by other law enforcement agencies who may themselves have pending investigations, or indicates that a United States Attorney is presenting evidence to a grand jury concerning the respondent, multiple continuances would be justified by the ongoing criminal process into which neither DHS nor the immigration judge can intrude. This process contemplates that, if DHS indicates that it is unable to complete the identity, law enforcement, or security investigation because of a pending investigation of the respondent—either by DHS or by any other agency—then DHS will be able to obtain a further continuance to complete the pending investigation.

The Attorney General has delegated authority to immigration judges in the past to close cases administratively in certain contexts, particularly in those cases where DHS, rather than the immigration judge, has substantive authority over a particular form of relief. *See* 8 CFR 1240.62, 1245.13, 1245.15, 1245.21. However, the regulations do not authorize the immigration judge to close cases administratively solely because the respondent is subject to investigation or indices checks. Administrative closure causes a case to fall out of the regular calendar, undermining an assurance that the case will be resolved in a timely manner. Instead, this rule contemplates that cases awaiting the completion of an identity, law enforcement, or security investigation should remain on an active calendar and should be on schedule for a hearing on a particular date. Instead of administrative closure, the Department anticipates that the continuance process described in this rule will deal with the necessary delays inherent in completing identity, law enforcement, and security investigations and examinations for certain respondents.

The Department recognizes the importance of completing the investigations and indices checks in advance and allowing an adequate opportunity for DHS or other agencies to complete the necessary steps regarding the background investigations. On occasion, immigration judges have attempted to ''order'' DHS to complete investigations by a specific date, an authority that was never delegated by the Attorney General when the functions of the former Immigration and Naturalization Service were a part of the Department of Justice, and an authority that the Attorney General does not now delegate to immigration judges.

However, the Department believes that it is also important for the immigration judge to be able to move cases toward completion. The Department believes that the rule properly balances the respective and competing interests in that very small number of affected cases where DHS is not able to complete the necessary identity, law enforcement, and security investigations of the alien in time for the scheduled hearing on the merits of the alien's application for immigration relief.

In some cases, the continuance of a merits hearing would impose significant burdens on the court, the respondent, or witnesses, and this rule does not prohibit an immigration judge from proceeding with a merits hearing in the absence of a report from DHS that all background investigations are complete. In such cases, the immigration judge may hear the case on the merits but may not render a decision granting any covered form of relief. Instead, the immigration judge should schedule an additional master hearing on a date by which investigations are expected to be completed.

Procedures for Cases on Appeal Before the Board

This rule also provides new procedures codified at § 1003.1(d)(6) to

Law 101–238, § 2, 103 Stat. 2099 (Dec. 15, 1989); Chinese Student Protection Act of 1992, Public Law 102–404, 106 Stat. 1969 (Oct. 9, 1992); Polish and Hungarian Parolees Adjustment Act of, Public Law 104–208, Div. C, § 646, 110 Stat. 3009–709 (Sept. 30, 1996); Nicaraguan Adjustment and Central American Relief Act (NACARA), Public Law 105–100, § 202, 11 Stat. 2193 (Nov. 19, 1997); Haitian Refugee Immigration Fairness Act (HRIFA), Public Law 105–277, Div. A, § 101(h) [Title IX, § 902], 112 Stat. 2681–538 (Oct. 21, 1998); Syrian Adjustment Act, Public Law 106–378, 114 Stat. 1442 (Oct. 27, 2000); and Indochinese Parolees Adjustment Act, Public Law 106–429, § 101(a), 114 Stat. 1900 (Nov. 6, 2000).

[6] This includes special rule cancellation of removal under NACARA § 203.

take account of those cases where the Board is considering relief from removal that is subject to the provisions of § 1003.47(b), to ensure that the Board does not affirm or grant such relief where the identity, law enforcement, and security investigations or examinations have not been conducted or the results of prior background checks have expired and must be updated.

In most of the currently pending cases (sometimes referred to as pipeline or transitional cases), there is no indication in the record whether or not DHS ever conducted the identity, law enforcement, and security investigations or examinations with respect to the respondent. In such cases, the Board will not be able to issue a final decision granting any application for relief that is subject to the provisions of § 1003.47, because the record is not yet complete. After consideration of the issues on appeal, the Board will remand the case to the immigration judge with instructions to allow DHS to complete the necessary investigations and examinations and report the results to the immigration judge.

In the future, though, once the provisions of § 1003.47 take effect, the Department recognizes that for those cases appealed to the Board involving applications for relief, DHS will have completed the appropriate background checks either in advance of the filing of the NTA or prior to the immigration judge's decision. The issue on appeal therefore will be whether those checks are current and whether new information has developed since completion of the initial background checks that would affect the appeal and the underlying application for relief.

Based upon the consideration that DHS will have run background checks at least once prior to the time the Board is considering an appeal, this rule provides a new limitation that the Board cannot grant an application for relief if DHS notifies the Board that the background checks have expired and need to be updated or if the background checks have uncovered information bearing on the merits of the alien's application for relief. Because DHS (not the immigration judge or the Board) determines the requirements and timing for updating previous investigations or examinations, and DHS may decide to revise such standards and requirements over time, it is appropriate to require DHS to notify the Board in those cases where DHS has determined that the results of the previous checks have expired and must be updated. However, in view of the time needed for the Board to complete its case adjudications, the Department acknowledges that in many (perhaps most) appeals the results of the previous identity, law enforcement, and security investigations or examinations will no longer be current under the standards established by DHS and must be updated before the Board has completed its adjudication process. (Under the current regulations in 8 CFR 1003.1(e), the Board is required to adjudicate cases within 90 days after the completion of the record on appeal for cases assigned to a single Board member, or within 180 days after completion of the record on appeal for cases assigned to a three-member panel. Those time frames, however, do not include the time needed to complete the record on appeal, including transcription of the proceedings before the immigration judge and completion of briefing by the parties.)

In those cases where DHS advises the Board that the results of earlier investigations are no longer current under DHS's standards, the Board will not be able to issue a final decision granting or affirming any form of relief covered by § 1003.47. Except as provided in § 1003.1(d)(6)(iv) of this rule, the Board will then choose one of two alternatives in order to complete the adjudication of the case in the most expeditious manner. In many such cases, after consideration of the merits of the appeal, the Board will issue an order remanding the case to the immigration judge to permit DHS to update the results of the previous identity, law enforcement, and security investigations or examinations and report the results to the immigration judge. In the alternative, after consideration of the merits of the appeal, the Board may provide notice to both parties that in order to complete the adjudication of the appeal the case is being placed on hold to allow DHS to update biometrics and other biographical information processing requirements and any remaining identity, law enforcement, and security investigations. (The rule also includes a conforming amendment to the existing time limits for the Board's disposition of appeals). Under the provisions of § 1003.1(d)(6) and § 1003.47(e), as added by this rule, DHS is obligated to complete the investigations as soon as practicable and to advise the Board promptly whether or not the investigations have been completed and are current.

This rule does not disturb the Board's authority to take administrative notice of the contents of official documents as provided in 8 CFR 1003.1(d)(3)(iv). If there are any issues to be resolved relating to any information bearing on the respondent's eligibility (or, if the relief is discretionary, whether that information supports a denial in the exercise of discretion), DHS may file a motion with the Board to remand the record of proceedings to the immigration judge. Where the Board cannot properly resolve the appeal without further factfinding, the record may be remanded to the immigration judge.

In the short term, the Department anticipates that remanding cases to the immigration judge may be the most efficient means to complete or update results for pipeline or transitional cases, since that process will facilitate DHS's ability to obtain new biometrics from the respondent for the purpose of updating previous identity, law enforcement, and security investigations or examinations. Over time, however, as DHS is able to improve its internal procedures for updating the results of previous investigations or examinations without the need for aliens to provide a new set of fingerprints, the Department expects that the Board and DHS should be able to make much greater use of the procedure for holding pending appeals where necessary in order to allow the opportunity for DHS to update prior results without requiring a remand.

In any case that is remanded to the immigration judge pursuant to § 1003.1(d)(6), the Board's order will be an order remanding the case and not a final decision, in order to allow DHS to complete or update the identity, law enforcement, and security investigations or examinations of the respondent(s). The immigration judge will then consider the results of the completed or updated investigations or investigations before issuing a decision granting or denying the relief sought. If DHS presents additional information as a result, the immigration judge may conduct a further hearing as needed to resolve any legal or factual issues raised. The immigration judge's decision following remand may be appealed to the Board as provided by §§ 1003.1(b) and 1003.38 if there is any new evidence in the record as a result of the background investigation.

Section 1003.1(d)(6)(iv) of this rule, however, provides that the Board is not required to remand or hold a case under § 1003.1(d)(6) if the Board decides to dismiss the respondent's appeal or deny the relief sought. In any case where the results of the DHS investigations or examinations would not affect the disposition of the case—for example, where the Board determines that the respondent's appeal should be dismissed or the alien is ineligible for

the relief sought because of a criminal conviction or is unable to establish required elements for eligibility such as continuous physical presence, extreme hardship, good moral character, or past persecution or a well-founded fear of future persecution—there is no reason to delay the Board's disposition of the case. The results of the identity, law enforcement, or security investigations or examinations may be relevant to the exercise of discretion in granting or denying relief in some cases, but not in cases where the respondent is unable to establish eligibility in any event.

The Department recognizes that the implementation of this rule will mean that many cases may be continued by the immigration judges or remanded or placed on hold by the Board pending the completion or updating of the necessary identity, law enforcement, and security investigations or examinations by DHS. This is particularly true for the pipeline or transitional cases that are already pending as of the date this rule takes effect. Nevertheless, the Department has determined that the security of the United States is of the utmost importance and requires that aliens not be granted the forms of relief covered by § 1003.47 unless the identity, law enforcement, and security investigations and examinations have been conducted by DHS and are up-to-date. The Department is therefore publishing this rule as an interim rule. Moreover, after the initial implementation period, it is expected that the number of cases where immigration judges will continue a case under § 1003.47(f) or where the Board is required to hold or remand a case under § 1003.1(d)(6) will diminish over time. The Department anticipates that in the future DHS will be able to improve its procedures for conducting and updating its investigations or examinations in such a manner as to minimize the delays in the adjudicatory process.

Granting of Relief

When the immigration judge or the Board grants relief entitling respondent to a document from DHS evidencing status, the decision will include either an oral or written notification to the respondent to appear before the appropriate local DHS office for preparation of such document or to obtain required biometric and other biographical information for preparation of such document. In the past, the lack of such a notification by immigration judge and Board decisions and the ambiguity of an Immigration and Customs Enforcement counsel's responsibility to provide such instruction relating to a function of CIS have resulted in confusion on the part of the alien about the process for receiving such document. It is expected that the local DHS office will promptly direct the respondent to submit to any biometric processing necessary to prepare documents in keeping with biometric and other requirements of the law.

Conforming Amendments to Part 1208

This rule makes conforming amendments to 8 CFR part 1208 to ensure consistency with the provisions of § 1003.47 as added by this rule. The rule amends § 1208.4 to provide that an asylum application filed in proceedings before an immigration judge is considered to have been filed regardless of when biometrics are completed, as provided in § 1003.47. Failure to comply with processing requirements for biometrics and other biographical information within the time allowed will result in dismissal of the application, unless the applicant demonstrates that such failure was the result of good cause under § 1003.47(c) and (d) and amended 8 CFR 1208.10.

This rule also revises the language of § 1208.10 to eliminate confusing and unnecessary language that pertains to the processing of asylum applications by asylum officers in USCIS rather than by the immigration judges. Retention of such provisions pertaining solely to DHS's asylum office procedures—including the reference to a failure to appear for an asylum interview before an asylum officer, the waiver of the right to an adjudication by an asylum officer, and providing a change of address to the Office of International Affairs—is unnecessary and inappropriate in the Attorney General's regulations in part 1208 that now govern consideration of asylum cases by the immigration judges and the Board.[7] (Such provisions, of course, are still retained in the DHS regulations in 8 CFR part 208 relating to the consideration of asylum applications by asylum officers.)

There is no need for lengthy provisions in § 1208.10 pertaining to an alien's failure to appear for a hearing before an immigration judge because the Act already provides clear procedures for dealing with a failure to appear, including the issuance of an order of deportation or removal *in absentia* in appropriate cases, and also a process for seeking rescission of an *in absentia* order. *See* section 240(b)(5) and former section 242B(c) of the Act. There is also no need for discussion of a change of address in this context because the Act and the regulations already include clear provisions relating to the obligation of aliens to provide a current address to the Attorney General in connection with the immigration proceedings. Accordingly, after a brief reference to the consequences for an alien's failure to appear for a deportation or removal proceeding, § 1208.10 is revised to focus on the issue of a failure to comply with requirements to provide biometrics and other biographical information, consistent with the provisions of § 1003.47.

This rule also makes a conforming amendment in § 1208.14 to require compliance with the requirements of § 1003.47 concerning identity, law enforcement, and security investigations before an immigration judge can grant asylum. This change codifies the existing statutory requirement in section 208(d)(5)(A)(i) of the Act and cross-references the procedural requirements in § 1003.47.

Voluntary Departure

Section 240B of the Act (8 U.S.C. 1229c) authorizes DHS (prior to the initiation of removal proceedings) or an immigration judge (after the initiation of removal proceedings) to approve an alien's request to be granted the privilege of voluntary departure in lieu of being ordered removed from the United States. Although a grant of voluntary departure does not authorize an alien to remain indefinitely in the United States, it permits the alien to

[7] Pursuant to the Homeland Security Act of 2002, Public Law 107–296, on March 1, 2003, the functions of the former Immigration and Naturalization Service were transferred from the Department of Justice to DHS. Although the responsibility for the Asylum Officer program was transferred to USCIS, the immigration judges and the Board remained under the authority of the Attorney General and retained their preexisting authority with respect to applications for asylum and withholding of removal filed or renewed by aliens in removal proceedings. Since both the Secretary of Homeland Security and the Attorney General are vested with independent authority over asylum matters and certain other matters under the Immigration and Nationality Act, it was necessary for the Attorney General to promulgate a new set of regulations pertaining to the authority of the immigration judges and the Board, separate from the previous INS regulations. Accordingly, on February 28, 2003, the Attorney General published regulations reorganizing title 8 of the Code of Federal Regulations, creating a new chapter V for regulations of the Department of Justice, which is separate from the regulations of the new DHS that continue to be codified in 8 CFR chapter I. 68 FR 9824 (February 28, 2003); *see also* 68 FR 10349 (March 5, 2003). As a result of the shared authority over asylum matters, and in view of the limited time available to implement the necessary changes, the Attorney General's new regulations duplicated the asylum and withholding of removal regulations in part 208 into a new part 1208 in chapter V. The Department of Justice and DHS are now engaged in the process of amending their respective regulations to eliminate unnecessary provisions pertaining to the authority of the other agency.

remain in the United States until the expiration of the period of voluntary departure—generally, up to 120 days if voluntary departure is granted prior to the completion of immigration proceedings pursuant to 8 CFR 1240.26(b) and up to 60 days if granted at the conclusion of the proceedings before the immigration judge pursuant to 8 CFR 1240.26(c).

The identity, law enforcement, and security checks conducted by DHS are also relevant in connection with the granting of voluntary departure by an immigration judge, whether during the pendency of removal proceedings or at the completion of those proceedings. This is so because the results of the investigations may be relevant with respect to the exercise of discretion by the immigration judge in deciding whether or not to grant voluntary departure, and also in view of the requirement that an alien must demonstrate good moral character to obtain voluntary departure at the conclusion of removal proceedings. *See* 8 CFR 1240.26(c). A grant of voluntary departure is a valuable benefit because it allows an alien who departs the country within the allowable period to avoid the adverse future consequences under the immigration laws attributable to having been ordered removed.

On the other hand, the Department recognizes the importance of granting of voluntary departure in proper cases, whether voluntary departure is granted prior to the conclusion of immigration proceedings or in lieu of an order of removal, without causing unnecessary delays in the process. As a practical matter, the DHS background and security checks may be completed routinely in many cases in a timely manner, if DHS captures the alien's biometrics or other biographical information and initiates the necessary investigations prior to or at the time of issuing and filing the NTA, but there will be some cases as noted above where completion of the background or security checks may require a significant additional period of time.

Accordingly, this rule does not propose to require the immigration judges to wait until being advised by DHS that it has completed the appropriate identity, law enforcement, and security investigations before the immigration judges can grant voluntary departure. However, the rule recognizes that DHS may affirmatively seek additional time to complete such investigations in some cases prior to the granting of voluntary departure, and allows the immigration judges to decide such requests for a continuance on a case-by-case basis.

This rule also makes an accommodation in the existing time limits with respect to the granting of voluntary departure prior to the conclusion of removal proceedings, where the alien makes a request for voluntary departure no later than the master calendar hearing at which the case is initially calendared for a merits hearing, as provided in 8 CFR 1240.26(b)(1)(i)(A). In such a case, where the DHS investigations have not yet been completed, the immigration judge may grant a continuance to await the results of DHS's investigations before granting voluntary departure. The granting of a continuance will thereby extend the 30-day period, as currently provided in § 1240.26(b)(1)(ii), for the immigration judge to grant a request for voluntary departure prior to the conclusion of removal proceedings.

Custody Redeterminations

In view of the distinct nature of custody redetermination hearings before the immigration judges, and the exigencies of time often associated with such hearings, this rule does not propose to apply the same procedures for custody hearings as for removal proceedings. *See* 8 CFR 1003.19(d) (custody and bond hearings separate and apart from removal proceedings).

Although some background or security investigations may require weeks or months to resolve certain sensitive or difficult issues, as noted above, the initial determinations relating to holding aliens in custody during the pendency of removal proceedings against them must be made on a more expedited basis. Under its existing regulations, DHS generally must make a decision on the continued detention of an alien within 48 hours of apprehending the alien, except in the case of an emergency or other extraordinary circumstances requiring additional time. 8 CFR 287.3(d). Thereafter, unless the alien is subject to detention pursuant to section 236(c) of the Act or other special circumstances, the alien can immediately request a hearing before an immigration judge to seek a redetermination of the conditions of custody, as provided in 8 CFR 1003.19.

The Supreme Court has repeatedly ''recognized detention during deportation proceedings as a constitutionally valid aspect of the deportation process,'' *Demore* v. *Kim*, 538 U.S. 510, 523 (2003), and has recognized that ''Congress eliminated any presumption of release pending deportation, committing that determination to the discretion of the Attorney General.'' *Reno* v. *Flores*, 507 U.S. 292, 306 (1993); *see also Carlson* v. *Landon*, 342 U.S. 524, 538–40 (1952). Under section 236 of the Act (8 U.S.C. 1226), an alien has no right to be released from custody during the pendency of removal proceedings, and both DHS, in making custody decisions, and the Attorney General, the Board, and the immigration judges, in conducting reviews of custody determinations, have broad discretion in deciding whether or not an alien has made a sufficient showing to merit being released on bond or on personal recognizance pending the completion of removal proceedings.

> As recognized by the Supreme Court, section 236(a) does not give detained aliens any *right* to release on bond. Rather, the statute merely gives the Attorney General the authority to grant bond *if* he concludes, in the exercise of broad discretion, that the alien's release on bond is warranted. The extensive discretion granted the Attorney General under the statute is confirmed by its further provision that ''[t]he Attorney General's discretionary judgment regarding the application of this section shall not be subject to review.'' Section 236(e) of the INA. Even apart from that provision, the courts have consistently recognized that the Attorney General has extremely broad discretion in determining whether or not to release an alien on bond under this and like provisions. Further, the INA does not limit the discretionary factors that may be considered by the Attorney General in determining whether to detain an alien pending a decision on asylum or removal.

Matter of D-J-, 23 I&N Dec. 572, 575–76 (A.G. 2003) (citations omitted; emphasis in original).

The existing regulations provide that an immigration judge, in reviewing a custody determination by DHS, may consider any relevant information available to the immigration judge or any information presented by the alien or by DHS. 8 CFR 1003.19(d). There can be no doubt that the results of DHS's identity, law enforcement, and security investigations can be quite relevant with respect to a redetermination of custody conditions by the immigration judge for aliens detained in connection with immigration proceedings. The custody decisions should be made on the basis of as complete a record as possible under the circumstances, but must be made promptly in light of applicable legal standards.

Accordingly, § 1003.47(k) of the rule provides that the immigration judges, in scheduling a custody redetermination hearing in response to an alien's request under 8 CFR 1003.19(b), should take into account, to the extent practicable consistent with the expedited nature of such cases, the brief initial period of time needed by DHS to conduct the

automated portions of its identity, law enforcement, and security checks prior to a custody redetermination by an immigration judge.

This rule contemplates that DHS may have an opportunity to present at least the results of automated checks, to the extent practicable, but does not require the immigration judges to wait until being advised by DHS that it has completed all appropriate identity, law enforcement, and security investigations before the immigration judges can order an alien released on bond or personal recognizance. However, the rule specifically provides that DHS may affirmatively request that the immigration judge allow additional time to complete such investigations in particular cases prior to the issuance of a custody decision, and the immigration judge will decide such requests for a continuance on a case-by-case basis.

Allowing a brief initial period of time for DHS to complete the automated portions of its background and security checks, and providing a process for DHS to request additional time in particular cases to resolve issues in those investigations, is sound public policy in order to ensure that the immigration judges' decisions are based on as complete a record as possible under the circumstances. Moreover, this approach may also be expected to reduce the number of instances in which an immigration judge's custody decision is subject to an automatic stay pending appeal to the Board—*i.e.*, in those cases where DHS as a matter of discretion chooses to invoke the provisions of 8 CFR 1003.19(i)(2) because of concerns relating to the unresolved identity, law enforcement, or security investigations.

Under this rule, though, there will be cases where the immigration judge may issue a custody decision without waiting for DHS to complete all portions of its identity, law enforcement, or security checks, particularly where there is some delay in completing those investigations. In any case (whether through the background and security checks or otherwise) where DHS subsequently discovers information reflecting a clear change of circumstances with regard to the reasons for detaining an individual during the pendency of the removal proceedings, the Department notes that DHS is free to decide to cancel the alien's bond and take the alien back into custody under section 236 of the Act, under established procedures. *See* 8 CFR 236.1(c)(9), 1236.1(c)(9); Matter of Sugay, 17 I&N Dec. 637, 639 (BIA 1981) (finding ''without merit [the alien's] counsel's argument that the District Director was without authority to revoke bond once an alien has had a bond redetermination hearing'' before an immigration judge); *see also Matter of Valles-Perez,* 21 I&N Dec. 769, 772 (BIA 1997) (''the regulations presently provide that when an alien has been released following a bond proceeding, a district director has continuing authority to revoke or revise the bond, regardless of whether the Immigration Judge or this Board has rendered a bond decision.''). An alien whose bond has been revoked after previously being ordered released by an immigration judge can then seek a new custody determination. *See Ortega de los Angeles* v. *Ridge,* No. CV 04–0551–PHX–JAT (JI) (D. Ariz. Apr. 27, 2004).

Consistent with the district court's accurate interpretation of the existing regulatory language in *Ortega,* this rule also revises § 1003.19(e) to clarify this provision and codify the Department's interpretation that it only relates to subsequent requests for bond redeterminations made by the alien.

Good Cause Exception

The Department has determined that good cause exists under 5 U.S.C. 553(b)(B) and (d)(3) to make this rule effective April 1, 2005, for several reasons. Protecting national security and public safety has long been a focus of U.S. immigration law. Applicants for immigration benefits are always subject to some form of law enforcement check to assess their eligibility for the benefits or determine their inadmissibility to, or removability from, the United States. The September 11, 2001, attack and the 9/11 Commission's report, however, have highlighted the urgent need for immediate reforms to certain immigration processes, including the process by which the Department, DHS, and other law enforcement agencies initiate, vet, and resolve law enforcement checks.

Both the Department and DHS have expanded the number and types of law enforcement checks conducted on aliens seeking immigration benefits. However, vulnerability exists in the manner in which immigration benefits are given, particularly when an immigration status is granted or document is issued prior to completion of the required law enforcement checks or investigations by DHS, the Department, or other law enforcement agencies. The 9/11 Commission highlighted many of the dangers posed by terrorists, including their mobility, and recommended improved immigration controls that would ensure, among other things, that terrorists cannot obtain travel documents. Certain immigration statuses granted by DHS and the Department and certain documents issued by USCIS authorize aliens not only to work in the United States but also to travel freely to and from the United States. Issuance of this interim rule will enable DOJ and DHS to detect aliens who may pose a threat to the United States before they would otherwise be granted relief from removal that would permit them to continue residing in the United States and to obtain documents from DHS that permit them to board planes and other vessels or work in jobs in the U.S. that could facilitate their plans to commit terrorist acts. In addition, possession of an employment authorization document demonstrates that an alien's presence in the U.S. is ''under color of law,'' which not only can facilitate travel within the U.S., but also can cause a law enforcement officer or security official (public or private) not to follow up on an encounter with the individual.

The significance of completing law enforcement checks prior to the granting of applications for relief from removal by EOIR adjudicators or issuance of immigration documents by DHS cannot be overestimated. DHS reports that through the law enforcement check process it has discovered that certain applicants were: (1) Attempting to procure missile technology for a foreign government with terrorist ties; (2) previously deported for attempted drug smuggling; (3) serving as an executive officer of a designated foreign terrorist organization; (4) subject to outstanding warrants for rape and other aggravated felonies; and (5) escaped prisoners from Canada and other countries who were subject to extradition. If the Department had granted an application for relief from removal, such as lawful permanent resident status, without being apprised of results from law enforcement checks or investigations, it is likely that individuals such as these would have gained the freedom to move throughout the United States (and possibly travel internationally) and to further any criminal efforts or terrorist activities that could affect America's safety and threaten national security.

Congress has provided DHS and the Department with authority in certain instances to rescind, revoke, or terminate an immigration status that was illegally procured or procured by concealment of a material fact or by willful misrepresentation. *See, e.g.* sections 205, 246, and 340 of the Act (8 U.S.C. 1155, 1256, and 1451). However, the process for rescission, revocation, or termination of an immigration status or document in many instances can be prolonged for several months or years, particularly in those cases requiring

judicial review. Even when DHS places aliens in removal or rescission proceedings or seeks to terminate or revoke an immigration status previously granted, the aliens in most instances retain their immigration status, even if granted in error, while such proceedings are ongoing and until concluded. As a result, the potential for harm increases the longer an alien retains an immigration status or document that he or she is not lawfully entitled to or should not have been issued in the first instance. Therefore, it is imperative that DHS run background checks before applications for immigration relief or protection from removal are granted or immigration documents are issued.

While we expect that public comments may help the Department to improve its process, the urgency of putting a better system in place outweighs the opportunity for notice and comment before any improvement is made. Accordingly, the Department finds that it would be impracticable and contrary to the public interest to delay implementation of this rule to allow the prior notice and comment period normally required under 5 U.S.C. 553(b)(B) and (d)(3). The Department nevertheless invites written comments on this interim rule and will consider any timely comments in preparing the final rule.

Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and, by approving it, certifies that this rule will not have a significant economic impact on a substantial number of small entities. It does not have any impact on small entities as that term is defined in 5 U.S.C. 601(6).

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Act of 1996, 5 U.S.C. 804. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Executive Order 12866

This rule is considered by the Department of Justice to be a ''significant regulatory action'' under Executive Order 12866, section 3(f), Regulatory Planning and Review. Accordingly, this rule has been submitted to the Office of Management and Budget for review.

Executive Order 13132

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

Executive Order 12988, Civil Justice Reform

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, Public Law 104–13, all Departments are required to submit to the Office of Management and Budget (OMB) for review and approval, any reporting requirements inherent in a final rule. This rule does not impose any new reporting or recordkeeping requirements under the Paperwork Reduction Act.

List of Subjects

8 CFR Part 1003

Administrative practice and procedure, Aliens, Immigration, Legal services, Organization and function (Government agencies).

8 CFR Part 1208

Administrative practice and procedure, Aliens, Immigration, Organization and function (Government agencies).

■ Accordingly, chapter V of title 8 of the Code of Federal Regulations is amended as follows:

PART 1003—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

■ 1. The authority citation for 8 CFR part 1003 continues to read as follows:

Authority: 5 U.S.C. 301; 8 U.S.C. 1101 note, 1103, 1252 note, 1252b, 1324b, 1362; 28 U.S.C. 509, 510, 1746; sec. 2, Reorg. Plan No. 2 of 1950, 3 CFR, 1949–1953 Comp., p. 1002; section 203 of Pub. L. 105–100, 111 Stat. 2196–200; sections 1506 and 1510 of Pub. L. 106–386; 114 Stat. 1527–29, 1531–32; section 1505 of Pub. L. 106–554, 114 Stat. 2763A–326 to –328.

■ 2. Section 1003.1 is amended by redesignating paragraph (d)(6) as paragraph (d)(7), adding a new paragraph (d)(6), and revising paragraph (e)(8)(i), to read as follows:

§ 1003.1 Organization, jurisdiction, and powers of the Board of Immigration Appeals.

* * * * *

(d) * * *

(6) *Identity, law enforcement, or security investigations or examinations.* (i) The Board shall not issue a decision affirming or granting to an alien an immigration status, relief or protection from removal, or other immigration benefit, as provided in 8 CFR 1003.47(b), that requires completion of identity, law enforcement, or security investigations or examinations if:

(A) Identity, law enforcement, or security investigations or examinations have not been completed during the proceedings;

(B) DHS reports to the Board that the results of prior identity, law enforcement, or security investigations or examinations are no longer current under the standards established by DHS and must be updated; or

(C) Identity, law enforcement, or security investigations or examinations have uncovered new information bearing on the merits of the alien's application for relief.

(ii) Except as provided in paragraph (d)(6)(iv) of this section, if identity, law enforcement, or security investigations or examinations have not been completed or DHS reports that the results of prior investigations or examinations are no longer current under the standards established by DHS, then the Board will determine the best means to facilitate the final disposition of the case, as follows:

(A) The Board may issue an order remanding the case to the immigration judge with instructions to allow DHS to complete or update the appropriate identity, law enforcement, or security investigations or examinations pursuant to § 1003.47; or

(B) The Board may provide notice to both parties that in order to complete

adjudication of the appeal the case is being placed on hold until such time as all identity, law enforcement, or security investigations or examinations are completed or updated and the results have been reported to the Board.

(iii) In any case placed on hold under paragraph (d)(6)(ii)(B) of this section, DHS shall report to the Board promptly when the identity, law enforcement, or security investigations or examinations have been completed or updated. If DHS obtains relevant information as a result of the identity, law enforcement, or security investigations or examinations, or if the applicant fails to comply with necessary procedures for collecting biometrics or other biographical information, DHS may move to remand the record to the immigration judge for consideration of whether, in view of the new information or the alien's failure to comply, the immigration relief should be denied, either on grounds of eligibility or, where applicable, as a matter of discretion.

(iv) The Board is not required to remand or hold a case pursuant to paragraph (d)(6)(ii) of this paragraph if the Board decides to dismiss the respondent's appeal or deny the relief sought.

(v) The immigration relief described in 8 CFR 1003.47(b) and granted by the Board shall take effect as provided in 8 CFR 1003.47(i).

(e) * * *

(8) * * *

(i) Except in exigent circumstances as determined by the Chairman, or as provided in paragraph (d)(6) of this section, the Board shall dispose of all appeals assigned to a single Board member within 90 days of completion of the record on appeal, or within 180 days after an appeal is assigned to a three-member panel (including any additional opinion by a member of the panel).

* * * * *

■ 3. Paragraph (e) of § 1003.19 is revised to read as follows:

§ 1003.19 Custody/bond.

* * * * *

(e) After an initial bond redetermination, an alien's request for a subsequent bond redetermination shall be made in writing and shall be considered only upon a showing that the alien's circumstances have changed materially since the prior bond redetermination.

* * * * *

■ 4. Section 1003.47 is added to read as follows:

§ 1003.47 Identity, law enforcement, or security investigations or examinations relating to applications for immigration relief, protection, or restriction on removal.

(a) *In general.* The procedures of this section are applicable to any application for immigration relief, protection, or restriction on removal that is subject to the conduct of identity, law enforcement, or security investigations or examinations as described in paragraph (b) of this section, in order to ensure that DHS has completed the appropriate identity, law enforcement, or security investigations or examinations before the adjudication of the application.

(b) *Covered applications.* The requirements of this section apply to the granting of any form of immigration relief in immigration proceedings which permits the alien to reside in the United States, including but not limited to the following forms of relief, protection, or restriction on removal to the extent they are within the authority of an immigration judge or the Board to grant:

(1) Asylum under section 208 of the Act.

(2) Adjustment of status to that of a lawful permanent resident under sections 209 or 245 of the Act, or any other provision of law.

(3) Waiver of inadmissibility or deportability under sections 209(c), 212, or 237 of the Act, or any provision of law.

(4) Permanent resident status on a conditional basis or removal of the conditional basis of permanent resident status under sections 216 or 216A of the Act, or any other provision of law.

(5) Cancellation of removal or suspension of deportation under section 240A or former section 244 of the Act, or any other provision of law.

(6) Relief from removal under former section 212(c) of the Act.

(7) Withholding of removal under section 241(b)(3) of the Act or under the Convention Against Torture.

(8) Registry under section 249 of the Act.

(9) Conditional grants relating to the above, such as for applications seeking asylum pursuant to section 207(a)(5) of the Act or cancellation of removal in light of section 240A(e) of the Act.

(c) *Completion of applications for immigration relief, protection, or restriction on removal.* Failure to file necessary documentation and comply with the requirements to provide biometrics and other biographical information in conformity with the applicable regulations, the instructions to the applications, the biometrics notice, and instructions provided by DHS, within the time allowed by the immigration judge's order, constitutes abandonment of the application and the immigration judge may enter an appropriate order dismissing the application unless the applicant demonstrates that such failure was the result of good cause. Nothing in this section shall be construed to affect the provisions in 8 CFR 1208.4 regarding the timely filing of asylum applications or the determination of a respondent's compliance with any other deadline for initial filing of an application, including the consequences of filing under the Child Status Protection Act.

(d) *Biometrics and other biographical information.* At any hearing at which a respondent expresses an intention to file or files an application for relief for which identity, law enforcement, or security investigations or examinations are required under this section, unless DHS advises the immigration judge that such information is unnecessary in the particular case, DHS shall notify the respondent of the need to provide biometrics and other biographical information and shall provide a biometrics notice and instructions to the respondent for such procedures. The immigration judge shall specify for the record when the respondent receives the biometrics notice and instructions and the consequences for failing to comply with the requirements of this section. Whenever required by DHS, the applicant shall make arrangements with an office of DHS to provide biometrics and other biographical information (including for any other person covered by the same application who is required to provide biometrics and other biographical information) before or as soon as practicable after the filing of the application for relief in the immigration proceedings. Failure to provide biometrics or other biographical information of the applicant or any other covered individual within the time allowed will constitute abandonment of the application or of the other covered individual's participation unless the applicant demonstrates that such failure was the result of good cause. DHS is responsible for obtaining biometrics and other biographical information with respect to any alien in detention.

(e) *Conduct of investigations or examinations.* DHS shall endeavor to initiate all relevant identity, law enforcement, or security investigations or examinations concerning the alien or beneficiaries promptly, to complete those investigations or examinations as promptly as is practicable (considering, among other things, increased demands placed upon such investigations), and to advise the immigration judge of the

results in a timely manner, on or before the date of a scheduled hearing on any application for immigration relief filed in the proceedings. The immigration judges, in scheduling hearings, shall allow a period of time for DHS to undertake the necessary identity, law enforcement, or security investigations or examinations prior to the date that an application is scheduled for hearing and disposition, with a view to minimizing the number of cases in which hearings must be continued.

(f) *Continuance for completion of investigations or examinations.* If DHS has not reported on the completion and results of all relevant identity, law enforcement, or security investigations or examinations for an applicant and his or her beneficiaries by the date that the application is scheduled for hearing and disposition, after the time allowed by the immigration judge pursuant to paragraph (e) of this section, the immigration judge may continue proceedings for the purpose of completing the investigations or examinations, or hear the case on the merits. DHS shall attempt to give reasonable notice to the immigration judge of the fact that all relevant identity, law enforcement, or security investigations or examinations have not been completed and the amount of time DHS anticipates is required to complete those investigations or examinations.

(g) *Adjudication after completion of investigations or examinations.* In no case shall an immigration judge grant an application for immigration relief that is subject to the conduct of identity, law enforcement, or security investigations or examinations under this section until after DHS has reported to the immigration judge that the appropriate investigations or examinations have been completed and are current as provided in this section and DHS has reported any relevant information from the investigations or examinations to the immigration judge.

(h) *Adjudication upon remand from the Board.* In any case remanded pursuant to 8 CFR 1003.1(d)(6), the immigration judge shall consider the results of the identity, law enforcement, or security investigations or examinations subject to the provisions of this section. If new information is presented, the immigration judge may hold a further hearing if necessary to consider any legal or factual issues, including issues relating to credibility, if relevant. The immigration judge shall then enter an order granting or denying the immigration relief sought.

(i) *Procedures when immigration relief granted.* At the time that the immigration judge or the Board grants any relief under this section that would entitle the respondent to a new document evidencing such relief, the decision granting such relief shall include advice that the respondent will need to contact an appropriate office of DHS. Information concerning DHS locations and local procedures for document preparation shall be routinely provided to EOIR and updated by DHS. Upon respondent's presentation of a final order from the immigration judge or the Board granting such relief and submission of any biometric and other information necessary, DHS shall prepare such documents in keeping with section 264 of the Act and regulations thereunder and other relevant law.

(j) *Voluntary departure.* The procedures of this section do not apply to the granting of voluntary departure prior to the conclusion of proceedings pursuant to 8 CFR 1240.26(b) or at the conclusion of proceedings pursuant to 8 CFR 1240.26(c). If DHS seeks a continuance in order to complete pending identity, law enforcement, or security investigations or examinations, the immigration judge may grant additional time in the exercise of discretion, and the 30-day period for the immigration judge to grant voluntary departure, as provided in § 1240.26(b)(1)(ii), shall be extended accordingly.

(k) *Custody hearings.* The foregoing provisions of this section do not apply to proceedings seeking the redetermination of conditions of custody of an alien during the pendency of immigration proceedings under section 236 of the Act. In scheduling an initial custody redetermination hearing, the immigration judge shall, to the extent practicable consistent with the expedited nature of such cases, take account of the brief initial period of time needed for DHS to conduct the automated portions of its identity, law enforcement, or security investigations or examinations with respect to aliens detained in connection with immigration proceedings. If at the time of the custody hearing DHS seeks a brief continuance in an appropriate case based on unresolved identity, law enforcement, or security investigations or examinations, the immigration judge in the exercise of discretion may grant one or more continuances for a limited period of time which is reasonable under the circumstances.

PART 1208—PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL

■ 5. The authority citation for part 1208 is revised to read as follows:

Authority: 8 U.S.C. 1103, 1158, 1225, 1231, 1282.

■ 6. Section 1208.4 is amended by adding two new sentences at the end of paragraph (a)(2)(ii), to read as follows:

§ 1208.4 Filing the application.

* * * * *

(a) * * *

(2) * * *

(ii) * * * The failure to have provided required biometrics and other biographical information does not prevent the ''filing'' of an asylum application for purposes of the one-year filing rule of section 208(a)(2)(B) of the Act. *See* 8 CFR 1003.47.

* * * * *

■ 7. Section 1208.10 is revised to read as follows:

§ 1208.10 Failure to appear at a scheduled hearing before an immigration judge; failure to follow requirements for biometrics and other biographical information processing.

Failure to appear for a scheduled immigration hearing without prior authorization may result in dismissal of the application and the entry of an order of deportation or removal *in absentia*. Failure to comply with processing requirements for biometrics and other biographical information within the time allowed will result in dismissal of the application, unless the applicant demonstrates that such failure was the result of good cause. DHS is responsible for obtaining biometrics and other biographical information with respect to any alien in custody.

■ 8. Section 1208.14 is amended by adding a new sentence at the end of paragraph (a) to read as follows:

§ 1208.14 Approval, denial, referral, or dismissal of application.

(a) * * * In no case shall an immigration judge grant asylum without compliance with the requirements of § 1003.47 concerning identity, law enforcement, or security investigations or examinations.

* * * * *

Dated: January 26, 2005.

John Ashcroft,

Attorney General.

[FR Doc. 05–1782 Filed 1–27–05; 12:33 pm]

BILLING CODE 4410–30–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2004–19262; Directorate Identifier 2004–NM–54–AD; Amendment 39–13953; AD 2005–02–08]

RIN 2120–AA64

Airworthiness Directives; McDonnell Douglas Model MD–11 and MD–11F Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain McDonnell Douglas Model MD–11 and MD–11F airplanes. This AD requires inspecting the power feeder cables of the auxiliary power unit (APU) for chafing damage, and accomplishing any related corrective action. This AD also requires modifying the drain line of the fuel feed shroud of the horizontal stabilizer. This AD is prompted by a report of the drain line of the fuel feed shroud riding on the power feeder cables of the APU. We are issuing this AD to prevent chafing of the power feeder cables of the APU, which could result in electrical arcing to adjacent structure and consequent fire in the airplane.

DATES: This AD becomes effective March 7, 2005.

The incorporation by reference of a certain publication listed in the AD is approved by the Director of the Federal Register as of March 7, 2005.

ADDRESSES: For service information identified in this AD, contact Boeing Commercial Airplanes, Long Beach Division, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Data and Service Management, Dept. C1–L5A (D800–0024). 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.*

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 U.S. Department of Transportation, 400 Seventh Street SW, room PL–401, Washington, DC. This docket number is FAA–2004–19262; the directorate identifier for this docket is 2004–NM–54–AD.

FOR FURTHER INFORMATION CONTACT: Samuel Lee, Aerospace Engineer, Propulsion Branch, ANM–140L, FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California 90712–4137; telephone (562) 627–5262; fax (562) 627–5210.

SUPPLEMENTARY INFORMATION: The FAA proposed to amend 14 CFR Part 39 with an AD for certain McDonnell Douglas Model MD–11 and MD–11F airplanes. That action, published in the **Federal Register** on October 6, 2004 (69 FR 59837), proposed to require inspecting the power feeder cables of the auxiliary power unit (APU) for chafing damage, and accomplishing any related corrective action. The proposed AD would also require modifying the drain line of the fuel feed shroud of the horizontal stabilizer.

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

There are about 195 airplanes of the affected design in the worldwide fleet, and 85 airplanes of U.S. registry.

The inspection will take about 1 work hour per airplane, at an average labor rate of $65 per work hour. Based on these figures, the estimated cost of the AD for U.S. operators is $5,525, or $65 per airplane.

The modification will take about 3 work hours per airplane (including the functional test), at an average labor rate of $65 per work hour. Parts cost will be minimal. Based on these figures, the estimated cost of the AD for U.S. operators is $16,575, or $195 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):

2005–02–08 McDonnell Douglas: Amendment 39–13953. Docket No. FAA–2004–19262; Directorate Identifier 2004–NM–54–AD.

Effective Date

(a) This AD becomes effective March 7, 2005.

Affected ADs

(b) None.

Applicability

(c) This AD applies to McDonnell Douglas Model MD–11 and MD–11F airplanes, certificated in any category; as identified in Boeing Alert Service Bulletin MD11–28A119, dated June 3, 2003.

Unsafe Condition

(d) This AD was prompted by a report of the drain line of the fuel feed shroud riding on the power feeder cables of the auxiliary power unit (APU). We are issuing this AD to prevent chafing of the power feeder cables of the APU, which could result in electrical arcing to adjacent structure and consequent fire in 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.

Inspection/Related Corrective Action/Modification

(f) Within 18 months after the effective date of this AD: Do the actions required by paragraphs (f)(1) and (f)(2) of this AD by doing all the actions specified in the Accomplishment Instructions of Boeing Alert Service Bulletin MD11–28A119, including appendix A, dated June 3, 2003.

(1) Accomplish a general visual inspection of the power feeder cables of the APU for chafing damage. Do any related corrective action before further flight.

(2) Modify the drain line of the fuel feed shroud of the horizontal stabilizer (including a functional test after accomplishing the modification).

Note 1: For the purposes of this AD, a general visual inspection is: ''A visual examination of an interior or exterior area, installation, or assembly to detect obvious damage, failure, or irregularity. This level of inspection is made from within touching distance unless otherwise specified. A mirror may be necessary to ensure visual access to all surfaces in the inspection area. This level of inspection is made under normally available lighting conditions such as daylight, hangar lighting, flashlight, or droplight and may require removal or opening of access panels or doors. Stands, ladders, or platforms may be required to gain proximity to the area being checked.''

Alternative Methods of Compliance (AMOCs)

(g) The Manager, Los Angeles 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

(h) You must use Boeing Alert Service Bulletin MD11–28A119, including appendix A, dated June 3, 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, Long Beach Division, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Data and Service Management, Dept. C1–L5A (D800–0024). 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 January 18, 2005.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–1557 Filed 1–28–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2003–NM–252–AD; Amendment 39–13955; AD 2005–02–10]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 757 Series Airplanes Equipped With Rolls Royce Model RB211 Engines

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain Boeing Model 757 series airplanes, that requires repetitive detailed inspections of the support brackets and associated fasteners for the hydraulic lines located in the nacelle struts, and related investigative and corrective actions as necessary. This action also provides an optional terminating action for the repetitive inspections. This action is necessary to prevent flammable fluids from leaking into the interior compartment of the nacelle struts where ignition sources exist, which could result in the ignition of flammable fluids and an uncontained fire. This action is intended to address the identified unsafe condition.

DATES: Effective March 7, 2005. The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of March 7, 2005.

ADDRESSES: The service information referenced in this AD may be obtained from Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or 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.*

FOR FURTHER INFORMATION CONTACT: Tom Thorson, Aerospace Engineer, Propulsion Branch, ANM–140S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 917–6508; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to certain Boeing Model 757 series airplanes was published in the **Federal Register** on May 17, 2004 (69 FR 27866). That action proposed to require repetitive detailed inspections of the support brackets and associated fasteners for the hydraulic lines located in the nacelle struts, and related investigative and corrective actions as necessary. That action also proposed to provide an optional terminating action for the repetitive inspections.

Comments

Interested persons have been afforded an opportunity to participate in the making of this amendment. Due consideration has been given to the comment received.

Request To Revise Paragraph (b), Related Investigative and Corrective Actions

The commenter, an operator, supports the repetitive inspections required by paragraph (a) of the proposed AD, but requests that the related investigative and corrective actions required by paragraph (b) of the proposed AD be applicable only to a pylon (nacelle strut) that has damaged or loose hydraulic line support brackets or associated fasteners.

(If either pylon has loose or damaged parts, the proposed AD requires that operators do all of the related investigative and corrective actions on both pylons concurrently.) The commenter states that, if the inspection results show that a pylon has no damaged or loose hydraulic line attachment hardware, operators should be given the opportunity to repetitively inspect that pylon until damaged or loose attachment hardware is found. The commenter notes that the service bulletins estimate 15 labor hours per pylon to modify the hydraulic line brackets. That modification is the terminating action for the repetitive inspections required by paragraph (a) of the proposed AD. We infer that the commenter is making this request to conserve resources and not expend labor hours to do the terminating action on a pylon that does not have damaged or loose hydraulic line attachment hardware.

The FAA agrees that operators should be required to only perform the related investigative and corrective actions on a nacelle strut that has damaged or loose hydraulic line support brackets or associated fasteners. We have revised paragraph (b) of this AD accordingly. We have determined that this allowance will not affect continued operational safety. If the results of any inspection indicate that a nacelle strut has no damaged or loose hydraulic line attachment hardware, operators must continue to repetitively inspect that strut in accordance with the requirements of paragraph (a) of this AD until damaged or loose attachment hardware is found, at which time the requirements of paragraph (b) of this AD must be accomplished.

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 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.

Cost Impact

There are approximately 603 airplanes of the affected design in the worldwide fleet. We estimate that 325 airplanes of U.S. registry will be affected by this AD, that it will take approximately 22 work hours per airplane to accomplish the required actions, and that the average labor rate is $65 per work hour. Based on these figures, the cost impact of the AD on U.S. operators is estimated to be $464,750, or $1,430 per airplane.

The cost impact figure discussed above is based on assumptions that no operator has yet accomplished any of the requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted. The cost impact figures discussed in AD rulemaking actions represent only the time necessary to perform the specific actions actually required by the AD. These figures typically do not include incidental costs, such as the time required to gain access and close up, planning time, or time necessitated by other administrative actions.

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 Impact

The regulations adopted herein 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. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this action (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. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2005–02–10 Boeing: Amendment 39–13955. Docket 2003–NM–252–AD.

Applicability: Model 757 series airplanes; certificated in any category; line numbers 1 through 1018 inclusive; equipped with Rolls Royce Model RB211 engines.

Compliance: Required as indicated, unless accomplished previously.

To prevent flammable fluids from leaking into the interior compartment of the nacelle struts where ignition sources exist, which could result in the ignition of flammable fluids and an uncontained fire, accomplish the following:

Inspection

(a) Within 3,000 flight hours after the effective date of this AD: Do a detailed inspection of the support brackets and associated fasteners for the hydraulic lines located in the nacelle struts for loose or damaged parts, by accomplishing all of the actions specified in Part 1 of the Accomplishment Instructions of Boeing Alert Service Bulletin 757–54A0045 (for Model 757–200 series airplanes), dated May 22, 2003; or Boeing Alert Service Bulletin 757–54A0046 (for Model 757–300 series airplanes), dated May 29, 2003; as applicable. Do the actions per the applicable service bulletin. Repeat the inspection thereafter at intervals not to exceed 3,000 flight hours.

Note 1: For the purposes of this AD, a detailed inspection is defined as: ''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 Investigative and Corrective Actions

(b) Except as required by paragraph (d) of this AD: If any loose or damaged parts are found during any inspection required by paragraph (a) of this AD, before further flight, for the affected nacelle strut only, do all of the related investigative and corrective actions specified in Part 2 of the Accomplishment Instructions of Boeing Alert Service Bulletin 757–54A0045 (for Model 757–200 series airplanes), dated May 22, 2003; or Boeing Alert Service Bulletin 757–54A0046 (for Model 757–300 series airplanes), dated May 29, 2003; as applicable. Do the actions in accordance with the applicable service bulletin. Accomplishment of these actions constitutes terminating action for the repetitive inspections required by paragraph (a) of this AD for that nacelle strut only.

Optional Terminating Action

(c) If performed on both nacelle struts concurrently: Accomplishment of all of the actions specified in Part 2 of the Accomplishment Instructions of Boeing Alert Service Bulletin 757–54A0045 (for Model 757–200 series airplanes), dated May 22, 2003; or Boeing Alert Service Bulletin 757–54A0046 (for Model 757–300 series airplanes), dated May 29, 2003; as applicable; constitutes terminating action for the repetitive inspections required by paragraph (a) of this AD.

Repair Information

(d) If any damage is found during any inspection required by this AD, and the service bulletin specifies contacting Boeing for appropriate action. Before further flight, repair per a method approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA. For a repair method to be approved by the Manager, Seattle ACO, as required by this paragraph, the Manager's approval letter must specifically refer to this AD.

Alternative Methods of Compliance

(e) In accordance with 14 CFR 39.19, the Manager, Seattle ACO, is authorized to approve alternative methods of compliance for this AD.

Incorporation by Reference

(f) Unless otherwise specified in this AD, the actions shall be done in accordance with Boeing Alert Service Bulletin 757–54A0045, dated May 22, 2003; or Boeing Alert Service Bulletin 757–54A0046, dated May 29, 2003; as applicable. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or 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.*

Effective Date

(g) This amendment becomes effective on March 7, 2005.

Issued in Renton, Washington, on January 18, 2005.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–1517 Filed 1–28–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2004–19449; Directorate Identifier 2004–NM–07–AD; Amendment 39–13951; AD 2005–02–06]

RIN 2120–AA64

Airworthiness Directives; McDonnell Douglas Model MD–11 and MD–11F Airplanes Equipped With Pratt & Whitney PW4000 Series Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain McDonnell Douglas Model MD–11 and MD–11F airplanes equipped with Pratt & Whitney PW4000 series engines. This AD requires, for each engine, replacing, with a tube assembly, the existing hose assembly that connects the oil pressure transmitter to the main oil circuit. This AD is prompted by a report indicating that, for each engine, the existing hose assembly does not meet zero-flow fireproof capability requirements. We are issuing this AD to prevent, if there is an engine fire, failure of the oil pressure indicator and the low-oil pressure warning, which could result in an unannounced shutdown of that engine; and oil leakage, which may feed the engine fire.

DATES: This AD becomes effective March 7, 2005.

The incorporation by reference of certain publications listed in the AD is approved by the Director of the Federal Register as of March 7, 2005.

ADDRESSES: For service information identified in this AD, contact Boeing Commercial Airplanes, Long Beach Division, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Data and Service Management, Dept. C1–L5A (D800–0024). 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.*

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 U.S. Department of Transportation, 400 Seventh Street, SW., room PL–401, Washington, DC. This docket number is FAA–2004–19449; the directorate identifier for this docket is 2004–NM–07–AD.

FOR FURTHER INFORMATION CONTACT: Samuel Lee, Aerospace Engineer, Propulsion Branch, ANM–140L, FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California 90712–4137; telephone (562) 627–5262; fax (562) 627–5210.

SUPPLEMENTARY INFORMATION: The FAA proposed to amend 14 CFR Part 39 with an AD for certain McDonnell Douglas Model MD–11 and MD–11F airplanes equipped with Pratt & Whitney PW4000 series engines. That action, published in the **Federal Register** on October 27, 2004 (69 FR 62629), proposed to require, for each engine, replacing, with a tube assembly, the existing hose assembly that connects the oil pressure transmitter to the main oil circuit.

Comments

We provided the public the opportunity to participate in the development of this AD. We have considered the comments that have been submitted on the proposed AD. The commenters support the proposed AD.

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

There are about 76 airplanes of the affected design in the worldwide fleet. 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
Replacement	2	$65	No charge	$130	34	$4,420

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):

2005–02–06 McDonnell Douglas: Amendment 39–13951. Docket No. FAA–2004–19449; Directorate Identifier 2004–NM–07–AD.

Effective Date

(a) This AD becomes effective March 7, 2005.

Affected ADs

(b) None.

Applicability

(c) This AD applies to McDonnell Douglas Model MD–11 and MD–11F airplanes, as listed in Boeing Alert Service Bulletin MD11–79A008, dated December 11, 2001; certificated in any category; equipped with Pratt & Whitney PW4000 series engines.

Unsafe Condition

(d) This AD was prompted by a report indicating that, for each engine, the existing hose assembly that connects the oil pressure transmitter to the main oil circuit does not meet zero-flow fireproof capability requirements. We are issuing this AD to prevent, if there is an engine fire, failure of the oil pressure indicator and the low-oil pressure warning, which could result in an unannounced shutdown of that engine; and oil leakage, which may feed the engine fire.

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.

Replacement of Hose Assemblies

(f) Within 18 months after the effective date of this AD: For each engine, replace the existing hose assembly, part number (P/N) 113286, that connects the oil pressure transmitter to the main oil circuit, with tube assembly P/N 221–5318–501. Do the replacement in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin MD11–79A008, dated December 11, 2001.

Note 1: Boeing Alert Service Bulletin MD11–79A008 refers to Pratt & Whitney Alert Service Bulletin PW4MD11 A79–9, dated October 25, 2001, as an additional source of service information for replacing the hose assemblies.

Alternative Methods of Compliance (AMOCs)

(g) The Manager, Los Angeles 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

(h) You must use Boeing Alert Service Bulletin MD11–79A008, dated December 11, 2001, 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, Long Beach Division, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Data and Service Management, Dept. C1–L5A (D800–0024). 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 January 18, 2005.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–1516 Filed 1–28–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2004–19526; Directorate Identifier 2004–NM–140–AD; Amendment 39–13952; AD 2005–02–07]

RIN 2120–AA64

Airworthiness Directives; Empresa Brasileira de Aeronautica S.A. (EMBRAER) Model EMB–135BJ Series Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain EMBRAER Model EMB–135BJ series airplanes. This AD requires modifying the electrical wiring for the ''stick pusher'' system. This AD is prompted by a report that the stick pushers are not being inhibited when the AP/PUSH/TRIM switches are activated, which can result in reduced controllability of the airplane if there is a system malfunction. We are issuing this AD to prevent reduced controllability of the airplane if the stick pusher system malfunctions.

DATES: This AD becomes effective March 7, 2005.

The incorporation by reference of a certain publication listed in the AD is approved by the Director of the Federal Register as of March 7, 2005.

ADDRESSES: For service information identified in this AD, contact Empresa Brasileira de Aeronautica S.A. (EMBRAER), P.O. Box 343—CEP 12.225, Sao Jose dos Campos—SP, Brazil. 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.*

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 U.S. Department of Transportation, 400 Seventh Street, SW., room PL–401, Washington, DC. This docket number is FAA–2004–19526; the directorate identifier for this docket is 2004–NM–140–AD.

FOR FURTHER INFORMATION CONTACT: Todd Thompson, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–1175; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION: The FAA proposed to amend 14 CFR Part 39 with an AD for certain EMBRAER Model EMB–135BJ series airplanes. That action, published in the **Federal Register** on November 4, 2004 (69 FR 64262), proposed to require modifying the electrical wiring for the ''stick pusher'' system.

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

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
Modification	2	$65	$7	$137	7	$959

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):

2005–02–07 Empresa Brasileira de Aeronautica S.A. (EMBRAER): Amendment 39–13952. Docket No. FAA–2004–19526; Directorate Identifier 2004–NM–140–AD.

Effective Date

(a) This AD becomes effective March 7, 2005.

Affected ADs

(b) None.

Applicability

(c) This AD applies to EMBRAER Model EMB–135BJ series airplanes, serial numbers 145462, 145495, 145505, 145528, 145625, 145637, and 145642; certificated in any category.

Unsafe Condition

(d) This AD was prompted by a report that the stick pushers are not being inhibited when the AP/PUSH/TRIM switches are activated, which can result in reduced controllability of the airplane if there is a system malfunction. We are issuing this AD to prevent reduced controllability of the airplane if the stick pusher system malfunctions.

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 of Electrical Wiring

(f) Within 400 flight hours or 180 calendar days after the effective date of this AD, whichever is first: Modify the wiring for the stick pusher system by accomplishing all of the actions specified in the Accomplishment Instructions of EMBRAER Service Bulletin 145LEG–27–0009, dated March 1, 2004.

Alternative Methods of Compliance (AMOCs)

(g) 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

(h) Brazilian airworthiness directive 2004–04–02, dated May 6, 2004, also addresses the subject of this AD.

Material Incorporated by Reference

(i) You must use EMBRAER Service Bulletin 145LEG–27–0009, dated March 1, 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 Empresa Brasileira de Aeronautica S.A. (EMBRAER), P.O. Box 343—CEP 12.225, Sao Jose dos Campos—SP, Brazil. 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 January 18, 2005.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–1515 Filed 1–28–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2004–19442; Directorate Identifier 2004–CE–31–AD; Amendment 39–13956; AD 2005–01–11]

RIN 2120–AA64

Airworthiness Directives; Gippsland Aeronautics Pty. Ltd. Model GA8 Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA adopts a new airworthiness directive (AD) for certain Gippsland Aeronautics Pty. Ltd. Model GA8 airplanes. This AD requires you to inspect the pilot and co-pilot control column wheels and aileron cable operating arm shafts for damage and, if damage is found, to repair the shafts or to replace the steel shafts with bronze shafts. We are issuing this AD to detect and correct damage of the pilot and co-pilot control wheels and aileron cable operating arm shafts. This damage could result in the aileron controls becoming stiff or locking, which could lead to loss of control of the airplane.

DATES: This AD becomes effective on March 4, 2005.

As of March 4, 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 Gippsland Aeronautics Pty. Ltd., Latrobe Regional Airport, P.O. Box 881, Morwell, Victoria 3840, Australia; telephone: 61 (0) 3 5172 1200; facsimile: 61 (0) 3 5172 1201. 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–2004–19442.

FOR FURTHER INFORMATION CONTACT: Doug Rudolph, Aerospace Engineer, Small Airplane Directorate, ACE–112, 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 Civil Aviation Safety Authority (CASA), which is the airworthiness authority for Australia, recently notified FAA that an unsafe condition may exist on certain Gippsland Aeronautics Pty. Ltd. Model GA8 airplanes. CASA reports three occurrences of aileron control stiffness and one occurrence of aileron control locking during taxi. Rubbing between the control wheel shaft and the bush in the control column may cause wear or damage to the control wheel shaft where the shaft connects to the control column. This damage may lead to the aileron control becoming stiff or locking.

What is the potential impact if FAA took no action? Damage of the pilot and co-pilot control wheels and aileron cable operating arm shafts could result in the aileron controls becoming stiff or locking, which could lead to loss of control of the airplane.

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 Gippsland Aeronautics Pty. Ltd. Model GA8 airplanes. This proposal was published in the **Federal Register** as a notice of proposed rulemaking (NPRM) on November 8, 2004 (69 FR 64695). The NPRM proposed to detect and correct damage of the pilot and co-pilot control wheels and aileron cable operating arm shafts that could result in

the aileron controls becoming stiff or locking, which could lead to loss of control of the airplane.

Comments

Was the public invited to comment? We provided the public the opportunity to participate in developing this AD. We received no comments on the proposal or on the determination of the cost to the public.

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 minor editorial corrections. We have determined that these 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.

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 5 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 accomplish the inspection:

Labor cost	Parts cost	Total cost per airplane	Total cost on U.S. operators
2 work hours × $65 per hour = $130	N/A	$130	$650

We estimate the following costs to accomplish any necessary replacements 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 repair/replacement:

Labor cost	Parts cost	Total cost per airplane
Labor Cost per side (either pilot or co-pilot)—8 work hours × $65 per hour = $520.	Warranty	Per side = $520. For both sides = $1,040.

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–2004–19442; Directorate Identifier 2004–CE–31–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:

2005–02–11 Gippsland Aeronautics Pty. Ltd.: Amendment 39–13956; Docket No. FAA–2004–19442; Directorate Identifier 2004–CE–31–AD.

When Does This AD Become Effective?

(a) This AD becomes effective on March 4, 2005.

What Other ADs Are Affected by This Action?

(b) None.

What Airplanes Are Affected by This AD?

(c) This AD affects model GA8 airplanes, serial numbers GA8–00–004 through GA8–04–056, that are certificated in any category.

What Is the Unsafe Condition Presented in This AD?

(d) This AD is the result of rubbing between the control wheel shaft and the bush in the control column, which may cause wear or damage to the control wheel shaft where the shaft connects to the control column. This damage may lead to the aileron control becoming stiff or locking. The actions specified in this AD are intended to detect and correct damage of the pilot and co-pilot control wheels and aileron cable operating arm shafts that could result in the aileron controls becoming stiff or locking, which could lead to loss of control of the airplane.

What Must I Do To Address This Problem?

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

Actions	Compliance	Procedures
(1) Inspect the pilot and co-pilot control column wheel and aileron cable operating arm shafts for damage.	Perform the initial inspection within 50 hours time-in-service (TIS) after March 4, 2005 (the effective date of this AD).	Follow Gippsland Aeronautics Pty. Ltd. Service Bulletin SB–GA8–2004–11, Issue 2, dated August 25, 2004.
(2) If no damage is found, continue repetitive inspections.	Perform repetitive inspections every 300 hours TIS until steel operating arm shafts are replaced with bronze operating arm shafts. Replacement of steel operating arm shafts with bronze operating arm shafts is terminating action for this AD on the side that was replaced. If one steel shaft requires replacement, all of the shafts on that side (pilot or co-pilot) must be replaced with bronze shafts. If only one side (pilot or co-pilot) is replaced, repetitive inspections are still required for the side that was not replaced.	Follow Gippsland Aeronautics Pty. Ltd. Service Bulletin SB–GA8–2004–11, Issue 2, dated August 25, 2004.
(3) For airplanes where damage is found: (i) If damage can be repaired by polishing out marks or scratches so that material removed does not exceed 0.005 inches, repair the shaft. You can not repair by polishing out marks or scratches more than one time. (ii) If damage can not be repaired by polishing out marks or scratches so that that material removed does not exceed 0.005 inches or you have already repaired the damage by polishing out marks or scratches previously, the damed steel operating arm shaft must be replaced with a bronze operating arm shaft. When a shaft (pilot or co-pilot) requires replacement, you must install new bronze shafts in all areas of the affected side	If damage is found, repair or replace operating arm shafts prior to further flight. If airplane is repaired, repetitively inspect every 300 hours TIS after repair until replacement of the operating arm shafts. Replacement of the steel operating arm shafts with bronze operating arm shafts is terminating action for this AD. If only one side (pilot or co-pilot) is replaced with bronze shafts, you must still repetitively inspect the other side that was not replaced.	Follow Gippsland Aeronautics Pty. Ltd. Service Bulletin SB–GA8–2004–11, Issue 2, dated August 25, 2004.
(4) As of the effective date of this AD, do not install shafts that are not bronze on any affected Model GA8 airplane.	As of March 4, 2005 (the effective date of this AD).	Follow Gippsland Aeronautics Pty. Ltd. Service Bulletin SB–GA8–2004–11, Issue 2, dated August 25, 2004.

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, Small Airplane Directorate, ACE–112, 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) Australian Civil Aviation Safety Authority Airworthiness Directive AD/GA8/2, dated September 17, 2004, and Gippsland Aeronautics Pty., Ltd., Service Bulletin SB–GA8–2004–11, dated August 25, 2004, also address 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 Gippsland Aeronautics Pty. Ltd. Service Bulletin SB–GA8–2004–11, Issue 2, dated August 25, 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 Gippsland Aeronautics Pty. Ltd., Latrobe Regional Airport, P.O. Box 881, Morwell, Victoria 3840, Australia; telephone: 61 (0) 3 5172 1200; facsimile: 61 (0) 3 5172 1201. 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–2004–19442.

Issued in Kansas City, Missouri, on January 20, 2005.

David A. Downey,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–1511 Filed 1–28–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF JUSTICE

28 CFR Part 28

[Docket No. OAG 108; A.G. Order No. 2753–2005]

RIN 1105–AB09

DNA Sample Collection From Federal Offenders Under the Justice for All Act of 2004

AGENCY: Department of Justice.

ACTION: Interim rule with request for comments.

SUMMARY: The Department of Justice is publishing this interim rule to implement section 203(b) of Pub. L. 108–405, the Justice for All Act of 2004. The Justice for All Act of 2004 authorizes the Department of Justice to treat offenses in certain specified categories as qualifying Federal offenses for purposes of DNA sample collection. This rule amends regulations to reflect new categories of Federal offenses subject to DNA sample collection. The Justice for All Act amendment added ''[a]ny felony'' as a specified offense category in 42 U.S.C. 14135a(d)—thereby permitting the collection of DNA samples from all convicted Federal felons. This rule includes the new ''any felony'' category and does not change the coverage of misdemeanors in certain categories already included under prior law.

DATES: *Effective Date:* This interim rule is effective January 31, 2005.

Comment Date: Comments must be received by April 1, 2005.

ADDRESSES: Comments may be mailed to David J. Karp, Senior Counsel, Office of Legal Policy, Room 4509, Main Justice Building, 950 Pennsylvania Avenue, NW., Washington, DC 20530. To ensure proper handling, please reference OAG Docket No. 108 on your correspondence. You may view an electronic version of this interim rule at *http://www.regulations.gov.* You may also comment via the Internet to the Justice Department's Office of Legal Policy (OLP) at *olpregs@usdoj.gov* or by using the *http://www.regulations.gov* comment form for this regulation. When submitting comments electronically you must include OAG Docket No. 108 in the subject box.

SUPPLEMENTARY INFORMATION: On December 29, 2003, the Department of Justice published a final rule to implement section 3 and related provisions of the DNA Analysis Backlog Elimination Act of 2000, as amended by the USA PATRIOT Act. 68 FR 74855. That rule, in part, specified the Federal offenses that will be treated as qualifying offenses for purposes of DNA sample collection. As provided by law, DNA samples are collected from persons who have been convicted of these offenses. See 42 U.S.C. 14135a. Reflecting statutory law (42 U.S.C. 14135a(d)) as it was at the time, DNA sample collection from Federal offenders under that rule was confined to offenders who had been convicted of crimes of violence, or offenses in a limited list of other offense categories specified in the statute.

Subsequent to the publication of that final rule, Congress enacted Pub. L. 108–405, the Justice for All Act of 2004. Section 203(b) of that Act expands the categories of offenses that shall be treated for purposes of DNA sample collection as qualifying Federal offenses to include the following offenses, as determined by the Attorney General: (1) Any felony; (2) any offense under chapter 109A of title 18, United States Code; (3) any crime of violence (as defined in section 16 of title 18, United States Code); and (4) any attempt or conspiracy to commit any of the above offenses. See 42 U.S.C. 14135a(d). This reform brings the authorized scope of DNA sample collection for Federal offenders more into line with that generally authorized for State offenders. About 35 States had enacted legislation authorizing DNA sample collection from all felons by the time of the Justice for All Act's enactment of the corresponding reform for federal cases.

The purpose of this interim rule is to revise a section of the existing regulations, 28 CFR 28.2, to reflect the expansion of the statutory DNA sample collection categories. The rule also makes a minor conforming change in 28 CFR 28.1. The new versions of these regulations are as follows:

Section 28.1

This section notes that section 3 of Pub. L. 106–546 (42 U.S.C. 14135a) directs the collection, analysis, and indexing of DNA samples from each individual in the custody of the Bureau of Prisons or under the supervision of a probation office ''who is, or has been, convicted of a qualifying Federal offense.'' These requirements apply both to Federal offenders who are currently incarcerated or under supervision on the basis of qualifying Federal offenses, and to Federal offenders who are currently incarcerated or under supervision on the basis of other Federal offenses, but who have been convicted at some time in the past of a qualifying Federal offense.

The change from the previous version of 28 CFR 28.1 is limited to some modification of the wording in the second sentence, for accuracy in describing the version of 42 U.S.C. 14135a(d) enacted by the Justice for All Act.

Section 28.2(a)

Section 28.2(a), in substance, defines ''felony'' as it is ordinarily understood—*i.e.*, as referring to offenses for which the maximum authorized term of imprisonment exceeds one year. See 18 U.S.C. 3559(a). The definition cross-references the pertinent statutory provision that sets forth this understanding, stating in part that ''felony'' means ''an offense that would be classified as a felony under 18 U.S.C. 3559(a).'' 18 U.S.C. 3559(a)(1)–(5) provides the following classifications of offenses as felonies based on the maximum term of imprisonment: (i) Life imprisonment (or if the maximum penalty is death)—Class A felony; (ii) twenty-five years or more—Class B felony; (iii) less than twenty-five years but ten or more years—Class C felony; (iv) less than ten years but five or more years—Class D felony; (v) less than five years but more than one year—Class E felony.

However, 18 U.S.C. 3559(a) is not applied to determine the classification of offenses that are specifically classified by letter grade as Class A, B, C, D, or E felonies. For example, 33 U.S.C. 1232(b)(2) provides that a person who engages in certain proscribed conduct ''commits a Class C felony.'' In such cases, the statute on its face identifies the offense as a felony—obviating the need for any further inquiry to determine its classification—and the authorized prison terms are set by 18 U.S.C. 3581(b). The definition in revised 28 CFR 28.2(a)(1) accordingly states that ''felony'' means an offense classifiable as such under 18 U.S.C. 3559(a) ''or that is specifically classified by a letter grade as a felony.''

In most instances, Federal criminal statutes do not include specific letter grade classifications. Hence, the status of Federal offenses as felonies or non-felonies usually must be determined under the criteria of 18 U.S.C. 3559(a) by examining the statutes defining the offenses or associated penalty provisions. For example, maiming within the special maritime and territorial jurisdiction under 18 U.S.C. 114 is a felony, because the defining statute authorizes imprisonment in excess of one year (specifically, up to 20 years). In other cases, the relevant penalties appear in different statutes from those defining the offenses. For example, the penalties authorized for the explosive offenses defined by 18 U.S.C. 842 appear in 18 U.S.C. 844. Most of these offenses are felonies, as provided in section 844(a), but some are misdemeanors, as provided in section 844(b). While the penalties for Federal offenses are normally specified in Federal statutes, it is occasionally necessary to look outside of the United States Code to determine whether the maximum prison term authorized for a Federal offense exceeds one year, and hence whether it is a felony. For

example, under 18 U.S.C. 1153, an Indian country jurisdictional provision, the penalties for most offenses prosecutable under that section are provided by other Federal statutes defining offenses in the special maritime and territorial jurisdiction of the United States—*e.g.*, murder under 18 U.S.C. 1111, kidnapping under 18 U.S.C. 1201(a)(2), and robbery under 18 U.S.C. 2111. But there are no Federal offenses of ''incest'' or ''burglary'' defined for the special maritime and territorial jurisdiction, so the penalties for incest and burglary offenses prosecuted under 18 U.S.C. 1153 are determined by the laws of the State in which the offense was committed, as provided in section 1153(b).

Many statutes define both misdemeanor and felony offenses, often without structural subdivisions in the statute to separate them. The presence of non-felony offenses in the same statute does not vitiate the status of felony offenses defined by such a statute under 18 U.S.C. 3559(a) or this rule. For example, the unaggravated offense under 18 U.S.C. 242 (relating to willful deprivation of rights under color of law) is a misdemeanor, punishable by not more than one year of imprisonment. But the same statute authorizes lengthier prison terms for case in which bodily injury results to a victim or other specified aggravating factors are present. These aggravated offenses under 18 U.S.C. 242 are accordingly felonies, notwithstanding the misdemeanor status of the base offense under the statute.

In applying 18 U.S.C. 3559(a), only the statutory maximum term of imprisonment is considered. Limitations on the length of sentences of imprisonment under the Federal sentencing guidelines are not relevant to the determination whether an offense is a felony.

Section 28.2(b)(1)

Section 28.2(b)(1) states that qualifying Federal offenses for purposes of DNA sample collection include any felony, as authorized by 42 U.S.C. 14135a(d)(1).

Overall, the amended regulation is much simpler and shorter than the previous version of 28 CFR 28.2, because the amendment's inclusion of all felonies as qualifying Federal offenses encompasses the vast majority of the offenses that were specifically listed in the previous rule, as well as many others. In the previous version, it was necessary to attempt to provide a comprehensive listing of ''crimes of violence'' under Federal law. However, because the current version of the sample-collection statute and the new version of 28 CFR 28.2 cover all felonies—whether or not they are crimes of violence—it only remains necessary to list code sections separately in the rule if these sections define crimes of violence that are not felonies. This shorter list of code sections—to ensure DNA sample collection from persons convicted of misdemeanor crimes of violence—appears in paragraph (b)(3) of revised 28 CFR 28.2 (discussed below).

Section 28.2(b)(2)

Section 28.2(b)(2) includes among qualifying Federal offenses any offense under chapter 109A of title 18 (the ''sexual abuse'' chapter of the Federal criminal code), as authorized by 42 U.S.C. 14135a(d)(2). Most of the offenses in chapter 109A are independently covered as felonies, but some are misdemeanors. See 18 U.S.C. 2243(b), 2244(a)(4), (b). The inclusion of chapter 109A offenses without qualification means that all persons who have been convicted of any Federal offense under that chapter, whether a felony or a misdemeanor, are subject to DNA sample collection.

Section 28.2(b)(3)

Section 28.2(b)(3) includes offenses under 30 code sections which (wholly or in part) define misdemeanors, on the ground that these misdemeanors are ''crimes of violence,'' as authorized by 42 U.S.C. 14135a(d)(3). The inclusion of these misdemeanors in the rule as qualifying Federal offenses reflects the Attorney General's determination that they are crimes of violence as defined in 18 U.S.C. 16, and that persons convicted of these misdemeanors should be subject to DNA sample collection. Many felonies are also crimes of violence as defined in 18 U.S.C. 16, but there is no need to list them individually in the revised regulation, because they are encompassed in 28 CFR 28.2(a)(1)'s inclusion of all felonies (whether violent or non-violent) as qualifying Federal offenses.

''Crimes of violence,'' whether felonies or misdemeanors, were already included in the statutory DNA sample collection categories prior to the Justice for All Act amendment of 42 U.S.C. 14135a(d). Hence, such offenses were listed in the previous version of 28 CFR 28.2. In particular, all of the offenses listed in paragraph (b)(3) of the revised regulation were already covered as qualifying Federal offenses under the previous regulation. This rule, therefore, does not expand the class of misdemeanors that are qualifying Federal offenses.

As noted, the specific listing of code sections in paragraph (b)(3) is necessary to ensure the consistent collection of DNA samples from persons convicted of crimes of violence, regardless of the penalty grading of such crimes. For example, 18 U.S.C. 245, a civil rights offense, only authorizes imprisonment for ''not more than one year'' in some circumstances, but all offenses defined by that section are crimes of violence, requiring interference with the exercise of certain rights ''by force or threat of force.'' Section 245 is accordingly included in the listing of title 18 sections in paragraph (b)(3)(A), to ensure consistent coverage of offenses, including misdemeanor offenses, under that section for DNA sample collection purposes. Likewise, offenses under 18 U.S.C. 115—relating to violence against federal officials or members of their families—are usually independently covered as felonies, but subsection (b)(1) of that section provides that assaults in violation of the section shall be punished as provided in 18 U.S.C. 111, and 18 U.S.C. 111 only provides misdemeanor penalties in cases of simple assault. So a reference to 18 U.S.C. 115 in paragraph (b)(3)(A) is necessary to cover misdemeanor assaults under that section.

In some instances, the reference in paragraph (b)(3) to a code section or subsection includes some qualifying phrase. For example, the listing of title 18 provisions in paragraph (b)(3)(A) refers to offenses under section ''1153 involving assault against an individual who has not attained the age of 16 years.'' Section 1153 is the major crimes act for Indian country cases, and most offenses prosecutable under that section are independently covered as felonies under paragraph (b)(1) of this rule. However, section 1153 includes ''assault against an individual who has not attained the age of 16 years,'' and applicable penalty provisions, appearing in 18 U.S.C. 113(a)(5), authorize only misdemeanor penalties for the simple assault form of that offense. An express reference in the rule is accordingly necessary to make it clear that this crime of violence under 18 U.S.C. 1153—simple assault against a child below the age of 16—is a qualifying Federal offense.

A number of the qualifying phrases accompanying cited code sections in paragraph (b)(3) reflect the fact that some code sections effectively define a number of offenses—some violent and some nonviolent under the definition of 18 U.S.C. 16—without structural subdivisions that can readily be referenced in identifying the violent offenses. For such provisions, the listing

in the rule identifies the covered crimes of violence by including appropriate phrases that specify the relevant limitations.

For example, paragraph (b)(3)(B) refers to a number of penalty provisions in title 16 of the United States Code which include authorizations of misdemeanor penalties for certain violations under regulatory programs. The misdemeanor offenses under these provisions are not uniformly crimes of violence, but they are crimes of violence in cases in which the violation occurs under a provision that prohibits forcibly assaulting or resisting officers who are carrying out inspections or other specified functions. The formulation of paragraph (b)(3)(B) accordingly reflects this distinction, *e.g.*, in referring to ''section 773g [of title 16] if the offense involves a violation of section 773e(a)(3).''

As a final illustration, 49 U.S.C. 46506(1) provides that certain offenses defined for the special maritime and territorial jurisdiction apply as well in the special aircraft jurisdiction of the United States. Most of these offenses are crimes of violence and/or felonies, but the referenced offenses include certain theft-related offenses under 18 U.S.C. 661 and 662 that are not crimes of violence, and are also not felonies in cases where the value of the stolen property is below $1,000. Consequently, these theft-related offenses under 49 U.S.C. 46506(1) involving property whose value is below $1,000 are outside of the statutory DNA sample collection categories, and paragraph (b)(3)(I) qualifies its reference to offenses under 49 U.S.C. 46506(1) by excluding offenses that ''involve[] only an act that would violate section 661 or 662 of title 18 and would not be a felony if committed in the special maritime and territorial jurisdiction of the United States.''

Section 28.2(b)(4)

Section 28.2(b)(4) includes among qualifying Federal offenses any attempt or conspiracy to commit an offense which is otherwise included as a qualifying Federal offense, as authorized by 42 U.S.C. 14135a(d)(4). In most cases such attempt and conspiracy offenses are independently covered as felonies under 28 CFR 28.2(b)(1), but in some instances they will be misdemeanors which are not otherwise covered. For example, a conspiracy to commit a misdemeanor offense under chapter 109A of title 18, prosecuted under 18 U.S.C. 371, would itself be a misdemeanor pursuant to the second paragraph of 18 U.S.C. 371. Likewise, a conspiracy to commit a misdemeanor crime of violence listed in paragraph (b)(3) of this rule, prosecuted under 18 U.S.C. 371, would itself be a misdemeanor. 28 CFR 28.2(d)(4) ensures that DNA samples will be collected from persons convicted of such attempt or conspiracy offenses, regardless of whether the offenses are felonies or misdemeanors.

Section 28.2(c)

Section 28.2(c) makes it clear that the subsequent repeal or modification of an offense does not affect the requirement of DNA sample collection from an offender convicted of such an offense. This point applies both to offenses that presently exist or are hereafter enacted and constitute qualifying Federal offenses under the rule's criteria, and to offenses that were repealed or modified prior to the enactment of the statutory authorization for DNA sample collection from Federal offenders or the issuance of this rule, but would have been classified as qualifying Federal offenses under the criteria of this rule. Paragraph (c) mentions by way of illustration the old statutes defining offenses involving rape or sexual abuse of children—18 U.S.C. 2031 and 2032—which have been repealed and have been effectively replaced by offenses now appearing in chapter 109A of title 18 of the United States Code. These old offenses were included in the previous version of 28 CFR 28.2 because they are crimes of violence, and their status as felonies provides an additional reason for including them in the current rule. Notwithstanding their repeal, they remain relevant for DNA sample collection purposes, because there may be Federal offenders who were convicted of offenses under 18 U.S.C. 2031 or 2032 prior to their repeal and who remain incarcerated or under supervision for those offenses, or who are incarcerated or under supervision for some other offense but have been convicted at some time in the past of an offense under 18 U.S.C. 2031 or 2032. 28 CFR 28.2(c) as revised makes it clear that an offense which was or would have been a qualifying Federal offense at the time of conviction, according to the definition of that concept in the rule, remains a qualifying Federal offense—and a person convicted of such an offense accordingly remains subject to DNA sample collection—even if the provision or provisions defining the offense or assigning its penalties have subsequently been repealed, superseded, or modified.

Administrative Procedure Act

The implementation of this rule as an interim rule, with provisions for post-promulgation public comments, is based on the ''good cause'' exceptions found at 5 U.S.C. 553(b)(3)(B) and (d)(3), for circumstances in which ''notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.'' 5 U.S.C. 553(b)(3)(B). This rule implements the provisions of section 203(b) of the Justice For All Act, amending 42 U.S.C. 14135a(d), which governs the authorized scope of DNA sample collection from Federal offenders. The prior notice and comment period normally required under 5 U.S.C. 553(b) and the delayed effective date normally required under 5 U.S.C. 553(d) are unnecessary because the formulation of this rule involves no new significant exercises of judgment or discretion. The Justice for All Act reform primarily authorizes DNA sample collection from all Federal offenders convicted of felonies. The notion of a ''felony'' is a standard, familiar concept in Federal criminal law, and this rule simply refers to existing statutory provisions for its definition. The Justice for All Act provisions also encompass chapter 109A offenses, crimes of violence (as defined in 18 U.S.C. 16), and attempts or conspiracies to commit offenses which are otherwise covered. However, these categories were already covered under 42 U.S.C. 14135a(d) and 28 CFR 28.2 prior to the Justice for All Act's amendment of 42 U.S.C. 14135a(d). Moreover, the statutory categories of an offense under chapter 109A, and of an offense constituting an attempt or conspiracy to commit an offense which is otherwise covered, require no particular interpretation or elaboration. The Attorney General may need to make judgments in determining which particular offenses constitute ''crimes of violence'' as defined in 18 U.S.C. 16—but these judgments were already made, following public notice and the receipt of comments, in the version of 28 CFR 28.2 that was published on December 29, 2003, and went into effect on January 28, 2004. The revised regulation does not change these determinations. In all instances, the non-felony offenses covered as ''crimes of violence'' in this rule were already covered as qualifying Federal offenses under the previous version of the regulation. The revised regulation also includes a paragraph (c) which states in so many words that the repeal or modification of an offense does not affect its status as a qualifying Federal offense, but this principle was already reflected in the previous version of 28 CFR 28.2, which included repealed statutes (18 U.S.C. 2031 and 2032) in its listing of qualifying Federal

offenses. Hence, nothing new of substance needed to be determined in the formulation of this interim rule.

Moreover, the collection of DNA samples from all Federal felons authorized by the Justice for All Act amendment furthers important public safety interests by facilitating the solution and prevention of crimes. Issuance by the Attorney General of an effective implementing regulation for 42 U.S.C. 14135a(d), as amended, is needed to provide a secure basis for commencing DNA sample collection pursuant to this broadened statutory authorization. See 42 U.S.C. 14135a(d) (qualifying Federal offenses for purposes of DNA sample collection are offenses in specified categories ''as determined by the Attorney General''); 42 U.S.C. 14135a(e) (section is generally to be ''carried out under regulations prescribed by the Attorney General''). The absence of such an effective regulation could accordingly delay the implementation of the current version of 42 U.S.C. 14135a(d), thereby thwarting or delaying the realization of the public safety benefits that the Justice for All Act amendment was enacted to secure. Dangerous offenders who could be successfully identified through DNA matching could be released from prison or reach the end of supervision before DNA sample collection could be carried out, thereby remaining at large to engage in further crimes against the public. Furthermore, delay in collecting, analyzing, and indexing DNA samples, and hence in the identification of offenders, may foreclose prosecution due to the running of statutes of limitations. Failure to identify, or delay in identifying, offenders as the perpetrators of crimes through DNA matching also increases the risk that innocent persons may be wrongly suspected, accused, or convicted of such crimes. Therefore, it would be impracticable and contrary to the public interest to adopt this rule with the prior notice and comment period normally required under 5 U.S.C. 553(b) or with the delayed effective date normally required under 5 U.S.C. 553(d). Countenancing such delay in the implementation of the DNA sample collection provisions for Federal offenders under the Justice for All Act would disserve Congress's objective in the Justice for All Act of ensuring the prompt identification of the perpetrators of rapes, murders, and other serious crimes through the use of the DNA identification system, and would be inappropriate in light of Congress's concerns reflected in the Justice for All Act about the harm caused by delay in securing and utilizing available DNA information for law enforcement identification purposes. See H.R. Rep. No. 711, 108th Cong., 2d Sess. (2004); H.R. Rep. No. 321, 108th Cong., 1st Sess. (2003); Cong. Rec. S12293–97 (Oct. 1, 2003).

Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and by approving it certifies that this regulation will not have a significant economic impact on a substantial number of small entities for the following reason: The regulation concerns the collection by Federal agencies of DNA samples from certain offenders.

Executive Order 12866

This regulation has been drafted and reviewed in accordance with Executive Order 12866, ''Regulatory Planning and Review,'' section 1(b), Principles of Regulation. The Department of Justice has determined that this rule is a ''significant regulatory action'' under Executive Order 12866, section 3(f), and accordingly this rule has been reviewed by the Office of Management and Budget.

Executive Order 13132

This regulation 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. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Executive Order 12988—Civil Justice Reform

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996. 5 U.S.C. 804. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, or innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

List of Subjects in 28 CFR Part 28

Crime, Information, Law enforcement, Prisons, Prisoners, Records, Probation and parole.

■ For the reasons stated in the preamble, the Department of Justice amends 28 CFR Chapter I part 28 as follows:

PART 28—DNA IDENTIFICATION SYSTEM

■ 1. The authority citation for part 28 is amended to read as follows:

Authority: 28 U.S.C. 509, 510; 42 U.S.C. 14132, 14135a, 14135b; 10 U.S.C. 1565; Pub. L. 106–546, 114 Stat. 2726; Pub. L. 107–56, 115 Stat. 272; Pub. L. 108–405, 118 Stat. 2260.

■ 2. Sections 28.1 and 28.2 are revised to read as follows:

§ 28.1 Purpose.

Section 3 of Pub. L. 106–546 directs the collection, analysis, and indexing of a DNA sample from each individual in the custody of the Bureau of Prisons or under the supervision of a probation office who is, or has been, convicted of a qualifying Federal offense. Subsection (d) of that section states that the offenses that shall be treated as qualifying Federal offenses are any felony and certain other types of offenses, as determined by the Attorney General.

§ 28.2 Determination of offenses.

(a) *Felony* means a Federal offense that would be classified as a felony under 18 U.S.C. 3559(a) or that is specifically classified by a letter grade as a felony.

(b) The following offenses shall be treated for purposes of section 3 of Pub. L. 106–546 as qualifying Federal offenses:

(1) Any felony.

(2) Any offense under chapter 109A of title 18, United States Code, even if not a felony.

(3) Any offense under any of the following sections of the United States Code, even if not a felony:

(i) In title 18, section 111, 112(b) involving intimidation or threat, 113, 115, 245, 247, 248 unless the offense involves only a nonviolent physical obstruction and is not a felony, 351, 594, 1153 involving assault against an individual who has not attained the age of 16 years, 1361, 1368, the second paragraph of 1501, 1509, 1751, 1991, or 2194 involving force or threat.

(ii) In title 16, section 773g if the offense involves a violation of section 773e(a)(3), 1859 if the offense involves a violation of section 1857(1)(E), 3637(c) if the offense involves a violation of section 3637(a)(3), or 5010(b) if the offense involves a violation of section 5009(6).

(iii) In title 26, section 7212.

(iv) In title 30, section 1463 if the offense involves a violation of section 1461(4).

(v) In title 40, section 5109 if the offense involves a violation or attempted violation of section 5104(e)(2)(F).

(vi) In title 42, section 2283, 3631, or 9152(d) if the offense involves a violation of section 9151(3).

(vii) In title 43, section 1063 involving force, threat, or intimidation.

(viii) In title 47, section 606(b).

(ix) In title 49, section 46506(1) unless the offense involves only an act that would violate section 661 or 662 of title 18 and would not be a felony if committed in the special maritime and territorial jurisdiction of the United States.

(4) Any offense that is an attempt or conspiracy to commit any of the foregoing offenses, even if not a felony.

(c) An offense that was or would have been a qualifying Federal offense as defined in this section at the time of conviction, such as an offense under 18 U.S.C. 2031 or 2032, remains a qualifying Federal offense even if the provision or provisions defining the offense or assigning its penalties have subsequently been repealed, superseded, or modified.

Dated: January 25, 2005.

John Ashcroft,

Attorney General.

[FR Doc. 05–1691 Filed 1–28–05; 8:45 am]

BILLING CODE 4410–19–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Parts 1 and 38

RIN 2900–AM10

Relocation of National Cemetery Administration Regulations

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: Previously the regulations administered by the National Cemetery Administration (NCA) of the Department of Veterans Affairs (VA) were set forth in Part 1 of Title 38 of the Code of Federal Regulations. Recently, NCA was assigned Part 38 of Title 38 for its regulations. Accordingly, we are moving the regulations administered by NCA and located in Part 1 to new Part 38. We have made non-substantive changes to headings of regulations, but we have not made any changes to the text other than conforming changes to section numbers.

DATES: *Effective Date:* January 31, 2005.

FOR FURTHER INFORMATION CONTACT: Karen Barber, Program Analyst, Legislative and Regulatory Division (41C3), National Cemetery Administration (NCA), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420; telephone: (202) 273–5183 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: Regulations administered by NCA are currently located in Part 1 of Title 38 of the Code of Federal Regulations along with general provisions that are applicable to VA offices and programs other than NCA. The current placement of NCA regulations in Part 1 with regulations that are not particular to NCA programs may be confusing to users who want to quickly and easily reference information about NCA benefits. Additionally, as NCA expands its body of regulations, users will find it increasingly more difficult to reference information about NCA benefits unless NCA regulations are re-located and consolidated in a separate part of Title 38.

NCA was recently assigned new Part 38 of Title 38 for its regulations. Relocation and consolidation of NCA regulations in a separate Part is intended to help readers reference information about NCA benefits more easily. Although certain headings are being changed and conforming changes to section numbers are being made, the amendments made by this notice are non-substantive and will not affect benefits entitlement or otherwise result in new costs. This final rule merely moves NCA regulations to a new location in the Code of Federal Regulations without any substantive changes.

Administrative Procedure Act

We are publishing this document as a final rule without prior notice and comment and without a delayed effective date. This document contains only non-substantive changes. Because this document merely restates existing regulations without substantive change, it is exempt from those procedures under 5 U.S.C. 553(b)(3)(A) and (d)(2). Additionally, VA has determined that there is good cause under 5 U.S.C. 553(b)(3)(B) and (d)(3) for dispensing with those procedures, because a comment period and a delayed effective date are unnecessary in the absence of any substantive change to existing regulations.

Unfunded Mandates

The Unfunded Mandates Reform Act requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before developing any rule that may result in an expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any given year. This rule would have no such effect on State, local, or tribal governments, or the private sector.

Paperwork Reduction Act

This document does not contain new provisions constituting a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501–3521).

Regulatory Flexibility Act

The Secretary hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. Only individual VA beneficiaries could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), this final rule is exempt from the initial and final regulatory flexibility analyses requirements of sections 603 and 604.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance program numbers for this document are 64.201 and 64.202.

List of Subjects in 38 CFR Parts 1 and 38

Administrative practice and procedure, Cemeteries, Veterans, Claims, Crime, Criminal offenses.

Approved: December 14, 2004.

Anthony J. Principi,

Secretary of Veterans Affairs.

■ For the reasons set out in the preamble, we are amending 38 CFR Chapter 1 as follows:

PART 1—GENERAL PROVISIONS

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

Authority: 38 U.S.C. 501(a), unless otherwise noted.

§§ 1.600–1.633 [Removed]

■ 2. Remove §§ 1.600 through 1.633 and the undesignated center heading and authority citation immediately preceding those sections.

■ 3. A new part 38 is added to read as follows:

PART 38—NATIONAL CEMETERIES OF THE DEPARTMENT OF VETERANS AFFAIRS

Sec.
38.600 Definitions.
38.601 Advisory Committee on Cemeteries and Memorials.
38.602 Names for national cemeteries and features.
38.603 Gifts and donations.
38.617 Prohibition of interment or memorialization of persons who have been convicted of Federal or State capital crimes.
38.618 Findings concerning commission of a capital crime where a person has not been convicted due to death or flight to avoid prosecution.
38.620 Persons eligible for burial.
38.621 Disinterments.
38.629 Outer burial receptacle allowance.
38.630 Headstones and markers.
38.631 Graves marked with a private headstone or marker.
38.632 Headstone and marker application process.
38.633 Group memorial monuments.

Authority: 38 U.S.C. 107, 501, 512, chapter 24, 7105, and as noted in specific sections.

§ 38.600 Definitions.

(a) [Reserved]

(b) *Definitions.* For purposes of §§ 38.617 and 38.618:

Appropriate State official means a State attorney general or other official with statewide responsibility for law enforcement or penal functions.

Clear and convincing evidence means that degree of proof which produces in the mind of the fact-finder a firm belief regarding the question at issue.

Convicted means a finding of guilt by a judgment or verdict or based on a plea of guilty, by a Federal or State criminal court.

Federal capital crime means an offense under Federal law for which the death penalty or life imprisonment may be imposed.

Interment means the burial of casketed remains or the placement or scattering of cremated remains.

Life imprisonment means a sentence of a Federal or State criminal court directing confinement in a penal institution for life.

Memorialization means any action taken to honor the memory of a deceased individual.

Personal representative means a family member or other individual who has identified himself or herself to the National Cemetery Administration cemetery director as the person responsible for making decisions concerning the interment of the remains of or memorialization of a deceased individual.

State capital crime means, under State law, the willful, deliberate, or premeditated unlawful killing of another human being for which the death penalty or life imprisonment without parole may be imposed.

(Authority: 38 U.S.C. 2408, 2411)

§ 38.601 Advisory Committee on Cemeteries and Memorials.

Responsibilities in connection with Committee authorized by 38 U.S.C. chapter 24 are as follows:

(a) The Under Secretary for Memorial Affairs will schedule the frequency of meetings, make presentations before the Committee, participate when requested by the Committee, evaluate Committee reports and recommendations and make recommendations to the Secretary based on Committee actions.

(b) The Committee will evaluate and study cemeterial, memorial and burial benefits proposals or problems submitted by the Secretary or Under Secretary for Memorial Affairs, and make recommendations as to course of action or solution. Reports and recommendations will be submitted to the Secretary for transmission to Congress.

§ 38.602 Names for national cemeteries and features.

(a) *Responsibility.* The Secretary is responsible for naming national cemeteries. The Under Secretary for Memorial Affairs, is responsible for naming activities and features therein, such as drives, walks, or special structures.

(b) *Basis for names.* The names of national cemetery activities may be based on physical and area characteristics, the nearest important city (town), or a historical characteristic related to the area. Newly constructed interior thoroughfares for vehicular traffic in national cemetery activities will be known as *drives.* To facilitate location of graves by visitors, drives will be named after cities, counties or States or after historically notable persons, places or events.

§ 38.603 Gifts and donations.

(a) Gifts and donations will be accepted only after it has been determined that the donor has a clear understanding that title thereto passes to, and is vested in, the United States, and that the donor relinquishes all control over the future use or disposition of the gift or donation, with the following exceptions:

(1) Carillons will be accepted with the condition that the donor will provide the maintenance and the operator or the mechanical means of operation. The time of operation and the maintenance will be coordinated with the superintendent of the national cemetery.

(2) Articles donated for a specific purpose and which are usable only for that purpose may be returned to the donor if the purpose for which the articles were donated cannot be accomplished.

(3) If the donor directs that the gift is donated for a particular use, those directions will be carried out insofar as they are proper and practicable and not in violation of Department of Veterans Affairs policy.

(4) When considered appropriate and not in conflict with the purpose of the national cemetery, the donor may be recognized by a suitable inscription on those gifts. In no case will the inscription give the impression that the gift is owned by, or that its future use is controlled by, the donor. Any tablet or plaque, containing an inscription will be of such size and design as will harmonize with the general nature and design of the gift.

(b) Officials and employees of the Department of Veterans Affairs will not solicit contributions from the public nor will they authorize the use of their names, the name of the Secretary, or the name of the Department of Veterans Affairs by an individual or organization in any campaign or drive for money or articles for the purpose of making a donation to the Department of Veterans Affairs. This restriction does not preclude discussion with the individual offering the gift relative to the appropriateness of the gift offered.

§ 38.617 Prohibition of interment or memorialization of persons who have been convicted of Federal or State capital crimes.

(a) *Prohibition.* The interment in a national cemetery under the control of the National Cemetery Administration of the remains, or the memorialization, of any of the following persons is prohibited:

(1) Any person identified to the Secretary of Veterans Affairs by the United States Attorney General, prior to approval of interment or memorialization, as an individual who has been convicted of a Federal capital crime and sentenced to death or life imprisonment as a result of such crime.

(2) Any person identified to the Secretary of Veterans Affairs by an appropriate State official, prior to approval of interment or memorialization, as an individual who has been convicted of a State capital crime and sentenced to death or life imprisonment without parole as a result of such crime.

(3) Any person found under procedures specified in § 38.618 to have committed a Federal or State capital crime but have avoided conviction of such crime by reason of unavailability for trial due to death or flight to avoid prosecution.

(b) *Notice.* The prohibition referred to in paragraph (a)(3) of this section is not contingent on receipt by the Secretary of Veterans Affairs or any other VA official of notice from any Federal or State official.

(c) Receipt of notification. The Under Secretary for Memorial Affairs is delegated authority to receive from the United States Attorney General and appropriate State officials on behalf of the Secretary of Veterans Affairs the notification of conviction of capital crimes referred to in paragraphs (a)(1) and (2) of this section.

(d) *Decision where notification previously received.* Upon receipt of a request for interment or memorialization, where the Secretary of Veterans Affairs has received the notification referred to in paragraph (a)(1) or (2) of this section with regard to the deceased, the cemetery director will make a decision on the request for interment or memorialization pursuant to 38 U.S.C. 2411.

(e) *Inquiry.* (1) Upon receipt of a request for interment or memorialization, where the Secretary of Veterans Affairs has not received the notification referred to in paragraph (a)(1) or (a)(2) of this section with regard to the deceased, but the cemetery director has reason to believe that the deceased may have been convicted of a Federal or State capital crime, the cemetery director will initiate an inquiry to either:

(i) The United States Attorney General, in the case of a Federal capital crime, requesting notification of whether the deceased has been convicted of a Federal capital crime for which the deceased was sentenced to death or life imprisonment; or

(ii) An appropriate State official, in the case of a State capital crime, requesting notification of whether the deceased has been convicted of a State capital crime for which the deceased was sentenced to death or life imprisonment without parole.

(2) The cemetery director will defer decision on whether to approve interment or memorialization until after a response is received from the Attorney General or appropriate State official.

(f) *Decision after inquiry.* Where an inquiry has been initiated under paragraph (e) of this section, the cemetery director will make a decision on the request for interment or memorialization pursuant to 38 U.S.C. 2411 upon receipt of the notification requested under that paragraph, unless the cemetery director initiates an inquiry pursuant to § 38.618(a).

(g) *Notice of decision.* Written notice of a decision under paragraph (d) or (f) of this section will be provided by the cemetery director to the personal representative of the deceased, along with written notice of appellate rights in accordance with § 19.25 of this title. This notice of appellate rights will include notice of the opportunity to file a notice of disagreement with the decision of the cemetery director. Action following receipt of a notice of disagreement with a denial of eligibility for interment or memorialization under this section will be in accordance with §§ 19.26 through 19.38 of this title.

(Authority: 38 U.S.C. 512, 2411, 7105)

§ 38.618 Findings concerning commission of a capital crime where a person has not been convicted due to death or flight to avoid prosecution.

(a) *Inquiry.* With respect to a request for interment or memorialization, if a cemetery director has reason to believe that a deceased individual who is otherwise eligible for interment or memorialization may have committed a Federal or State capital crime, but avoided conviction of such crime by reason of unavailability for trial due to death or flight to avoid prosecution, the cemetery director, with the assistance of the VA regional counsel, as necessary, will initiate an inquiry seeking information from Federal, State, or local law enforcement officials, or other sources of potentially relevant information. After completion of this inquiry and any further measures required under paragraphs (c), (d), (e), and (f) of this section, the cemetery director will make a decision on the request for interment or memorialization in accordance with paragraph (b), (e), or (g) of this section.

(b) *Decision approving request without a proceeding or termination of a claim by personal representative without a proceeding.* (1) If, after conducting the inquiry described in paragraph (a) of this section, the cemetery director determines that there is no clear and convincing evidence that the deceased committed a Federal or State capital crime of which he or she was not convicted due to death or flight to avoid prosecution, and the deceased remains otherwise eligible, the cemetery director will make a decision approving the interment or memorialization.

(2) If the personal representative elects for burial at a location other than a VA national cemetery, or makes alternate arrangements for burial at a location other than a VA national cemetery, the request for interment or memorialization will be considered withdrawn and action on the request will be terminated.

(c) *Initiation of a proceeding.* (1) If, after conducting the inquiry described in paragraph (a) of this section, the cemetery director determines that there appears to be clear and convincing evidence that the deceased has committed a Federal or State capital crime of which he or she was not convicted by reason of unavailability for trial due to death or flight to avoid prosecution, the cemetery director will provide the personal representative of the deceased with a written summary of the evidence of record and a written notice of procedural options.

(2) The notice of procedural options will inform the personal representative that he or she may, within 15 days of receipt of the notice:

(i) Request a hearing on the matter;

(ii) Submit a written statement, with or without supporting documentation, for inclusion in the record;

(iii) Waive a hearing and submission of a written statement and have the matter forwarded immediately to the Under Secretary for Memorial Affairs for a finding; or

(iv) Notify the cemetery director that the personal representative is withdrawing the request for interment or memorialization, thereby, closing the claim.

(3) The notice of procedural options will also inform the personal representative that, if he or she does not exercise one or more of the stated options within the prescribed period, the matter will be forwarded to the Under Secretary for Memorial Affairs for a finding based on the existing record.

(d) *Hearing.* If a hearing is requested, the Director, Memorial Services Network will conduct the hearing. The purpose of the hearing is to permit the personal representative of the deceased to present evidence concerning whether the deceased committed a crime which would render the deceased ineligible for interment or memorialization in a national cemetery. Testimony at the hearing will be presented under oath, and the personal representative will

have the right to representation by counsel and the right to call witnesses. The VA official conducting the hearing will have the authority to administer oaths. The hearing will be conducted in an informal manner and court rules of evidence will not apply. The hearing will be recorded on audiotape and, unless the personal representative waives transcription, a transcript of the hearing will be produced and included in the record.

(e) *Decision of approval or referral for a finding after a proceeding.* Following a hearing or the timely submission of a written statement, or in the event a hearing is waived or no hearing is requested and no written statement is submitted within the time specified:

(1) If the cemetery director determines that it has not been established by clear and convincing evidence that the deceased committed a Federal or State capital crime of which he or she was not convicted due to death or flight to avoid prosecution, and the deceased remains otherwise eligible, the cemetery director will make a decision approving interment or memorialization; or

(2) If the cemetery director believes that there is clear and convincing evidence that the deceased committed a Federal or State capital crime of which he or she was not convicted due to death or flight to avoid prosecution, the cemetery director will forward a request for a finding on that issue, together with the cemetery director's recommendation and a copy of the record to the Under Secretary for Memorial Affairs.

(f) *Finding by the Under Secretary for Memorial Affairs.* Upon receipt of a request from the cemetery director under paragraph (e) of this section, the Under Secretary for Memorial Affairs will make a finding concerning whether the deceased committed a Federal or State capital crime of which he or she was not convicted by reason of unavailability for trial due to death or flight to avoid prosecution. The finding will be based on consideration of the cemetery director's recommendation and the record supplied by the cemetery director.

(1) A finding that the deceased committed a crime referred to in paragraph (f) of this section must be based on clear and convincing evidence.

(2) The cemetery director will be provided with written notification of the finding of the Under Secretary for Memorial Affairs.

(g) *Decision after finding.* Upon receipt of notification of the finding of the Under Secretary for Memorial Affairs, the cemetery director will make a decision on the request for interment or memorialization pursuant to 38 U.S.C. 2411. In making that decision, the cemetery director will be bound by the finding of the Under Secretary for Memorial Affairs.

(h) *Notice of decision.* The cemetery director will provide written notice of the finding of the Under Secretary for Memorial Affairs and of a decision under paragraph (b), (e)(1), or (g) of this section. With notice of any decision denying a request for interment or memorialization, the cemetery director will provide written notice of appellate rights to the personal representative of the deceased, in accordance with § 19.25 of this title. This will include notice of the opportunity to file a notice of disagreement with the decision of the cemetery director and the finding of the Under Secretary for Memorial Affairs. Action following receipt of a notice of disagreement with a denial of eligibility for interment or memorialization under this section will be in accordance with §§ 19.26 through 19.38 of this title.

(Authority: 38 U.S.C. 512, 2411)

§ 38.620 Persons eligible for burial.

The following is a list of those individuals who are eligible for burial in a national cemetery:

(a) Any veteran (which for purposes of this section includes a person who died in the active military, naval, or air service).

(b) Any member of a Reserve component of the Armed Forces, and any member of the Army National Guard or the Air National Guard, whose death occurs under honorable conditions while such member is hospitalized or undergoing treatment, at the expense of the United States, for injury or disease contracted or incurred under honorable conditions while such member is performing active duty for training, inactive duty training, or undergoing that hospitalization or treatment at the expense of the United States.

(c) Any Member of the Reserve Officers' Training Corps of the Army, Navy, or Air Force whose death occurs under honorable conditions while such member is—

(1) Attending an authorized training camp or on an authorized practice cruise;

(2) Performing authorized travel to or from that camp or cruise; or

(3) Hospitalized or undergoing treatment, at the expense of the United States, for injury or disease contracted or incurred under honorable conditions while such member is—

(i) Attending that camp or on that cruise;

(ii) Performing that travel; or

(iii) Undergoing that hospitalization or treatment at the expense of the United States.

(d) Any person who, during any war in which the United States is or has been engaged, served in the armed forces of any government allied with the United States during that war, whose last such service terminated honorably, and who was a citizen of the United States at the time of entry on such service and at the time of his or her death.

(e) The spouse, surviving spouse, minor child, or unmarried adult child of a person eligible under paragraph (a), (b), (c), (d), or (g) of this section. For purposes of this section—

(1) A surviving spouse includes a surviving spouse who had a subsequent remarriage;

(2) A minor child means an unmarried child under 21 years of age, or under 23 years of age if pursuing a full-time course of instruction at an approved educational institution; and

(3) An unmarried adult child means a child who became permanently physically or mentally disabled and incapable of self-support before reaching 21 years of age, or before reaching 23 years of age if pursuing a full-time course of instruction at an approved educational institution.

(f) Such other persons or classes of persons as may be designated by the Secretary.

(g) Any person who at the time of death was entitled to retired pay under chapter 1223 of title 10, United States Code, or would have been entitled to retired pay under that chapter but for the fact that the person was under 60 years of age.

(h) Any person who:

(1) Was a citizen of the United States or an alien lawfully admitted for permanent residence in the United States at the time of their death; and

(2) Resided in the United States at the time of their death; and

(3) Either was a—

(i) Commonwealth Army veteran or member of the organized guerillas—a person who served before July 1, 1946, in the organized military forces of the Government of the Commonwealth of the Philippines, while such forces were in the service of the Armed Forces of the United States pursuant to the military order of the President dated July 26, 1941, including organized guerilla forces under commanders appointed, designated, or subsequently recognized by the Commander in Chief, Southwest Pacific Area, or other competent authority in the Army of the United States, and who died on or after November 1, 2000; or

(ii) New Philippine Scout—a person who enlisted between October 6, 1945, and June 30, 1947, with the Armed Forces of the United States with the consent of the Philippine government, pursuant to section 14 of the Armed Forces Voluntary Recruitment Act of 1945, and who died on or after December 16, 2003.

(Authority: 38 U.S.C. 107, 501, 2402)

§ 38.621 Disinterments.

(a) Interments of eligible decedents in national cemeteries are considered permanent and final. Disinterment will be permitted only for cogent reasons and with the prior written authorization of the National Cemetery Area Office Director or Cemetery Director responsible for the cemetery involved. Disinterment from a national cemetery will be approved only when all living immediate family members of the decedent, and the person who initiated the interment (whether or not he or she is a member of the immediate family), give their written consent, or when a court order or State instrumentality of competent jurisdiction directs the disinterment. For purposes of this section, ''immediate family members'' are defined as surviving spouse, whether or not he or she is remarried; all adult children of the decedent; the appointed guardian(s) of minor children; and the appointed guardian(s) of the surviving spouse or of the adult child(ren) of the decedent. If the surviving spouse and all of the children of the decedent are deceased, the decedent's parents will be considered ''immediate family members.''

(b) All requests for authority to disinter remains will be submitted on VA Form 40–4970, Request for Disinterment, and will include the following information:

(1) A full statement of reasons for the proposed disinterment.

(2) Notarized statement(s) by all living immediate family members of the decedent, and the person who initiated the interment (whether or not he or she is a member of the immediate family), that they consent to the proposed disinterment.

(3) A notarized statement, by the person requesting the disinterment that those who supplied affidavits comprise all the living immediate family members of the deceased.

(Authority: 38 U.S.C. 2404)

(c) In lieu of the documents required in paragraph (b) of this section, an order of a court of competent jurisdiction will be considered.

(d) Any disinterment that may be authorized under this section must be accomplished without expense to the Government.

(The reporting and recordkeeping requirements contained in paragraph (b) have been approved by the Office of Management and Budget under OMB control number 2900–0365)

§ 38.629 Outer Burial Receptacle Allowance.

(a) *Definitions—Outer burial receptacle.* For purposes of this section, an outer burial receptacle means a graveliner, burial vault, or other similar type of container for a casket.

(b) *Purpose.* This section provides for payment of a monetary allowance for an outer burial receptacle for any interment in a VA national cemetery where a privately-purchased outer burial receptacle has been used in lieu of a Government-furnished graveliner.

(c) *Second interments.* In burials where a casket already exists in a grave with or without a graveliner, placement of a second casket in an outer burial receptacle will not be permitted in the same grave unless the national cemetery director determines that the already interred casket will not be damaged.

(d) *Payment of monetary allowance.* VA will pay a monetary allowance for each burial in a VA national cemetery where a privately-purchased outer burial receptacle was used on and after October 9, 1996. For burials on and after January 1, 2000, the person identified in records contained in the National Cemetery Administration Burial Operations Support System as the person who privately purchased the outer burial receptacle will be paid the monetary allowance. For burials during the period October 9, 1996 through December 31, 1999, the allowance will be paid to the person identified as the next of kin in records contained in the National Cemetery Administration Burial Operations Support System based on the presumption that such person privately purchased the outer burial receptacle (however, if a person who is not listed as the next of kin provides evidence that he or she privately purchased the outer burial receptacle, the allowance will be paid instead to that person). No application is required to receive payment of a monetary allowance.

(e) *Amount of the allowance.* (1) For calendar year 2000 and each calendar year thereafter, the allowance will be the average cost, as determined by VA, of Government-furnished graveliners, less the administrative costs incurred by VA in processing and paying the allowance.

(i) The average cost of Government-furnished graveliners will be based upon the actual average cost to the Government of such graveliners during the most recent fiscal year ending prior to the start of the calendar year for which the amount of the allowance will be used. This average cost will be determined by taking VA's total cost during that fiscal year for single-depth graveliners which were procured for placement at the time of interment and dividing it by the total number of such graveliners procured by VA during that fiscal year. The calculation shall exclude both graveliners procured and pre-placed in gravesites as part of cemetery gravesite development projects and all double-depth graveliners.

(ii) The administrative costs incurred by VA will consist of those costs that relate to processing and paying an allowance, as determined by VA, for the calendar year ending prior to the start of the calendar year for which the amount of the allowance will be used.

(2) For calendar year 2000 and each calendar year thereafter, the amount of the allowance for each calendar year will be published in the ''Notices'' section of the **Federal Register**. The **Federal Register** notice will also provide, as information, the determined average cost of Government-furnished graveliners and the determined amount of the administrative costs to be deducted.

(3) The published allowance amount for interments which occur during calendar year 2000 will also be used for payment of any allowances for interments which occurred during the period from October 9, 1996 through December 31, 1999.

(Authority: 38 U.S.C. 2306(d))

§ 38.630 Headstones and markers.

(a) Types of Government headstones and markers and inscriptions will be in accordance with policies approved by the Secretary.

(b) Inscriptions on Government headstones, markers, and private monuments will be in accordance with policies and specifications of the Under Secretary for Memorial Affairs.

(c) A memorial headstone or marker furnished for a deceased veteran by the Government may be erected in a private cemetery or in a national cemetery section established for this purpose. The headstones or markers for national cemeteries will be of the standard design authorized for the cemetery in which they are to be erected. In addition to the authorized inscription, the words ''In Memory Of'' are mandatory.

(Authority: 38 U.S.C. 501)

§ 38.631 Graves marked with a private headstone or marker.

(a) VA will furnish an appropriate Government marker for the grave of a decedent described in paragraph (b) of this section, but only if the individual requesting the marker certifies on VA Form 40–1330 that it will be placed on the grave for which it is requested or, if placement on the grave is impossible or impracticable, as close to the grave as possible within the grounds of the private cemetery where the grave is located.

(b) The decedent referred to in paragraph (a) of this section is one who:

(1) Died on or after September 11, 2001;

(2) Is buried in a private cemetery; and

(3) Was eligible for burial in a national cemetery, but is not an individual described in 38 U.S.C. 2402(4), (5), or (6).

(c) VA will deliver the marker directly to the cemetery where the grave is located or to a receiving agent for delivery to the cemetery.

(d) VA will not pay the cost of installing a Government marker in a private cemetery.

(e) The applicant must obtain certification on VA Form 40–1330 from a cemetery representative that the type and placement of the marker requested adheres to the policies and guidelines of the selected private cemetery.

(f) VA will furnish its full product line of Government markers for private cemeteries.

(g) The authority to furnish a marker under this section expires on December 31, 2006.

(Authority: 38 U.S.C. 501, 2306)

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900–0222.)

§ 38.632 Headstone and marker application process.

(a) Headstones and markers for graves in national cemeteries shall be ordered from the Record of Interment (VA Form 40–4956) prepared by the national cemetery superintendent at the time of interment. No further application is required.

(b) Submission of VA Form 40–1330, Application for Headstone or Marker, is required for the purpose of:

(1) Ordering a Government headstone or marker for any unmarked grave of any eligible veteran buried in a private or local cemetery.

(2) Ordering a Government headstone or marker for any unmarked grave in a post cemetery of the Armed Forces.

(3) Ordering a Government memorial headstone or marker for placement in a national cemetery, in a private or local cemetery and any post cemetery of the Armed Forces.

§ 38.633 Group memorial monuments.

(a) *Definitions of terms.* For the purpose of this section, the following definitions apply:

(1) *Group*—all the known and unknown dead who perished in a common military event.

(2) *Memorial Monument*—a monument commemorating veterans, whose remains have not been recovered or identified. Monuments will be selected in accordance with policies established under 38 CFR 38.630.

(3) *Next of kin*—recognized in order: Surviving spouse; children, according to age; parents, including adoptive, stepparents, and foster parents; brothers or sisters, including half or stepbrothers and stepsisters; grandparents; grandchildren; uncles or aunts; nephews or nieces; cousins; and/or other lineal descendent.

(4) *Documentary evidence*—Official documents, records, or correspondence signed by an Armed Services branch historical center representative attesting to the accuracy of the evidence.

(b) The Secretary may furnish at government expense a group memorial monument upon request of next of kin. The group memorial monument will commemorate two or more identified members of the Armed Forces, including their reserve components, who died in a sanctioned common military event, (*e.g.*, battle or other hostile action, bombing or other explosion, disappearance of aircraft, vessel or other vehicle) while in active military, naval or air service, and whose remains were not recovered or identified, were buried at sea, or are otherwise unavailable for interment.

(c) A group memorial monument furnished by VA may be placed only in a national cemetery in an area reserved for such purpose. If a group memorial monument has already been provided under this regulation or by any governmental body, *e.g.*, the American Battle Monuments Commission, to commemorate the dead from a common military event, an additional group memorial monument will not be provided by VA for the same purpose.

(d) Application for a group memorial monument shall be submitted in a manner specified by the Secretary. Evidence used to establish and determine eligibility for a group memorial monument will conform to paragraph (a)(4) of this section.

(Authority: 38 U.S.C. 501, 2403)

[FR Doc. 05–1705 Filed 1–28–05; 8:45 am]

BILLING CODE 8320–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[Region II Docket No. R02–OAR–2004–NY–0002, FRL–7851–1]

Approval and Promulgation of Implementation Plans; New York; Low Emission Vehicle Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency is approving a New York State State Implementation Plan (SIP) revision to revise its existing low emission vehicle (LEV) program. The State's revision adopts California's second generation low emission vehicle program for light-duty vehicles (LEV II). New York has revised its LEV rule to include a non-methane hydrocarbon standard and various administrative and grammatical changes to make its existing LEV rule identical to California's LEV II program. The intended effect of this rulemaking is to approve a control strategy which will result in emissions reductions that will help achieve attainment of national ambient air quality standards for ozone.

DATES: *Effective Date:* This rule will be effective March 2, 2005.

ADDRESSES: Copies of the state submittal are available at the following addresses for inspection during normal business hours:

Environmental Protection Agency, Region 2 Office, Air Programs Branch, 290 Broadway, 25th Floor, New York, New York 10007–1866.

Environmental Protection Agency, Air and Radiation Docket and Information Center, Air Docket (6102), 401 M Street, SW., Washington, DC 20460.

New York State Department of Environmental Conservation, Office of Air and Waste Management, 14th Floor, 625 Broadway, Albany, New York 12233–1010.

FOR FURTHER INFORMATION CONTACT: David Risley, Air Programs Branch, Environmental Protection Agency, 290 Broadway, 25th Floor, New York, New York 10007–1866, (212) 637–4249 or *risley.david@epa.gov.*

SUPPLEMENTARY INFORMATION:

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I. Description of the SIP Revision

II. Public Comments on the Proposed Action
III. Final EPA Action
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I. Description of the SIP Revision

In 1994, New York requested EPA to revise its SIP to include a LEV program. EPA approved that SIP revision on January 6, 1995 (60 FR 2022). At the time, New York's LEV program was identical to California's first-generation LEV program. More recently, New York has updated its LEV program to be identical to California's LEV II program. New York has adopted California's LEV II program by reference in the New York State Code of Rules and Regulations part 218, ''Emission Standards for Motor Vehicles and Motor Vehicle Engines.''

New York has requested that EPA take action on its revised LEV program. EPA has already approved the emissions reduction credits from the revised LEV program as part of our approval of New York's attainment demonstration SIP revision on February 4, 2002 (67 FR 5170). In the current SIP revision, New York requested Federal approval of the LEV program regulation. EPA's approval of New York's LEV program makes it Federally-enforceable, further ensuring that planned emissions reductions will continue to take place. For further information on the specifics of New York's LEV program see the September 24, 2004 Notice of Proposed Rulemaking (69 FR 57241).

II. Public Comments on the Proposed Action

No comments were received on the Notice of Proposed Rulemaking, published in the September 24, 2004 **Federal Register** (69 FR 57241).

III. Final EPA Action

EPA is approving the light-duty portion of New York's LEV program, which is identical to California's LEV II program. The LEV program that EPA is approving is contained in title 6, part 218, subparts 218–1, 218–2, 218–3, 218–5, 218–6, 218–7 and 218–8 of the Official Compilation of Codes, Rules and Regulations of the State of New York. Approval of New York's LEV program further ensures that planned emissions reductions attributable to this program will be achieved. These reductions are necessary for New York to achieve its clean air goals, as detailed in the State's 1-hour ozone attainment demonstration SIP. The updated program was filed on November 28, 2000 and adopted on December 28, 2000, as noticed in the New York State Register.

IV. Administrative Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001). This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104–4).

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely approves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

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 the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by April 1, 2005. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

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

Dated: November 23, 2004.

Kathleen C. Callahan,

Acting Regional Administrator, Region 2.

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

PART 52—[AMENDED]

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

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

Subpart HH—New York

■ 2. Section 52.1670 is amended by adding new paragraph (c)(107) to read as follows:

§ 52.1670 Identification of plan.

* * * * *

(c) * * *

* * * * *

(107) Revisions to the State Implementation Plan submitted on December 9, 2002, by the New York State Department of Environmental Conservation which consists of the adoption of California's second generation Low Emissions Vehicle (LEV) program.

(i) Incorporation by reference.

(A) Regulation part 218 ''Emissions Standards for Motor Vehicles and Motor Vehicle Engines'' of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6NYCRR), part 218, subparts 218–1, 218–2, 218–3, 218–5, 218–6, 218–7 and 218–8 filed on November 28, 2000 and effective on December 28, 2000.

■ 3. Section 52.1679 is amended by revising the entry for part 218 under title 6 to read as follows:

§ 52.1679 EPA-approved New York State regulations.

New York State regulation	State effective date	Latest EPA approval date	Comments
Title 6			
* *	*	* *	* *
Part 218, Emission Standards for Motor Vehicles and Motor Vehicle Engines:	.....	.....	EPA's approval of part 218 only applies to light-duty vehicles.
Subpart 218–1: Applicability and Definitions.	12/28/00	1/31/05, [insert FR citation of this document].	
Subpart 218–2: Certification and Prohibitions.	12/28/00	1/31/05, [insert FR citation of this document].	
Subpart 218–3: Fleet Average	12/28/00	1/31/05, [insert FR citation of this document].	
Subpart 218–4: Zero Emissions Vehicle Sales Mandate.	5/28/92	1/6/95, 60 FR 2025.	
Subpart 218–5: Testing	12/28/00	1/31/05, [insert FR citation of this document].	
Subpart 218–6: Surveillance	12/28/00	1/31/05, [insert FR citation of this document].	
Subpart 218–7: Aftermarket Parts	12/28/00	1/31/05, [insert FR citation of this document].	
Subpart 218–8: Severability	12/28/00	1/31/05, [insert FR citation of this document].	
* *	*	* *	* *

[FR Doc. 05–1630 Filed 1–28–05; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 2, 25, and 101

[IB Docket No. 02–10, FCC 04–286]

Procedures To Govern the Use of Satellite Earth Stations on Board Vessels in the 5925–6425 MHz/3700–4200 MHz Bands and 14.0–14.5 GHz/11.7–12.2 GHz Bands

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document is a summary of the *Report and Order* adopted by the Commission in this proceeding. The Commission adopted licensing and service rules for satellite earth stations on vessels (ESVs) in the C- and Ku-bands that will provide regulatory certainty to ESV licensees, while protecting existing users in the bands. The new rules will further the Commission's goal of promoting market-based deployment of broadband technologies.

DATES: Effective March 2, 2005, except for 47 CFR 25.221(c), 25.221(e), and 25.222(c) which contain information requirements that have not yet been approved by Office of Management and Budget (OMB). The Commission will publish a document in the **Federal Register** announcing the effective date of those sections. OMB, the general public, and other Federal agencies are invited to comment on the information collection requirements on or before April 1, 2005.

ADDRESSES: In addition to filing comments with the Office of the Secretary, a copy of any comments on the Paperwork Reduction Act information collection(s) contained herein should be submitted to Judith B. Herman, Federal Communications Commission, Room 1–C804, 445 12th Street, SW., Washington, DC 20554, or via the Internet to *Judith-B.Herman@fcc.gov,* and to Kristy L. LaLonde, OMB Desk Officer, Room 10236 NEOB, 725 17th Street, NW., Washington, DC 20503 or via the Internet to *Kristy_L._LaLonde@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Jennifer Gorny or Gardner Foster, Policy Division, International Bureau, (202) 418–1460. For additional information concerning the Paperwork Reduction Act information collection(s) contained in this document, contact Judith B. Herman at (202) 418–0214, or via the Internet at *Judith-B.Herman@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Report and Order* in IB Docket No. 02–10, FCC 04–286, adopted December 15, 2004, and released on January 6, 2005. This proceeding was initiated by the Notice of Proposed Rule Making (*ESV NPRM*), 69 FR 3056, January 22, 2004. The full

text of this Commission decision 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 document is also available for download over the Internet at *http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC–04–286A1.pdf.* The complete text may also be purchased from the Commission's copy contractor, Best Copy and Printing, Inc., (BCPI) located in Room CY–B402, 445 12th Street, SW., Washington, DC 20554. Customers may contact BCPI at their Web site: *http://www.bcpiweb.com* or call 1–800–378–3160.

Paperwork Reduction Act of 1995 Analysis

This *Report and Order* contains modified information collections. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public to comment on the information collection(s) contained in this *Report and Order* as required by the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. Public and agency comments are due April 1, 2005. In addition, the Commission notes that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.''

In this present *Report and Order,* we have assessed the effects of adopting licensing and service rules for ESVs, and find that with the flexibility allowing ESV providers to use either the C-band or the Ku-band will provide regulatory certainty to small businesses while protecting against interference.

The Commission will send a copy of the *Report and 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

On November 24, 2003, the Commission released the *ESV NPRM* seeking comment on proposed rules for satellite services on vessels, including broadband services. The Commission's proposals sought to provide regulatory certainty to ESVs while protecting incumbent terrestrial fixed service (FS) and fixed satellite service (FSS) operators in the C- and Ku-bands.

On December 15, 2004, the Commission adopted the *Report and Order* in this proceeding. The *Report and Order* establishes licensing and service rules for ESVs operating in the 5925–6425 MHz/3700–4200 MHz (C-band) and 14.0–14.5 GHz/11.7–12.2 GHz (Ku-band) frequencies. A portion of the ''extended'' Ku-band (10.95–11.2 GHz and 11.45–11.7 GHz) is also included in this decision. ESVs have been used for the past several years to provide communications services, including Internet access, to cruises, merchant ships, ferries, barges, yachts and U.S. Navy vessels. The Commission's decision will allow ESV operations to continue in the C- and Ku-bands, while ensuring that ESVs protect FS and FSS operators, and a limited number of Government operations in these bands from harmful interference.

To protect FS operations in the C-band, ESV operators will be subject to operational requirements, including spectrum limitations and coordination requirements. The Commission imposes fewer operational requirements in the Ku-band than in the C-band because ESVs are less likely to cause harmful interference to incumbent services in that band. For example, in the Ku-band, ESV coordination with the fixed terrestrial service is not required because these operations are limited in that band. In the 14.0–14.5 GHz band, ESV coordination is required near a limited number of Federal Government earth stations. ESVs will be permitted to operate in portions of the ''extended'' Ku-band downlink (10.95–11.2 GHz and 11.45–12.2 GHz) and must accept all interference from FS operations in that band. In addition, the new rules place power limits on ESV operations to protect fixed satellite operators in both the C- and Ku-bands. The Commission also requires ESV operators in both bands to collect and maintain vessel tracking data to assist in identifying and resolving sources of interference. Finally, the Commission establishes a regulatory framework that will enable foreign-licensed ESVs to operate near the United States without causing harmful interference to domestic operations.

Prior to the adoption of the *Report and Order,* the Commission permitted ESVs to operate pursuant to six month special temporary authorizations. In the *Report and Order,* the Commission adopted blanket licensing procedures and a fifteen-year license term. These measures will ensure expeditious processing and regulatory certainty.

Procedural Matters

Paperwork Reduction Act

This *Report and Order* contains or modified information collections subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. It will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the modified information collection contained in this proceeding. All comments regarding the requests for approval of the information collection should be submitted to Judith B. Herman, Federal Communications Commission, Room 1–C804, 445 12th Street, SW., Washington, DC 20554, or via the Internet to *Judith-B.Herman@fcc.gov,* and to Kristy L. LaLonde, OMB Desk Officer, Room 10236 NEOB, 725 17th Street, NW., Washington, DC 20503 or via the Internet to *Kristy_L._LaLonde@omb.eop.gov.*

Final Regulatory Flexibility Act Certification

The Regulatory Flexibility Act of 1980, as amended (RFA), requires that a regulatory flexibility analysis be prepared for notice-and-comment rule making proceedings, unless the agency certifies that ''the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.'' The RFA, *see* 5 U.S.C. 601–612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Public Law 104–121, Title II, 110 Stat. 857 (1996), and 5 U.S.C. 605(b). The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' (5 U.S.C. 601(6)). In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. 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**.'' 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 U.S. Small Business Administration (SBA). *See* 5 U.S.C. 632.

In light of the rules adopted in this *Report and Order,* we believe that there are only two categories of licensees that would be affected by the new rules. These categories of licensees are Satellite Telecommunications and Fixed-Satellite Transmit/Received Earth Stations. The SBA has developed a small business size standard for Satellite Telecommunications, which consists of all such companies having $12.5 million or less in annual revenue. *See* 13 CFR 121.201, NAICS code 517410. Currently there are approximately 3,390 operational fixed-satellite transmit/received earth stations authorized for use in the C- and Ku-bands. The Commission does not request or collect annual revenue information, and thus is unable to estimate the number of earth stations that would constitute a small business under the SBA definition. Of the two classifications of licensees, we estimate that only 15 entities will provide ESV service.

Pursuant to the RFA, the Commission incorporated an Initial Regulatory Flexibility Analysis (IRFA) into the *ESV NPRM.* In the IRFA, the Commission tentatively concluded that the proposals contained in the *ESV NPRM* were the least burdensome alternatives for all entities, both large and small. We received no comments in response to the IRFA. For the reasons described below, we now certify that the policies and rules adopted in this *Report and Order* will not have a significant economic impact on a substantial number of small entities.

In 2003, the Commission adopted the *ESV NPRM* seeking comments on its proposals to license ESV hub stations for operation in both the C- and Ku-bands. In this *Report and Order,* the Commission establishes licensing and service rules for ESVs operating in the C- and Ku-bands. These rules allow ESV operations in the C- and Ku-bands, while ensuring that ESVs protect FS and FSS operators, and a limited number of Government operations in these bands from harmful interference.

ESVs have been used for the past several years to provide telecommunications services, including Internet access, to cruise ships, merchant ships, ferries, barges, yachts, and U.S. Navy vessels—*i.e.*, any marine craft large enough to meet reasonable size requirements and safely carry a stabilized satellite dish. Licensing ESV operations advances the Commission's goals and objectives for market-driven deployment of broadband technologies. The market for broadband via satellite-based communications continues to expand. As ESV operators deploy increasingly innovative broadband services to their subscribers, the rules will assure that, through ESVs, broadband services are available to businesses and consumers on the high seas, coastlines, and inland waterways.

In this *Report and Order,* the Commission imposes certain technical conditions on ESV operations as an application of the FSS with mobile capabilities. By allowing ESVs to continue operations in the C-band, the Commission strikes the appropriate balance of ESV and FS interests by adopting strict operational requirements for ESVs in the C-band that will ensure that incumbent and future FS operators are protected from harmful interference. The Commission encourages ESV operators to utilize the Ku-band for their operations wherever possible through enhanced rights and limited regulation in that band. Given the relatively limited presence of FS users in the 11.7–12.2 GHz band, and the Commission's belief that the proliferation of Ku-band satellites are making Ku-band spectrum more accessible and reliable, the Commission views the Ku-band as an ideal operational environment for future ESV growth. The availability of Ku-band spectrum for non-coordinated use could help reduce costs to both large and small entities. We believe that it will have no significant economic impact on small entities because ESV operators will have the ability to choose the spectrum (C-or Ku-band) that meets their needs and will not be precluded from being licensed in each band. In addition, permitting this flexibility will greatly reduce interference problems.

In both the C- and Ku-bands, the Commission requires ESV operators to protect FSS incumbents through limits on off-axis effective isotropically radiated power density and to cease operations if the ESV antenna drifts more than 0.2 degrees from the target satellite. In addition, the Commission adopts footnotes to the U.S. Table of Frequency Allocations to recognize ESVs as an application of the FSS with primary status. In doing so, the Commission implements, in part, the decision reached at the International Telecommunication Union's (ITU's) 2003 World Radiocommunication Conference (WRC–03), which added a footnote to the International Table of Frequency Allocations stating that, in the 5925–6425 MHz and 14.0–14.5 GHz bands, ESVs may communicate with FSS space stations. We also require operators in both bands to collect and maintain vessel tracking data to assist in identifying and resolving sources of interference. The Commission also provides for system licensing (consisting of ESV hub stations and/or blanket licensing for ESV earth stations) in order to give both C- and Ku-band ESV operators greater flexibility in structuring their operations. Finally, consistent with ITU encouragement of administrative cooperation in reaching agreements on the use of ESV systems, the Commission established a regulatory framework that will enable foreign-licensed ESVs to operate near the United States without causing harmful interference to domestic operations. This flexible approach should benefit all entities, and the requirements should not have a significant economic impact on small entities.

ESV operators also are required to establish a database for tracking the location of ESV remote earth stations and to maintain a point of contact for resolving possible claims of harmful interference. The Commission does not expect small entities to incur significant costs associated with this requirement. The new licensing rules will benefit both large and small entities by streamlining the process for obtaining authority from the Commission to provide ESV service. Licensees will have certainty in the provision of service because the new rules will provide license terms of 15 years rather than the current procedure whereby a licensee receives temporary authorization for 6 months. In addition, the new rules provide a simplified means of resolving issues of harmful interference. Small entities will benefit from the flexibility of being able to operate in the Ku-band where there are very few restrictions. We believe these requirements are nominal and do not impose a significant economic impact on small entities.

Therefore, we certify that the requirements adopted in this *Report and Order* will not have a significant economic impact on a substantial number of small entities.

Report to Congress: The Commission will send a copy of the *Report and Order,* including a copy of the Final Regulatory Flexibility Certification, in a report to Congress. In addition, the Commission will send a copy of the *Report and Order,* including a copy of the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the SBA. A copy of the *Report and Order* and Final Regulatory Flexibility Certification will also be published in the **Federal Register**.

Ordering Clauses

Accordingly, pursuant to the authority contained in sections 4(i), 7, 302(a), 303(c), 303(e), 303(f) and 303(r) of the Communications Act of 1934, as

amended, 47 U.S.C. sections 154(i), 157, 302(a), 303(c), 303(e), 303(f) and 303(r), the *Report and Order is adopted* and that parts 2, 25, and 101 of the Commission's Rules *are amended* as specified in the Final Rules, effective March 2, 2005, except for 47 CFR 25.221(c), 25.221(e), and 25.222(c), which are not effective until approved by the Office of Management and Budget. The Commission will publish a document in the **Federal Register** announcing the effective date of those sections.

The Regulatory Flexibility Certification, as required by section 604 of the Regulatory Flexibility Act and as set forth in the *Report and Order, is adopted.*

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 Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Parts 2, 25, and 101

Radio, Satellites, Telecommunications.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Final Rules

■ For the reasons discussed in the preamble, parts 2, 25, and 101 of the Commission's rules are amended as follows:

PART 2—FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

■ 1. The authority citation for part 2 continues to read as follows:

Authority: 47 U.S.C. 154, 302a, 303, and 336, unless otherwise noted.

■ 2. Section 2.106 is amended as follows:

■ a. Revise pages 55, 57, 64 and 66 of the Table of Frequency Allocations.

■ b. In the list of international footnotes, revise footnotes 5.457B, 5.487, 5.487A, and 5.488; and remove footnote 5.491.

■ c. In the list of non-Federal Government footnotes, add footnotes NG180, NG181, NG182, NG183 and NG184.

The revisions and additions read as follows:

§ 2.106 Table of Frequency Allocations.

* * * * *

BILLING CODE 6712–01–P

3700-5570 MHz (SHF) Page 55

International Table			United States Table		FCC Rule Part(s)
Region 1	Region 2	Region 3	Federal Government	Non-Federal Government	
See previous page for 3600-4200 MHz	3700-4200 FIXED FIXED-SATELLITE (space-to-Earth) MOBILE except aeronautical mobile		3700-4200	3700-4200 FIXED NG41 FIXED-SATELLITE (space-to-Earth) NG180	International Fixed (23) Satellite Communications (25) Fixed Microwave (101)
4200-4400 AERONAUTICAL RADIONAVIGATION 5.438 5.439 5.440			4200-4400 AERONAUTICAL RADIONAVIGATION 5.440 US261		Aviation (87)
4400-4500 FIXED MOBILE			4400-4500 FIXED MOBILE	4400-4500	
4500-4800 FIXED FIXED-SATELLITE (space-to-Earth) 5.441 MOBILE			4500-4800 FIXED MOBILE US245	4500-4800 FIXED-SATELLITE (space-to-Earth) 5.441 US245	
4800-4990 FIXED MOBILE 5.442 Radio astronomy			4800-4940 FIXED MOBILE US203 US342	4800-4940 US203 US342	
5.149 5.339 5.443			4940-4990 5.339 US311 US342 G122	4940-4990 FIXED MOBILE except aeronautical mobile 5.339 US311 US342	Private Land Mobile (90) Fixed Microwave (101)
4990-5000 FIXED MOBILE except aeronautical mobile RADIO ASTRONOMY Space research (passive) 5.149			4990-5000 RADIO ASTRONOMY US74 Space research (passive) US246		
5000-5150 AERONAUTICAL RADIONAVIGATION 5.367 5.443A 5.443B 5.444 5.444A			5000-5250 AERONAUTICAL RADIO-NAVIGATION US260	5000-5150 AERONAUTICAL RADIO-NAVIGATION US260 5.367 5.444A US211 US344 US370	Satellite Communications (25) Aviation (87)

5570-7250 MHz (SHF) — Page 57

International Table			United States Table		FCC Rule Part(s)
Region 1	Region 2	Region 3	Federal Government	Non-Federal Government	
5570-5650 MARITIME RADIONAVIGATION MOBILE except aeronautical mobile 5.446A 5.450A RADIOLOCATION 5.450B 5.450 5.451 5.452			5570-5600 MARITIME RADIONAVIGATION US65 RADIOLOCATION G56 US50 G131	5570-5600 MARITIME RADIONAVIGATION US65 RADIOLOCATION US50	RF Devices (15) Maritime (80) Private Land Mobile (90)
			5600-5650 MARITIME RADIONAVIGATION US65 METEOROLOGICAL AIDS RADIOLOCATION G56 5.452 US50 G131	5600-5650 MARITIME RADIONAVIGATION US65 METEOROLOGICAL AIDS RADIOLOCATION 5.452 US50	
5650-5725 RADIOLOCATION MOBILE except aeronautical mobile 5.446A 5.450A Amateur Space research (deep space) 5.282 5.451 5.453 5.454 5.455			5650-5925 RADIOLOCATION G2	5650-5830 Amateur 5.150 5.282	RF Devices (15) ISM Equipment (18) Amateur (97)
5725-5830 FIXED-SATELLITE (Earth-to-space) RADIOLOCATION Amateur 5.150 5.451 5.453 5.455 5.456	5725-5830 RADIOLOCATION Amateur 5.150 5.453 5.455				
5830-5850 FIXED-SATELLITE (Earth-to-space) RADIOLOCATION Amateur Amateur-satellite (space-to-Earth) 5.150 5.451 5.453 5.455 5.456	5830-5850 RADIOLOCATION Amateur Amateur-satellite (space-to-Earth) 5.150 5.453 5.455			5830-5850 Amateur Amateur-satellite (space-to-Earth) 5.150	ISM Equipment (18) Amateur (97)
5850-5925 FIXED FIXED-SATELLITE (Earth-to-space) MOBILE 5.150	5850-5925 FIXED FIXED-SATELLITE (Earth-to-space) MOBILE Amateur Radiolocation 5.150	5850-5925 FIXED FIXED-SATELLITE (Earth-to-space) MOBILE Radiolocation 5.150	5.150 US245	5850-5925 FIXED-SATELLITE (Earth-to-space) US245 MOBILE NG160 Amateur 5.150	ISM Equipment (18) Private Land Mobile (90) Personal Radio (95) Amateur (97)
5925-6700 FIXED FIXED-SATELLITE (Earth-to-space) 5.457A 5.457B MOBILE			5925-6425	5925-6425 FIXED NG41 FIXED-SATELLITE (Earth-to-space) NG181	International Fixed (23) Satellite Commun. (25) Fixed Microwave (101)

10.7-11.7 FIXED FIXED-SATELLITE (space-to-Earth) 5.441 5.484A (Earth-to-space) 5.484 MOBILE except aeronautical mobile	10.7-11.7 FIXED FIXED-SATELLITE (space-to-Earth) 5.441 5.484A MOBILE except aeronautical mobile		10.7-11.7 US211	10.7-11.7 FIXED FIXED-SATELLITE (space-to-Earth) 5.441 US211 US355 NG104 NG182	Satellite Communications (25) Fixed Microwave (101)
11.7-12.5 FIXED MOBILE except aeronautical mobile BROADCASTING BROADCASTING-SATELLITE	11.7-12.1 FIXED 5.486 FIXED-SATELLITE (space-to-Earth) 5.484A Mobile except aeronautical mobile 5.485 5.488	11.7-12.2 FIXED MOBILE except aeronautical mobile BROADCASTING BROADCASTING-SATELLITE	11.7-12.7	11.7-12.2 FIXED-SATELLITE (space-to-Earth) NG143 NG145 NG183 5.488 NG184	Satellite Communications (25)
	12.1-12.2 FIXED-SATELLITE (space-to-Earth) 5.484A 5.485 5.488 5.489	5.487 5.487A 5.492			
5.487 5.487A 5.492	12.2-12.7 FIXED MOBILE except aeronautical mobile BROADCASTING BROADCASTING-SATELLITE	12.2-12.5 FIXED FIXED-SATELLITE (space-to-Earth) MOBILE except aeronautical mobile BROADCASTING 5.484A 5.487		12.2-12.7 FIXED BROADCASTING-SATELLITE 5.487A 5.488 5.490	Satellite Communications (25) Fixed Microwave (101)
12.5-12.75 FIXED-SATELLITE (space-to-Earth) 5.484A (Earth-to-space) 5.494 5.495 5.496	5.487A 5.488 5.490 5.492 See next page for 12.7-12.75 GHz	12.5-12.75 FIXED FIXED-SATELLITE (space-to-Earth) 5.484A MOBILE except aeronautical mobile BROADCASTING-SATELLITE 5.493	See next page for 12.7-12.75 GHz		See next page for 12.7-12.75 GHz

14-14.25 FIXED-SATELLITE (Earth-to-space) 5.457A 5.457B 5.484A 5.506 5.506B RADIONAVIGATION 5.504 Mobile-satellite (Earth-to-space) 5.504C 5.506A Space research 5.504A 5.505			14-14.2 RADIONAVIGATION US292 Space research	14-14.2 FIXED-SATELLITE (Earth-to-space) NG183 RADIONAVIGATION US292 Mobile-satellite (Earth-to-space) Space research	Satellite Communications (25) Maritime (80) Aviation (87)
14.25-14.3 FIXED-SATELLITE (Earth-to-space) 5.457A 5.457B 5.484A 5.506 5.506B RADIONAVIGATION 5.504 Mobile-satellite (Earth-to-space) 5.506A 5.508A Space research 5.504A 5.505 5.508 5.509			14.2-14.4	14.2-14.47 FIXED-SATELLITE (Earth-to-space) NG183 Mobile-satellite (Earth-to-space)	Satellite Communications (25)
14.3-14.4 FIXED FIXED-SATELLITE (Earth-to-space) 5.457A 5.457B 5.484A 5.506 5.506B MOBILE except aeronautical mobile Mobile-satellite (Earth-to-space) 5.506A 5.509A Radionavigation-satellite 5.504A	14.3-14.4 FIXED-SATELLITE (Earth-to-space) 5.457A 5.484A 5.506 5.506B Mobile-satellite (Earth-to-space) 5.506A Radionavigation-satellite 5.504A	14.3-14.4 FIXED FIXED-SATELLITE (Earth-to-space) 5.457A 5.484A 5.506 5.506B MOBILE except aeronautical mobile Mobile-satellite (Earth-to-space) 5.506A 5.509A Radionavigation-satellite 5.504A			
14.4-14.47 FIXED FIXED-SATELLITE (Earth-to-space) 5.457A 5.457B 5.484A 5.506 5.506B MOBILE except aeronautical mobile Mobile-satellite (Earth-to-space) 5.506A 5.509A Space research (space-to-Earth) 5.504A			14.4-14.47 Fixed Mobile	NG184	
14.47-14.5 FIXED FIXED-SATELLITE (Earth-to-space) 5.457A 5.457B 5.484A 5.506 5.506B MOBILE except aeronautical mobile Mobile-satellite (Earth-to-space) 5.504B 5.506A 5.509A Radio astronomy 5.149 5.504A			14.47-14.5 Fixed Mobile US203 US342	14.47-14.5 FIXED-SATELLITE (Earth-to-space) NG183 Mobile-satellite (Earth-to-space) US203 US342	

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International Footnotes

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5.457B In the bands 5925–6425 MHz and 14–14.5 GHz, earth stations located on board vessels may operate with the characteristics and under the conditions contained in Resolution 902 (WRC–03) in Algeria, Saudi Arabia, Bahrain, Comoros, Djibouti, Egypt, United Arab Emirates, the Libyan Arab Jamahiriya, Jordan, Kuwait, Morocco, Mauritania, Oman, Qatar, the Syrian Arab Republic, Sudan, Tunisia and Yemen, in the maritime mobile-satellite service on a secondary basis. Such use shall be in accordance with Resolution 902 (WRC–03).

* * * * *

5.487 In the band 11.7–12.5 GHz in Regions 1 and 3, the fixed, fixed-satellite, mobile, except aeronautical mobile, and broadcasting services, in accordance with their respective allocations, shall not cause harmful interference to, or claim protection from, broadcasting-satellite stations operating in accordance with the Regions 1 and 3 Plan in Appendix 30.

5.487A *Additional allocation:* in Region 1, the band 11.7–12.5 GHz, in Region 2, the band 12.2–12.7 GHz and, in Region 3, the band 11.7–12.2 GHz, are also allocated to the fixed-satellite service (space-to-Earth) on a primary basis, limited to non-geostationary systems and subject to application of the provisions of No. 9.12 for coordination with other non-geostationary-satellite systems in the fixed-satellite service. Non-geostationary-satellite systems in the fixed-satellite service shall not claim protection from geostationary-satellite networks in the broadcasting-satellite service operating in accordance with the Radio Regulations, irrespective of the dates of receipt by the Bureau of the complete coordination or notification information, as appropriate, for the non-geostationary-satellite systems in the fixed-satellite service and of the complete coordination or notification information, as appropriate, for the geostationary-satellite networks, and No. 5.43A does not apply. Non-geostationary-satellite systems in the fixed-satellite service in the above bands shall be operated in such a way that any unacceptable interference that may occur during their operation shall be rapidly eliminated.

5.488 The use of the band 11.7–12.2 GHz by geostationary-satellite networks in the fixed-satellite service in Region 2 is subject to application of the provisions of No. 9.14 for coordination with stations of terrestrial services in Regions 1, 2 and 3. For the use of the band 12.2–12.7 GHz by the broadcasting-satellite service in Region 2, see Appendix 30.

* * * * *

Non-Federal Government (NG) Footnotes

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NG180 In the band 3700–4200 MHz (space-to-Earth) earth stations on vessels (ESVs) may be authorized to communicate with space stations of the fixed-satellite service and, while docked, may be coordinated for up to 180 days, renewable. ESVs in motion must operate on a secondary basis.

NG181 In the band 5925–6425 MHz (Earth-to-space), earth stations on vessels are an application of the fixed-satellite service (FSS) and may be authorized to communicate with space stations of the FSS on a primary basis.

NG182 In the bands 10.95–11.2 GHz and 11.45–11.7 GHz, earth stations on vessels may be authorized to communicate with U.S. earth stations through space stations of the fixed-satellite service but must accept interference from terrestrial systems operating in accordance with Commission Rules.

NG183 In the bands 11.7–12.2 GHz (space-to-Earth) and 14.0–14.5 GHz (Earth-to-space), earth stations on vessels are an application of the fixed-satellite service (FSS) and may be authorized to communicate with space stations of the FSS on a primary basis.

NG184 Land mobile stations in the bands 11.7–12.2 GHz and 14.2–14.4 GHz and fixed stations in the band 11.7–12.1 GHz that are licensed pursuant to part 101, subpart J of the Commission's Rules as of March 1, 2005 may continue to operate on a secondary basis until their license expires. Existing licenses issued pursuant to part 101, subpart J will not be renewed in the bands 11.7–12.2 GHz and 14.2–14.4 GHz.

* * * * *

PART 25—SATELLITE COMMUNICATIONS

■ 3. The authority citation for part 25 continues to read as follows:

Authority: 47 U.S.C. 701–744. Interprets or applies Sections 4, 301, 302, 303, 307, 309 and 332 of the Communications Act, as amended, 47 U.S.C. Sections 154, 301, 302, 303, 307, 309, 332, unless otherwise noted.

■ 4. Section 25.115 is amended by adding paragraph (a)(2)(iii) to read as follows:

§ 25.115 Application for earth station authorizations.

(a) * * *

(2) * * *

(iii) The earth station is not an ESV.

* * * * *

■ 5. Section 25.130 is amended by revising paragraph (a) to read as follows:

§ 25.130 Filing requirements for transmitting earth stations.

(a) Applications for a new or modified transmitting earth station facility shall be submitted on FCC Form 312, and associated Schedule B, accompanied by any required exhibits, except for those earth station applications filed on FCC Form 312EZ pursuant to § 25.115(a). All such earth station license applications must be filed electronically through the International Bureau Filing System (IBFS) in accordance with the applicable provisions of part 1, subpart Y of this chapter. Additional filing requirements for Earth Stations on Vessels are described in §§ 25.221 and 25.222.

* * * * *

■ 6. Section 25.201 is amended by adding the following definitions in alphabetical order to read as follows:

§ 25.201 Definitions.

* * * * *

Ambulatory. Not stationary. Baselines from which maritime boundaries are measured change with accretion- and erosion-caused ambulation of the boundaries themselves.

* * * * *

Baseline. The line from which maritime zones are measured, also known as the coast line. The baseline is a combination of the low-water line (''low-tide elevation'') and closing lines across the mouths of inland water bodies. The baseline is defined by a series of baseline points. The baseline points are not just the low-water marks of the shore of mainland but also includes islands and ''low-water elevations'' (*i.e.*, natural rocks). Baseline points are ambulatory, and thus, require adjustment from time-to-time by the U.S. Department of State's Baseline Committee.

* * * * *

Earth Station on Vessel (''ESV''). An ESV is an earth station onboard a craft designed for traveling on water receiving from and transmitting to fixed-satellite space stations.

* * * * *

Low-Tide Elevation. A naturally formed area of land that is surrounded by and above water at low tide but below water at high tide. Low-tide elevations serve as part of the coast line when they are within the breath of the territorial sea of the mainland (either uplands or inland waters) or an island. 1958 Convention on the Territorial Sea, Article 11.

* * * * *

■ 7. Section 25.202 is amended by adding paragraph (a)(8) to read as follows:

§ 25.202 Frequencies, frequency tolerance and emission limitations.

(a) * * *

(8) The following frequencies are available for use by ESVs:

3700–4200 MHz (space-to-Earth)
5925–6425 MHz (Earth-to-space)
10.95–11.2 GHz (space-to-Earth)
11.45–11.7 GHz (space-to-Earth)
11.7–12.2 GHz (space-to-Earth)
14.0–14.5 GHz (Earth-to-space)

ESVs shall be authorized and coordinated as set forth in §§ 25.221 and 25.222. ESV operators, collectively, may

coordinate up to 180 megahertz of spectrum in the 5925–6425 MHz (Earth-to-space) band for all ESV operations at any given location subject to coordination.

* * * * *

■ 8. Section 25.203 is amended by revising paragraphs (a), (b), (c) introductory text, (d) and (k) to read as follows:

§ 25.203 Choice of sites and frequencies.

(a) Sites and frequencies for earth stations, other than ESVs, operating in frequency bands shared with equal rights between terrestrial and space services, shall be selected, to the extent practicable, in areas where the surrounding terrain and existing frequency usage are such as to minimize the possibility of harmful interference between the sharing services.

(b) An applicant for an earth station authorization, other than an ESV, in a frequency band shared with equal rights with terrestrial microwave services shall compute the great circle coordination distance contour(s) for the proposed station in accordance with the procedures set forth in § 25.251. The applicant shall submit with the application a map or maps drawn to appropriate scale and in a form suitable for reproduction indicating the location of the proposed station and these contours. These maps, together with the pertinent data on which the computation of these contours is based, including all relevant transmitting and/or receiving parameters of the proposed station that is necessary in assessing the likelihood of interference, an appropriately scaled plot of the elevation of the local horizon as a function of azimuth, and the electrical characteristics of the earth station antenna(s), shall be submitted by the applicant in a single exhibit to the application. The coordination distance contour plot(s), horizon elevation plot, and antenna horizon gain plot(s) required by this section may also be submitted in tabular numerical format at 5° azimuthal increments instead of graphical format. At a minimum, this exhibit shall include the information listed in paragraph (c)(2) of this section. An earth station applicant shall also include in the application relevant technical details (both theoretical calculations and/or actual measurements) of any special techniques, such as the use of artificial site shielding, or operating procedures or restrictions at the proposed earth station which are to be employed to reduce the likelihood of interference, or of any particular characteristics of the earth station site which could have an effect on the calculation of the coordination distance.

(c) Prior to the filing of its application, an applicant for operation of an earth station, other than an ESV, shall coordinate the proposed frequency usage with existing terrestrial users and with applicants for terrestrial station authorizations with previously filed applications in accordance with the following procedure:

* * * * *

(d) An applicant for operation of an earth station, other than an ESV, shall also ascertain whether the great circle coordination distance contours and rain scatter coordination distance contours, computed for those values of parameters indicated in § 25.251 (Appendix 7 of the ITU RR) for international coordination, cross the boundaries of another Administration. In this case, the applicant shall furnish to the Commission copies of these contours on maps drawn to appropriate scale for use by the Commission in effecting coordination of the proposed earth station with the Administration(s) affected.

* * * * *

(k) An applicant for operation of an earth station, other than an ESV, that will operate with a geostationary satellite or non-geostationary satellite in a shared frequency band in which the non-geostationary system is (or is proposed to be) licensed for feeder links, shall demonstrate in its applications that its proposed earth station will not cause unacceptable interference to any other satellite network that is authorized to operate in the same frequency band, or certify that the operations of its earth station shall conform to established coordination agreements between the operator(s) of the space station(s) with which the earth station is to communicate and the operator(s) of any other space station licensed to use the band.

■ 9. Section 25.204 is amended by adding paragraphs (h) and (i) to read as follows:

§ 25.204 Power limits.

* * * * *

(h) ESV transmissions in the 5925–6425 MHz (Earth-to-space) band shall not exceed an e.i.r.p. spectral density towards the radio-horizon of 17 dBW/MHz, and shall not exceed an e.i.r.p. towards the radio-horizon of 20.8 dBW. The ESV network shall shut-off the ESV transmitter if the e.i.r.p. spectral density towards the radio-horizon or e.i.r.p. towards the radio-horizon are exceeded.

(i) Within 125 km of the TDRSS sites identified in § 25.222(d), ESV transmissions in the 14.0–14.2 GHz (Earth-to-space) band shall not exceed an e.i.r.p. spectral density towards the horizon of 12.5 dBW/MHz, and shall not exceed an e.i.r.p. towards the horizon of 16.3 dBW.

■ 10. Section 25.205 is revised to read as follows:

§ 25.205 Minimum angle of antenna elevation.

(a) Earth station antennas shall not normally be authorized for transmission at angles less than 5° measured from the horizontal plane to the direction of maximum radiation. However, upon a showing that the transmission path will be seaward and away from land masses or upon special showing of need for lower angles by the applicant, the Commission will consider authorizing transmissions at angles between 3° and 5° in the pertinent directions. In certain instances, it may be necessary to specify minimum angles greater than 5° because of interference considerations.

(b) ESVs making a special showing requesting angles of elevation less than 5° measured from the horizontal plane to the direction of maximum radiation pursuant to (a) of this Section must still meet the effective isotropically radiated power (e.i.r.p.) and e.i.r.p. density towards the horizon limits contained in § 25.204(h) and (i).

■ 11. Section 25.221 is added to read as follows:

§ 25.221 Blanket Licensing provisions for Earth Stations on Vessels (ESVs) receiving in the 3700–4200 MHz (space-to-Earth) frequency band and transmitting in the 5925–6425 MHz (Earth-to-space) frequency band, operating with Geostationary Satellites in the Fixed-Satellite Service.

(a) All applications for licenses for ESVs transmitting in the 5925–6425 MHz (Earth-to-space) bands to geostationary-orbit satellites in the fixed-satellite service shall provide sufficient data to demonstrate that the ESV operations meet the following criteria, which are ongoing requirements that govern all ESV licensees and operations in these bands:

(1) The off-axis effective isotropically radiated power (e.i.r.p.) spectral density for co-polarized signals, emitted from the ESV, in the plane of the geostationary satellite orbit as it appears at the particular earth station location (*i.e.*, the plane determined by the focal point of the antenna and the line tangent to the arc of the geostationary satellite orbit at the position of the target satellite), shall not exceed the following values:

26.3–25log(θ) dBW/4kHz for 1.0° ≤ θ ≤ 7.0°
5.3 dBW/4kHz for 7.0° < θ ≤ 9.2°
29.3–25log(θ) dBW/4kHz for 9.2° < θ ≤ 48°
−12.7 dBW/4kH for 48° < θ ≤ 180°

(2) In all other directions, the off-axis e.i.r.p. spectral density for co-polarized signals emitted from the ESV shall not exceed the following values:

29.3–25log(θ) dBW/4kHz for 1.0° ≤ θ ≤ 48°
−12.7 dBW/4kHz for 48° < θ ≤ 180°

(3) For θ > 7°, the values given in paragraphs (a)(1) of this Section may be exceeded by no more than 10% of the earth station antenna sidelobes, provided no individual sidelobe exceeds the criteria given by more than 3 dB.

(4) In all directions, the off-axis e.i.r.p. spectral density for cross-polarized signals emitted from the ESV shall not exceed the following values:

16.3–25log(θ) dBW/4kHz for 1.8° ≤ θ ≤ 7.0°
−4.7 dBW/4kHz for 7.0° < θ ≤ 9.2°

Where θ is the angle in degrees from the axis of the main lobe.

(5) For non-circular ESV antennas, the major axis of the antenna will be aligned with the tangent to the geostationary satellite orbital arc at the target satellite point, to the extent required to meet specified off-axis e.i.r.p. criteria.

(6) A pointing error of less than 0.2°, between the orbital location of the target satellite and the axis of the main lobe of the ESV antenna.

(7) All emissions from the ESV shall automatically cease within 100 milliseconds if the angle between the orbital location of the target satellite and the axis of the main lobe of the ESV antenna exceeds 0.5°, and transmission will not resume until such angle is less than 0.2°.

(8) There shall be a point of contact in the United States, with phone number and address included with the application, available 24 hours a day, seven days a week, with authority and ability to cease all emissions from the ESVs, either directly or through the facilities of a U.S. Hub or a Hub located in another country with which the U.S. has a bilateral agreement that enables such cessation of emissions.

(9) ESVs that exceed the radiation guidelines of Section 1.1310 Radiofrequency radiation exposure limits must provide, with their environmental assessment, a plan for mitigation of radiation exposure to the extent required to meet those guidelines.

(10) ESV operators transmitting in the 5925–6425 MHz (Earth-to-space) frequency bands to geostationary satellites in the fixed-satellite service (FSS) shall not seek to coordinate, in any geographic location, more than 36 MHz of uplink bandwidth on each of no more than two GSO FSS satellites.

(11) There shall be an exhibit included with the application describing the geographic area(s) in which the ESVs will operate.

(12) ESVs shall not operate in the 5925–6425 MHz (Earth-to-space) and 3700–4200 MHz (space-to-Earth) frequency bands on vessels smaller than 300 gross tons.

(b) Applications for ESV operation in the 5925–6425 MHz band to geostationary satellites in the fixed-satellite service must include, in addition to the particulars of operation identified on Form 312, and associated Schedule B, the following data, for each earth station antenna type:

(1) A series of e.i.r.p. density charts or tables, calculated for a production earth station antenna, based on measurements taken on a calibrated antenna range at 6.0 GHz, with the off-axis e.i.r.p. envelope set forth in paragraphs (a)(1) through (a)(4) of this section superimposed, as follows:

(i) Showing off-axis co-polarized e.i.r.p. spectral density in the azimuth plane, for off-axis angles from minus 10° to plus 10° and from minus 180° to plus 180°.

(ii) Showing off-axis co-polarized e.i.r.p. spectral density in the elevation plane, at off-axis angles from 0° to plus 30°.

(iii) Showing off-axis cross-polarized e.i.r.p. spectral density in the azimuth plane, at off-axis angles from minus 10° to plus 10°.

(iv) Showing off-axis cross-polarized e.i.r.p. spectral density in the elevation plane, at off-axis angles from minus 10° to plus 10°; or

(2) A series of gain charts or tables, for a production earth station antenna, measured on a calibrated antenna range at 6.0 GHz, with the Earth station antenna gain envelope set forth in § 25.209(a) and (b) superimposed, for the same planes and ranges enumerated in paragraphs (b)(1)(i) through (b)(1)(iv) of this section, that, combined with input power density entered in Schedule B, demonstrates that the off-axis e.i.r.p. spectral density envelope set forth in paragraphs (a)(1) through (a)(4) of this section will be met; or

(3) A certification that the antenna conforms to the gain pattern criteria of § 25.209(a) and (b), that, combined with input power density entered in Schedule B, demonstrates that the off-axis e.i.r.p. spectral density envelope set forth in paragraphs (a)(1) through (a)(4) of this section will be met.

(c) ESVs receiving and transmitting in the 3700–4200 MHz (space-to-Earth) and 5925–6425 MHz (Earth-to-space) frequency bands shall operate with the following provisions:

(1) For each ESV transmitter, a record of the ship location (*i.e.*, latitude/longitude), transmit frequency, channel bandwidth and satellite used shall be time annotated and maintained for a period of not less than 1 year. Records will be recorded at time intervals no greater than every 20 minutes while the ESV is transmitting. The ESV operator will make this data available upon request to a coordinator, fixed system operator, fixed-satellite system operator, or the Commission within 24 hours of the request.

(2) ESV operators communicating with vessels of foreign registry must maintain detailed information on each vessel's country of registry and a point of contact for the relevant administration responsible for licensing ESVs.

(3) ESV operators shall control all ESVs by a Hub earth station located in the United States, except that an ESV on U.S.-registered vessels may operate under control of a Hub earth station location outside the United States provided the ESV operator maintains a point of contact within the United States that will have the capability and authority to cause an ESV on a U.S.-registered vessel to cease transmitting if necessary.

(4) ESVs, operating while docked, that complete coordination with terrestrial stations in the 3700–4200 MHz band in accordance with § 25.251, shall receive protection from such terrestrial stations in accordance with the coordination agreements, for 180 days, renewable for 180 days.

(d) ESVs in motion shall not claim protection from harmful interference from any authorized terrestrial stations or lawfully operating satellites to which frequencies are either already assigned, or may be assigned in the future in the 3700–4200 MHz (space-to-Earth) frequency band.

(e) ESVs operating in the 5925–6425 MHz (Earth-to-space) band, within 200 km from the baseline of the United States, or within 200 km from a fixed service offshore installation, shall complete coordination prior to operation. The coordination method and the interference criteria objective shall be determined by the frequency coordinator. The details of the coordination shall be maintained and available at the frequency coordinator, and shall be filed with the Commission

to be placed on Public Notice. Operation of each individual ESV may commence immediately after the Public Notice is released that identifies the notification sent to the Commission. Continuance of operation of that ESV for the duration of the coordination term shall be dependent upon successful completion of the normal public notice process. If any objections are received to the coordination prior to the end of the 30-day comment period of the Public Notice, the licensee shall immediately cease operation of that particular station until the coordination dispute is resolved and the ESV licensee informs the Commission of the resolution.

(f) ESV operators must automatically cease transmission if the ESV operates in violation of the terms of its coordination, including, but not limited to, conditions related to speed of the vessel or if the ESV travels outside the coordinated area, if within 200 km from the baseline of the United States, or within 200 km from a fixed service offshore installation. Transmissions may be controlled by the ESV network. The frequency coordinator may decide whether ESV operators should automatically cease transmissions if the vessel falls below a prescribed speed within a prescribed geographic area.

■ 12. Section 25.222 is added to read as follows:

§ 25.222 Blanket Licensing provisions for Earth Stations on Vessels (ESVs) receiving in the 10.95–11.2 GHz (space-to-Earth), 11.45–11.7 GHz (space-to-Earth), 11.7–12.2 GHz (space-to-Earth) frequency bands and transmitting in the 14.0–14.5 GHz (Earth-to-space) frequency band, operating with Geostationary Satellites in the Fixed-Satellite Service.

(a) All applications for licenses for ESVs receiving in the 10.95–11.2 GHz (space-to-Earth), 11.45–11.7 GHz (space-to-Earth), 11.7–12.2 GHz (space-to-Earth) frequency bands, and transmitting in the 14.0–14.5 GHz (Earth-to-space) frequency band, to Geostationary Satellites in the fixed-satellite service shall provide sufficient data to demonstrate that the ESV operations meet the following criteria, which are ongoing requirements that govern all ESV licensees and operations in these bands:

(1) The off-axis effective isotropically radiated power (e.i.r.p.) spectral density for co-polarized signals, emitted from the ESV in the plane of the geostationary satellite orbit as it appears at the particular earth station location (*i.e.*, the plane determined by the focal point of the antenna and the line tangent to the arc of the geostationary satellite orbit at the position of the target satellite), shall not exceed the following values:

$15-25\log(\theta)$ dBW/4kHz for $1.25° \leq \theta \leq 7.0°$
-6 dBW/4kHz for $7.0° < \theta \leq 9.2°$
$18-25\log(\theta)$ dBW/4kHz for $9.2° < \theta \leq 48°$
-24 dBW/4kHz for $48° < \theta \leq 180°$

(2) In all other directions, the off-axis e.i.r.p. spectral density for co-polarized signals emitted from the ESV shall not exceed the following values:

$18-25\log(\theta)$ dBW/4kHz for $1.25° \leq \theta \leq 48°$
-24 dBW/4kHz for $48° < \theta \leq 180°$

(3) For $\theta > 7°$, the values given in paragraphs (a)(1) of this section may be exceeded by no more than 10% of the sidelobes, provided no individual sidelobe exceeds the criteria given by more than 3 dB.

(4) In all directions, the off-axis e.i.r.p. spectral density for cross-polarized signals emitted from the ESV shall not exceed the following values:

$5-25\log(\theta)$ dBW/4kHz for $1.8° \leq \theta \leq 7°$
-16 dBW/4kHz for $7° < \theta \leq 9.2°$

Where θ is the angle in degrees from the axis of the main lobe.

(5) For non-circular ESV antennas, the major axis of the antenna will be aligned with the tangent to the geostationary satellite orbital arc at the target satellite point, to the extent required to meet specified off-axis e.i.r.p. criteria.

(6) A pointing error of less than 0.2°, between the orbital location of the target satellite and the axis of the main lobe of the ESV antenna.

(7) All emissions from the ESV shall automatically cease within 100 milliseconds if the angle between the orbital location of the target satellite and the axis of the main lobe of the ESV antenna exceeds 0.5°, and transmission will not resume until such angle is less than 0.2°.

(8) There shall be a point of contact in the United States, with phone number and address included with the application, available 24 hours a day, seven days a week, with authority and ability to cease all emissions from the ESVs, either directly or through the facilities of a U.S. Hub or a Hub located in another country with which the U.S. has a bilateral agreement that enables such cessation of emissions.

(9) ESVs that exceed the radiation guidelines of § 1.1310 of this chapter, Radiofrequency radiation exposure limits, must provide, with their environmental assessment, a plan for mitigation of radiation exposure to the extent required to meet those guidelines.

(10) There shall be an exhibit included with the application describing the geographic area(s) in which the ESVs will operate.

(b) Applications for ESV operation in the 14.0–14.5 GHz (Earth-to-space) to geostationary satellites in the fixed-satellite service must include, in addition to the particulars of operation identified on Form 312 and associated Schedule B, the following data for each earth station antenna type:

(1) A series of e.i.r.p. density charts or tables, calculated for a production earth station antenna, based on measurements taken on a calibrated antenna range at 14.25 GHz, with the off-axis e.i.r.p. envelope set forth in paragraphs (a)(1) through (a)(4) of this section superimposed, as follows:

(i) Showing off-axis co-polarized e.i.r.p. spectral density in the azimuth plane, for off-axis angles from minus 10° to plus 10° and from minus 180° to plus 180°.

(ii) Showing off-axis co-polarized e.i.r.p. spectral density in the elevation plane, at off-axis angles from 0° to plus 30°.

(iii) Showing off-axis cross-polarized e.i.r.p. spectral density in the azimuth plane, at off-axis angles from minus 10° to plus 10°.

(iv) Showing off-axis cross-polarized e.i.r.p. spectral density in the elevation plane, at off-axis angles from minus 10° to plus 10°; or

(2) A series of gain charts or tables, for a production earth station antenna, measured on a calibrated antenna range at 14.25 GHz, with the Earth station antenna gain envelope set forth in § 25.209(a) and (b) superimposed, for the same planes and ranges enumerated in paragraphs (b)(1)(i) through (b)(1)(iv) of this section, that, combined with input power density entered in Schedule B, demonstrates that off-axis e.i.r.p. spectral density envelope set forth in paragraphs (a)(1) through (a)(4) of this section will be met; or

(3) A certification that the ESV antenna conforms to the gain pattern criteria of § 25.209(a) and (b), that, combined with input power density entered in Schedule B, demonstrates that the off-axis e.i.r.p. spectral density envelope set forth in paragraphs (a)(1) through (a)(4) of this section will be met.

(c) ESVs receiving in the 10.95–11.2 GHz (space-to-Earth), 11.45–11.7 GHz (space-to-Earth), 11.7–12.2 GHz (space-to-Earth) frequency bands, and transmitting in the 14.0–14.5 GHz (Earth-to-space) frequency band shall operate with the following provisions:

(1) For each ESV transmitter a record of the ship location (*i.e.*, latitude/longitude), transmit frequency, channel bandwidth and satellite used shall be time annotated and maintained for a period of not less than 1 year. Records

will be recorded at time intervals no greater than every 20 minutes while the ESV is transmitting. The ESV operator will make this data available upon request to a coordinator, fixed system operator, fixed-satellite system operator, NTIA, or the Commission within 24 hours of the request.

(2) ESV operators communicating with vessels of foreign registry must maintain detailed information on each vessel's country of registry and a point of contact for the relevant administration responsible for licensing ESVs.

(3) ESV operators shall control all ESVs by a Hub earth station located in the United States, except that an ESV on U.S.-registered vessels may operate under control of a Hub earth station location outside the United States provided the ESV operator maintains a point of contact within the United States that will have the capability and authority to cause an ESV on a U.S.-registered vessel to cease transmitting if necessary.

(d) Operations of ESVs in the 14.0–14.2 GHz (Earth-to-space) frequency band within 125 km of the NASA TDRSS facilities on Guam (located at latitude: 13° 36′ 55″ N, longitude 144° 51′ 22″ E) or White Sands, New Mexico (latitude: 32° 20′ 59″ N, longitude 106° 36′ 31″ W and latitude: 32° 32′ 40″ N, longitude 106° 36′ 48″ W) are subject to coordination through the National Telecommunications and Information Administration (NTIA) Interdepartment Radio Advisory Committee (IRAC). When NTIA seeks to provide similar protection to future TDRSS sites that have been coordinated through the IRAC Frequency Assignment Subcommittee process, NTIA will notify the Commission that the site is nearing operational status. Upon public notice from the Commission, all Ku-band ESV operators must cease operations in the 14.0–14.2 GHz band within 125 km of the new TDRSS site until after NTIA/IRAC coordination for the new TDRSS facility is complete. ESV operations will then again be permitted to operate in the 14.0–14.2 GHz band within 125 km of the new TDRSS site, subject to any operational constraints developed in the coordination process.

(e) Operations of ESVs in the 14.47–14.5 GHz (Earth-to-space) frequency band within a) 45 km of the radio observatory on St. Croix, Virgin Islands (latitude 17° 46′ N, longitude 64° 35′ W); b) 125 km of the radio observatory on Mauna Kea, Hawaii (at latitude 19° 48′ N, longitude 155° 28′ W); and c) 90 km of the Arecibo Observatory on Puerto Rico (latitude 18° 20′ 46″ W, longitude 66° 45′ 11″ N) are subject to coordination through the National Telecommunications and Information Administration (NTIA) Interdepartment Radio Advisory Committee (IRAC).

(f) In the 10.95–11.2 GHz (space-to-Earth) and 11.45–11.7 GHz (space-to-Earth) frequency bands ESVs shall not claim protection from interference from any authorized terrestrial stations to which frequencies are either already assigned, or may be assigned in the future.

■ 13. Section 25.271 is amended by revising paragraphs (b) and (c) introductory text and adding paragraph (f), to read as follows:

§ 25.271 Control of transmitting stations.

* * * * *

(b) The licensee of a transmitting earth station, other than an ESV, licensed under this part shall ensure that a trained operator is present on the earth station site, or at a designated remote control point for the earth station, at all times that transmissions are being conducted. No operator's license is required for a person to operate or perform maintenance on facilities authorized under this part.

(c) Authority will be granted to operate a transmitting earth station, other than an ESV, by remote control only on the conditions that:

* * * * *

(f) Rules for control of transmitting ESVs are provided in §§ 25.221 and 25.222.

■ 14. Section 25.277 is amended by revising paragraph (b) and the introductory text of paragraph (c) to read as follows:

§ 25.277 Temporary fixed earth stations.

* * * * *

(b) When a station, other than an ESV, authorized as a temporary fixed earth station, is to remain at a single location for more than six months, application for a regular station authorization at that location shall be filed at least 30 days prior to the expiration of the six-month period.

(c) The licensee of an earth station, other than an ESV, which is authorized to conduct temporary fixed operations in bands shared co-equally with terrestrial fixed stations shall provide the following information to the Director of the Columbia Operations Center at 9200 Farmhouse Lane, Columbia, Maryland 21046, and to the licensees of all terrestrial facilities lying within the coordination contour of the proposed temporary fixed earth station site before beginning transmissions:

* * * * *

PART 101—FIXED MICROWAVE SERVICES

■ 15. The authority citation for part 101 continues to read as follows:

Authority: 47 U.S.C. 154, 303.

§ 101.101 [Amended]

■ 16. Section 101.101 is amended by removing the entries for ''11,700–12,200'' and ''14,200–14,400'' from the table.

■ 17. Section 101.107 is amended by revising footnote 1 to read as follows:

§ 101.107 Frequency tolerance.

* * * * *

[1]Applicable only to common carrier LTTS stations. Tolerance for 2450–2500 MHz is 0.005%. Beginning Aug. 9, 1975, this tolerance will govern the marketing of LTTS equipment and the issuance of all such authorizations for new radio equipment. Until that date new equipment may be authorized with a frequency tolerance of .03% in the frequency range 2,200 to 10,500 MHz and .05% in the range 10,500 MHz to 12,200 MHz, and equipment so authorized may continue to be used for its life provided that it does not cause interference to the operation of any other licensee. Beginning March 1, 2005, new LTTS operators will not be licensed and existing LTTS licensees will not be renewed in the 11.7–12.2 GHz band.

* * * * *

■ 18. Section 101.113 is amended by republishing the entry for ''14,200–14,400'' and by adding footnote 12 in the table of paragraph (a) to read as follows:

§ 101.113 Transmitter power limitations.

(a) * * *

Frequency band (MHz)	Maximum allowable EIRP [1, 2]	
	Fixed; [1, 2] (dBW)	Mobile (dBW)
*	*	*	*	*
14,200–14,400 [12]	+45			
*	*	*	*	*

[12]Beginning March 1, 2005, no new LTTS operators will be licensed and no existing LTTS licensees will be renewed in the 14.2–14.4 GHz band.

* * * * *

■ 19. Section 101.147 is amended by revising note (24) in paragraph (a) to read as follows:

§ 101.147 Frequency assignments.

(a) * * *

(24) Frequencies in these bands are available for assignment to television pickup and television non-broadcast pickup stations. The maximum power for the local television transmission service in the 14.2–14.4 GHz

band is +45 dBW except that operations are not permitted within 1.5 degrees of the geostationary orbit. Beginning March 1, 2005, no new LTTS operators will be licensed and no existing LTTS licenses shall be issued in the 11.7–12.2 and 14.2–14.4 GHz bands.

* * * * *

■ 20. Section 101.803 is amended by revising notes (3) and (8) in paragraph (a), the text of paragraph (d) before the notes, and note (3) of paragraph (d) to read as follows:

§ 101.803 Frequencies.

(a) * * *

(3) This frequency band is shared, on a secondary basis, with stations in the broadcasting-satellite and fixed-satellite services. As of March 1, 2005, no new LTTS operators will be licensed in the 11.7–12.2 GHz band. LTTS operators authorized prior to March 1, 2005 may continue to operate in 11.7–12.2 GHz band until their license expires; no existing LTTS licenses will be renewed in the 11.7–12.2 GHz band.

* * * * *

(8) The maximum power for the local television transmission service in the 14.2–14.4 GHz band is +45 dBW except that operations are not permitted within 1.5 degrees of the geostationary orbit. As of March 1, 2005, no new LTTS operators will be licensed in the 14.2–14.4 GHz band. LTTS operators authorized prior to March 1, 2005 may continue to operate in 14.2–14.4 GHz band until their license expires; no existing LTTS licenses will be renewed in the 11.7–12.2 GHz band.

* * * * *

(d) Frequencies in the following bands are available for assignment to television STL stations in this service:

3,700 to 4,200 MHz (1)
5,925 to 6,425 MHz (1),(5)
10,700 to 11,700 MHz (1),(6)
11,700 to 12,100 MHz (3)
13,200 to 13,250 MHz (2)
21,200 to 22,000 MHz (2),(4),(7),(8)
22,000 to 23,600 MHz (2),(6),(8)
31,000 to 31,300 MHz (9)

* * * * *

(3) This frequency band is shared with space stations (space to earth) in the fixed-satellite service. As of March 1, 2005, no new LTTS operators will be licensed in the 11.7–12.2 GHz band. LTTS operators authorized prior to March 1, 2005 may continue to operate in 11.7–12.2 GHz band until their license expires; no existing LTTS licenses will be renewed in the 11.7–12.2 GHz band.

* * * * *

■ 21. Section 101.809 is amended in the table of paragraph (d) by republishing the entry for ''10,700 to 12,200'' and by adding footnote 2 to read as follows:

§ 101.809 Bandwidth and emission limitations.

* * * * *

(d) * * *

MAXIMUM AUTHORIZED

Frequency band (MHz)	Bandwidth (MHz)
* * * * *	
10,700 to 12,200	[1] [2] 40
* * * * *	

[2] As of March 1, 2005, no new LTTS operators will be licensed in the 11.7–12.2 GHz band. LTTS operators authorized prior to March 1, 2005 may continue to operate in 11.7–12.2 GHz band until their license expires; no existing LTTS licensees will be renewed in the 11.7–12.2 GHz band.

* * * * *

[FR Doc. 05–1359 Filed 1–28–05; 8:45 am]

BILLING CODE 6712–01–P

Proposed Rules

Federal Register
Vol. 70, No. 19
Monday, January 31, 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 TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2005–20166; Directorate Identifier 2004–NM–175–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A319, A320, and A321 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain Airbus Model A319, A320, and A321 series airplanes. This proposed AD would require replacing the cargo ventilation extraction duct at frame 65 with a new duct, and relocating the temperature sensor in the aft cargo compartment. This proposed AD is prompted by a report indicating that, during a test of the fire extinguishing system, air leakage around the temperature sensor for the aft cargo compartment reduced the concentration of fire extinguishing agent to below the level required to suppress a fire. We are proposing this AD to prevent air leakage around the temperature sensor for the aft cargo compartment, which, in the event of a fire in the aft cargo compartment, could result in an insufficient concentration of fire extinguishing agent, and consequent inability of the fire extinguishing system to suppress the fire.

DATES: We must receive comments on this proposed AD by March 2, 2005.

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

- DOT Docket Web site: Go to *http://dms.dot.gov* and follow the instructions for sending your comments electronically.
- Government-wide rulemaking Web site: Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- Mail: Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, room PL–401, Washington, DC 20590.
- By fax: (202) 493–2251.
- Hand Delivery: Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France.

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–2005–20166; the directorate identifier for this docket is 2004–NM–175–AD.

FOR FURTHER INFORMATION CONTACT: Tim Dulin, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2141; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to submit any relevant written data, views, or arguments regarding this proposed AD. Send your comments to an address listed under **ADDRESSES.** Include ''Docket No. FAA–2005–20166; Directorate Identifier 2004–NM–175–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD. We will consider all comments submitted by the closing date and may amend the proposed AD in light of those comments.

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

Examining the Docket

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. Comments will be available in the AD docket shortly after the DMS receives them.

Discussion

The Direction Générale de l'Aviation Civile (DGAC), which is the airworthiness authority for France, notified the FAA that an unsafe condition may exist on certain Airbus Model A319, A320, and A321 series airplanes. The DGAC advises that a test of the fire containment capability of the aft cargo compartment was performed on a Model A319 series airplane. The test revealed that the concentration of the halon fire extinguishing agent decreased below the level required to suppress a fire. Investigation revealed that the drop in the concentration of halon was due to too high a rate of air renewal in the compartment. Further investigation revealed that air leakage around the water drain valves in the forward and aft cargo doors and around the aft cargo compartment temperature sensor contributed to the reduced concentration of halon. The air leakage allowed the halon to leak out of the compartment, and the remaining concentration of halon was insufficient to suppress a fire. The DGAC states that a separate French airworthiness directive will address air leakage around the water drain valves. In the event of a fire in the aft cargo compartment, an insufficient concentration of fire extinguishing agent could result in the inability of the fire extinguishing system to suppress the fire.

The aft cargo compartment temperature sensor installation on the Airbus A320 and A321 series airplanes

is similar to that of the Airbus A319 series airplanes; therefore, those airplanes may also be subject to this unsafe condition.

Relevant Service Information

Airbus has issued Service Bulletin A320–21–1141, dated April 7, 2004. The service bulletin describes procedures for relocating the temperature sensor in the aft cargo compartment. The procedures include replacing the duct at frame 65 with a new duct that can accommodate the temperature sensor and installing a placard, rerouting the sensor line, and installing the temperature sensor and associated hardware in the new duct. Accomplishing the actions specified in the service information is intended to adequately address the unsafe condition. The DGAC mandated the service information and issued French airworthiness directive F–2004–123, dated July 21, 2004, to ensure the continued airworthiness of these airplanes in France.

FAA's Determination and Requirements of the Proposed AD

These airplane models are manufactured in France and are type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. According to this bilateral airworthiness agreement, the DGAC has kept the FAA informed of the situation described above. We have examined the DGAC's findings, evaluated all pertinent information, and determined that we need to issue an AD for products of this type design that are certificated for operation in the United States.

Therefore, we are proposing this AD, which would require accomplishing the actions specified in the service information described previously, except as discussed under ''Difference Between the Proposed AD and French Airworthiness Directive.''

Difference Between the Proposed AD and French Airworthiness Directive

The applicability of French airworthiness directive F–2004–123 excludes airplanes that accomplished Airbus Service Bulletin A320–21–1141 in service. However, we have not excluded those airplanes in the applicability of this proposed AD; rather, this proposed AD includes a requirement to accomplish the actions specified in that service bulletin. This requirement would ensure that the actions specified in the service bulletin and required by this proposed AD are accomplished on all affected airplanes. Operators must continue to operate the airplane in the configuration required by this proposed AD unless an alternative method of compliance is approved.

Costs of Compliance

The following table provides the estimated costs for U.S. operators to comply with this proposed AD.

ESTIMATED COSTS

Action	Work hours	Average labor rate per hour	Parts	Cost per airplane	Number of U.S.-registered airplanes	Fleet cost
Replacement of duct/relocation of temperature sensor in aft cargo compartment.	34	$65	Between $7,000 and $11,640.	Between $9,210 and $13,850.	643	Between $5,922,030 and $8,905,550.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

3. 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 proposed 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, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Airbus: Docket No. FAA–2005–20166; Directorate Identifier 2004–NM–175–AD.

Comments Due Date

(a) The Federal Aviation Administration must receive comments on this AD action by March 2, 2005.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Airbus Model A319, A320, and A321 series airplanes, certificated in any category; as identified in Table 1 of this AD.

TABLE 1.—APPLICABILITY

Airbus Model-	Having the following Airbus modification installed in production-	Or the following Airbus service bulletin incorporated in service-	But not having the following Airbus modification installed in production-
A319 series airplanes	24486	A320–21–1140	32616
A320 series airplanes	20084	A320–21–1048	32616
A321 series airplanes	22596	Not applicable ...	32616

Unsafe Condition

(d) This AD was prompted by a report that, during a test of the fire extinguishing system, air leakage around the temperature sensor for the aft cargo compartment reduced the concentration of fire extinguishing agent to below the level required to suppress a fire. We are issuing this AD to prevent air leakage around the temperature sensor for the aft cargo compartment, which, in the event of a fire in the aft cargo compartment, could result in an insufficient concentration of fire extinguishing agent, and consequent inability of the fire extinguishing system to suppress the fire.

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 Aft Cargo Compartment Temperature Sensor

(f) Within 24 months after the effective date of this AD: Replace the ventilation extraction duct with a new duct and relocate the aft cargo compartment temperature sensor by accomplishing all of the actions specified in the Accomplishment Instructions of Airbus Service Bulletin A320–21–1141, dated April 7, 2004.

Alternative Methods of Compliance (AMOCs)

(g) 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

(h) French airworthiness directive F–2004–123, dated July 21, 2004, also addresses the subject of this AD.

Issued in Renton, Washington, on January 18, 2005.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–1725 Filed 1–28–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 35

[Docket No. RM05–4–000]

Interconnection for Wind Energy and Other Alternative Technologies

January 24, 2005.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is proposing to amend its regulations to require public utilities to append to the standard large generator interconnection agreement in their open access transmission tariffs (OATTs) specific technical requirements for the interconnection of large wind generation.

DATES: Comments are due March 2, 2005. Reply comments will be due 30 days thereafter.

ADDRESSES: Comments may be filed electronically via the eFiling link on the Commission's Web site at *http://www.ferc.gov.* Commenters unable to file comments electronically must send an original and 14 copies of their comments to Federal Energy Regulatory Commission, Office of the Secretary, 888 First Street, NE., Washington, DC 20426. Refer to the Comment Procedures section of the preamble for additional information on how to file comments.

FOR FURTHER INFORMATION CONTACT:

Bruce A. Poole (Technical Information), Office of Markets, Tariffs and Rates, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. (202) 502–8468.

G. Patrick Rooney (Technical Information), Office of Markets, Tariffs and Rates, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. (202) 502–6205.

P. Kumar Agarwal (Technical Information), Office of Markets, Tariffs and Rates, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. (202) 502–8923.

Jeffery S. Dennis (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. (202) 502–6027.

SUPPLEMENTARY INFORMATION:

Introduction

1. In Order No. 2003,[1] the Commission adopted standard procedures for the interconnection of large generation facilities and a standard large generator interconnection agreement. The Commission required public utilities that own, control, or operate facilities for transmitting electric energy in interstate commerce to file revised Open Access Transmission Tariffs (OATTs) containing these standard provisions, and use them to provide interconnection service to generating facilities having a capacity of more than 20 megawatts. In Order No. 2003–A, on rehearing, the Commission determined that the standard procedures and agreement were designed around the needs of traditional synchronous generation facilities, and that generators relying on non-

[1] *Standardization of Generator Interconnection Agreements and Procedures,* Order No. 2003, 68 FR 49845 (Aug. 19, 2003), FERC Stats. & Regs., Regulations Preambles ¶ 31,146 (2003) (Order No. 2003), *order on reh'g,* 69 FR 15932 (Mar. 24, 2004), FERC Stats & Regs., Regulations Preambles ¶ 31,160 (2004) (Order No. 2003–A), *order on reh'g,* 70 FR 265 (January 4, 2005), FERC Stats & Regs., Regulations Preambles ¶ 31,171 (2004) (Order No. 2003–B), *reh'g pending; see also* Notice Clarifying Compliance Procedures, 106 FERC ¶ 61,009 (2004).

synchronous technologies,[2] such as wind plants, may find that a specific requirement is inapplicable or that a different approach is needed.[3] Accordingly, the Commission granted certain clarifications, and also added a blank Appendix G (Requirements of Generators Relying on Non-Synchronous Technologies) to the standard generator interconnection agreement as a placeholder for the inclusion of requirements specific to non-synchronous technologies.[4] It appears that the only relevant non-synchronous generator in this rulemaking is the wind generator, and thus the proposed rule would apply only to wind plants, although we request comments on whether there are other technologies that should also be subject to the rule.

2. In this Notice of Proposed Rulemaking (NOPR), the Commission is proposing standards applicable to the interconnection of large wind generating plants,[5] to be included in Appendix G of the Large Generator Interconnection Agreement (LGIA). The Commission proposes these standards in light of its findings in Order No. 2003–A, noted above, and in response to a petition submitted by the American Wind Energy Association (AWEA) on May 20, 2004. Specifically, and as described more fully below, we propose to include in Appendix G to the LGIA certain technical requirements that Transmission Providers must apply to interconnection service for wind generation plants that are different from that required of traditional synchronous generating plants or are now needed because of the increased presence of larger aggregated wind plants on the Transmission Provider's systems. These requirements would be applied in addition to the standard interconnection procedures and requirements adopted by the Commission in Order No. 2003. Additionally, the Commission seeks comments on certain issues, including whether there are other non-synchronous technologies, or other technologies in addition to wind, that should also be covered by the proposed Appendix G.

Background

3. In Order No. 2003, pursuant to its responsibility under sections 205 and 206 of the Federal Power Act (FPA)[6] to remedy undue discrimination, the Commission required all public utilities that own, control, or operate facilities for transmitting electric energy in interstate commerce to append to their OATTs the *pro forma* Large Generator Interconnection Procedures (LGIP) and *pro forma* LGIA. To achieve greater standardization of interconnection terms and conditions, Order No. 2003 required such public utilities to file revised OATTs containing the *pro forma* LGIP and LGIA included in Order No. 2003.

4. Order Nos. 2003–A and 2003–B, issued on rehearing, made certain revisions to the *pro forma* LGIP and LGIA. In Order No. 2003–A, the Commission clarified that certain provisions of the LGIP and LGIA are not appropriately applied to wind generators. The Commission stated that it ''recognize[d] that the LGIA and LGIP are designed around the needs of large synchronous generators and that many generators relying on newer technologies may find that either a specific requirement is inapplicable or that it calls for a slightly different approach.''[7] In light of this recognition, the Commission clarified that LGIA article 5.4 (Power System Stabilizers), LGIA article 5.10.3 (Interconnection Customer's Interconnection Facilities Construction) and LGIA article 9.6.1 (Power Factor Design Criteria) would not be applied to wind generators.[8] Additionally, the Commission noted that ''there may be other areas of the LGIP and LGIA that may call for a slightly different approach for a generator relying on newer technology because it may have unique electrical characteristics.''[9] As a result, the Commission added to the LGIA a blank new Appendix G as a placeholder for requirements specific to newer technologies to be developed at a future time.[10]

5. On May 20, 2004, in Docket No. RM02–1–005, AWEA submitted a petition for rulemaking or, in the alternative, request for clarification of Order No. 2003–A, and a request for a technical conference. AWEA asked the Commission to adopt in Appendix G certain standards for the interconnection of wind generation plants. Specifically, AWEA submitted a proposed Appendix G that it argues addresses the concerns of both Transmission Providers and the wind generation industry. AWEA's proposed Appendix G included a low voltage ride-through capability standard, which would allow the Transmission Provider to require as a condition of interconnection that wind generation facilities have the ability to continue operating or ''ride-through'' certain low voltage conditions on the transmission system to which they are interconnected. Additionally, AWEA proposed that the power factor design criteria of up to 0.95 leading/lagging be applied to wind generation plants, with certain flexibility regarding whether the location of the reactive support equipment would be at the common point of interconnection of all the generators in the plant rather than at the individual turbine. Further, AWEA proposed that we require Transmission Providers and wind generator manufacturers to participate in a formal process to develop, update, and improve the engineering models and specifications used in modeling wind plant interconnections. Finally, AWEA proposed to include language in Appendix G allowing the wind Interconnection Customer to ''self-study'' interconnection feasibility by entering the interconnection queue without providing certain power and load flow data, receiving certain information from the Transmission Provider, and conducting its own Feasibility Study.

6. On September 24, 2004, the Commission held a Technical Conference to discuss the issues raised by AWEA's petition. The goal was to discuss the technical requirements for the interconnection of wind plants and other alternative technologies and the need for specific requirements for their interconnection. Additionally, the Technical Conference considered how wind and other alternative generator technologies may respond differently to transmission grid disturbances and have different effects on the transmission grid. The Commission also solicited and

[2] A wind generator is considered non-synchronous because it does not run at the same speed as a traditional generator. A non-synchronous generator possesses significantly different characteristics and responds differently to network disturbances.

[3] Order No. 2003–A at P 407, n. 86.

[4] *Id.*

[5] Large wind generating plants are those with an output rated at 20 MW or higher at the point of interconnection.

[6] 16 U.S.C. 824d–e (2000).

[7] Order No. 2003–A at P 407, n. 85.

[8] *Id.* at P 278, 407, n. 85.

[9] *Id.* at P 407, n. 85.

[10] The Appendix G that was added to the LGIA in Order No. 2003–A and that we propose in this NOPR should not be confused with the Appendix G that the Commission originally proposed to include in the LGIA, which concerned Interconnection Guidelines. The Commission did not include that Appendix in the Final Rule LGIA, since its provisions were covered elsewhere in the LGIP and LGIA. *See* Order No. 2003 at P 673. In Order No. 2003–A, the Commission used the Appendix G label for the requirements specific to wind generation and perhaps other non-synchronous technologies that we propose in this rulemaking.

received post-Technical Conference comments from interested persons.

Discussion

7. Based on our review and consideration of AWEA's petition and the comments received at and after the Technical Conference, the Commission is proposing certain technical requirements for the interconnection of wind generating plants. The Commission proposes to include these technical requirements as Appendix G to the LGIA, as contemplated in Order No. 2003–A. The technical requirements we propose here are similar in certain respects and differ in other respects from the Appendix G proposed by AWEA in its petition for rulemaking. The Commission is also seeking comments on certain issues, as discussed below. Our goal is to adopt final technical requirements for the interconnection of wind plants (and other alternative technologies, if any) that recognize the special characteristics of wind plants, their larger size and increased penetration on the transmission system (in terms of the wind generating capacity's percentage contribution to total system generating capacity), and the effects they have on the transmission system. This proposal seeks to accommodate wind plants while ensuring the continued reliability of the nation's electric transmission system.

8. The Appendix G technical requirements for the interconnection of wind generation plants that we propose in this NOPR are not intended to be the sole interconnection requirements for wind plants. Such plants will still be subject to the other standard interconnection procedures and requirements adopted by the Commission in Order No. 2003, unless wind plants have been otherwise exempted from such procedures and requirements.

9. Recently, the Commission became aware of the Alberta Electric System Operator's adoption of technical standards for the interconnection of wind generation plants to its transmission system.[11] The standards adopted by the AESO are similar to, but more comprehensive than, the standards we propose in the Appendix G in this NOPR.

10. The Commission is not proposing a transition period before the technical requirements in Appendix G would take effect. At the Technical Conference, however, several participants noted that wind turbine manufacturers have turbines in their inventory that do not have low voltage ride-through capability or adequate reactive power capability. Some participants argued that a transition period would be appropriate to accommodate this inventory. This proposal is designed in part to allow the Transmission Provider to assure transmission grid safety and reliability. For this reason, deviations should not be permitted unless approved by the Transmission Provider on a comparable basis. The proposal grants the Transmission Provider the flexibility to relax certain requirements if not needed for safety and reliability, as explained in more detail below.

Low Voltage Ride-Through Standard

11. Prior to the advent of larger wind plants generally consisting of multiple wind generation turbines, individual wind turbines were designed to go offline if there was a sudden change in voltage on the transmission system. However, now there are larger aggregated wind plants with a greater penetration level on the Transmission Provider's systems in certain areas, and significant stability problems can occur on the transmission system if such large plants become unavailable during a low voltage excursion. As a result, Transmission Providers need large wind plants to remain online during low-voltage occurrences for reliability reasons.

12. The Commission is proposing to require that large wind plants seeking to interconnect to the grid demonstrate low voltage ride-through capability, unless waived by the Transmission Provider on a comparable and not unduly discriminatory basis. Specifically, Appendix G would require that ''wind generating plants * * * demonstrate the ability to remain on-line during voltage disturbances up to the time periods and associated voltage levels set forth in Figure 1'' of the Appendix. The required voltage levels would be measured at the high voltage side of the substation transformers.[12]

13. The Commission seeks comments on this proposed standard. Particularly, the Commission is interested in comments addressing whether it should adopt a low voltage ride-through standard at all, whether this or another standard is more appropriate, and whether this proposed standard is specific enough. Additionally, the Commission seeks comment on whether the voltage-time profile of the proposed Appendix G is appropriate or should be modified.

Supervisory Control and Data Acquisition (SCADA) Capability

14. Previously, Transmission Providers generally did not require wind generators to have remote supervisory control and data acquisition (SCADA) capability because of their small size and minimal effects on the transmission system. Now that there are more large wind plants, Transmission Providers may need SCADA capability to ensure the safety and reliability of the transmission system during normal, system emergency, and system contingency conditions, and to acquire wind facility operating data.

15. The Commission proposes to require that large wind plants seeking to interconnect to the transmission grid possess SCADA capability. The proposed Appendix G would require that the wind plant install SCADA capability to transmit data and receive instructions from the Transmission Provider. Additionally, the proposed Appendix G states that the Transmission Provider and wind plant owner shall determine the SCADA information that is essential for the proposed wind plant, taking into account the size of the plant, its characteristics, location, and importance in maintaining generation resource adequacy and transmission system reliability in its area.[13]

16. The Commission seeks comments regarding the SCADA capability requirements proposed in this NOPR. Particularly, the Commission seeks comments on whether there is any basic essential SCADA information that large wind plants should be required to provide, and if so, what that information should be (such as information needed to determine how the plant's maximum megawatt output and megawatt ramp rate vary over time with changes in the wind speed, and/or information needed to forecast the megawatt output of the plant).

Power Factor Design Criteria (Reactive Power)

17. Previously, Transmission Providers did not require wind generators to have the capability to

[11] Those standards, titled Wind Power Facility Technical Requirements, are at *http://www.aeso.com.*

[12] While low voltage ride-through capability is needed for wind plants, it is not a concern for large synchronous generating facilities because most of these facilities are equipped with automatic voltage control devices to increase output during low voltage excursions.

[13] Unlike synchronous generating plants, which generally possess SCADA capability, can respond to automatic generation control signals from the control center and are often staffed, wind generating plants are often remote, unmanned, and characterized by an unpredictable rate of change of output, thus making it difficult for the Transmission Provider to limit the output of the wind plant when necessary for system reliability.

provide reactive power because the facilities were generally small and had minimal impact on the transmission grid. Because of the larger size of many of the wind plants currently operating and the increased penetration of wind energy on the transmission system, Transmission Providers may need to require wind plants to operate within a specified power factor range to help balance the reactive power needs of the transmission system.

18. The Commission is proposing to require that wind plants maintain a power factor within the range of 0.95 leading to 0.95 lagging (as required by Order No. 2003), to be measured at the high voltage side of the substation transformer. The proposed Appendix G permits wind plants flexibility in how they meet the power factor requirement (for example, using either power electronics designed to supply this level of reactive capability or fixed and switched capacitors if agreed to by the Transmission Provider, or a combination of the two.) Additionally, the Commission proposes to allow the Transmission Provider to waive the power factor requirement for wind plants where such capability is not needed at that location or for a generating facility of that size, provided that such waiver is not unduly discriminatory and is offered on a comparable basis to similarly situated wind plants. Should the power factor requirement be waived, however, the interconnection agreement would be considered a non-conforming agreement under section 11.3 of the LGIP, requiring that it be filed with the Commission. The Commission believes that it is appropriate to permit the Transmission Provider to waive the power factor requirement for a wind plant if the Transmission Provider does not need reactive power for reliability at that plant's location because, unlike a non-wind generator which always has some reactive power capability, a wind plant must incur an additional capital cost to provide this reactive power. Finally, we propose to require that wind plants have the capability to provide sufficient dynamic voltage support in order to interconnect to the transmission system, instead of the power system stabilizer and automatic voltage support at the generator excitation system, if the System Impact Study shows that such dynamic capability is necessary for system reliability.

19. The Commission seeks comments regarding whether the proposed power factor range proposed should be increased or decreased for wind generation plants. Also, the Commission seeks input as to whether any dynamic (*i.e.,* controllable) reactive capability should be required of wind plants as a condition of interconnection, and if so, what level of dynamic capability should be required. Further, the Commission seeks comments on the proposed waiver provisions for the power factor requirement discussed above.

Models and Self-Study of Feasibility

20. In its petition, AWEA proposed that certain variations in the Interconnection Study process be applied to the interconnection of wind plants. Specifically, AWEA proposed that Transmission Providers be required to ''participate in a formal process for updating, improving, and validating the engineering models used for modeling the interconnection impacts of wind turbines.'' [14] Additionally, AWEA proposed that wind Interconnection Customers be permitted to enter the interconnection queue and ''self-study'' the feasibility of interconnection after submitting an Interconnection Request that does not include power and load flow data and paying the applicable deposit. These wind Interconnection Customers should be entitled to have the scoping meeting with the Transmission Provider and receive from the Transmission Provider the base case data, according to AWEA. Following its self-study, the wind Interconnection Customer would submit an electrical design and turbine models sufficient to allow the Transmission Provider to conduct a System Impact Study under AWEA's proposal. AWEA stated that these provisions were necessary because requiring power system and load flow data to be submitted with the Interconnection Request is impractical for wind plants, since the turbine selection and electrical design of the wind plant may be based on the outcome of the Feasibility Study and grid conditions at the point of interconnection.

21. The Commission is not proposing these provisions for several reasons. With regard to the proposal to require Transmission Providers to participate in a formal process to update and improve wind turbine modeling, we believe that such a formal process should take place outside the Commission, through industry technical groups or perhaps through the regional reliability councils. The Commission recognizes, however, that improvements in the way that wind interconnections are modeled would be beneficial, and we encourage the industry to address this issue.

[14] AWEA Proposed Appendix G at 5.

22. With regard to AWEA's self-study proposal, Order No. 2003 currently requires that a valid and complete Interconnection Request be on file with the Transmission Provider before the Interconnection Customer may receive Base Case data.[15] Section 2.3 did not address situations where the Interconnection Customer might need access to the Base Case data *before* it could complete its Interconnection Request. Therefore we seek comments on how to balance the need of wind generators to self-study prior to filing a completed Interconnection Request with the need to protect this critical energy infrastructure information and commercially sensitive data against unwarranted disclosure.

23. Additionally, in Order No. 2003 the Commission addressed requests that additional time be provided after the Interconnection Request is made to submit final design specifications.[16] There, we stated that ''[t]he Interconnection Customer should have its design substantially completed prior to submitting its Interconnection Request so that it does not block or disrupt the queue process.'' [17] We also noted that Transmission Providers would not be able to act on an incomplete Interconnection Request, and that giving ''one class of Interconnection Customers extra time to submit design specifications would be unfair to other Interconnection Customers in the queue.'' [18] The Commission is not persuaded to propose deviations from these conclusions in this rulemaking.

Other Generating Technologies

24. The Commission seeks comments regarding whether there are other generating technologies that should be required to comply with the specific technical requirements included in Appendix G.

Variations From Appendix G

25. The Commission is proposing to permit Transmission Providers to justify variations from the terms of the final Appendix G using the approach taken in Order No. 2003. In Order No. 2003, the Commission modified the approach taken in Order No. 888,[19] which

[15] See LGIP, section 2.3; *see also* Order No. 2003 at P 77–84.

[16] *See* Order No. 2003 at P 99.

[17] *Id.* at P 103.

[18] *Id.*

[19] *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities,* Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996) at 31,760–61 (Order No. 888), *order on reh'g,* Order No. 888–A, FERC Stats. & Regs. ¶ 31,048 (1997),

allowed two types of variations. First, public utilities may seek variations to the LGIP and LGIA based on regional reliability requirements.[20] Second, public utilities may argue that proposed changes to any OATT provision are ''consistent with or superior to'' the terms of the *pro forma* OATT.[21] Additionally, Order No. 2003 allows RTOs and ISOs greater flexibility in complying with its provisions. They may seek an ''independent entity variation'' from the pricing and non-pricing provisions of the *pro forma* LGIP and LGIA.[22] The Commission intends to apply all three of these variation standards to proposed variations from the Appendix G the Commission finally adopts in this proceeding.

Information Collection Statement

26. Office of Management and Budget (OMB) regulations require OMB to approve certain information collection requirements imposed by agency rule.[23] Comments are solicited on the Commission's need for this information, whether the information will have practical utility, the accuracy of provided burden estimates, ways to enhance the quality, utility and clarity of the information to be collected, and any suggested methods for minimizing respondents' burden, including the use of automated information techniques.

27. *Public Reporting Burden:*

Data collection	Number of respondents	Number of responses	Hours per response	Total annual hours
FERC–516	238	1	18	4,284

Information Collection Costs: The Commission seeks comments on the costs to comply with these requirements. It has projected the annualized cost for all respondents to be: Annualized Capital/Startup Costs-Staffing requirements to review and prepare an interconnection agreement = $642,600. (238 respondents × $150 hourly rate × 18 hours per respondent.)

The OMB regulations require OMB to approve certain information collection requirements imposed by agency rule.[24] Accordingly, pursuant to OMB regulations, the Commission is providing notice of its proposed information collections to OMB.

Title: FERC–516, Electric Rate Schedule Filings.

Action: Proposed Information Collection.

OMB Control No.: 1902–0096.

The applicant shall not be penalized for failure to respond to this collection of information unless the collection of information displays a valid OMB control number.

Respondents: Business or other for profit.

Frequency of Responses: One-time implementation.

Necessity of Information: The proposed rule would revise the requirements contained in 18 CFR part 35. The Commission is seeking to revise its standardized interconnection procedures and agreements to include wind generation plants. In particular, the Commission will propose that public utilities add to their standard interconnection agreements the technical requirements for the interconnection of wind generation plants. The proposed rule would require that each public utility that owns, operates, or controls transmission facilities participate in one-time filings incorporating the technical requirements into their own open access transmission tariffs. Internal Review: the Commission has assured itself, by means of internal review, that there is specific, objective support for the burden estimates associated with the information collection requirements. The Commission's Office of Market, Tariffs and Rates will use the data included in filings under Section 203 and 205 of the Federal Power to evaluate efforts for interconnection and coordination of the U.S. electric transmission as well as for general industry oversight. These information requirements conform to the Commission's plan for efficient information collection, communication, and management within the electric power industry. Interested persons may obtain information on the reporting requirements by contacting: Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, Attention: Michael Miller, Office of the Executive Director, phone: (202) 502–8415, fax: (202) 273–0873, e-mail: *michael.miller@ferc.gov.* Comments on the proposed requirements of the subject rule may also be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503, Attention: Desk Officer for the Federal Energy Regulatory Commission, phone: (202) 395–4650.

Environmental Analysis

28. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.[25] The Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human environment. Included in the exclusion are rules that are clarifying, corrective, or procedural, or that do not substantially change the effect of the regulations being amended.[26] The exclusion also includes information gathering, analysis, and dissemination.[27] The rules proposed in this NOPR would update and clarify the application of the Commission's standard interconnection requirements to wind generation plants. Further, this NOPR involves information gathering, analysis, and dissemination regarding the interconnection of wind generators. Therefore, this NOPR falls within the categorical exemptions provided in the Commission's Regulations, and as a result neither an environmental impact statement nor an environmental assessment is required. Additionally, we note that this proposed rule will help the development and interconnection of wind plants, eliminating the airborne and other emissions that would result from constructing fossil fuel generating plants instead.

Regulatory Flexibility Act Certification

29. The Regulatory Flexibility Act of 1980 (RFA)[28] generally requires a description and analysis of final rules

order on reh'g, Order No. 888–B, 81 FERC ¶ 61,248 (1997), *order on reh'g,* Order No. 888–C, 82 FERC ¶ 61,046 (1997), *aff'd in relevant part sub nom.* Transmission Access Policy Study Group *v.* FERC, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom.* New York *v.* FERC, 535 U.S. 1 (2002).

[20] *See* Order No. 2003 at P 823–24.

[21] *See id.* at P 816.

[22] *Id.* at P 822–827; *see also* Order No. 2003–A at P 48.

[23] 5 CFR 1320.11 (2004).

[24] *Id.*

[25] *Order No. 486, Regulations Implementing the National Environmental Policy Act,* 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs. Preambles 1986–1990 ¶ 30,783 (Dec. 10, 1987).

[26] 18 CFR 380.4(a)(2)(ii) (2004).

[27] 18 CFR 380.4(a)(5) (2004).

[28] 5 U.S.C. 601–612 (2000).

that will have significant economic impact on a substantial number of small entities.[29] The Commission is not required to make such analyses if a rule would not have such an effect.

30. The Commission does not believe that this proposed rule would have such an impact on small entities. Most filing companies subject to the Commission's jurisdiction do not fall within the RFA's definition of a small entity. Further, the filing requirements contain standard generator interconnection procedures and agreement for interconnecting generators larger than 20 MW, which exceeds the threshold of the Small Business Size Standard of NAICS. Therefore, the Commission certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Comment Procedures

31. The Commission invites comments on the matters and proposals in this notice, including any related matters or alternative proposals that commenters may wish to discuss. Comments are due March 2, 2005. Reply comments will be due 30 days thereafter. Comments must refer to Docket No. RM05–4–000, and must include the commenters' name, the organization represented, if applicable, and address.

32. Comments may be filed electronically via the eFiling link on the Commission's Web site at *http://www.ferc.gov.* The Commission accepts most standard word processing formats and commenters may attach additional files with supporting information in certain other file formats. Commenters filing electronically do not need to make a paper filing. Commenters that are not able to file comments electronically must send an original and 14 copies of their comments to Federal Energy Regulatory Commission, Office of the Secretary, 888 First Street, NE., Washington, DC 20426.

33. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this proposal are not required to serve copies of their comments on other commenters.

Document Availability

34. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through FERC's home page (*http://www.ferc.gov*) and in FERC's Public Reference Room during normal business hours (8:30 a.m. to 5 p.m. eastern time) at 888 First Street, NE., Room 2A, Washington, DC 20426.

35. From FERC's home page on the Internet, this information is available in the Commission's document management system, eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

36. User assistance is available for eLibrary and the FERC's Web site during normal business hours. For assistance, please contact FERC Online Support at 1–866–208–3676 (toll free) or 202–502–6652 (e-mail at *FERCOnlineSupport@FERC.gov*), or the Public Reference Room at 202–502–8371, TTY 202–502–8659 (e-mail at *public.referenceroom@ferc.gov*).

List of Subjects in 18 CFR Part 35

Electric power rates, Electric utilities.

By direction of the Commission.

Linda Mitry,

Deputy Secretary.

In consideration of the foregoing, the Commission proposes to revise part 35, Chapter I, Title 18 of the Code of Federal Regulations, as follows.

PART 35—FILING OF RATE SCHEDULES

1. The authority citation for part 35 continues to read as follows:

Authority: 16 U.S.C. 791a–825r, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352.

2. In § 35.28, paragraph (f)(1) is revised to read as follows:

§ 35.28 Non-discriminatory open access transmission tariff.

* * * * *

(f) *Standard generator interconnection procedures and agreements.*

(1) Every public utility that is required to have on file a non-discriminatory open access transmission tariff under this section must amend such tariff by adding the standard interconnection procedures and agreement contained in Order No. 2003, FERC Stats. & Regs. ¶ 31,146 (Final Rule on Generator Interconnection), as amended by the Commission in Order No. ____, FERC Stats. & Regs. ¶ ____ (Final Rule on Interconnection for Wind Energy and Other Alternative Technologies), or such other interconnection procedures and agreement as may be approved by the Commission consistent with the Final Rule on Generator Interconnection.

(i) The amendment to implement the Final Rule on Generator Interconnection required by the preceding subsection must be filed no later than January 20, 2004.

(ii) The amendment to implement the Final Rule on Interconnection for Wind Energy and other Alternative Technologies required by the preceding subsection must be filed no later than [60 days after publication of final rule].

(iii) Any public utility that seeks a deviation from the standard interconnection procedures and agreement contained in Order No. 2003, FERC Stats. & Regs. ¶ 31,146 (Final Rule on Generator Interconnection), as amended by the Commission in Order No. ____, FERC Stats. & Regs. ¶ ____ (Final Rule on Interconnection for Wind Energy and Other Alternative Technologies), must demonstrate that the deviation is consistent with the principles of the Final Rule on Generator Interconnection.

* * * * *

[**Note:** The attachments will not be published in the Code of Federal Regulations]

Appendix G—Interconnection Requirements for Wind Generators

Appendix G sets forth additional requirements and provisions specific to wind generating plants.

A. Standards Applicable to Wind Generators

i. Low Voltage Ride-Through (LVRT) Standard

Wind generating plants shall demonstrate the ability to remain online during voltage disturbances up to the time periods and associated voltage levels set forth in Figure 1, below. The requirements apply to voltage measured at the high voltage side of the wind plant substation transformer(s). The figure shows the ratio of actual to nominal voltage (on the vertical axis) over time (on the horizontal axis). Before time 0.0, the voltage at the transformer is the nominal voltage. At time 0.0, the voltage drops. If the voltage remains at a level greater than 15 percent of the nominal voltage for a period that does not exceed 0.625 seconds, the plant must stay online. Further, if the voltage returns to 90 percent of the nominal voltage within 3 seconds of the beginning of the voltage drop

[29] The RFA definition of ''small entity'' refers to the definition provided in the Small Business Act, which defines a ''small business concern'' as a business that is independently owned and operated and that is not dominant in its field of operation. 15 U.S.C. 632 (2000). The Small Business Size Standards component of the North American Industry Classification System defines a small electric utility as one that, including its affiliates, is primarily engaged in the generation, transmission, and/or distribution of electric energy for sale and whose total electric output for the preceding fiscal years did not exceed 4 million MWh. 13 CFR 121.201 (Section 22, Utilities, North American Industry Classification System, NAICS) (2004)).

(with the voltage at any given time never falling below the minimum voltage indicated by the solid line in Figure 1), the plant must stay online. The Interconnection Customer may not disable low voltage ride-through equipment while the wind plant is in operation.

Two key features of this proposed regulation are:

1. A wind generating plant must have LVRT capability down to 15 percent of the rated line voltage for 0.625 seconds;

2. A wind generating plant must be able to operate continuously at 90 percent of the rated line voltage, measured at the high voltage side of the wind plant substation transformer(s).

The wind generating plant may ask the Transmission Provider for a variation of the parameters of this regulation, and the Transmission Provider may agree to such a variation provided it does so on a comparable and not unduly discriminatory basis among wind generators. The Transmission Provider may waive the low voltage ride-through requirement on a comparable and not unduly discriminatory basis for all wind plants.

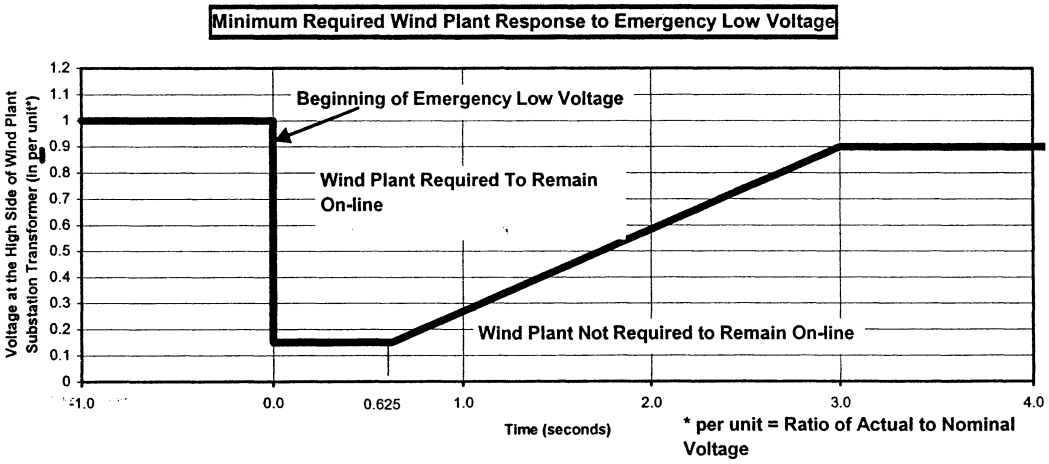

Figure 1 Proposed low voltage ride-through requirement

ii. Supervisory Control and Data Acquisition (SCADA) Capability

The wind plant shall provide SCADA capability to transmit data and receive instructions from the Transmission Provider. The Transmission Provider and the wind plant Interconnection Customer shall determine what SCADA information is essential for the proposed wind plant, taking into account the size of the plant, its characteristics, location, and importance in maintaining generation resource adequacy and transmission system reliability in its area.

iii. Power Factor Design Criteria (Reactive Power)

A wind plant shall maintain a power factor within the range of 0.95 leading to 0.95 lagging, measured at the high voltage side of the wind plant substation transformer(s). The power factor range requirement can be met by using, for example, power electronics designed to supply this level of reactive capability (taking into account any limitations due to voltage level, real power output, etc.) or fixed and switched capacitors if agreed to by the Transmission Provider, or a combination of the two. The Interconnection Customer shall not disable power factor equipment while the wind plant is in operation. Wind plants shall also be able to provide sufficient dynamic voltage support in lieu of the power system stabilizer and automatic voltage regulation at the generator excitation system if the Interconnection System Impact Study shows this to be required for system reliability.

The Transmission Provider may agree to waive or defer compliance with the reactive power standard. However, any such waiver or exemption must be considered a non-conforming agreement pursuant to section 11.3 of the LGIP.

[FR Doc. 05–1693 Filed 1–28–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF THE TREASURY

Alcohol and Tobacco Tax and Trade Bureau

27 CFR Part 9

[Notice No. 30]

RIN 1513–AA67

Proposed Expansion of the Russian River Valley Viticultural Area (2003R–144T)

AGENCY: Alcohol and Tobacco Tax and Trade Bureau, Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Alcohol and Tobacco Tax and Trade Bureau has received a petition proposing the expansion of the existing Russian River Valley viticultural area in Sonoma County, California. The proposed 30,200-acre expansion would increase the size of this viticultural area to 126,200 acres. We designate viticultural areas to allow vintners to better describe the origin of their wines and to allow consumers to better identify wines they may purchase. We invite comments on this proposed amendment to our regulations.

DATES: We must receive written comments on or before April 1, 2005.

ADDRESSES: You may send comments to any of the following addresses:

- Chief, Regulations and Procedures Division, Alcohol and Tobacco Tax and Trade Bureau, Attn: Notice No. 30, P.O. Box 14412, Washington, DC 20044–4412.
- 202–927–8525 (facsimile).
- *nprm@ttb.gov* (e-mail).
- *http://www.ttb.gov/alcohol/rules/index.htm.* An online comment form is posted with this notice on our Web site.
- *http://www.regulations.gov* (Federal e-rulemaking portal; follow instructions for submitting comments).

You may view copies of this notice, the petition, the appropriate maps, and any comments we receive about this proposal by appointment at the TTB Library, 1310 G Street, NW., Washington, DC 20220. To make an appointment, call 202–927–2400. You may also access copies of the notice and comments online at *http://www.ttb.gov/alcohol/rules/index.htm.*

See the *Public Participation* section of this notice for specific instructions and

requirements for submitting comments, and for information on how to request a public hearing.

FOR FURTHER INFORMATION CONTACT: N. A. Sutton, Regulations and Procedures Division, Alcohol and Tobacco Tax and Trade Bureau, 925 Lakeville St., No. 158, Petaluma, CA 94952; telephone 415–271–1254.

SUPPLEMENTARY INFORMATION:

Background on Viticultural Areas

TTB Authority

Section 105(e) of the Federal Alcohol Administration Act (the FAA Act, 27 U.S.C. 201 *et seq.*) requires that alcohol beverage labels provide the consumer with adequate information regarding a product's identity and prohibits the use of misleading information on those labels. The FAA Act also authorizes the Secretary of the Treasury to issue regulations to carry out its provisions. The Alcohol and Tobacco Tax and Trade Bureau (TTB) administers these regulations.

Part 4 of the TTB regulations (27 CFR part 4) allows the establishment of definitive viticultural areas and the use of their names as appellations of origin on wine labels and in wine advertisements. Part 9 of the TTB regulations (27 CFR part 9) contains the list of approved viticultural areas.

Definition

Section 4.25(e)(1)(i) of the TTB regulations (27 CFR 4.25(e)(1)(i)) defines a viticultural area for American wine as a delimited grape-growing region distinguishable by geographical features, the boundaries of which have been recognized and defined in part 9 of the regulations. These designations allow vintners and consumers to attribute a given quality, reputation, or other characteristic of a wine made from grapes grown in an area to its geographic origin. The establishment of viticultural areas allows vintners to describe more accurately the origin of their wines to consumers and helps consumers to identify wines they may purchase. Establishment of a viticultural area is neither an approval nor an endorsement by TTB of the wine produced in that area.

Requirements

Section 4.25(e)(2) of the TTB regulations outlines the procedure for proposing an American viticultural area and provides that any interested party may petition TTB to establish a grape-growing region as a viticultural area. Section 9.3(b) of the TTB regulations requires the petition to include—

- Evidence that the proposed viticultural area is locally and/or nationally known by the name specified in the petition;
- Historical or current evidence that supports setting the boundary of the proposed viticultural area as the petition specifies;
- Evidence relating to the geographical features, such as climate, elevation, physical features, and soils, that distinguish the proposed viticultural area from surrounding areas;
- A description of the specific boundary of the proposed viticultural area, based on features found on United States Geological Survey (USGS) maps; and
- A copy of the appropriate USGS map(s) with the proposed viticultural area's boundary prominently marked.

Petitioners may use the same procedure to request changes involving existing viticultural areas.

Russian River Valley Expansion Petition

General Background

TTB has received a petition from the Russian River Valley Winegrowers, a wine industry association based in Fulton, California, proposing a 30,200-acre expansion of the established Russian River Valley viticultural area (27 CFR 9.66). The established Russian River Valley viticultural area is located in Sonoma County, California, about 50 miles north of San Francisco. As it currently exists, the Russian River Valley viticultural area generally lies north and west of Santa Rosa, north of Sebastopol, east of the Bohemian Highway (about 7 miles inland from the Pacific coast), and south of Healdsburg.

The Chalk Hill viticultural area (27 CFR 9.52) lies entirely within the existing Russian River Valley viticultural area's northeastern third, while about 90 percent of the Sonoma County Green Valley viticultural area (27 CFR 9.57) is within the Russian River Valley area's southwestern third. In turn, the Russian River Valley viticultural area is entirely within the Northern Sonoma viticultural area (27 CFR 9.70), and is largely within the Sonoma Coast viticultural area (27 CFR 9.116). These two larger Sonoma County areas are within the multi-county North Coast viticultural area (27 CFR 9.30).

In the vicinity of the city of Santa Rosa, the Russian River Valley Winegrowers' proposed expansion area includes the mix of rural, suburban, and urban land between Santa Rosa and Mendocino Avenues in Santa Rosa and the area's present eastern boundary. To the south, the proposed expansion would incorporate the remainder of the Sonoma County Green Valley viticultural area into the Russian River Valley area, as well as a large rural region to the west, south, and east of Sebastopol.

As petitioned, the expansion proposed by the Russian River Valley Winegrowers includes a smaller, 767-acre expansion approved by TTB in 2003. For details regarding this earlier expansion, see T.D. TTB–7, published in the **Federal Register** on December 2, 2003, at 68 FR 67367. T.D. TTB–7 is also posted on the TTB Internet Web site at *http://www.tttb.gov.*

Cooling coastal fog, which moves inland from the Pacific Ocean via the valleys of the Russian River and its tributaries, is the dominant distinguishing viticultural feature of the existing Russian River Valley viticultural area. The expansion petition states that the reach of this coastal fog is the most significant factor for including the land in the proposed expansion within the established area. Other factors noted in the petition include the expansion area's location within the Russian River Valley watershed, and, to a lesser extent, the expansion area's geology and soils, which are similar to what is found in the existing viticultural area.

Below, we summarize the evidence presented in the Russian River Valley Winegrowers' petition.

Name Evidence

The petition offers evidence that the land in the proposed expansion area to the east and south of the current Russian River Valley viticultural area is also referred to as the Russian River Valley. A State of California hydrology map shows that the Russian River Valley, including the proposed expansion area, is within the Russian River Valley watershed.

The petition also included an article from the July 2002 Wine Enthusiast magazine (page 31) that defined the Russian River Valley as ''the box-shaped region that extends from Healdsburg to Santa Rosa in the east, and from Occidental to Guerneville in the west.'' This description includes the proposed eastern boundary expansion. The 1996 ''Wine Country'' guidebook (page 196), also included in the petition, provides a ''Russian River Region'' map that includes the east and south sides of the proposed expansion.

The Homes and Land real estate magazine (Vol, 18, No. 7, summer of 2002) lists a ''Russian River Appellation Vineyard Estate'' on pages 32 and 33. The petition indicates that this estate is

within the eastern portion of the proposed expansion area.

The Wine News June/July 2002 magazine publication includes an article titled ''Russian River Valley Pinot Noir's Promised Land'' which discusses this winegrowing area. On page 60 it notes that the 24-acre Meredith Vineyard is ''located at the southern end of the RRV [Russian River Valley].'' This vineyard is in the proposed expansion area as well, as noted on the United States Geological Service Sebastopol quadrangle map.

Boundary Evidence

The petition explains that, historically, agriculture in the proposed expansion area has included apples, prunes, cherries, berries, grapes, and other crops. As noted in the petition, local resident Lee Bondi recalls that in the early 1900s his family made wine from Palomino grapes on their ranch in the expansion area. Dena Bondelie, also a resident living within the proposed expansion area, remembers her father talking about the Zinfandel wine made by her grandfather at their Darby Lane property.

Tom Henderson, an area resident, recalls that during World War II his grandparents grew berries, corn, pumpkins, and acorn squash to supplement their apple crop, on their Sander Road property. Ms. Merry Edwards, a current resident, states that when she first moved to the area in 1977, it was heavily planted with apples. Some apple and prune orchards are being replaced with vineyards because of the changing agricultural markets, according to the Russian River Valley Winegrowers group.

As of spring 2003, according to the petition, there are approximately 1,070 acres planted with grapes within the proposed expansion area, with another 200 acres under development for commercial viticulture purposes.

Distinguishing Features

Treasury Decision ATF–159 of October 21, 1983 (48 FR 48813), established the Russian River Valley as a viticultural area. This Treasury Decision stated:

> The Russian River viticultural area includes those areas through which flow the Russian River or some of its tributaries and where there is a significant climate effect from coastal fogs. The specific growing climate is the principal distinctive characteristic of the Russian River Valley viticultural area. The area designated is a cool growing coastal area because of fog intruding up the Russian River and its tributaries during the early morning hours.

Climate

The Russian River Valley viticultural area expansion petition states that fog is the single most unifying and significant feature of the area. This is consistent with statements in the original 1983 Russian River Valley viticultural area petition. The proposed expansion area also has heavy fog as documented by Robert Sisson, Sonoma County Viticulture Farm Advisor Emeritus, on his 1976 map titled ''Lines of Heaviest and Average Maximum Fog Intrusion for Sonoma County.''

The current petition and Treasury Decision ATF–159, which established the Russian River Valley viticultural area, both refer to the Winkler degree-day (or accumulated heat units) system, which classifies grape-growing climatic regions. (Each degree that a day's mean temperature is above 50 degrees F, which is the minimum temperature required for grapevine growth, is counted as one degree day; see ''General Viticulture,'' Albert J. Winkler, University of California Press, 1975.) As noted in Treasury Decision ATF–159, ''The Russian River Valley viticultural area is termed 'coastal cool' with a range of 2000 to 2800 accumulated heat units.''

The petition provides growing season temperature data from 2001 for four vineyards within the proposed expansion boundaries.

Vineyard	Degree days (accumulated heat units)
Le Carrefour	2,636
Osley East	2,567
Osley West	2,084
Bloomfield	2,332

The table above shows that the degree days for all four vineyards fall within the 2,000 to 2,800 accumulated heat units range of Winkler's ''coastal cool'' climate. This evidence suggests that these vineyards have the same grape-growing climate found within the established Russian River Valley viticultural area.

Elevation

The terrain within the Russian River Valley viticultural area's proposed expansion ranges in elevation from about 70 feet to the east of Sebastopol, to around 800 feet in the expansion area's west toward Occidental, as noted on USGS maps. These elevations, according to USGS maps of this portion of Sonoma County, are similar to those found within most of the established Russian River Valley viticultural area.

Soils

As indicated in the petition, there is a similar range and diversity of soils in the proposed expansion area and the originally established Russian River Valley viticultural area. This similarity is documented on the Sonoma County Soil Survey maps (USDA Conservation Service, U.S. Forest Service, and University of California Agricultural Experiment Station, undated) on survey sheets 65, 66, 73, 74, 80, 82, 88, 89, 96, and 97.

The predominant soils within the proposed Russian River Valley viticultural area expansion the petition notes, are Huichica Loam, Yolo Clay Loam, and Yolo Silt Loam. These soils are depicted on sheet 74 of the Sonoma County Soil Survey. They are also found within the established Russian River Valley viticultural area in vineyards to the north of the proposed expansion area, as documented on pages 57 and 66 of the soil survey. The 1983 Treasury Decision ATF–159 does not identify the predominant soils of the area. Nor does it indicate that the soils of the viticultural area are unique.

Watershed

According to the petition, the large Russian River watershed includes both the established Russian River Valley viticultural area and the proposed expansion area. The Russian River watershed, unit #18010110, is depicted on the State of California Hydrology map, 1978. It extends from Lake Mendocino south to Sonoma Mountain, and from Mt. St. Helena west to Jenner, where the river meets the coastline of the Pacific Ocean. The 1983 Treasury Decision, ATF–159 states that the Russian River Valley viticultural area ''includes those areas through which flow the Russian River or some of its tributaries.''

Boundary Description

The 30,200-acre proposed expansion of the Russian River Valley viticultural area includes land east and south of the area's originally established boundary. The proposed expanded boundary deviates from the established boundary at a point east of Highway 101 along Mark West Springs Road. From that point, the proposed expanded boundary line, in a clockwise direction, goes south to Todd Road in Santa Rosa. It then meanders west, with a southward bulge south of Sebastopol that incorporates the crossroads hamlet of Knowles Corners. Passing north of the town of Bloomfield, the proposed expanded boundary continues northwest of Freestone, where it rejoins

the area's established boundary. This expansion would increase the Russian River Valley viticultural area by about 31 percent, from 96,000 acres to 126,200 acres.

For a detailed description of the Russian River Valley's proposed expanded boundary, see the narrative boundary description the proposed regulatory text published below in this notice.

Maps

The petitioner(s) provided the required maps to document the proposed boundary, and we list them in the proposed regulatory text.

Public Participation

Comments Invited

We invite comments from interested members of the public on whether we should expand the Russian River Valley viticultural area as described above. We are especially interested in comments concerning the similarity of the proposed expansion area to the currently existing Russian River Valley viticultural area. Please support your comments with specific information about the proposed expansion area's name, proposed boundaries, or distinguishing features.

Submitting Comments

Please submit your comments by the closing date shown above in this notice. Your comments must include this notice number and your name and mailing address. Your comments must be legible and written in language acceptable for public disclosure. We do not acknowledge receipt of comments, and we consider all comments as originals. You may submit comments in one of five ways:

- *Mail:* You may send written comments to TTB at the address listed in the **ADDRESSES** section.
- *Facsimile:* You may submit comments by facsimile transmission to 202–927–8525. Faxed comments must—
  (1) Be on 8.5- by 11-inch paper;
  (2) Contain a legible, written signature; and
  (3) Be no more than five pages long. This limitation assures electronic access to our equipment. We will not accept faxed comments that exceed five pages.
- *E-mail:* You may e-mail comments to *nprm@ttb.gov*. Comments transmitted by electronic mail must—
  (1) Contain your e-mail address;
  (2) Reference this notice number on the subject line; and
  (3) Be legible when printed on 8.5- by 11-inch paper.
- *Online form:* We provide a comment form with the online copy of this notice on our Web site at *http://www.ttb.gov/alcohol/rules/index.htm.* Select the ''Send comments via e-mail'' link under this notice number.
- *Federal e-Rulemaking Portal:* To submit comments to us via the Federal e-rulemaking portal, visit *http://www.regulations.gov* and follow the instructions for submitting comments.

You may also write to the Administrator before the comment closing date to ask for a public hearing. The Administrator reserves the right to determine, in light of all circumstances, whether to hold a public hearing.

Confidentiality

All submitted material is part of the public record and subject to disclosure. Do not enclose any material in your comments that you consider confidential or inappropriate for public disclosure.

Public Disclosure

You may view copies of this notice, the petition, the appropriate maps, and any comments we receive by appointment at the TTB Library at 1310 G Street, NW., Washington, DC 20220. You may also obtain copies at 20 cents per 8.5- x 11-inch page. Contact our librarian at the above address or telephone 202–927–2400 to schedule an appointment or to request copies of comments.

For your convenience, we will post this notice and any comments we receive on this proposal on the TTB Web site. We may omit voluminous attachments or material that we consider unsuitable for posting. In all cases, the full comment will be available in the TTB Library. To access the online copy of this notice, visit *http://www.ttb.gov/alcohol/rules/index.htm.* Select the ''View Comments'' link under this notice number to view the posted comments.

Regulatory Flexibility Act

We certify that this proposed regulation, if adopted, would not have a significant economic impact on a substantial number of small entities. The proposed regulation imposes no new reporting, recordkeeping, or other administrative requirement. Any benefit derived from the use of a viticultural area name would be the result of a proprietor's efforts and consumer acceptance of wines from that area. Therefore, no regulatory flexibility analysis is required.

Executive Order 12866

This proposed rule is not a significant regulatory action as defined by Executive Order 12866, 58 FR 51735. Therefore, it requires no regulatory assessment.

Drafting Information

N.A. Sutton of the Regulations and Procedures Division drafted this notice.

List of Subjects in 27 CFR Part 9

Wine.

Proposed Regulatory Amendment

For the reasons discussed in the preamble, we propose to amend title 27, chapter 1, part 9, Code of Federal Regulations, as follows:

PART 9—AMERICAN VITICULTURAL AREAS

1. The authority citation for part 9 continues to read as follows:

Authority: 27 U.S.C. 205.

Subpart C—American Viticultural Areas

2. Amend § 9.66 by revising paragraphs (b) and (c)(8) through (c)(14), redesignating paragraphs (c)(15) through (c)(26) as (c)(23) through (c)(34), and adding new paragraphs (c)(15) through (c)(22) to read as follows:

§ 9.66 Russian River Valley.

* * * * *

(b) *Approved maps.* The appropriate maps for determining the boundary of the Russian River Valley viticultural area are 11 United States Geological Survey (USGS) 1:24,000 Scale topographic maps. They are titled:

(1) Healdsburg, California Quadrangle—Sonoma Co., 7.5 Minute Series, edition of 1993;

(2) Guerneville, California Quadrangle—Sonoma Co., 7.5 Minute Series, edition of 1993;

(3) Cazadero, California Quadrangle—Sonoma Co., 7.5 Minute Series, edition of 1978;

(4) Duncans Mills California Quadrangle—Sonoma Co., 7.5 Minute Series, edition of 1979;

(5) Camp Meeker, California Quadrangle—Sonoma Co., 7.5 Minute Series, edition of 1995;

(6) Valley Ford, California Quadrangle, 7.5 Minute Series, edition of 1954; photorevised 1971;

(7) Two Rock, California Quadrangle, 7.5 Minute Series, edition of 1954; photorevised 1971;

(8) Sebastopol, California Quadrangle—Sonoma Co., 7.5 Minute Series, edition of 1954; photorevised 1980;

(9) Santa Rosa, California Quadrangle—Sonoma Co., 7.5 Minute Series, edition of 1954; and

(10) Mark West Springs, California Quadrangle, 7.5 Minute Series, edition of 1998, and

(11) Jimtown, California Quadrangle—Sonoma Co., 7.5 Minute Series, edition of 1993.

(c) *Boundaries.* * * *

* * * * *

(8) Proceed southeast along the Bohemian Highway, crossing over the Camp Meeker map, to the town of Freestone, where the Highway intersects at BM 214 with an unnamed medium-duty road (known locally as Bodega Road, section 12, T6N, R10W, on the Valley Ford map).

(9) Proceed 0.9 mile northeast on Bodega Road to its intersection, at BM 486, with Jonvive Road to the north and an unnamed light duty road to the south, (known locally as Barnett Valley Road, T6N, R9W, on the Camp Meeker map).

(10) Proceed 2.2 miles south, followed by east, on Barnett Valley Road, crossing over the Valley Ford map, to its intersection with Burnside Road in section 17, T6N, R9W, on the Two Rock map.

(11) Proceed 3.3 miles southeast on Burnside Road to its intersection with an unnamed medium duty road at BM 375, T6N, R9W, on the Two Rock map.

(12) Proceed 0.6 mile straight southeast to an unnamed 610-foot elevation peak, 1.5 miles southwest of Canfield School, T6N, R9W, on the Two Rock map.

(13) Proceed 0.75 mile straight east-southeast to an unnamed 641-foot elevation peak, 1.4 miles south-southwest of Canfield School, T6N, R9W, on the Two Rock map.

(14) Proceed 0.85 mile straight northeast to the intersection with an unnamed intermittent stream and Canfield Road; continue 0.3 mile straight in the same northeast line of direction to its intersection with the common boundary of Ranges 8 and 9, just west of an unnamed unimproved dirt road, T6N, on the Two Rock map.

(15) Proceed 1.8 miles straight north along the common Range 8 and 9 boundary line to its intersection with Blucher Creek, T6N, on the Two Rock map.

(16) Proceed 1.25 miles generally northeast along Blucher Creek to its intersection with Highway 116, also known as Gravenstein Highway, in section 18, T6N, R8W, on the Two Rock map.

(17) Proceed 0.2 mile straight southeast along Highway 116 to its intersection with an unnamed light duty road to the north in section 18, T6N, R8W, on the Two Rock map.

(18) Proceed 0.1 mile straight northwest along the unnamed light duty road to its intersection with an unnamed medium-duty road to the east, (known as Todd Road in Section 18, T6N, R8W, on the Two Rock map).

(19) Proceed 4.8 miles east, north, and east again along Todd Road, a medium-duty road, crossing over the Sebastopol map and then passing over U.S. Highway 101 and continuing straight east 0.1 mile to Todd Road's intersection with Santa Rosa Avenue, a primary road that is generally parallel to U.S. Highway 101, in section 2, T6N, R8W, on the Santa Rosa map.

(20) Proceed 5.8 miles generally north along Santa Rosa Avenue, which becomes Mendocino Avenue, to its intersection with an unnamed secondary road, known locally as Bicentennial Way, 0.3 mile north-northwest of BM 161 on Mendocino Avenue, section 11, T7N, R8W, on the Santa Rosa map.

(21) Proceed 2.5 miles straight north, crossing over the 906-foot elevation peak in section 35 of the Santa Rosa map, to its intersection with Mark West Springs Road and the meandering 280-foot elevation in section 26, T8N, R8W, of the Mark West Springs map.

(22) Proceed 4.8 miles north-northwest along Mark West Springs Road, which becomes Porter Creek Road, to its intersection with Franz Valley Road, a light-duty road to the north of Porter Creek Road, in section 12, T8N, R8W, on the Mark West Springs map.

* * * * *

Signed: January 24, 2005.

John J. Manfreda,

Administrator.

[FR Doc. 05–1667 Filed 1–28–05; 8:45 am]

BILLING CODE 4810–31–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 3

RIN 2900–AK97

Time Limit for Requests for *De Novo* Review

AGENCY: Department of Veterans Affairs.

ACTION: Withdrawal of proposed rule.

SUMMARY: In a document published in the **Federal Register** at 67 FR 10866 on March 11, 2002, the Department of Veterans Affairs (VA) proposed to amend its adjudication regulations concerning the time a claimant has in which to request a *de novo* review of a decision at the Veterans Service Center level after filing a Notice of Disagreement. This document withdraws that proposed rule.

DATES: The proposed rule is withdrawn as of January 31, 2005.

FOR FURTHER INFORMATION CONTACT: Maya Ferrandino, Consultant, Policy and Regulations Staff, Compensation and Pension Service, Veterans Benefits Administration, 810 Vermont Ave., NW., Washington, DC 20420, telephone (202) 273–7232.

SUPPLEMENTARY INFORMATION: Currently, a claimant who disagrees with a decision by a Veterans Service Center may appeal that decision by filing a notice of disagreement (NOD). Under 38 CFR 3.2600, a claimant who has filed a timely NOD may also obtain *de novo* review of the decision of the Veterans Service Center by requesting such review with the NOD or within 60 days after the date that VA mails notice of the availability of *de novo* review. We proposed reducing that 60-day period to 15 days. However, we have determined that revision of the *de novo* review process is unnecessary at this time. Therefore, we are withdrawing the proposal.

Approved: December 17, 2004.

Anthony J. Principi,

Secretary of Veterans Affairs.

[FR Doc. 05–1704 Filed 1–28–05; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 36

RIN 2900–AK76

Loan Guaranty: Prepurchase Counseling Requirements

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule; withdrawal.

SUMMARY: The Department of Veterans Affairs (VA) published a proposed rule in the **Federal Register** on October 11, 2001 (66 FR 51893) to amend its loan guaranty regulations that set forth underwriting standards for VA guaranteed loans. We had proposed to require first-time homebuyers to complete homeownership counseling and to add a compensating factor for certain veterans who do not fully meet VA's underwriting standards. However, the proposed rule and comments have been superseded by recently-adopted requirements established by the Department of Defense mandating such counseling for all enlistees and by VA's decision to provide a link to the Government National Mortgage

Association (Ginnie Mae's) Homeownership Information Center, which provides a wide array of information for homebuyers pertaining to the homebuying process, mortgage affordability, loan calculators, credit counseling, etc. Accordingly, this document hereby withdraws the proposed rule.

DATES: The proposed rule is withdrawn as of January 31, 2005.

FOR FURTHER INFORMATION CONTACT: R.D. Finneran, Assistant Director for Loan Policy and Valuation (262), Loan Guaranty Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 (202) 273–7368.

Approved: December 17, 2004.

Anthony J. Principi,

Secretary of Veterans Affairs.

[FR Doc. 05–1712 Filed 1–28–05; 8:45 am]

BILLING CODE 8320–01–P

POSTAL RATE COMMISSION

39 CFR Part 3001

[Docket No. RM2005–2; Order No. 1429]

Solicitation of Comments on First Use of Rules Applicable to Negotiated Service Agreements

AGENCY: Postal Rate Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document addresses the solicitation of comments in a proceeding to consider potential changes to the Commission rules for considering functionally equivalent Negotiated Service Agreements. These comments will be used to evaluate whether improvements should be made to the rules to facilitate the Commission's review of future requests predicated on functionally equivalent Negotiated Service Agreements.

DATES: Initial comments: February 28, 2005; reply comments: March 28, 2005.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, 202–789–6818.

SUPPLEMENTARY INFORMATION:

Regulatory History

68 FR 52552, September 4, 2003. 69 FR 7574, February 19, 2004.

On February 11, 2004, the Commission promulgated rules applicable to the review of Postal Service requests predicated on baseline and functionally equivalent Negotiated Service Agreements.[1] The Postal Service first invoked the rules applicable to functionally equivalent Negotiated Service Agreements (39 CFR 3001.196) in requests filed on June 21, 2004, for proposed Negotiated Service Agreements with Discover Financial Services, Inc. (Discover) and Bank One Corporation (Bank One).[2] Both agreements were proffered as functionally equivalent to the recently recommended Negotiated Service Agreement with Capital One Services, Inc. (Capital One).[3] The Postal Service has not submitted a request for a new baseline agreement. Thus, the rules for new baseline Negotiated Service Agreements (39 CFR 3001.195) remain untested.

PRC Order No. 1391 at 48 explains the purpose of the rules applicable to functionally equivalent Negotiated Service Agreements:

> The purpose of § 3001.196 is to provide an opportunity to expedite the review of a request for a functionally equivalent Negotiated Service Agreement by allowing the proponents of the agreement to rely on relevant record testimony from a previous docket. This potentially could expedite the proceeding by avoiding the need to re-litigate issues that were recently litigated and resolved in a previous docket.

Once the Commission determines that it is appropriate to proceed under rule 196, a procedural schedule is established to allow for issuing a decision within 60 days if no hearing is scheduled, or within 120 days if a hearing is scheduled. In both the Discover and the Bank One dockets, the participants requested hearings, the hearings were scheduled, and schedules were initially established to allow for a decision to be issued within 120 days.[4]

The Commission recommended that the Postal Service enter into the Negotiated Service Agreement with Discover 72 days after making the decision to hear the request under the rules for functionally equivalent Negotiated Service Agreements (101 days after the filing of the request).[5] This was well within the 120 day time frame contemplated by the rules. The Commission found the Discover Negotiated Service Agreement functionally equivalent, albeit not identical, to the Capital One Negotiated Service Agreement, and recommended the request only with minor modification. Proceeding under the rules for functionally equivalent Negotiated Service Agreements successfully developed a sufficient record upon which to issue a decision and expedited the procedural schedule as envisioned when the rules were first developed.

Application of the rules for a functionally equivalent Negotiated Service Agreement in the Bank One docket also was successful. A sufficient record upon which to base a decision was developed, and the docket was expedited through reliance on record testimony from the previous Capital One docket. However, due to the complexity of the specific issues involved, procedural issues that arose, and more extensive than anticipated litigation and negotiation, issuing the decision exceeded the 120 day procedural schedule by 27 days. The Commission recommended that the Postal Service enter into the Negotiated Service Agreement with Bank One 147 days after making the decision to hear the request under the rules for functionally equivalent Negotiated Service Agreements (179 days after the filing of the request).[6]

A large number of unusual issues delayed a decision on the Bank One Negotiated Service Agreement. The testimony of Bank One witness Buc was filed seven days late, with no indication in the initial request that additional testimony was forthcoming. Potential intervenors were not alerted to important differences between the baseline and the proffered functionally equivalent agreement by less than full compliance with rule 196(b)(2). Within two weeks of the filing of the request, Bank One merged with J. P. Morgan Chase, requiring additional discovery efforts, and creating uncertainty over how to analyze the initial request. The Bank One Negotiated Service Agreement as proposed was not functionally equivalent to the Capital One Negotiated Service Agreement.[7] Participants

[1] Order Establishing Rules Applicable to Requests for Baseline and Functionally Equivalent Negotiated Service Agreements, PRC Order No. 1391, February 11, 2004. The rules applicable to Negotiated Service Agreements are incorporated into the Commission's rules at subpart L.

[2] Request of the United States Postal Service for a Recommended Decision on Classifications, Rates and Fees to Implement Functionally Equivalent Negotiated Service Agreement with Discover Financial Services, Inc., June 21, 2004; Request of the United States Postal Service for a Recommended Decision on Classifications, Rates and Fees to Implement Functionally Equivalent Negotiated Service Agreement with Bank One Corporation, June 21, 2004.

[3] PRC Op. MC2002–2, May 15, 2003.

[4] In both instances, the requests for hearings were withdrawn before the hearings occurred.

[5] PRC Op. MC2004–4, September 30, 2004.

[6] PRC Op. MC2004–3, December 17, 2004.

[7] Significantly, the request did not provide for adequate protection of mailers not party to the agreement (for example, an equivalent to the stop-loss cap as recommended in the Capital One docket was not proposed even though similar risks were apparent). As recommended, after modification, the Bank One Negotiated Service Agreement is functionally equivalent to the Capital One Negotiated Service Agreement.

litigated and negotiated issues that were not present in the baseline docket. This culminated in the submission of two proposed Stipulations and Agreements late in the proceeding addressing risks identified by the participants.[8] Finally, the details of the Bank One agreement and the specific facts presented in this docket were more complex than what was presented in the baseline docket. The Commission believes it unlikely that this many complicating factors are likely to be present in future requests for functionally equivalent Negotiated Service Agreements. Thus, the anticipated time for the Commission to review a request and render a recommendation still appears to be realistic.

The Presiding Officer decided to proceed under the rules for functionally equivalent Negotiated Service Agreements to lend structure to the Bank One proceeding. He recognized that future revelations might require a change in direction.[9] Although there were unanticipated complications in the Bank One docket, the rules for functionally equivalent Negotiated Service Agreements proved flexible and sufficient to hear the request and render a recommended decision.

The Commission indicated in the Discover and the Bank One recommendations that it would solicit comments on the first use of the new rules. The comments will be used to evaluate whether improvements should be made to the rules to facilitate the Commission's review of future requests predicated on functionally equivalent Negotiated Service Agreements. Comments are welcome of a general nature, or that address specific procedural or data requirement issues. By this order, the Commission hereby gives notice that comments from interested persons concerning the first use of the rules applicable to Negotiated Service Agreements are due February 28, 2005. Reply comments may also be filed and are due March 28, 2005.

In conformance with section 3624(a) of title 39, the Commission designates Shelley S. Dreifuss, director of the Commission's Office of the Consumer Advocate, to represent the interests of the general public in this proceeding. Pursuant to this designation, Ms. Dreifuss will direct the activities of Commission personnel assigned to assist her and, upon request, will supply their names for the record. Neither Ms. Dreifuss nor any of the assigned personnel will participate in or provide advice on any Commission decision in this proceeding.

Ordering Paragraphs

It is ordered:

1. Docket No. RM2005–2 is established to solicit comments on possible improvements to the Commission's rules applicable to Negotiated Service Agreements.
2. Interested persons may submit comments no later than February 28, 2005.
3. Reply comments also may be filed and are due March 28, 2005.
4. Shelley S. Dreifuss, director of the Office of the Consumer Advocate, is designated to represent the interests of the general public in this docket.
5. The Secretary shall arrange for publication of this Notice of Proposed Rulemaking in the **Federal Register**.

Issued: January 25, 2005.

By the Commission.

Steven W. Williams,

Secretary.

[FR Doc. 05–1732 Filed 1–28–05; 8:45 am]

BILLING CODE 7710–FW–P

[8] The rules for functionally equivalent Negotiated Service Agreements should provide adequate expedition without the need to file Stipulations and Agreements. Stipulations and Agreements should not be used as a procedural mechanism to expeditiously conclude a docket. In this docket, the Stipulations and Agreements were properly used to resolve issues unique to the request.

[9] An alternative could have been to reject the request as submitted, with directions to supplement testimony where necessary and refile as a new baseline docket. This would have considerably added to the length of the procedural schedule.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

45 CFR Part 1356

RIN 0970–AC14

Administrative Costs for Children in Title IV–E Foster Care

AGENCY: Administration for Children and Families (ACF), Department of Health and Human Services (DHHS).

ACTION: Proposed rule.

SUMMARY: The Administration for Children and Families (ACF) is proposing to amend the regulations for Child and Family Services with respect to title IV–E administrative costs and eligibility determinations and re-determinations for title IV–E foster care recipients and foster care ''candidates.'' This Notice of Proposed Rule Making (NPRM) proposes rules to implement title IV–E foster care eligibility and administrative cost provisions in sections 472 and 474 of the Social Security Act (the Act) and incorporates previously issued policy guidance.

DATES: Consideration will be given to written comments received by April 1, 2005.

ADDRESSES: Interested persons are invited to submit comments regarding this proposed rule to Kathleen McHugh, Director, Division of Policy, Children's Bureau, Administration on Children, Youth and Families, Administration for Children and Families, 330 C Street, SW., Washington, DC 20447. You may download an electronic version of the rule at *http://www.regulations.gov.* You may also transmit written comments electronically via the Internet at: *http://www.regulations.acf.hhs.gov*. Comments will be available for public inspection Monday through Friday 8:30 a.m. to 5 p.m. at the above address by contacting Jan Rothstein, in room 2411.

FOR FURTHER INFORMATION CONTACT: Kathleen McHugh, Director, Division of Policy, Children's Bureau, Administration on Children, Youth and Families, (202) 401–5789 or by e-mail at *kmchugh@acf.hhs.gov*. Do not e-mail comments on the Notice of Proposed Rule Making to this address.

SUPPLEMENTARY INFORMATION:

I. Statutory Authority

This proposed regulation is issued pursuant to 42 U.S.C. 1302, which authorizes the Secretary of Health and Human Services (the Secretary) to publish regulations that may be necessary for the efficient administration of the functions for which he/she is responsible under the Act.

II. Background

Section 474(a) in title IV–E of the Act entitles a State agency to Federal financial participation (FFP) for three separate categories of expenditures: title IV–E foster care maintenance payments for eligible children in licensed or approved foster family homes or child care institutions; adoption assistance payments; and payments for the proper and efficient administration of the title IV–E State plan. Furthermore, section 474(a)(3)(E) sets the rate of FFP for allowable administrative costs at 50 percent. Federal regulations at 45 CFR 1356.60(c) implement the title IV–E administrative cost requirements and subparagraph (c)(3) lists several examples of allowable administrative costs necessary for the administration of the title IV–E foster care program. As a general rule, a State agency may claim allowable title IV–E administrative costs for a child in title IV–E foster care who is eligible for title IV–E foster care

maintenance payments pursuant to sections 472(a), (b) and (c) of the Act or for a child who is a ''candidate'' for title IV–E foster care.

On July 3, 2001, ACF issued policy announcement ACYF–CB–PA–01–02 to clarify our policy regarding title IV–E administrative costs for title IV–E foster care ''candidates'' and other related issues. The policy announcement, in part, made clear that a State agency could not claim FFP for administrative costs for children in unlicensed foster care, with the exception of children in relative foster family homes while the State agency is in the process of licensing the home. Prior to ACYF–CB–PA–01–02, many States agencies were operating under an expansive interpretation of an August 17, 1993 memorandum from the Acting Commissioner of the Administration for Children, Youth and Families (ACYF) to the ACF Regional Administrators. That guidance allowed State agencies to claim FFP for title IV–E administrative costs associated with a child who otherwise would be eligible for title IV–E foster care maintenance payments but for his/her placement in an unlicensed foster family home, if the child could be considered a ''candidate'' for title IV–E foster care. A determination of title IV–E candidacy permits a State agency to claim the full Federal share (50 percent) of child-specific title IV–E administrative costs. ACYF–CB–PA–01–02 clarified that a child who has been removed from home and placed in title IV–E foster care cannot be considered a ''candidate'' since the term ''candidate'' refers to a child prior to such placement.

Pending the issuance of a Final Rule, a State agency may continue to claim FFP for the administrative costs associated with an otherwise title IV–E eligible child placed in an unlicensed foster family home. All other policies expressed in ACYF–CB–PA–01–02 (as incorporated into the Children's Bureau's Child Welfare Policy Manual (CWPM), found at *http://www.acf.dhhs.gov/programs/cb/laws/cwpm*) remain in effect.

However, as noted above, ACYF–CB–PA–01–02 also addressed other policy issues, some but not all of which are included as subjects of this NPRM. We have included these issues in response to the numerous letters we received from States and other interested parties who objected to our making some of the changes contained in ACYF–CB–PA–01–02 without providing an opportunity for public comment. Specifically, we propose to codify the following policies contained in ACYF–CB–PA–01–02: administrative cost claims for children in facilities not eligible for title IV–E foster care reimbursement; the requirement that the State agency itself must make the determinations of title IV–E foster care candidacy; and, the requirement that the State agency document (re-determine) a child's candidacy for title IV–E foster care every six months.

III. Discussion of the Proposed Regulatory Changes

Section 1356.60(c)(3) Administrative Cost Claims for a Child Placed in an Ineligible Facility

In new paragraph 1356.60(c)(3), we propose to state explicitly that title IV–E administrative costs do not include costs claimed on behalf of a child placed in an ineligible facility such as a detention center, a hospital (medical or psychiatric), a public institution that accommodates more than 25 children, or a facility operated primarily for the detention of children who are determined to be delinquent. This is consistent with policy guidance clarified in ACYF–CB–PA–01–02 and contained in the CWPM at section 8.1D, question 7, which prohibits a State agency's administrative cost claims on behalf of a child who is placed in an ineligible facility and CWPM section 8.1B, question 12, which prohibits administrative cost claims on behalf of a child placed in a public institution that accommodates more than 25 children.

A State agency may claim title IV–E administrative costs for the administration of the Federal title IV–E foster care program on behalf of an eligible child during the time the child is in a licensed or approved title IV–E foster care facility. The statute, at section 472(c)(2), expressly excludes from eligible title IV–E placement settings detention facilities, forestry camps, training schools, public institutions that accommodate more than 25 children and facilities that are primarily for the detention of children who are determined to be delinquent. Except as proposed in 1356.60(c)(5), a child who is placed in such a facility is not eligible under title IV–E and the State agency, therefore, may not claim FFP for foster care maintenance or administrative payments for such a child. Similarly, a child who is placed in a psychiatric hospital is not eligible for title IV–E. The State agency, therefore, may not claim FFP for foster care maintenance or administrative payments for such a child, except as proposed in 1356.60(c)(5), because psychiatric hospitals are not foster family homes or child-care institutions.

A child who is placed in the aforementioned facilities cannot be considered a ''candidate'' for title IV–E foster care because the child has been removed from his/her home and placed into some alternative care setting. The statute does not set forth separate eligibility criteria for title IV–E administrative cost claims nor does it allow ACF to disregard one or more of the eligibility criteria in section 472 of the Act in order to permit State agencies to claim title IV–E administrative costs. The requirements of section 472(c) of the Act apply to both administrative costs and foster care maintenance payments. A child must, therefore, satisfy all statutorily prescribed eligibility criteria to be eligible for either title IV–E foster care maintenance payments or title IV–E administrative funds.

We propose to re-designate § 1356.60(c)(3) as (c)(4).

Section 1356.60(c)(5) Administrative Cost Claims for a Child in an Ineligible Facility: An Exception

In new paragraph 1356.60(c)(5), we propose an exception to the general provision at proposed new paragraph 1356.60(c)(3). Proposed new paragraph (c)(5) permits a State agency to claim title IV–E administrative costs for up to one calendar month on behalf of a child in an ineligible facility such as a detention center, a hospital (medical or psychiatric), a public institution that accommodates more than 25 children, or a facility operated primarily for the detention of children who are determined to be delinquent. The one month exception is designed to ensure the child's continuity of care as the child transitions into a licensed foster family home or child care institution.

Following the release of ACYF–CB–PA–01–02, we learned that many State agencies considered an otherwise eligible child placed in an *ineligible* facility for whom the plan was placement into or return to title IV–E foster care as a title IV–E foster care ''candidate'' and were claiming title IV–E administrative costs accordingly. A child who is placed in an ineligible facility cannot be considered a ''candidate'' for title IV–E foster care. We agree that title IV–E administrative funds should be available for such a child for a limited period of time to ensure continuity of care as the child transitions into a licensed foster family home or child care institution. However, one month is a sufficient period of time for the State agency to develop or update the child's case plan, identify the appropriate placement, and make referrals to any necessary supportive

services. This continuity of care payment may be applied at any time a child experiences a brief disruption in title IV–E foster care, such as a short-term hospitalization. A State agency must apply this exception retroactively, after the child has been placed in or returned to an eligible facility.

Allowing State agencies to claim administrative costs for up to one calendar month prior to the child's placement into or return to title IV–E foster care is good child welfare practice because it allows the child welfare worker to adequately prepare for the child's transition from the ineligible placement into a foster care setting. Furthermore, it is consistent with the effective and efficient administration of the program pursuant to section 474(a)(3) of the Act because it encourages State agencies to ensure that a child is placed in the most appropriate, least restrictive placement available consistent with his/her needs. Moreover, it is consistent with the Federal Adoption and Foster Care Analysis and Reporting System (AFCARS) policy at section 1.2B.7, question 21 of the CWPM that instructs State agencies not to count brief disruptions in a title IV–E foster care placement of the type described above as a change in placement.

Section 1356.60(c)(6) Administrative Cost Claims for a Child in an Unlicensed Foster Family Home

In new paragraph (c)(6), we propose that a State agency may not claim title IV–E administrative costs on behalf of a child placed in an unlicensed foster family home. However, we make an exception to allow State agencies to claim administrative costs on behalf of a child placed in the unlicensed home of a relative while the State agency is in the process of licensing that home in accordance with its standard procedures. If the State agency does not license the relative's home within its standard time frame, the State agency must discontinue all claims for administrative costs incurred on behalf of the child until such time as it licenses the home.

Making this exception for a relative foster family home is in keeping with section 471(a)(19) of the Act that requires State agencies to consider giving relatives preference when making placement decisions. The statutory requirements for State agencies to consider giving relatives preference in making placement decisions on the one hand, and to place children in licensed foster family homes on the other hand, create competing priorities for State agencies. We have attempted to harmonize these two provisions by permitting State agencies to claim title IV–E administrative costs, but not title IV–E foster care maintenance payments, on behalf of a child placed in an unlicensed related foster family home while the home is in the process of being licensed.

This is a reasonable exception because a State agency may have access to several licensed, unrelated foster family homes in which to immediately place a child who enters foster care, but no similar readily available pool of licensed relative homes. For this reason, this exception does not apply to children placed in the unlicensed homes of non-relatives.

We considered proposing a specific time limit for how long a State agency may claim administrative costs on behalf of a child in the unlicensed home of a relative. Specifically, we considered requiring State agencies to license the relative within 6 months of the child's placement or ceasing administrative cost claims for the child. We struggled, however, with the following challenges to doing so: (1) It is inconsistent with section 471(a)(10) of the Act, in which State agencies are vested with the authority to establish licensing standards for foster family homes; (2) The length of time it customarily takes to license a foster home varies from State to State and often within a State. For example, in rural areas, the necessary foster parent training may not be offered as frequently as in urban areas; (3) Some State agencies have procedures in place to expedite licensing of relative foster family homes. We do not want to create a disincentive for State agencies to follow the procedures they have in place by establishing a Federal timeframe that is longer than a State agency's licensing process; and (4) Conversely, we do not want to set a time limit that encourages a State agency to accelerate the licensing process and inadvertently creates safety concerns for children.

Our ultimate goal is to ensure that children are placed and sustained in appropriate and safe settings. We are, therefore, proposing to continue our policy as stated in ACYF–CB–PA–01–02 that allows a State agency to claim the administrative costs for children in the unlicensed home of relatives during the standard time frame for licensing foster family homes in that State. We are particularly interested in public comments on this section of the proposed rule.

Section 1356.60(c)(7) State Agency Authority and Responsibility To Make Title IV–E Foster Care Eligibility and Candidacy Determinations and Re-Determinations

In new paragraph (c)(7), we propose adding language that establishes the State agency's authority and responsibility for conducting determinations and re-determinations of title IV–E foster care eligibility and foster care candidacy.

The regulations at 45 CFR 1355.30(p)(4) which cross reference to 45 CFR 205.100, require that officials of the State agency perform administrative functions that require the exercise of discretion and do not permit the State agency to delegate such functions. Under long-standing Departmental policy that originates with the 1939 amendments to the Act, the determination of an individual's eligibility for a Federal entitlement is considered an inherently governmental function that requires the exercise of discretion. The determination of eligibility is fundamental to the administration of an entitlement program because it is the basis for the flow of funds. A determination of title IV–E foster care candidacy is a type of eligibility determination because title IV–E funds are expended as the result of this determination.

We propose in paragraph (c)(7)(i) that the title IV–E agency or other public agency that has entered into an agreement with the title IV–E agency pursuant to section 472(a)(2) of the Act re-determine title IV–E foster care eligibility every 12 months, consistent with policy guidance at section 8.3A.10, question 1 of the CWPM. The State agency should review and document factors subject to change, such as continued deprivation of parental support and care of the child and the child's financial need. We propose to regulate the 12-month timeframe for re-determinations of foster care eligibility to take the opportunity to propose a more comprehensive approach to eligibility determinations in general.

Similarly, we propose in paragraph (c)(7)(ii) that the title IV–E agency or other public agency that has entered into an agreement with the title IV–E agency pursuant to section 472(a)(2) of the Act re-determine eligibility for title IV–E foster care candidacy every six months. This is consistent with section 8.1D, question 5 of the CWPM, which requires a State to document its justification for retaining a child in ''candidate'' status for longer than six months. We propose to regulate the timeframe for candidacy re-

determinations in response to numerous comments from States and other interested parties who objected to our issuing policy clarifications in ACYF–CB–PA–01–02 without providing an opportunity for public comment.

Given the many contingencies that may arise in a particular case, we have not set a maximum time for which a child may be a ''candidate''; however, if a child continues in such status for more than six months, the State agency must confirm that the child is still at serious risk of removal but safe enough to remain in the home. A child who is a ''candidate'' must be at serious risk of removal from the home, so that the status of ''candidate'' is necessarily a temporary one; either the risk to the child will be alleviated or the necessity for removal will become clear and the child will be removed.

Good child welfare practice suggests, in light of the goals of both safety and permanency, that a child should not remain a ''candidate'' indefinitely. This proposed policy is also consistent with several Departmental Appeals Board (DAB) Decisions, which make clear that the basic purpose of the title IV–E program is to fund foster care maintenance payments for children who are eligible for the former Aid to Families with Dependent Children program and who must be placed in foster care. For example, in DAB Decision 1783, issued August 29, 2001, the DAB stated that we must be ''mindful of the purpose of the IV–E program and the limited authorization in the statute and regulations for title IV–E funding for administrative activities on behalf of children prior to their actual placement in foster care.'' The DAB in that decision further clarified that ''[t]he Act and the regulations contemplate only very limited funding under the IV–E program for administrative activities on behalf of children who have not yet been placed in foster care.''

We propose in paragraph (c)(7)(iii) to specify the limits of the role of contract personnel in completing the steps necessary for an eligibility determination. Specifically, the State agency may permit contract personnel to gather the necessary documentation, prepare the case plan, complete the steps necessary for an eligibility determination, and make a recommendation to the State agency about a child's eligibility for title IV–E foster care or foster care candidacy.

The State agency, however, must actually make and document the final determination of eligibility for title IV–E foster care or eligibility for foster care candidacy. We felt it was necessary to clarify these roles in regulation to ensure that State agencies and contractors are clear on their roles in the foster care eligibility determination process and the foster care candidacy determination process.

IV. Impact Analysis

Executive Order 12866

Executive Order 12866 requires that regulations be drafted to ensure that they are consistent with the priorities and principles set forth in the Executive Order. The Department has determined that this proposed rule is consistent with these priorities and principles. This rule is considered a ''significant regulatory action'' under 3(f) of the Executive Order and therefore has been reviewed by the Office of Management and Budget.

We believe the majority of States have implemented the policy on children in unlicensed relative foster family homes correctly. In fact, when policy announcement ACYF–CB–PA–01–02 was issued in 2001, we were surprised by the reaction of some State agencies to the policy clarification. We were unaware of the extent to which State agencies were operating under an expansive interpretation of the policy. Therefore, our cost estimates reflect our best assessment of the number of States that are currently employing this more expansive policy interpretation. Based on available data we estimate that this policy clarification will result in a reduction of Federal reimbursement to those States that are claiming inappropriate administrative expenses ranging from approximately $65–$78 million in FY 2006 and increasing to approximately $75–$88 million by FY 2009.

We developed these costs estimates using data gathered through informal surveys conducted by the American Public Human Services Association (APHSA) and ACF regional offices. Specifically, in an informal survey conducted by ACF, 24 States indicated that this policy would have a financial impact ranging from $200,000 per year at the low end to $79 million at the high end. In addition, 15 States indicated that there would be little or no financial impact and two States were uncertain whether there would be any impact. In a second survey conducted by APHSA 16 States responded, with five reporting no anticipated impact, one reporting uncertain impact, and the remaining 10 States reporting very wide ranging impacts. Eight of these States estimated financial impact in the range of $80,000 to $20 million in reduced Federal funding and the remaining two States estimated that the impact could be as high as $21 million to $100 million.

Based on the response to these surveys we assumed that approximately 20–25 States would be impacted to some extent by the policy clarification contained in this proposed rule. It was more challenging to determine the total financial impact on States given the wide ranges reported by some States and the lack of clarity regarding how the States developed their estimates.

Given this uncertainty we were extremely cautious in developing these costs estimates. In addition to these data concerns, there are other mitigating circumstances that could result in increased Federal administrative and maintenance payment reimbursements which would offset the potential financial impact on States. The primary mitigating factor turns on a State's ultimate decision regarding the licensing of relative homes when final regulations are published in the **Federal Register**. We would expect that States will move in the direction of licensing relative foster care homes, the most beneficial outcome for foster care children resulting from this regulatory change. States choosing this option will then be able to claim both Federal reimbursement for administrative costs as well as maintenance payments for children in these newly licensed homes. In addition to the positive programmatic outcome of this policy shift, we have observed an increasing propensity on the part of States to move in the direction of licensing relative foster care homes. This trend is supported by Federal policy that eases licensing requirements for relative foster care homes while ensuring that children are in safe and stable environments.

In addition, this regulatory document contains two provisions that may impact States ability to claim Federal reimbursement for administrative costs, thereby reducing the impact cited in our cost estimates and those estimates originally submitted by the States. First, we have proposed that States be allowed to claim Federal financial participation during the period of time in which it takes to license a relative foster family home. Licensing authority is vested with the States so the time frame in which licensing occurs varies from State to State. Second, we have proposed that States be allowed to claim one month of administrative costs for children who are transitioning between allowable and unallowable facilities, such as placement in a hospital to address medical issues. This added flexibility should provide much needed relief to States and offers a reasonable approach

to address short term shifts in placements for foster care children.

We especially welcome comments on our cost estimates and the other mitigating circumstances that could impact Federal reimbursement to States. We urge States to consider the interaction of these factors as they review the proposed regulatory changes. We will carefully consider these comments as we finalize the regulations.

Regulatory Flexibility Analysis

The Secretary certifies under 5 U.S.C. 605(b), as enacted by the Regulatory Flexibility Act (Pub. L. 96–354), that this rule will not result in a significant impact on a substantial number of small entities. This proposed rule does not affect small entities because it is applicable only to State agencies that administer child and family services programs and the title IV–E foster care program.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act (Pub. L. 104–4) requires agencies to prepare an assessment of anticipated costs and benefits before proposing any rule that may result in an annual expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation). We have determined that this rule will not have an impact of $100,000,000 or more in any one year.

Paperwork Reduction Act

Under the Paperwork Reduction Act (Pub. L. 104–13), all Departments are required to submit to the Office of Management and Budget (OMB) for review and approval any reporting or record-keeping requirements inherent in a proposed or final rule. This NPRM contains information collection requirements in sections 1356.60(c)(7)(i) and (ii) which the Department has submitted to OMB for its review. The respondents to the information collection in this proposed rule are State agencies. The Department must require this collection of information to ensure State agencies are properly claiming title IV–E maintenance payments and administrative costs for the appropriate children. Re-determinations of title IV–E foster care eligibility must be conducted every 12 months for children in title IV–E foster care and every six months for ''candidates'' for title IV–E foster care.

The following are estimates:

Instrument	Number of respondents	Number of responses per respondent annually	Average burden hours per response (hours)	Total annual burden (hours)
Title IV–E foster care eligibility re-determination	264,670	1	0.5	132,335
Title IV–E foster care candidacy re-determination	144,600	2	0.5	144,600

Title IV–E Foster Care Eligibility Re-Determination—There were 264,670 children in title IV–E foster care in FY 2002. We estimate each title IV–E foster care eligibility re-determination will take approximately one-half hour and that there will be one per year. Therefore, we estimate the total number of respondents to be 264,670 for title IV–E eligibility re-determinations. The total annual burden in hours will be 132,335 (264,670 multiplied by 0.5 hours).

Title IV–E Foster Care Candidacy Re-Determination—Using State administrative cost claiming data for title IV-E foster care for FY 2002, we estimate the number of foster care ''candidates'' to be 144,600. We estimate each title IV–E foster care candidacy re-determination will take approximately one-half hour and there will be two per year. Therefore, we estimate the total annual burden hours for title IV–E foster care candidacy re-determinations to be 144,600 hours per year (144,600 multiplied by 1.0).

OMB is required to make a decision concerning the collection of information contained in this proposed regulation between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment to the Department on the proposed regulations. Written comments to OMB on the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, 725 17th Street, NW., Washington DC 20503, Attention: Desk Officer for the Administration for Children and Families.

Congressional Review

This regulation is not a major rule as defined in 5 U.S.C. Chapter 8.

Assessment of Federal Regulations on Policies and Families

Section 654 of the Treasury and General Government Appropriations Act of 1999 requires Federal agencies to determine whether a proposed policy or regulation may affect family wellbeing. If the agency's determination is affirmative, then the agency must prepare an impact assessment addressing criteria specified in the law. These regulations will not have an impact on family wellbeing as defined in the legislation.

Executive Order 13132

Executive Order 13132 on Federalism requires that Federal agencies consult with State and local government officials in the development of regulatory policies with Federal implications. Consistent with Executive Order 13132, we specifically solicit comment from State and local government officials on this proposed rule.

List of Subjects in 45 CFR Part 1356

Adoption and Foster Care.

(Catalog of Federal Domestic Assistance Program Number 93, 658, Foster Care Maintenance)

Wade F. Horn,

Assistant Secretary for Children and Families.

Approved: July 21, 2004.

Tommy G. Thompson,

Secretary.

Editorial Note: This document was received at the Office of the Federal Register January 19, 2005.

For the reasons set forth in the preamble, we propose to amend 45 CFR 1356.60 as follows:

PART 1356—REQUIREMENTS APPLICABLE TO TITLE IV–E

1. The authority citation for part 1356 continues to read as follows:

Authority: 42 U.S.C. 620 *et seq.*, 42 U.S.C. 670 *et seq.*, and 42 U.S.C. 1302.

2. We propose to amend § 1356.60 to re-designate paragraph (c)(3) as paragraph (c)(4), and add new paragraphs (c)(3), (5), (6) and (7) as follows:

§ 1356.60 Fiscal requirements (title IV–E).

* * * * *

(c) * * *

(3) Subject to the exception in paragraph (c)(5) of this section, a State agency may not claim FFP as an allowable administrative cost on behalf of a child placed in an ineligible facility, including but not limited to the following facilities: a detention center, a hospital (medical or psychiatric), a public institution that accommodates more than 25 children, or a facility operated primarily for the detention of children who are determined to be delinquent.

(4) * * *

(5) Notwithstanding paragraph (c)(3) of this section, a State agency may claim administrative costs for up to one calendar month on behalf of a child in an ineligible facility, including but not limited to the following facilities: a detention center, a hospital (medical or psychiatric), a public institution that accommodates more than 25 children, or a facility operated primarily for the detention of children who are determined to be delinquent as the child transitions into a licensed foster family home or child care institution. The claims must be submitted after the child is in an eligible placement.

(6) Allowable administrative costs do not include costs claimed on behalf of a child placed in an unlicensed foster family home. Exception: A State agency may claim such costs on behalf of a child placed in an unlicensed relative foster family home while it is in the process of licensing that home in accordance with its standard procedures for licensing foster family homes. If the State agency does not license the foster family home within its standard time frame, the State agency must discontinue administrative cost claims on behalf of the child.

(7) Determinations of title IV–E foster care eligibility and foster care candidacy must be performed by an employee of the title IV–E State agency or an employee of another public agency that has entered into an agreement with the title IV–E State agency pursuant to section 472(a)(2) of the Act.

(i) The State agency must re-determine title IV–E foster care eligibility every 12 months.

(ii) The State agency must re-determine title IV–E foster care candidacy every 6 months.

(iii) Contract personnel may gather the necessary documentation, prepare the case plan, complete the steps necessary for an eligibility determination, and make a recommendation to the State agency about a child's eligibility for title IV–E foster care or foster care candidacy.

* * * * *

[FR Doc. 05–1307 Filed 1–28–05; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 050112008–5008–01; I.D. 010605E]

RIN 0648–AS23

Fisheries of the Northeastern United States; Atlantic Herring Fishery

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

ACTION: Proposed 2005 specifications for the Atlantic herring fishery; request for comments.

SUMMARY: NMFS proposes specifications for the 2005 Atlantic herring fishery, which would be maintained through 2006 unless stock and fishery conditions change substantially. The regulations for the Atlantic herring fishery require NMFS to publish specifications for the upcoming year and to provide an opportunity for public comment. The intent of the specifications is to conserve and manage the Atlantic herring resource and provide for a sustainable fishery. NMFS also proposes one clarification to the Atlantic herring regulations, which would remove references to the dates on which the proposed and final rules for the annual specifications must be published.

DATES: Comments must be received no later than 5 p.m., Eastern Standard Time, on March 2, 2005.

ADDRESSES: Copies of supporting documents, including the Environmental Assessment, Regulatory Impact Review, Initial Regulatory Flexibility Analysis (EA/RIR/IRFA), and Essential Fish Habitat Assessment are available from Paul J. Howard, Executive Director, New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950. The EA/RIR/IRFA is accessible via the Internet at *http:/www.nero.gov*.

Written comments on the proposed specifications should be sent to Patricia A. Kurkul, Regional Administrator, National Marine Fisheries Service, 1 Blackburn Drive, Gloucester, MA 01930. Mark on the outside of the envelope: ''Comments–2005 Herring Specifications.'' Comments may also be sent via facsimile (fax) to 978–281–9135. Comments on the specifications may be submitted by e-mail as well. The mailbox address for providing e-mail comments is *Herr2005Specs@noaa.gov*. Include in the subject line of the e-mail comment the following document identifier: ''Comments–2005 Herring Specifications.'' Comments may also be submitted electronically through the Federal e-Rulemaking portal: *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Eric Jay Dolin, Fishery Policy Analyst, 978–281–9259, e-mail at *eric.dolin@noaa.gov*, fax at 978–281–9135.

SUPPLEMENTARY INFORMATION:

Background

Regulations implementing the Atlantic Herring Fishery Management Plan (FMP) require the New England Fishery Management Council's (Council) Atlantic Herring Plan Development Team (PDT) to meet at least annually, no later than July each year, with the Atlantic States Marine Fisheries Commission's (Commission) Atlantic Herring Plan Review Team (PRT) to develop and recommend the following specifications for consideration by the Council's Atlantic Herring Oversight Committee: Allowable biological catch (ABC), optimum yield (OY), domestic annual harvest (DAH), domestic annual processing (DAP), total foreign processing (JVPt), joint venture processing (JVP), internal waters processing (IWP), U.S. at-sea processing (USAP), border transfer (BT), total allowable level of foreign fishing (TALFF), and reserve (if any). The PDT and PRT also recommend the total allowable catch (TAC) for each management area and subarea identified in the FMP. As the basis for its recommendations, the PDT reviews available data pertaining to: Commercial and recreational catch; current estimates of fishing mortality; stock status; recent estimates of recruitment; virtual population analysis results and other estimates of stock size; sea sampling and trawl survey data or, if sea sampling data are unavailable, length frequency information from trawl surveys; impact of other fisheries on herring mortality; and any other relevant information. Recommended specifications are presented to the Council for adoption and recommendation to NMFS. NMFS reviews the Council recommendation, and may modify it if necessary to insure

that it is consistent with the criteria in the FMP and other applicable laws. After the review of the Council submission, NMFS has modified the following Council recommendations, for reasons detailed below: The Council recommended setting OY at 180,000 mt, DAH at 180,000 mt, DAP at 176,000 mt, USAP at 0, the TAC for Area 2 at 50,000 mt, and the TAC for Area 3 at 60,000 mt.

Proposed 2005 Specifications

NMFS proposes the specifications and Area TACs contained in the following table.

SPECIFICATIONS AND AREA TACS FOR THE 2005 (AND 2006) ATLANTIC HERRING FISHERY

Specification	Proposed Allocation (mt)
ABC	220,000.
OY	150,000.
DAH	150,000.
DAP	146,000.
JVPt	0.
JVP	0.
IWP	0.
USAP	20,000 (Area 2 and 3 only).
BT	4,000.
TALFF	0.
Reserve	0.
TAC - Area 1A	60,000 (January 1 - May 31, landings cannot exceed 6,000).
TAC - Area 1B	10,000.
TAC - Area 2	30,000 (No Reserve).
TAC - Area 3	50,000.

In addition, the Council recommended, and NMFS proposes, to maintain the 2005 specifications for 2006, unless stock and fishery conditions change substantially. The Herring PDT will update and evaluate stock and fishery information during 2005, and the Council and NMFS may determine, based on the review by the Herring PDT, that no adjustments to the specifications are necessary for the 2006 fishing year. Maintaining the specifications for 2 years would provide the Council with an opportunity to complete the development of Amendment 1 to the FMP, which may implement a limited access program for the herring fishery in addition to other management measures, including possible adjustments to the specification process.

NMFS also proposes one change to the Atlantic herring regulations, which would remove references to the dates on which the proposed and final rules for the annual specifications must be published, because it is not necessary to specify these dates in regulatory text. This regulatory language change is a matter of agency procedure and is consistent with previously approved measures.

An ABC of 220,000 mt is proposed, consistent with the MSY proxy recommended in Amendment 1 to the FMP, which is currently being developed. The 220,000 mt proxy recommended in Amendment 1 is intended to be a temporary and precautionary placeholder for MSY until the next stock assessment for the Atlantic herring stock complex is completed. Because of the importance of ABC as a means of determining the other values in the specifications, it is discussed in the specifications, even though it is not a value that is set by the specification process.

The FMP specifies that OY will be less than or equal to ABC minus the expected Canadian catch (C) from the stock complex. The estimate of the Canadian catch that is deducted from ABC will be no more than 20,000 mt for the New Brunswick weir fishery and no more than 10,000 mt for the Georges Bank fishery. With ABC set at 220,000, OY could be less than or equal to 190,000 mt if the maximum catch is assumed for the Canadian herring fishery. The FMP also states that the establishment of OY will include consideration of relevant economic, social, and ecological factors and that, for this reason, OY may be less than ABC C. In addition, the Herring PDT recommended that OY be specified at a level lower than ABC for biological and ecological reasons.

The Council recommended that the OY and the DAH for the 2005 Atlantic herring fishery be set at 180,000 mt. The determination of OY was based, in part, on meeting the FMP objectives of increasing economic benefits to the U.S. fishing industry through the expansion of U.S. herring into the world market. If OY were set at a higher level, it could result in TALFF, which is that portion of the OY of a fishery that will not be harvested by vessels of the United States. While NMFS agrees that there are legitimate and legally defensible reasons to set the OY at a level that can be harvested by the domestic fleet and that would thereby preclude the specification of a TALFF, NMFS does not find that the Council's analysis justifies the levels of OY and DAH that it recommended.

The allocation of TALFF would allow foreign vessels to harvest U.S. fish and sell their product on the world market, in direct competition with the U.S. industry. The Council expressed its concern, supported by industry testimony, that an allocation of TALFF would threaten the expansion of the domestic industry. The economic benefits to the Nation from TALFF activity are limited to the payment of poundage fees. However, the Council's analysis also makes it clear that, despite the loss of poundage fees resulting from zero TALFF, the expansion of the U.S. industry would generate potential long-term economic benefits for U.S. Atlantic herring harvesters and processors that would outweigh that loss. For these reasons, the Council concluded, and NMFS agrees, that the specification of an OY at a level that can be fully harvested by the domestic fleet, thereby precluding the specification of a TALFF, will assist the U.S. Atlantic herring industry to expand and will yield positive social and economic benefits to U.S. harvesters and processors. NMFS, therefore, proposes that OY be specified at 150,000 mt.

The Council recommended that DAH be set at 180,000 mt. NMFS believes that this is too high for a number of reasons. First, the Council proposal presumes a dramatic increase in landings that is not justified in the Council's submission. From 1996–2003, herring landings averaged 102,000 mt. The highest level of landings in recent years was in 2001, when they reached 121,332 mt. To justify a DAH of 180,000, one would have to assume a roughly 80–percent increase in DAH as compared to average landings in recent years, and a 50–percent increase in DAH as compared to the highest year in the series. NMFS proposes setting DAH at 150,000 mt. This would allow a 23–percent increase in landings as compared to 2001, and would, therefore, better reflect fishery performance in recent years, while at the same time giving the fishery an opportunity to expand. Given the trends in landings, and the industry's testimony that the fishery is poised for significant growth, NMFS concludes that it is reasonable to assume that in 2005 the commercial fishery will harvest 150,000 mt of herring.

The Council's recommendation for TACs assumed an OY of 180,000 mt. With the OY being set at 150,000 mt, the proposed TACs, too, have to be modified. While the proposed Area 1A and 1B TACs would remain the same as they were in 2004, NMFS proposes reducing the Area 2 TAC from 50,000 mt to 30,000 mt, and the Area 3 TAC from 60,000 mt to 50,000 mt. These area allocations are intended to permit the fishery to increase landings above the highest levels achieved in recent years. The highest recent landings in Area 2 were 27,198 mt in 2000; thus, the allocation would allow the fishery to slightly exceed that level. The highest recent landings in Area 3 were 35,079 mt in 2001; thus, the allocation would

allow the fishery to exceed that level by a considerable amount because this is the area most likely to see expanded harvests.

The regulations, at § 648.200(e), allow for inseason adjustments of the herring specifications. Thus, if the herring fishery during the 2005 or the 2006 fishing year expands more than anticipated, the OY, the DAH, the DAP, and the area TACs could be increased to enable the fishery to perform to its fullest potential. Such increases would be constrained by the analysis that the Council included in this year's specification recommendations. That means that DAH and OY could be increased to a maximum of 180,000 mt, the DAP could be increased to a maximum of 176,000 mt, and the Area 2 TAC and the Area 3 TAC could be increased to 50,000 mt and 60,000 mt, respectively, which are the highest levels that the Council originally recommended and analyzed for each of these measures. NMFS invites the public to comment on the potential use of the inseason adjustment mechanism to set new levels for DAH, DAP, OY, and area TACs during the 2005 fishing year, should such changes be warranted based on the performance of the fishery. More specifically, NMFS invites the public to comment on the appropriateness of potentially increasing DAH and OY up to the maximum level of 180,000 mt, and the Area 2 TAC and the Area 3 TAC to 50,000 mt and 60,000 mt, respectively, through the inseason adjustment mechanism.

The Council argued that DAP equals 176,000 mt, and NMFS found its argument that current processing capacity is capable of handling that volume of fish persuasive. However, for the purposes of these specifications, DAP is determined not only by capability to process but also by whether domestic processors will utilize such capacity. Since DAH is proposed to be set at 150,000 mt (of which 4,000 mt would be allocated for BT), DAP would be limited to 146,000 mt. It is certainly possible, given the capacity of the current harvesting fleet, the potential for market expansion to occur, and the expressed intent (made clear through public testimony) of the U.S. industry to increase its participation in the Atlantic herring fishery, that processors will utilize the recommended DAP. Because the Council's recommended DAP is sufficient to process the entire DAH (minus the BT), the Council and NMFS proposes setting JVP at zero. Future JV operations would likely compete with U.S. processors for product, which could have a substantial negative impact on domestic facilities in a market-driven fishery. This is consistent with the following relationship, which is specified in the FMP: DAH = DAP + JVPt + BT.

The Council recommended setting USAP at zero, arguing that current shoreside capacity is sufficient to process U.S. landings, therefore eliminating the need for alternative processing capacity (USAP). The Council also argued that the FMP provides discretion to favor certain segments of the processing industry, and that to allow USAP would economically hurt shoreside processors/communities. The Council expressed concern that, once utilized, USAP allocations would become permanent. Finally, the Council argued that the fact that there was USAP allocated from 2000–2004 that was not used demonstrates that there is no interest in USAP.

NMFS believes that the Council's rationale for setting USAP at zero is insufficient because it would favor one segment of the U.S. processing sector over another, without any justifiable reasons based on conservation objectives. On average, large amounts of the TAC in Areas 2 and 3 (where USAP was authorized in previous years) have not been taken each year. During the development of the specifications, at least one industry member expressed interest in pursuing USAP operations in 2005. When the Council discussed the possibility of allocating 10,000 mt to USAP, this individual stated that USAP operations would not be feasible at that level. For these reasons, NMFS proposes setting USAP at 20,000 mt in Areas 2 and 3 only. USAP could provide an additional outlet for harvesters and, therefore, increase the benefits to the U.S. industry. As for the Council's concern that USAPs will become permanent, there is no basis for this concern. The specification process allows the Council to modify its recommendations in the future, provided there is justification.

Classification

This action is authorized by 50 CFR part 648 and has been determined to be not significant for purposes of Executive Order 12866.

The Council prepared an IRFA, as required by section 603 of the Regulatory Flexibility Act, which describes the economic impacts this proposed rule, if adopted, would have on small entities. A copy of the IRFA can be obtained from the Council or NMFS (see **ADDRESSES**) or via the Internet at *http:/www.nero.noaa.gov*. A summary of the analysis follows:

Statement of Objective and Need

A description of the reasons why this action is being considered, and the objectives of and legal basis for this action, is contained in the preamble to this proposed rule and is not repeated here.

Description and Estimate of Number of Small Entities to Which the Rule Will Apply

During the 2003 fishing year, 154 vessels landed herring, 38 of which averaged more than 2,000 lb (907 kg) of herring per trip. There are no large entities, as defined in section 601 of the RFA, participating in this fishery. Therefore, there are no disproportionate economic impacts between large and small entities.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

This action does not contain any new collection-of-information, reporting, recordkeeping, or other compliance requirements. It does not duplicate, overlap, or conflict with any other Federal rules.

Minimizing Significant Economic Impacts on Small Entities

Impacts were assessed by the Council and NMFS by comparing the proposed measures to the Atlantic herring landings made in 2003. The proposed specifications are not expected to produce a negative economic impact to vessels prosecuting the fishery because, while it reduces the current (2003/2004) TACs for herring in Areas 2 and 3 (while keeping Areas 1A and 1B the same), it still allows for landings levels that are significantly higher than the average landings achieved by the fishery in recent years. The proposed 2005 specifications should allow for incremental growth in the industry, while taking into consideration biological uncertainty.

The specification of 150,000 mt for OY and DAH is proposed for the 2005 fishery, and for the 2006 fishery if stock and/or fishery conditions do not change significantly during 2005. At this level, there could be an increase of up to 50,000 mt in herring landings, or $7,150,000 in revenues, based on a market price of $143/mt. This could allow individual vessels to increase their profitability under the proposed 2005 specifications, depending on whether or not new vessels enter the fishery (the herring fishery will remain an open-access fishery for the 2005

fishing year). The magnitude of economic impacts related to the 146,000–mt specification of DAP will depend on the shoreside processing sector's ability to expand markets and increase capacity to handle larger amounts of herring during 2005 and 2006.

The potential loss associated with eliminating the JVPt allocation (20,000 mt for 2003 and 2004) could approximate $2.9 million (based on an average price of $143/mt) if all of the 20,000–mt allocation would have been utilized (10,000 mt for JVP and 10,000 mt for IWP). However, very little of the 10,000–mt JVP allocation was utilized in 2002 and 2003 and, as of August 2004, no JVP activity for herring had occurred during the 2004 fishing year. The Council received no indication that demand for the JVP allocation will increase in 2005 and 2006. As a result, no substantial economic impacts are expected from reducing the JVP allocation to 0 mt in 2005 and possibly 2006, as vessels that sold fish in the past to JV processor vessels could sell to U.S. processors.

The Area 1A and 1B TACs of 60,000 and 10,000 mt, respectively, have been unchanged since the 2000 fishery. In 2002 and 2003, the Area 1A TAC for the directed herring fishery was fully utilized and is expected to be fully utilized for the 2005 fishery. Therefore, no change is expected in profitability of vessels from the 2005 Area 1A specification. Since only 4,917 mt of herring were harvested in Area 1B in 2003, the proposed 2005 specification of 10,000 mt should allow for increased economic benefits to individual vessels prosecuting the fishery in this management area. The potential economic gains associated with allocating 20,000 mt for USAP could approximate $2.9 million (based on an average price of $143/mt) if all of the 20,000–mt allocation were utilized in 2005.

The Council analyzed four alternatives for OY and the distribution of TACs. One alternative would have retained the specifications implemented during the 2003 and 2004 fishing years, which would have maintained the OY at 180,000 mt. This OY is still roughly 80 percent greater than the average historical landings for this fishery, and therefore that level of OY would not pose a constraint on the fishery. The three other alternatives considered by the Council would set the OY at 150,000 mt. Although the OY of 150,000 mt is lower than that proposed by the Council, it is still roughly 50 percent greater than the average historical landings for this fishery, and therefore that level of OY would not pose a constraint on the fishery. Each of the alternatives that would set the OY at 150,000 mt would establish varying levels for the area TACs.

One alternative would have established the following TACs: Area 1A, 60,000 mt; Area 1B, 10,000 mt; Area 2, 20,000 mt; and Area 3, 60,000 mt. The only area TAC that would be lower than 2003/2004 under this option is the Area 2 TAC. The most recent year in which the landings from this area were greater than 20,000 mt (the proposed TAC) was 2000 (27,198 mt). The average landings from 2001 2003 were 14,300 mt with 2003 landings at 16,079 mt. Under current market conditions, the new TAC may become constraining if the fishery in 2005 (and possibly 2006) is similar to that in 2000. If this is the case, then the Area 2 TAC fishing season could end before the end of the year, creating a potential economic constraint on the fishery, especially if vessels are forced to travel farther (increased steaming time) to harvest in Area 3.

Another alternative considered would have established the following TACs: Area 1A, 45,000 mt; Area 1B, 10,000 mt; Area 2, 35,000 mt; and Area 3, 60,000 mt. With a 15,000–mt decrease in the combined Area 1 TACs, the economic impact of this option could be relatively large on vessels in the fishery that depend on herring in Area 1A, especially if those vessels are not able to move to other areas to obtain fish. Even if vessels could fish in other areas, their operating costs would be increased because of increased steaming time. An Area 2 TAC of 35,000 mt proposed under this alternative should not be constraining given recent landings history.

The final alternative considered would have established the following TACs: Area 1A, 55,000 mt; Area 1B, 5,000 mt; Area 2, 30,000 mt; and Area 3, 60,000 mt. With a 10,000–mt decrease in the combined Area 1 TACs, the impact of this alternative would very similar to the impact of the prior alternative, although not as severe. An Area 2 TAC of 30,000 mt proposed under this alternative should not be constraining given recent landings history.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: January 25, 2005.

Rebecca Lent,

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

For the reasons set out above, 50 CFR part 648 is proposed to be amended as follows:

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

1. The authority citation for part 648 continues to read as follows:

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

2. In § 648.200, paragraphs (c) and (d) are revised to read as follows:

§ 648.200 Specifications.

* * * * *

(c) The Atlantic Herring Oversight Committee shall review the recommendations of the PDT and shall consult with the Commission's Herring Section. Based on these recommendations and any public comment received, the Herring Oversight Committee shall recommend to the Council appropriate specifications. The Council shall review these recommendations and, after considering public comment, shall recommend appropriate specifications to NMFS. NMFS shall review the recommendations, consider any comments received from the Commission and shall publish notification in the **Federal Register** proposing specifications and providing a 30–day public comment period. If the proposed specifications differ from those recommended by the Council, the reasons for any differences shall be clearly stated and the revised specifications must satisfy the criteria set forth in this section.

(d) NMFS shall make a final determination concerning the specifications for Atlantic herring. Notification of the final specifications and responses to public comments shall be published in the **Federal Register**. If the final specification amounts differ from those recommended by the Council, the reason(s) for the difference(s) must be clearly stated and the revised specifications must be consistent with the criteria set forth in paragraph (b) of this section. The previous year's specifications shall remain effective unless revised through the specification process. NMFS shall issue notification in the **Federal Register** if the previous year's specifications will not be changed.

* * * * *

[FR Doc. 05–1744 Filed 1–28–05; 8:45 am]

BILLING CODE 3510–22–S

Notices

Federal Register

Vol. 70, No. 19

Monday, January 31, 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 25, 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.

Cooperative State Research, Education, and Extension Service

Title: Children, Youth, and Families at Risk (CYFAR) Year EndReport.

OMB Control Number: 0524–NEW.

Summary of Collection: The Children, Youth, and Families at Risk (CYFAR) funding program supports community-based programs serving children, youth, and families in at risk environments. CYFAR funds are intended to support the development of high quality, effective programs based on research and to document the impact of these programs on intended audiences. The CYFAR Year End Report collects demographic and impact data from each community site, which is used by the Cooperative State Research, Education, and Extension Service (CSREES). Funding for the CYFAR is authorized under section 3(d) of the Smith-Lever Act (7 U.S.C. 341 *et seq.*), as amended and other relevant authorizing legislation, which provides jurisdictional basis for the establishment and operation of extension educational work for the benefit of youth and families in communities.

Need and Use of the Information: The CYFAR data is used to respond to requests for impact information from Congress, the White House, and other Federal agencies. Data from the CYFAR annual reports is used to refine and improve program focus and effectiveness. If this information were not collected CSREES would not be able to verify if CYFAR programs are reaching at risk, low-income audiences.

Description of Respondents: State, Local or Tribal Government.

Number of Respondents: 50.

Frequency of Responses: Reporting: Annually.

Total Burden Hours: 16,100.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 05–1674 Filed 1–28–05; 8:45 am]

BILLING CODE 3410–09–P

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

[Docket No. 04–027N]

FSIS Policy on Delinquent Payments for Voluntary Reimbursable Inspection Services

AGENCY: Food Safety and Inspection Service (FSIS), USDA.

ACTION: Notice.

SUMMARY: The Food Safety and Inspection Service (FSIS) is providing notice that it will not provide reimbursable voluntary inspection, certification, and identification services to persons who have delinquent accounts. FSIS charges fees for a variety of voluntary reimbursable inspection, certification, and identification services that it provides to official establishments and plants and non-official establishments, *e.g.*, warehouses, importers, and exporters. FSIS is required to recover the costs of the voluntary inspection, certification, and identification services it provides. FSIS will pursue the collection of debts owed to it for such services.

DATES: This notice is effective March 2, 2005.

FOR FURTHER INFORMATION CONTACT: For further information contact Teresa Ramsey, Deputy Director, Financial Management Division, Office of Management, FSIS, U.S. Department of Agriculture, 5601 Sunnyside Avenue, Mail Drop 5262 Beltsville, MD 20705, (301) 504–5885.

SUPPLEMENTARY INFORMATION:

Background

FSIS is providing notice of the actions it will take in regard to its provision of voluntary reimbursable inspection, certification, and identification services to persons who are delinquent in paying for such services. FSIS is authorized to charge fees for the voluntary inspection, certification, and identification services it provides pursuant to the Agricultural Marketing Act of 1946, as amended (7 U.S.C. 1621, *et seq.*). The regulations that currently authorize the charging of these fees are set forth in Title 9 of the Code of Federal Regulations in sections 350.7, 351.8, 351.9, 352.5, 354.100 through 354.110, 355.11, 355.12, 362.5, and part 592.

FSIS provides monthly bills to recipients of inspection, certification,

and identification services. Those bills indicate when payment is due. Payments not received when due are delinquent, thus resulting in the recipient of the services having a delinquent account.

As of the effective date of this notice, if payment for voluntary reimbursable inspection, certification, and identification services, including payment of interest, penalty, and administrative charges, is delinquent, the Agency will take the following actions:

• FSIS will send the recipient of the service a dated ''dunning notice.''

• FSIS will send a certified letter, along with a second dunning notice, to the recipient of the services if the requested payment in full is not received within 30 days of the date of the initial dunning notice. If payment in full is not received by FSIS within 14 days from the date the certified letter and second dunning notice are received, no further voluntary inspection, certification, and identification services will be provided until payment in full of the delinquent debt, including any interest, penalty, and administrative charges assessed, is received.

• If a debtor either fails to make payment in full of a delinquent debt or does not enter into a written repayment agreement with FSIS, the Agency will transfer the delinquent debt to the U.S. Department of the Treasury for cross-servicing in accordance with the Debt Collection Improvement Act of 1996, as amended. At the discretion of the Secretary of the U.S. Department of the Treasury, referral of a delinquent non-tax debt may be made to (A) any executive department or agency operating a debt collection center for collection action; (B) a private collection contractor operating under a contract for servicing or collection action; or (C) the U.S. Department of Justice for litigation.

This notice applies to the provision of reimbursable voluntary inspection, certification, and identification services provided pursuant to the Agricultural Marketing Act of 1946, as amended (7 U.S.C. 1621, *et seq.*) and regulations enacted thereunder.

Additional Public Notification

Public awareness of all segments of rulemaking and policy development is important. Consequently, in an effort to ensure that the public and in particular minorities, women, and persons with disabilities, are aware of this notice, FSIS will announce it on-line through the FSIS Web page located at *http://www.fsis.usda.gov*.

FSIS also will make copies of this **Federal Register** publication available through the FSIS Constituent Update, which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, recalls, and other types of matters that could affect or would be of interest to our constituents and stakeholders. The update is communicated via Listserv, a free e-mail subscription service consisting of industry, trade, and farm groups, consumer interest groups, allied health professionals, scientific professionals, and other individuals who have requested to be included.

The update also is available on the FSIS Web page. Through Listserv and the Web page, FSIS is able to provide information to a much broader, more diverse audience.

In addition, FSIS offers an email subscription service which provides an automatic and customized notification when popular pages are updated, including **Federal Register** publications and related documents. This service is available at *http://www.fsis.usda.gov/news_and_events/email_subscription/* and allows FSIS customers to sign up for subscription options across eight categories. Options range from recalls to export information to regulations, directives and notices. Customers can add or delete subscriptions themselves and have the option to password protect their account.

Done at Washington, DC, on: January 25, 2005.

Barbara J. Masters,

Acting Administrator.

[FR Doc. 05–1703 Filed 1–28–05; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

[Docket No. 04–046N]

Codex Alimentarius Commission: Nineteenth Session of the Codex Committee on Fats and Oils

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Notice of public meeting, request for comments.

SUMMARY: The Office of the Under Secretary for Food Safety, United States Department of Agriculture (USDA), and the Food and Drug Administration (FDA), United States Department of Health and Human Services, are sponsoring a public meeting on February 1, 2005, to provide information and receive public comments on all agenda items that will be discussed at the Nineteenth Session of the Codex Committee on Fats and Oils (CCFO) of the Codex Alimentarius Commission (Codex). The 19th Session of the CCFO will be held in London, United Kingdom, February 21–25, 2005. The Under Secretary and FDA recognize the importance of providing interested parties the opportunity to obtain background information on the agenda items that will be discussed at this forthcoming session of the CCFL.

DATES: The public meeting is scheduled for Tuesday, February 1, 2005 from 10 a.m. to 12 noon.

ADDRESSES: The public meeting will be held in the Room 1A–002, Harvey W. Wiley Federal Building, 5100 Paint Branch Parkway, College Park, MD. Documents related to the 19th Session of the CCFO will be accessible via the World Wide Web at the following address: *http://www.codexalimentarius.net/current.asp*.

FSIS invites interested persons to submit comments on this notice. Comments may be submitted by any of the following methods:

• Mail, including floppy disks or CD–ROMs, and hand-or courier-delivered items: Send to the FSIS Docket Clerk, U.S. Department of Agriculture, Food Safety and Inspection Service, 300 12th Street, SW., Room 102, Cotton Annex, Washington DC 20250–3700. All Comments received must include the Agency name and docket number 04–046N.

All comments submitted in response to this notice, will be available for public inspection in the FSIS Docket Room at the address listed above between 8:30 a.m. and 4:30 p.m., Monday through Friday. The comments also will be posted on the Agency's Web site at *http://www.fsis.usda.gov/regulations/2005_Notices_Index/*.

FOR FURTHER INFORMATION ABOUT THE 19TH SESSION OF THE CCFO CONTACT: U.S. Delegate, Mr. Charles W. Cooper, Director, International Activities Staff, Center for Food Safety and Applied Nutrition, Food and Drug Administration (HFS–585), Harvey W. Wiley Federal Building, 5100 Paint Branch Parkway, College Park, MD 20740–3835, Phone: (301) 436–1714, Fax: (301) 436–2618, Email: *Charles.Cooper@cfsan.fda.gov*.

FOR FURTHER INFORMATION ABOUT THE PUBLIC MEETING CONTACT: Syed Amjad Ali, International Issues Analyst, U.S. Codex Office, FSIS, Room 4861, South Building, 1400 Independence Avenue SW., Washington, DC 20250–3700, Phone: (202) 205–7760, Fax: (202) 720–3157. Persons requiring a sign language interpreter or other special

accommodations should notify the Delegate at the address above.

SUPPLEMENTARY INFORMATION:

Background

The Codex Alimentarius Commission (Codex) was established in 1962 by two United Nations organizations, the Food and Agriculture Organization (FAO) and the World Health Organization (WHO). Codex is the major international standard-setting organization for protecting the health and economic interests of consumers and ensuring fair practices in international trade in food. Through adoption of food standards, codes of practice, and other guidelines developed by its committees, and by promoting their adoption and implementation by governments, Codex seeks to ensure that the world's food supply is sound, wholesome, free from adulteration, and correctly labeled. In the United States, USDA, FDA, and the Environmental Protection Agency (EPA) manage and carry out U.S. Codex activities.

The Codex Committee on Fats and Oils was established to elaborate codes and standards for fats and oils and their products. The Committee is chaired by the United Kingdom.

Issues To Be Discussed at the Public Meeting

The following items on the agenda for the 19th Session of CCFO will be discussed during the public meeting:

1. Matters arising from the Codex Alimentarius Commission and other Codex Committees.
2. Draft Standard for Fat Spreads and Blended Spreads.
3. Consideration of the Linolenic acid level in Section 3.9 of the *Standard for Olive Oils and Olive Pomace Oils*.
4. Proposed Draft Amendments to the *Standard for Named Vegetable Oils* (Rice Bran Oil, Amendment to Sesame Seed Oil).
5. Proposed Draft Revised Table 1 of the *Recommended International Code of Practice for the Storage and Transport of Edible Fats and Oils in Bulk*.
6. Discussion Paper for Criteria for the revision of the *Standard for Named Vegetable Oils*.

Each issue listed will be fully described in documents distributed, or to be distributed, by the United Kingdom Secretariat to the Meeting. Members of the public may access copies of these documents (see **ADDRESSES**).

Public Meeting

At the February 1, 2005 public meeting, these agenda items will be described and discussed, and attendees will have the opportunity to pose questions and offer comments. Written comments may be offered at the meeting or sent to the U.S. Delegate, for the 19th Session of the CCFO, Charles Cooper (See **ADDRESSES**). Written comments should state that they relate to activities of the 19th Session of the CCFO.

Additional Public Information

Public awareness of all segments of rulemaking and policy development is important. Consequently, in an effort to ensure that the public and in particular minorities, women, and persons with disabilities are aware of this notice, FSIS will announce it on-line through the FSIS Web page located at *http://www.fsis.usda.gov*.

FSIS also will make copies of this **Federal Register** publication available through the FSIS Constituent Update, which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meeting, recalls, and other types of information that could affect or would be of interest to our constituents and stakeholders. The update is communicated via Listserv, a free e-mail subscription service consisting of industry, trade, and farm groups, consumer interest groups, allied health professionals, scientific professionals, and other individuals who have requested to be included. The update is available on the FSIS Web page. Through Listserv and the Web page, FSIS is able to provide information to a much broader, more diverse audience.

Done at Washington, DC on: January 25, 2005.

F. Edward Scarbrough,

U.S. Manager for Codex Alimentarius.

[FR Doc. 05–1701 Filed 1–28–05; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

[Docket No. 04–047N]

Codex Alimentarius Commission: Twenty-seventh Session of the Codex Committee on Fish and Fishery Products

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Notice of public meeting, request for comments.

SUMMARY: The Office of the Under Secretary for Food Safety, United States Department of Agriculture (USDA), and the Food and Drug Administration (FDA), United States Department of Health and Human Services, are sponsoring a public meeting on February 9, 2005, to provide information and receive public comments on all agenda items that will be discussed at the Twenty-seventh Session of the Codex Committee on Fish and Fishery Products (CCFFP) of the Codex Alimentarius Commission (Codex). The 27th Session of the CCFFP will be held at the Arabella Sheraton Grand, 1 Lower Long Street, Cape Town, South Africa, February 28–March 4, 2005. The Under Secretary and FDA recognize the importance of providing interested parties the opportunity to obtain background information on the agenda items that will be discussed at this forthcoming session of the CCFFP.

DATES: The public meeting is scheduled for Wednesday, February 9, 2005 from 9 a.m. to 12 noon.

ADDRESSES: The public meeting will be held in Room 2A–047, Harvey W. Wiley Federal Building, 5100 Paint Branch Parkway, College Park, MD. Documents related to the 27th Session of the CCFFP will be accessible via the World Wide Web at the following address: *http://www.codexalimentarius.net/current.asp.*

FSIS invites interested persons to submit comments on this notice. Comments may be submitted by any of the following methods:

- Mail, including floppy disks or CD–ROMs, and hand- or courier-delivered items: Send to the FSIS Docket Clerk, U.S. Department of Agriculture, Food Safety and Inspection Service, 300 12th Street, SW., Room 102, Cotton Annex, Washington, DC 20250–3700. All Comments received must include the Agency name and docket number 04–047N.

All comments submitted in response to this notice, will be available for public inspection in the FSIS Docket Room at the address listed above between 8:30 a.m. and 4:30 p.m., Monday through Friday. The comments also will be posted on the Agency's Web site at *http://www.fsis.usda.gov/regulations/2005 Notices Index/.*

For Further Information About the 33rd Session of the CCFFP Contact: U.S. Delegate, Mr. Philip Spiller, Director, Office of Seafood, Center for Food Safety and Applied Nutrition, Food and Drug Administration, 5100 Paint Branch Parkway, College Park, MD 20740–3835, Phone: (301) 436–2300, Fax: (301) 436–2599, E-mail: *PCS@cfsan.fda.gov.*

For Further Information About the Public Meeting Contact: Syed Amjad Ali, International Issues Analyst, U.S. Codex Office, FSIS, Room 4861, South Building, 1400 Independence Avenue SW., Washington, DC 20250–3700,

Phone: (202) 205–7760, Fax: (202) 720–3157. Persons requiring a sign language interpreter or other special accommodations should notify Ms. Melissa Ellwanger, at telephone (301) 436–1401 or Fax (301) 436–2601.

SUPPLEMENTARY INFORMATION:

Background

The Codex Alimentarius Commission (Codex) was established in 1962 by two United Nations organizations, the Food and Agriculture Organization (FAO) and the World Health Organization (WHO). Codex is the major international standard-setting organization for protecting the health and economic interests of consumers and ensuring fair practices in international trade in food. Through adoption of food standards, codes of practice, and other guidelines developed by its committees, and by promoting their adoption and implementation by governments, Codex seeks to ensure that the world's food supply is sound, wholesome, free from adulteration, and correctly labeled. In the United States, USDA, FDA, and the Environmental Protection Agency (EPA) manage and carry out U.S. Codex activities.

The Codex Committee on Fish and Fishery Products was established to elaborate codes and standards for fish and fishery products. The Committee is chaired by Norway.

Issues To Be Discussed at the Public Meeting

The following items on the agenda for the 27th Session of the CCFFP will be discussed during the public meeting:

1. Matters arising from the Codex Alimentarius Commission and other Codex committees.
2. Proposed Draft Amendment to the *Standard for Salted Fish and Dried Salted Fish.*
3. Proposed Draft Standard for Scallops Adductor Muscle Meat.
4. Proposed Draft Code of Practice for Fish and Fishery Products (Sections 2 (Definitions), 6 (Aquaculture Production), 7 (Live and [Raw] Bivalve Molluscs), 11 (Processing of Salted Fish), 12 (Processing of Smoked Fish), 13 (Processing of Lobsters and Crabs), 14 (Processing of Shrimps and Prawns), 15 (Processing of Cephalopods), 17 (Transport), and 18 (Retail).
5. Proposed Draft Standard for Live and Raw Bivalve Molluscs.
6. Proposed Draft Standard for Smoked Fish.
7. Proposed Draft Standard for Granular Sturgeon Caviar.
8. Revision of the *Procedure for Inclusion of New Species.*
9. Discussion paper on new work to amend the Proposed Draft Code of Practice for Fish and Fishery Products, Section 10 (Processing of Quick Frozen Fish Products) to include molluscan shellfish and shrimp.

Each issue listed will be fully described in documents distributed, or to be distributed, by the Norwegian Secretariat to the Meeting. Members of the public may access copies of these documents (see **ADDRESSES**).

Public Meeting

At the February 9, 2005 public meeting, these agenda items will be described, and discussed, and attendees will have the opportunity to pose questions and offer comments. Written comments may be offered at the meeting or sent to the U.S. Delegate, for the 27th Session of the CCFFP, Philip Spiller (See **ADDRESSES**). Written comments should state that they relate to activities of the 27th Session of the CCFFP.

Additional Public Information

Public awareness of all segments of rulemaking and policy development is important. Consequently, in an effort to ensure that the public and in particular minorities, women, and persons with disabilities are aware of this notice, FSIS will announce it on-line through the FSIS Web page located at *http://www.fsis.usda.gov/regulations/2005 Notices Index/.*

FSIS also will make copies of this **Federal Register** publication available through the FSIS Constituent Update, which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meeting, recalls, and other types of information that could affect or would be of interest to our constituents and stakeholders. The update is communicated via Listserv, a free e-mail subscription service consisting of industry, trade, and farm groups, consumer interest groups, allied health professionals, scientific professionals, and other individuals who have requested to be included. The update is available on the FSIS Web page. Through Listserv and the Web page, FSIS is able to provide information to a much broader, more diverse audience.

Done at Washington, DC, on: January 25, 2005.

F. Edward Scarbrough,

U.S. Manager for Codex Alimentarius.

[FR Doc. 05–1702 Filed 1–28–05; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF AGRICULTURE

Forest Service

Ouachita-Ozark Resource Advisory Committee

AGENCY: Forest Service, USDA

ACTION: Meeting notice for the Ouachita-Ozark Resource Advisory Committee under Section 205 of the Secure Rural Schools and Community Self Determination Act of 2000 (Pub. L. 106–393).

SUMMARY: This notice is published in accordance with section 10(a)(2) of the Federal Advisory Committee Act. Meeting notice is hereby given for the Ouachita-Ozark Resource Advisory Committee pursuant to Section 205 of the Secure Rural Schools and Community Self-Determination Act of 2000, Public Law 106–393. Topics to be discussed include: general information, proposed new Title II projects, updates on current Title II projects, and next meeting dates and agendas.

DATES: The meeting will be held on February 15, 2005, beginning at 6 p.m. and ending at approximately 9 p.m.

ADDRESSES: The meeting will be held at the Scott County Court house, 100 W. First Street, Waldron, AR 71958.

FOR FURTHER INFORMATION CONTACT: Caroline Mitchell, Committee Coordinator, USDA, Ouachita National Forest, P.O. Box 1270, Hot Springs, AR 71902. (501–321–5318).

SUPPLEMENTARY INFORMATION: The meeting is open to the public. Committee discussion is limited to Forest Service staff, Committee members, and elected officials. However, persons who wish to bring matters to the attention of the Committee may file written statements with the Committee staff before or after the meeting. A public input session will be provided, and individuals who made written requests by February 14, 2005, will have the opportunity to address the committee at that session. Individuals wishing to speak or propose agenda items must send their names and proposals to Bill Pell, DFO, P.O. Box 1270, Hot Springs, AR 71902.

Dated: January 20, 2005.

Bill Pell,

Designated Federal Officer.

[FR Doc. 05–1672 Filed 1–28–05; 8:45 am]

BILLING CODE 3410–52–M

DEPARTMENT OF AGRICULTURE

Forest Service

Olympic Peninsula Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of Meeting.

SUMMARY: The Olympic Peninsula Resource Advisory Committee will meet on Wednesday, February 16, 2005. The meeting will be held at Olympic National Forest Headquarters, 1835 Black Lake Blvd., SW., Olympia, Washington. The meeting will begin at 9:30 a.m. and end at approximately 3:30 p.m. Agenda topics are: Overview of the Secure Rural School and Community Self-Determination Act of 2000; overview of the Federal Advisory Committee Act; approval of Title II expenditures for an individual to attend the National Resource Advisory Committee workshop; roles and responsibilities of Resource Advisory Committee (RAC) members; review and approve RAC bylaws; review the Title II project submission process; Title III project updates; election of RAC Chairperson and Vice-Chairperson; approve future meetings date; open forum; and public comments.

All Olympic Peninsula Resource Advisory Committee Meetings are open to the public. Interested citizens are encouraged to attend.

FOR FURTHER INFORMATION CONTACT: Direct questions regarding this meeting to Ken Eldredge, Province Liaison, USDA, Olympic National Forest Headquarters, 1835 Black Lake Blvd., Olympia, WA 98512–5623, (360) 956–2323 or Dale Hom, Forest Supervisor, at (360) 956–2301.

Dated: January 25, 2005.

Dale Hom,

Forest Supervisor, Olympic National Forest.

[FR Doc. 05–1721 Filed 1–28–05; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Establishment of Middle Mississippi Purchase Unit, Alexander, Jackson, and Union Counties, IL

AGENCY: Forest Service, USDA.

ACTION: Notice.

SUMMARY: On October 24, 2004, the Deputy Under Secretary of Natural Resources and Environment created the Middle Mississippi Purchase Unit. This purchase unit comprises 60,000 acres, more or less, within Alexander, Jackson, and Union Counties, Illinois. A copy of the establishment document, which includes the legal description of the lands within the purchase unit, appears at the end of this notice.

EFFECTIVE DATE: Establishment of this purchase unit was effective October 24, 2004.

ADDRESSES: A copy of the map showing the purchase unit is on file and available for public inspection in the Office of the Director, Lands Staff, 4th Floor-South, Sidney R. Yates Federal Building, Forest Service, USDA, 201 14th Street, SW., Washington, DC 20250, between the hours of 8:30 a.m. and 4:30 p.m. on business days. Those wishing to inspect the map are encouraged to call ahead to (202) 205–1248 to facilitate entry into the building.

FOR FURTHER INFORMATION CONTACT: Gregory C. Smith, Acting Director, Lands Staff, Forest Service, USDA, P.O. Box 96090, Washington, DC 20090–6090, telephone: (202) 205–1248.

Dated: January 19, 2005.

Gloria Manning,

Associate Deputy Chief, National Forest System.

Establishment of the Middle Mississippi Purchase Unit; Alexander, Jackson, and Union Counties, State of Illinois

The following described lands lying adjacent or proximate to the Shawnee National Forest are determined to be suitable for the protection of the watersheds of navigable streams and for other purposes in accordance with section 6 of the Weeks Act of 1911 (16 U.S.C. 515). Therefore, in furtherance of the authority of the Secretary of Agriculture pursuant to the Weeks Act of 1911, as amended, including section 17 of the National Forest Management Act of 1976 (Pub. L. 94–588; 90 Stat. 2961), these lands are hereby designated and established as the Middle Mississippi purchase unit.

All that certain tract of land lying within the watershed of the Mississippi River and other streams and tributaries of the Mississippi River Floodplain. The intent of this description is to describe a portion of land in the counties of Jackson, Union, and Alexander, and lying in the following Townships: Township 10 South, Range 3 West, Township 10 South, Range 4 West, Township 11 South, Range 3 West, Township 11 South, Range 4 West, Township 12 South, Range 2 West, Township 12 South, Range 3 West, Township 12 South, Range 4 West, Township 13 South, Range 2 West, Township 13 South, Range 3 West, Township 14 South, Range 3 West, Township 14 South, Range 4 West; said tract more particularly described as follows:

Beginning at a point on the Westerly line of the Shawnee National Forest, said point being near the center of Section 18, Township 10 South, Range 3 West, and being near the intersection of State Route 3 and Power Plant Road, Jackson County, Illinois; thence along said westerly line of Shawnee National Forest, through portions of Township 10 South, Range 3 West, and Township 10 South Range 4 West, to a point on the banks of the Mississippi River; thence departing said Shawnee National, Southerly, along the meanders of the banks of the Mississippi River, passing through portions of Jackson, Union and Alexander counties, Illinois, and passing through portions of Township 10 South, Range 4 West, Township 11 South Range 4 West, Township 12 South, Range 4 West, Township 12 South, Range 3 West, Township 13 South, Range 3 West, Township 14 South, Range 3 West, Township 14 South, Range 4 West, to a point on the South line of Section 32, Township 14 South, Range 3 West; thence departing said meanders of the banks of the Mississippi River, Easterly, along the South line of Township 14 South, Range 3 West, to a point on the Westerly line of the Shawnee National Forest, said point being near the South Quarter corner of Section 33, Township 14 South, Range 3 West, and being near the city of Gale; thence departing said South line of Township 14 South, Range 3 West, Northerly, along the Westerly line of the Shawnee National Forest passing through portions of Alexander, Union and Jackson counties, and passing through portions of Township 14 South, Range 3 West, Township 13 South, Range 3 West, Township 13 South, Range 2 West, Township 12 South, Range 2 West, Township 12 South, Range 3 West, Township 11 South, Range 3 West, and Township 10 South Range 3 West, to the point of beginning.

Executed in Washington, DC this 23rd day of October, 2004.

Mark Rey,

Under Secretary, Natural Resources and Environment.

[FR Doc. 05–1680 Filed 1–28–05; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Natural Resources Conservation Service

Notice of Proposed Changes to the Natural Resources Conservation Service's National Handbook of Conservation Practices

AGENCY: Natural Resources Conservation Service (NRCS), USDA.

ACTION: Notice of availability of proposed changes in the NRCS National Handbook of Conservation Practices for public review and comment.

SUMMARY: Notice is hereby given of the intention of NRCS to issue 21 new or revised conservation practice standards in its National Handbook of Conservation Practices. These standards include: Amendments for Treatment of Agricultural Waste (Code 591), Early Successional Habitat Development (Code 647), Firebreak (Code 394), Fuel Break (Code 383), Land Reclamation,

Toxic Discharge Control (Code 455), Residue and Tillage Management—Mulch Till (Code 345), Residue and Tillage Management—No Till/Strip Till/Direct Seed (Code 329), Residue and Tillage Management—Ridge Till (Code 346), Restoration and Management of Declining Habitats (Code 643), Riparian Herbaceous Cover (Code 390), Shallow Water Management for Wildlife (Code 646), Slash Treatment (Code 384), Streambank and Shoreline Protection (Code 580), Solid/Liquid Waste Separation Facility (Code 632), Upland Wildlife Habitat Management (Code 645), Use Exclusion (Code 472), Waste Treatment (Code 629), Wetland Creation (Code 658), Wetland Enhancement (Code 659), Wetland Restoration (Code 657), and Wetland Wildlife Habitat Management (Code 644). NRCS State Conservationists who choose to adopt these practices for use within their States will incorporate them into Section IV of their respective electronic Field Office Technical Guides. These practices may be used in conservation systems that treat highly erodible land, or on land determined to be wetland.

DATES: *Effective Dates:* Comments will be received for a 30-day period commencing with this date of publication. This series of new or revised conservation practice standards will be adopted after the close of the 30-day period.

FOR FURTHER INFORMATION CONTACT: Copies of these standards can be downloaded or printed from the following Web site: *ftp://ftp-fc.sc.egov.usda.gov/NHQ/practice-standards/federal-register/*. Single copies of these standards are also available from NRCS in Washington, DC. Submit individual inquiries in writing to Daniel Meyer, National Agricultural Engineer, Natural Resources Conservation Service, P.O. Box 2890, Room 6139-S, Washington, DC 20013–2890.

SUPPLEMENTARY INFORMATION: Section 343 of the Federal Agriculture Improvement and Reform Act of 1996 requires NRCS to make available, for public review and comment, proposed revisions to conservation practice standards used to carry out the highly erodible land and wetland provisions of the law. For the next 30 days, NRCS will receive comments relative to the proposed changes. Following that period, a determination will be made by NRCS regarding disposition of those comments, and a final determination of changes will be made.

Signed in Washington, DC, on January 24, 2005.

Bruce I. Knight,

Chief, Natural Resources Conservation Service.

[FR Doc. 05–1745 Filed 1–28–05; 8:45 am]

BILLING CODE 3410–16–P

DEPARTMENT OF COMMERCE

Census Bureau

Census Employment Inquiry

ACTION: Proposed collection; comment request.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

DATES: Written comments must be submitted on or before April 1, 2005.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *DHynek@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Viola Lewis-Willis, Bureau of the Census, Room 1408, Building #2, Washington, DC 20233, and (301) 763–3285.

SUPPLEMENTARY INFORMATION:

I. Abstract

The BC–170, Census Employment Inquiry, is used to collect information such as personal data and work experience from job applicants. The BC–170 is used throughout the census and intercensal periods for special censuses, decennial census pretests, and dress rehearsals for short-term time limited appointments. Applicants completing the form for a census related position are applying for temporary jobs in office and field positions (clerks, enumerators, crew leaders, supervisors). In addition, as an option to the OF–612, Optional Application for Federal Employment, the BC–170 may be used when applying for temporary/permanent office and field positions (clerks, field representatives, supervisors) on a recurring survey in one of the Census Bureau's 12 Regional Offices (ROs) throughout the United States. This form is completed by job applicants at the time they are tested. Selecting officials review the information shown on the form to evaluate an applicant's eligibility for employment. During the decennial census, the BC–170 is intended to expedite hiring and selection in situations requiring large numbers of temporary employees for assignments of a limited duration.

The use of this form is limited to only situations which require the establishment of a temporary office and/or involve special, one-time or recurring survey operations at one of the ROs. The form has been demonstrated to meet our recruitment needs for temporary workers and requires significantly less burden than the Office of Personnel Management (OPM) Optional Forms that are available for use by the public when applying for Federal positions. Over the next three years, we expect to recruit approximately 102,000 applicants for census jobs (*i.e.,* one-time censuses, special censuses and decennial pretests and dress rehearsals), resulting in a significant savings in respondent burden.

II. Method of Collection

We collect this information at the time of testing for temporary and permanent positions. Potential employees being tested complete a four-page paper application at the time of testing.

III. Data

OMB Number: 0607–0139.

Form Number: BC–170A, BC–170B, BC–170D.

Type of Review: Regular submission.

Affected Public: Individuals.

Estimated Number of Respondents: 34,000.

Estimated Time Per Response: 15 minutes.

Estimated Total Annual Burden Hours: 8,500.

Estimated Total Annual Cost: The only cost to the respondent is his/her time for completing the form.

Respondent's Obligation: Required to obtain a benefit.

Legal Authority: Title 13 U.S.C. 23.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the

proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: January 25, 2005.

Madeleine Clayton,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 05–1675 Filed 1–28–05; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Census Bureau

Current Population Survey—Basic Demographic Items

ACTION: Proposed collection; comment request.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other federal agencies to take this opportunity to comment on proposed or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

DATES: Written comments must be submitted on or before April 1, 2005.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the internet at *DHynek@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Maria Reed, Census Bureau, FOB 3, Room 3340, Washington, DC 20233–8400, (301) 763–3806.

SUPPLEMENTARY INFORMATION:

I. Abstract

The Census Bureau plans to request clearance from the Office of Management and Budget (OMB) for the collection of basic demographic information on the Current Population Survey (CPS) beginning in August 2005. The current clearance expires July 31, 2005.

The CPS has been the source of official government statistics on employment and unemployment for over 50 years. The Bureau of Labor Statistics (BLS) and the Census Bureau jointly sponsor the basic monthly survey. The Census Bureau also prepares and conducts all the field work. At the OMB's request, the Census Bureau and the BLS divide the clearance request in order to reflect the joint sponsorship and funding of the CPS program. The justification that follows is in support of the demographic data.

The demographic information collected in the CPS provides a unique set of data on selected characteristics for the civilian noninstitutional population. Some of the demographic information we collect are age, marital status, gender, Armed Forces status, education, race, origin, and family income. We use these data in conjunction with other data, particularly the monthly labor force data, as well as periodic supplement data. We use these data also independently for internal analytic research and for evaluation of other surveys. In addition, we use these data as a control to produce accurate estimates of other personal characteristics.

II. Method of Collection

The CPS basic demographic information is collected from individual households by both personal visit and telephone interviews each month. All interviews are conducted using computer-assisted interviewing.

III. Data

OMB Number: 0607–0049.

Form Number: There are no forms. We conduct all interviewing on computers.

Type of Review: Regular.

Affected Public: Households.

Estimated Number of Respondents: 57,000 per month.

Estimated Time Per Response: 1.58 minutes.

Estimated Total Annual Burden Hours: 18,012.

Estimated Total Annual Cost: There is no cost to respondents other than their time.

Respondent's Obligation: Voluntary.

Legal Authority: Title 13, United States Code, Section 182; and Title 29, United States Code, Sections 1–9.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized or included in the request for the OMB approval of this information collection; they also will become a matter of public record.

Dated: January 25, 2005.

Madeleine Clayton,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 05–1676 Filed 1–28–05; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

International Trade Administration

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

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

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

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

EFFECTIVE DATE: January 31, 2005.

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

SUPPLEMENTARY INFORMATION:

Background

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

Initiation of Reviews: In accordance with 19 CFR 351.221(c)(1)(i), we are initiating administrative reviews of the following antidumping and countervailing duty orders and findings. We intend to issue the final results of these reviews not later than December 31, 2005.

	Period to be reviewed
Antidumping Duty Proceedings	
Argentina: Honey, A–357–812	12/01/03–11/30/04
Asociacion de Cooperativas Argentinas	
Centauro S.A.	
Comexter Robinson S.A.	
Compa Inversora Platense S.A.	
Compania Apicola Argentina SA	
Compania Europea Americana S.A.	
ConAgra Argentina S.A.	
Coope-Riel Ltda.	
Cooperativa DeAgua Potable y Otros El Mana, S.A.	
Establecimiento Don Angel S.r.L.	
Food Way, S.A.	
Francisco Facundo Rodriguez	
Jay Bees	
Jose Luis Garcia	
HoneyMax S.A.	
Mielar S.A.	
Navicon S.A.	
Nexco S.A.	
Nutrin S.A.	
Parodi Agropecuaria S.A.	
Radix S.r.L.	
Seylinco S.A.	
Times S.A.	
Transhoney S.A.	
Brazil: Silicomanganese, A–351–824	12/1/03–11/30/04
Rio Doce Manganes S.A.	
Companhia Paulista de Ferro-Ligas	
Urucum Mineracao S.A.	
India: Certain Hot-Rolled Carbon Steel Flat Products, A–533–820	12/1/03–11/30/04
Essar Steel Ltd.	
The People's Republic of China: Certain Cased Pencils,[1] A–570–827	12/1/03–11/30/04
Anhui Import/Export Group Corporation	
Beijing Light Industrial Products Import/Export Corporation	
Beijing Yixunda Technology and Trade Co., Ltd.	
China First Pencil Company, Ltd.	
Guangdong Provincial Stationery & Sporting Goods Import & Export Corporation	
Orient International Holding Shanghai Foreign Trade Co., Ltd.	
Shanghai Three Star Stationary Industry Corp.	
Shanghai Weijun International Trading Inc./Grand World Inc.	
Shandong Rongxin Import & Export Company Ltd.	
Sichuan Light Industrial Products Import/Export Corporation	
Three Star Stationery Industry Corp.	
Tianjin Custom Wood Processing Co., Ltd.	
The People's Republic of China: Honey,[2] A–570–863	12/1/03–11/30/04
Anhui Native Produce Import & Export Corp.	
Anhui Honghui Foodstuff (Group) Co., Ltd.	
Cheng Du Wai Yuan Bee Products Co., Ltd.	
Eurasia Bee's Products Co., Ltd.	
Foodworld International Club, Ltd.	
High Hope International Group Jiangsu Foodstuffs Import and Export Corporation	
Henan Native Produce Import and Export Corporation	
Inner Mongolia Autonomous Region Native Produce and Animal By-Products Import & Export Corp.	
Inner Mongolia Autonomous Region Native Produce and Animal By-Products	
Inner Mongolia Youth Trade Development Co., Ltd.	
Jiangsu Kanghong Natural Healthfoods Co., Ltd.	
Jinfu Trading Co., Ltd.	
Kunshan Foreign Trade Company	
Shanghai Eswell Enterprise Co., Ltd.	
Shanghai Shinomiel International Trade Corporation	
Shanghai Xiuwei International Trading Co., Ltd.	
Sichuan-Dujiangyan Dubao Bee Industrial Co., Ltd.	
Wuhan Bee Healthy Co., Ltd.	
Zhejiang Native Produce and Animal By-Products Import & Export Group Corp. (a.k.a. Zhejiang Native Produce and Animal By-Products Import & Export Corp.)	

	Period to be reviewed
The People's Republic of China: Malleable Cast Iron Pipe Fittings,[3] A–570–881	12/2/03–11/30/04
Beijing Sai Lin Ke Hardware Co., Ltd.	
Langfang Pannext Pipe Fitting Co., Ltd.	
Chengde Malleable Iron General Factory	
SCE Co., Ltd.	
The People's Republic of China: Porcelain-on-Steel Cooking Ware,[4] A–570–506	12/1/03–11/30/04
Shanghai Watex Metal Products Co., Ltd.	
The People's Republic of China: Silicomanganese,[5] A–570–828	12/1/03–11/30/04
Sichuan Huaxin Iron Alloy Co., Ltd./Yonghe Metal Co., Ltd.	
Countervailing Duty Proceedings	
Argentina: Honey,[6] C–357–813	1/1/04–12/31/04
India: Certain Hot-Rolled Carbon Steel Flat Products, C–533–821	1/1/04–12/31/04
Essar Steel, Ltd.	
Thailand: Certain Hot-Rolled Carbon Steel Flat Products, C–549–818	1/1/03–12/31/03
Sahaviriya Steel Industries Public Company Limited	
Suspension Agreements	
None.	

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

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

[3] If one of the above named companies does not qualify for a separate rate, all other exporters of malleable cast iron pipe fittings from the People's Republic of China who have not qualified for a separate rate are deemed to be covered by this review as part of the single PRC entity of which the named exporters are a part.

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

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

[6] In accordance with section 351.213(b) of the regulations, the GOA and the petitioners have requested an administrative review of this countervailing duty order. No individual exporters requested the review pursuant to section 351.213(b) of the regulations. Accordingly, the Department will be conducting the review of this order on an aggregate basis.

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

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

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

Dated: January 26, 2005.

Holly A. Kuga,

Senior Office Director, Office 4 for Import Administration.

[FR Doc. 05–1731 Filed 1–28–05; 8:45 am]

BILLING CODE 3510–DS–P

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

NCCC Advisory Board Meeting

The Corporation for National and Community Service gives notice under Public Law 92–463 (Federal Advisory Committee Act), that it will hold a meeting of the National Civilian Community Corps (NCCC) Advisory Board. The Board advises the Director of the National Civilian Community Corps (NCCC) concerning the administration of the program and assists in the development and administration of the Corps.

Date and Time: Wednesday, February 2, 2005, 8:30 a.m. to 2 p.m.

Place: The meeting will be held in the offices of the Overseas Private Investment Corporation (OPIC), 1100 New York Ave, NW., Washington, DC 20527.

Status: Open.

Matters to be Considered: At this meeting the Board will discuss the future role of the Advisory Board to better support goals and strategic initiatives. Additionally, the Board will discuss issues related to developing program resources, recruitment, general awareness of the NCCC program and overall program operations.

Accommodations: Upon request, meeting notices will be made available in alternative formats to accommodate visual and hearing impairments. Anyone who needs an interpreter or other accommodation should notify to Corporation's contact person by 5 p.m. Monday, January 31, 2005.

FOR FURTHER INFORMATION CONTACT: Ms. Fran Campion, 1201 New York Avenue, NW., 9th Floor, Washington, DC 20525. Telephone (202) 606–5000, ext. 180. (T.D.D. (202) 565–2799).

Dated: January 26, 2005.

Thomas L. Bryant,

Associate General Counsel.

[FR Doc. 05–1848 Filed 1–28–05; 8:45 am]

BILLING CODE 6050–$$–P

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

Sunshine Act Notice

The Board of Directors of the Corporation for National and Community Service gives notice of the following meeting:

DATE AND TIME: Tuesday, February 8, 2005, 10 a.m.–12 p.m.

PLACE: Corporation for National and Community Service, 1201 New York Avenue, NW., 8th Floor, Room 8410, Washington, DC 20525.

STATUS: Open.

MATTERS TO BE CONSIDERED:

I. Chair's Opening Remarks

II. Administration of Oath of Office for Board Members

III. Consideration of Prior Meeting's Minutes

IV. Chief Executive Officer's Report

V. Committee Reports

VI. Public Comment. To help in developing a five-year strategic plan, the Board of Directors is particularly interested in any comments from the public concerning the future goals and strategies for the Corporation over the next five years.

VII. Adjourn

ACCOMMODATIONS: Anyone who needs an interpreter or other accommodation should notify the Corporation's contact person by 5 p.m. Friday, February 4, 2005.

FOR FURTHER INFORMATION CONTACT: David Premo, Public Affairs Associate, Public Affairs, Corporation for National and Community Service, 8th Floor, Room 8612C, 1201 New York Avenue NW., Washington, DC 20525. Phone (202) 606–5000 ext. 278. Fax (202) 565–2784. TDD: (202) 565–2799. E-mail: *dpremo@cns.gov.*

Dated: January 26, 2005.

Frank R. Trinity,

General Counsel.

[FR Doc. 05–1847 Filed 1–27–05; 1:53 pm]

BILLING CODE 6050–$$–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0058]

Federal Acquisition Regulation; Information Collection; Schedules for Construction Contracts

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for an extension to an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Federal Acquisition Regulation (FAR) Secretariat will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a currently approved information collection requirement concerning schedules for construction contracts. The clearance currently expires on May 31, 2005.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the FAR, and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

DATES: Submit comments on or before April 1, 2005.

ADDRESSES: Submit comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to the General Services Administration, FAR Secretariat (VIR), 1800 F Street, NW, Room 4035, Washington, DC 20405. Please cite OMB Control No.9000–0058, schedules for construction contracts, in all correspondence.

FOR FURTHER INFORMATION CONTACT Cecelia Davis, Contract Policy Division, GSA (202) 219–0202.

SUPPLEMENTARY INFORMATION:

A. Purpose

Federal construction contractors may be required to submit schedules, in the form of a progress chart, showing the order in which the contractor proposes to perform the work. Actual progress shall be entered on the chart as directed by the contracting officer. This information is used to monitor progress under a Federal construction contract when other management approaches for ensuring adequate progress are not used.

B. Annual Reporting Burden

Respondents: 2,600.
Responses Per Respondent: 2.
Annual Responses: 5,200.
Hours Per Response: 1.
Total Burden Hours: 5,200.
Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, FAR Secretariat (VIR), Room 4035, 1800 F Street, NW, Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control No. 9000–0058, Schedules for Construction Contracts, in all correspondence.

Dated: January 19, 2005

Laura Auletta

Director,Contract Policy Division

[FR Doc. 05–1692 Filed 1–28–05; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

Office of the Secretary

Meeting of the Defense Department Advisory Committee on Women in the Services (DACOWITS)

AGENCY: Department of Defense.

ACTION: Notice.

SUMMARY: Pursuant to section 10(a), Public Law 92–463, as amended, notice is hereby given of a forthcoming meeting of the Defense Department Advisory Committee on Women in the Services (DACOWITS). The purpose of the Committee meeting is to discuss the 2004 DACOWITS Report. The meeting is open to the public, subject to the availability of space.

Interested persons may submit a written statement for consideration by the Committee and make an oral presentation of such. Persons desiring to make an oral presentation or submit a written statement to the Committee must notify the point of contact listed below no later than 5 p.m., February 1, 2005. Oral presentations by members of the public will be permitted only on Thursday, February 3, 2005, from 4:30 p.m. to 4:45 p.m. before the full

Committee. Presentations will be limited to two minutes. Number of oral presentations to be made will depend on the number of requests received from members of the public. Each person desiring to make an oral presentation must provide the point of contact listed below with one (1) copy of the presentation by 5 p.m., February 1, 2005, and bring 35 copies of any material that is intended for distribution at the meeting. Persons submitting a written statement must submit 35 copies of the statement to the DACOWITS staff by 5 p.m. on February 1, 2005.

DATES: February 2, 2005, 8:30 a.m.–5 p.m. February 3, 2005, 8:30 a.m.–5 p.m. February 4, 2005, 8:30 a.m.–5 p.m.

Location: Embassy Suites Hotel, Crystal City—National Airport, 1300 Jefferson Davis Highway, Arlington, VA 22202.

FOR FURTHER INFORMATION CONTACT: MSgt Gerald T. Posey, USAF, DACOWITS, 4000 Defense Pentagon, Room 2C548A, Washington, DC 20301–4000. Telephone (703) 697–2122. Fax (703) 614–6233.

SUPPLEMENTARY INFORMATION: Meeting agenda.

Wednesday, February 2, 2005, 8:30 p.m.–5 p.m.

Welcome & Administrative Remarks
Review of 2004 Report
Briefings on Topical Information for 2005.

Thursday, February 3, 2005, 8:30 a.m.–5 p.m.

Development of Mission and Topics Statements for 2005 Report
2005 Report Outline Development, 4:30 p.m.–4:45 p.m. (Public Forum)

Friday, February 4, 2005, 8:30 a.m.–5 p.m.

Committee Administrative Training, Security, Ethics
Continued Outline and Report Development for 2005

Note: Exact order may vary.

Dated: January 13, 2005.

Jeannette Owings-Ballard,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 05–1854 Filed 1–27–05; 2:38 pm]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

AGENCY: Department of Education.

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

DATES: Interested persons are invited to submit comments on or before March 2, 2005.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Carolyn Lovett, Desk Officer, Department of Education, Office of Management and Budget, 725 17th Street, NW., Room 10235, New Executive Office Building, Washington, DC 20503 or faxed to (202) 395–6974.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Leader, Information Management Case Services Team, 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.

Dated: January 25, 2005.

Angela C. Arrington,

Leader, Information Management Case Services Team, Regulatory Information Management Services, Office of the Chief Information Officer.

Federal Student Aid

Type of Review: Extension.

Title: Lender's Application for Payment of Insurance Claim, ED Form 1207.

Frequency: On occasion.

Affected Public: State, local, or tribal gov't, SEAs or LEAs; businesses or other for-profit.

Reporting and Recordkeeping Hour Burden:

Responses: 4,086.

Burden Hours: 858.

Abstract: The ED Form 1207—Lender's Application for Payment of Insurance Claim is completed for each borrower for whom the lender is filing a Federal claim. Lenders must file for payment within 90 days of the default, depending on the type of claim filed.

Requests for copies of the submission for OMB review; comment request may be accessed from *http://edicsweb.ed.gov,* by selecting the ''Browse Pending Collections'' link and by clicking on link number 2623. 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 Joseph Schubart at his e-mail address *Joe.Schubart@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. 05–1729 Filed 1–28–05; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Office of Indian Education; Overview Information; Demonstration Grants for Indian Children; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2005

Catalog of Federal Domestic Assistance (CFDA) Number: 84.299A.

DATES: *Applications Available:* January 31, 2005.

Deadline for Transmittal of Applications: March 17, 2005.

Deadline for Intergovernmental Review: May 16, 2005.

Eligible Applicants: Eligible applicants for this program include a State educational agency (SEA); a local educational agency (LEA); an Indian tribe; an Indian organization; a federally supported elementary or secondary school for Indian students; an Indian institution (including an Indian institution of higher education); or a consortium of such institutions that

meets the requirements of 34 CFR 75.127 through 75.129.

An application from a consortium of eligible entities must include a consortium agreement. Letters of support do *not* meet the requirement for a consortium agreement.

Applicants applying as ''Indian organizations'' must demonstrate eligibility by showing how they meet all the criteria outlined in 34 CFR 263.20.

The term ''Indian institution of higher education'' means an accredited college or university within the United States that is cited in section 532 of the Equity in Educational Land-Grant Status Act of 1994 (7 U.S.C. 301 note), any other institution that qualifies for funding under the Tribally Controlled College or University Assistance Act of 1978 (25 U.S.C. 1801 *et seq.*), and Dine College (formerly Navajo Community College), authorized in the Navajo Community College Act (25 U.S.C. 640a et seq).

We will reject any application that does not meet these requirements.

Estimated Available Funds: $2,472,924.

Estimated Range of Awards: $100,000 to $275,000.

Estimated Average Size of Awards: $247,292.

Maximum Award: We will reject any application that proposes a budget exceeding $275,000 for a single budget period of 12 months. The Assistant Deputy Secretary may change the maximum amount through a notice published in the **Federal Register.**

Estimated Number of Awards: 10.

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

Project Period: Up to 48 months.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The purpose of the Demonstration Grants for Indian Children program is to provide financial assistance to projects that develop, test, and demonstrate the effectiveness of services and programs to improve the educational opportunities and achievement of preschool, elementary, and secondary Indian students. To meet the purposes of the No Child Left Behind Act of 2001, this program will focus project services on (1) Increasing school readiness skills of three- and four-year-old American Indian and Alaska Native children; and (2) enabling American Indian and Alaska Native high school graduates to transition successfully to postsecondary education by increasing their competency and skills in challenging subjects, including mathematics and science.

Priorities: This competition contains two absolute priorities and two competitive preference priorities.

Absolute Priorities: For FY 2005 these priorities are absolute priorities. In accordance with 34 CFR 75.105(b)(2)(ii), these priorities are from the regulations for this program (34 CFR 263.21(c)(1) and (3)). Under 34 CFR 75.105(c)(3), we consider only applications that meet one or both of the following priorities.

These priorities are:

Absolute Priority One

School readiness projects that provide age appropriate educational programs and language skills to three- and four-year-old Indian students to prepare them for successful entry into school at the kindergarten level.

Absolute Priority Two

College preparatory programs for secondary school students designed to increase competency and skills in challenging subject matters, including mathematics and science, to enable Indian students to transition successfully to postsecondary education.

Competitive Preference Priorities: Within these absolute priorities, we give competitive preference to applicants that address the following priorities.

Competitive Preference Priority One

In accordance with 34 CFR 75.105(b)(2)(iv), this priority is from section 7121 of the Elementary and Secondary Education Act of 1965, as amended (ESEA), 20 U.S.C. 7441(d)(1)(B). Five competitive preference priority points will be awarded to an applicant that presents a plan for combining two or more of the activities described in section 7121(c) of the ESEA over a period of more than one year.

Competitive Preference Priority Two

In accordance with 34 CFR 75.105(b)(2)(iv), this priority is from section 7143 of the ESEA, 20 U.S.C. 7473. Five competitive preference priority points will be awarded to an application submitted by an Indian tribe, Indian organization, or Indian institution of higher education, including a consortium of any of these entities with other eligible entities. An application from a consortium of eligible entities that meets the requirements of 34 CFR 75.127 through 75.129 and includes an Indian tribe, Indian organization, or Indian institution of higher education will be considered eligible to receive the five competitive preference points. These competitive preference points are in addition to the five competitive preference points that may be given under Competitive Preference Priority One.

Note: A consortium agreement, signed by all parties, must be submitted with the application in order for the application to be considered a consortium application. Letters of support do *not* meet the requirement for a consortium agreement. We will reject any application from a consortium that does not meet this requirement.

Note: The term ''Indian institution of higher education'' means an accredited college or university within the United States that is cited in section 532 of the Equity in Educational Land-Grant Status Act of 1994 (7 U.S.C. 301 note), any other institution that qualifies for funding under the Tribally Controlled College or University Assistance Act of 1978 (25 U.S.C. 1801 *et seq.*), and Dine College (formerly Navajo Community College), authorized in the Navajo Community College Act (25 U.S.C. 640a *et seq.*).

Program Authority: 20 U.S.C. 7441.

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 80, 81, 82, 84, 85, 86, 97, 98, and 99; and (b) 34 CFR part 263.

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

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

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: $2,472,924.

Estimated Range of Awards: $100,000 to $275,000.

Estimated Average Size of Awards: $247,292.

Maximum Award: We will reject any application that proposes a budget exceeding $275,000 for a single budget period of 12 months. The Assistant Deputy Secretary may change the maximum amount through a notice published in the **Federal Register.**

Estimated Number of Awards: 10.

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

Project Period: Up to 48 months.

III. Eligibility Information

1. *Eligible Applicants:* Eligible applicants for this program include an SEA; an LEA; an Indian tribe; an Indian organization; a federally supported elementary or secondary school for Indian students; an Indian institution (including an Indian institution of

higher education); or a consortium of such institutions that meets the requirements of 34 CFR 75.127 through 75.129. An application from a consortium of eligible entities must meet the requirements of 34 CFR 75.127 through 75.129. An application from a consortium of eligible entities must include a consortium agreement. Letters of support do *not* meet the requirement for a consortium agreement.

Applicants applying as ''Indian organizations'' must demonstrate eligibility by showing how they meet all the criteria outlined in 34 CFR 263.20.

The term ''Indian institution of higher education'' means an accredited college or university within the United States that is cited in section 532 of the Equity in Educational Land-Grant Status Act of 1994 (7 U.S.C. 301 note), any other institution that qualifies for funding under the Tribally Controlled College or University Assistance Act of 1978 (25 U.S.C. 1801 *et seq.*), and Dine College (formerly Navajo Community College), authorized in the Navajo Community College Act (25 U.S.C. 640a *et seq.*).

We will reject any application that does not meet these requirements.

2. *Cost Sharing or Matching:* This program does not involve cost sharing or matching.

3. *Other:* Projects funded under this competition must budget for a one-and-one-half day Project Directors' meeting in Washington, DC during each year of the project period.

IV. Application and Submission Information

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

You may also contact ED Pubs at its Web site: *http://www.ed.gov/pubs/edpubs.html* or you may contact ED Pubs at its e-mail address: *edpubs@inet.ed.gov.*

You may also obtain the application package electronically by downloading it from the following Web site: *http://www.ed.gov/about/offices/list/ods/oie/index.html.*

If you request an application from ED Pubs, be sure to identify this competition as follows: CFDA number 84.299A.

Individuals with disabilities may obtain a copy of the application package in an alternative format (*e.g.,* Braille, large print, audiotape, or computer diskette) by contacting the program contact person listed elsewhere in this notice under **FOR FURTHER INFORMATION CONTACT.**

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this competition.

Page Limit: The application narrative (Part III of the application) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. You must limit Part III to the equivalent of no more than 50 double-spaced pages, using the following standards:

- A ''page'' is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.
- Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).

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

Our reviewers will not read any pages of your application that—

- Exceed the page limit if you apply these standards; or
- Exceed the equivalent of the page limit if you apply other standards.

3. *Submission Dates and Times:*

Applications Available: January 31, 2005.

Deadline for Transmittal of Applications: March 17, 2005.

Applications for grants under this competition must be submitted electronically using the Grants.gov Apply site (Grants.gov). For information (including dates and times) about how to submit your application electronically or by mail or hand delivery if you qualify for an exception to the electronic submission requirement, please refer to section IV. 6. *Other Submission Requirements* in this notice.

We do not consider an application that does not comply with the deadline requirements.

Deadline For Intergovernmental Review: May 16, 2005.

4. *Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this program.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Other Submission Requirements:* Applications for grants under this competition must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section.

a. *Electronic Submission of Applications.* Applications for grants under the Demonstration Grants for Indian Children—CFDA Number 84.299A must be submitted electronically using the Grants.gov Apply site. Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not e-mail an electronic copy of a grant application to us.

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement *and* submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement.*

You may access the electronic grant application for Demonstration Grants for Indian Children at: *http://www.grants.gov.* You must search for the downloadable application package for this program by the CFDA number. Do not include the CFDA number's alpha suffix in your search.

Please note the following:

- When you enter the Grants.gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation.
- Applications received by Grants.gov are time and date stamped. Your application must be fully uploaded and submitted with a date/time received by the Grants.gov system no later than 4:30 p.m., Washington, DC time, on the application deadline date. We will not consider your application if it was received by the Grants.gov system later than 4:30 p.m. on the application deadline date. When we retrieve your

application from Grants.gov, we will notify you if we are rejecting your application because it was submitted after 4:30 p.m. on the application deadline date.

• The amount of time it can take to upload an application will vary depending on a variety of factors including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the application process through Grants.gov.

• You should review and follow the Education Submission Procedures for submitting an application through Grants.gov that are included in the application package for this competition to ensure that your application is submitted timely to the Grants.gov system.

• To use Grants.gov, you, as the applicant, must have a D–U–N–S Number and register in the Central Contractor Registry (CCR). You should allow a minimum of five business days to complete the CCR registration.

• You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.

• You must submit all documents electronically, including all information typically included on the Application for Federal Education Assistance (ED 424), Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications. Any narrative sections of your application should be attached as files in a .DOC (document), .RTF (rich text), or .PDF (Portable Document) format.

• Your electronic application must comply with any page limit requirements described in this notice.

• After you electronically submit your application, you will receive an automatic acknowledgement from Grants.gov that contains a Grants.gov tracking number. The Department will retrieve your application from Grants.gov and send you a second confirmation by e-mail that will include a PR/Award number (an ED-specified identifying number unique to your application).

• We may request that you provide us original signatures on forms at a later date.

Exception to Electronic Submission Requirement: You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through the Grants.gov system because—

• You do not have access to the Internet; or

• You do not have the capacity to upload large documents to the Grants.gov system; *and*

• No later than two weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevent you from using the Internet to submit your application. If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: Cathie Martin, U.S. Department of Education, 400 Maryland Avenue, SW., room 5C152, Washington, DC 20202–6335. FAX: (202) 260–7779.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

b. *Submission of Paper Applications by Mail.* If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier), your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the applicable following address:

By mail through the U.S. Postal Service:
U.S. Department of Education, Application Control Center, Attention: CFDA Number 84.299A, 400 Maryland Avenue, SW., Washington, DC 20202–4260; or

By mail through a commercial carrier:
U.S. Department of Education, Application Control Center—Stop 4260, Attention: CFDA Number 84.299A, 7100 Old Landover Road,Landover, MD 20785–1506.

Regardless of which address you use, you must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark,

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service,

(3) A dated shipping label, invoice, or receipt from a commercial carrier, or

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark, or

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. *Submission of Paper Applications by Hand Delivery.* If you qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: CFDA Number 84.299A, 550 12th Street, SW., Room 7041, Potomac Center Plaza,Washington, DC 20202–4260. The Application Control Center accepts hand deliveries daily between 8 a.m. and 4:30 p.m., Washington, DC time, except Saturdays, Sundays and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department:

(1) You must indicate on the envelope and—if not provided by the Department—in Item 4 of the Application for Federal Education Assistance (ED 424) the CFDA number—and suffix letter, if any—of the competition under which you are submitting your application.

(2) The Application Control Center will mail a grant application receipt acknowledgment to you. If you do not receive the grant application receipt acknowledgment within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

Selection Criteria: The selection criteria for this competition are from EDGAR, 34 CFR 75.210, and are listed in the application package.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S.

Representative and U.S. Senators and send you a Grant Award Notification (GAN). We may also notify you informally.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting.* At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as specified by the Secretary in 34 CFR 75.118.

4. *Performance Measures:* The Secretary has established the following key performance measures for assessing the effectiveness of the Demonstration Grants for Indian Children program: (1) The percentage of pre-school American Indian and Alaska Native students who possess school readiness skills gained through scientifically research-based curriculum that prepares them for kindergarten will increase; (2) The percentage of American Indian and Alaska Native high school students successfully completing (as defined by receiving a passing grade) challenging core subjects (including English, Mathematics, Science and Social Studies) will increase; and (3) Whether American Indian and Alaska Native high school students participating in the program have college assessment scores (ACT, SAT or PSAT) as high as the district average.

Under the selection criteria ''Quality of project services'' and ''Quality of the project evaluation,'' we will consider the extent to which the applicant demonstrates a strong capacity to provide reliable data on these measures.

All grantees will be expected to submit, as part of their performance report, information documenting their progress with regard to these performance measures.

VII. Agency Contact

FOR FURTHER INFORMATION CONTACT: Cathie Martin, Office of Indian Education, U.S. Department of Education, 400 Maryland Avenue, SW., room 5C152, Washington, DC 20202–6335. Telephone: (202) 260–3774 or by e-mail: *oiegrant@ed.gov.*

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

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

VII. Other Information

Electronic Access to This Document: You may view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister.*

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

Dated: January 25, 2005.

Victoria Vasques,

Assistant Deputy Secretary for Indian Education.

[FR Doc. 05–1746 Filed 1–28–05; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Office of Indian Education; Overview Information; Professional Development; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2005

Catalog of Federal Domestic Assistance (CFDA) Number: 84.299B.

Applications Available: January 31, 2005.

Deadline for Transmittal of Applications: March 17, 2005.

Deadline for Intergovernmental Review: May 16, 2005.

Eligible Applicants: Eligible applicants for this program are institutions of higher education, including Indian institutions of higher education; State or local educational agencies in consortium with institutions of higher education; Indian tribes or organizations in consortium with institutions of higher education; and Bureau-funded schools.

An application from a consortium of eligible entities must meet the requirements of 34 CFR 75.127 through 75.129. An application from a consortium of eligible entities must include a consortium agreement. Letters of support do *not* meet the requirement for a consortium agreement.

In order to be considered an eligible entity, applicants, including institutions of higher education, must be eligible to provide the level and type of degree proposed in the application or must apply in consortium with an institution of higher education that is eligible to grant the target degree.

Applicants applying as ''Indian organizations'' must demonstrate eligibility by showing how they meet all the criteria outlined in 34 CFR 263.3.

The term ''Indian institution of higher education'' means an accredited college or university within the United States cited in section 532 of the Equity in Educational Land-Grant Status Act of 1994 (7 U.S.C. 301 note), any other institution that qualifies for funding under the Tribally Controlled College or University Assistance Act of 1978 (25 U.S.C. 1801 *et seq.*), and Dine College (formerly Navajo Community College), authorized in the Navajo Community College Act (25 U.S.C. 640a *et seq.*).

We will reject any application that does not meet these requirements.

Estimated Available Funds: $3,709,382.

Estimated Range of Awards: $125,000 to $325,000.

Estimated Average Size of Awards: $285,337.

Maximum Award: We will reject any application that proposes a budget exceeding $325,000 for the first budget period of 12 months, and $400,000 during the second and third budget periods. The last 12-month budget period of a 48-month award will be limited to induction services only, at a cost not to exceed $75,000. The Assistant Deputy Secretary may change the maximum amount through a notice published in the **Federal Register**.

Estimated Number of Awards: 13.

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

Project Period: Up to 48 months.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The purpose of the Professional Development program is to (1) increase the number of qualified Indian individuals in professions that

serve Indians; (2) provide training to qualified Indian individuals to become teachers, administrators, teacher aides, social workers, and ancillary educational personnel; and (3) improve the skills of qualified Indian individuals who serve in the education field. Activities may include, but are not limited to, continuing programs, symposia, workshops, conferences, and direct financial support.

Priorities: This competition contains two absolute priorities and two competitive preference priorities. In accordance with 34 CFR 75.105(b)(2)(ii), these absolute and competitive preference priorities are from the regulations for this program (34 CFR 263.5(a), (b), and (c)(1) and (2)).

Absolute Priorities: For FY 2005 these priorities are absolute priorities. Under 34 CFR 75.105(c)(3) we consider only applications that meet one or both of the following priorities:

These priorities are:

Absolute Priority One—Pre-Service Training for Teachers

A project that provides support and training to Indian individuals to complete a pre-service education program that enables these individuals to meet the requirements for full State certification or licensure as a teacher through—

(1)(i) Training that leads to a bachelor's degree in education before the end of the award period;

(ii) For States allowing a degree in a specific subject area, training that leads to a bachelor's degree in the subject area so long as the training meets the requirements for full State teacher certification or licensure; or

(iii) Training in a current or new specialized teaching assignment that requires at least a bachelor's degree and in which a documented teacher shortage exists; and

(2) One-year induction services after graduation, certification, or licensure provided during the award period to graduates of the pre-service program while they are completing their first year of work in schools with significant Indian student populations.

Note: In working with various institutions of higher education and State certification/licensure requirements, we have found that states requiring a degree in a specific subject area (*e.g.*, specialty areas or teaching at the secondary level) generally require a master's degree or fifth-year requirement before an individual can be certified or licensed as a teacher. These students would be eligible to participate so long as their training meets the requirements for full State certification or licensure as a teacher.

Absolute Priority Two—Pre-Service Administrator Training

A project that provides—

(1) Support and training to Indian individuals to complete a master's degree in education administration that is provided before the end of the award period and that allows participants to meet the requirements for State certification or licensure as an education administrator; and

(2) One year of induction services during the award period to participants after graduation, certification or licensure, while they are completing their first year of work as administrators in schools with significant Indian student populations.

Competitive Preference Priorities: Within these absolute priorities, we give competitive preference to applications that address the following priorities.

These priorities are:

Competitive Preference Priority One

We award five points to an application submitted by an Indian tribe, Indian organization, or Indian institution of higher education that is eligible to participate in the Professional Development program. An application for a consortium of eligible entities that meets the requirements of 34 CFR 75.127 through 75.129 of EDGAR and includes an Indian tribe, Indian organization or Indian institution of higher education will be considered eligible to receive the five (5) competitive preference points.

Competitive Preference Priority Two

We award five points to an application submitted by a consortium of eligible applicants that includes a tribal college or university and that designates that tribal college or university as the fiscal agent for the application. The consortium application of eligible entities must meet the requirements of 34 CFR 75.127 through 75.129 of EDGAR to be eligible for the five competitive preference points. These points are in addition to the five (5) competitive preference points that may be awarded under Competitive Preference Priority One.

Note: A consortium application must include a consortium agreement, signed by all parties to be considered. Letters of support do *not* meet the requirement for a consortium agreement.

Note: Tribal colleges and universities are those institutions that are cited in section 532 of the Equity in Educational Land-Grant Status Act of 1994 (7 U.S.C. 301 note), any other institution that qualifies for funding under the Tribally Controlled College or University Assistance Act of 1978 (25 U.S.C. 1801 *et seq.*), or Dine College (formerly Navajo Community College), authorized in the Navajo Community College Act (25 U.S.C. 640a *et seq.*).

Program Authority: 20 U.S.C. 7442.

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 80, 81, 82, 84, 85, 86, 97, 98 and 99; and (b) 34 CFR part 263.

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

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

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: $3,709,382.

Estimated Range of Awards: $125,000 to $325,000.

Estimated Average Size of Awards: $285,337.

Maximum Award: We will reject any application that proposes a budget exceeding $325,000 for the first budget period of 12 months, and $400,000 during the second and third budget periods. The last 12-month budget period of a 48-month award will be limited to induction services only, at a cost not to exceed $75,000. The Assistant Deputy Secretary may change the maximum amount through a notice published in the **Federal Register.**

Estimated Number of Awards: 13.

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

Project Period: Up to 48 months.

III. Eligibility Information

1. *Eligible Applicants:* Eligible applicants for this program are institutions of higher education, including Indian institutions of higher education; State or local educational agencies in consortium with institutions of higher education; Indian tribes or organizations, in consortium with institutions of higher education; and Bureau-funded schools.

An application from a consortium of eligible entities must meet the requirements of 34 CFR 75.127 through 75.129. An application from a consortium of eligible entities must include a consortium agreement. Letters of support do *not* meet the requirement for a consortium agreement.

In order to be considered an eligible entity, applicants, including institutions of higher education, must be eligible to offer the level and type of degree proposed in the application or must apply in consortium with an institution of higher education that is eligible to grant the target degree.

Applicants applying as ''Indian organizations'' must demonstrate eligibility by showing how they meet all requirements of 34 CFR 263.3.

The term ''Indian institution of higher education'' means an accredited college or university within the United States that is cited in section 532 of the Equity in Educational Land-Grant Status Act of 1994 (7 U.S.C. 301 note), any other institution that qualifies for funding under the Tribally Controlled College or University Assistance Act of 1978 (25 U.S.C. 1801 *et seq.*), and Dine College (formerly Navajo Community College), authorized in the Navajo Community College Act (25 U.S.C. 640a *et seq.*).

We will reject any application that does not meet these requirements.

2. *Cost Sharing or Matching*: This program does not involve cost sharing or matching.

3. *Other*: Projects funded under this competition must budget for a two-day Project Directors' meeting in Washington, DC during each year of the project period.

IV. Application and Submission Information

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

You may also contact ED Pubs at its Web site: *http://www.ed.gov/pubs/edpubs.html* or you may contact ED Pubs at its e-mail address: *edpubs@inet.ed.gov*.

You may also obtain the application package electronically by downloading it from the following Web site: *http://www.ed.gov/about/offices/list/ods/oie/index.html*.

If you request an application from ED Pubs, be sure to identify this competition as follows: CFDA number 84.299B.

Individuals with disabilities may obtain a copy of the application package in an alternative format (*e.g.*, Braille, large print, audiotape, or computer diskette) by contacting the program contact person listed under for **FURTHER INFORMATION CONTACT** in section VII of this notice.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this competition.

Page Limit: The application narrative (Part III of the application) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. You must limit Part III to the equivalent of no more than 50 double-spaced pages, using the following standards:

- A ''page'' is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.
- Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).

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

Our reviewers will not read any pages of your application that—

- Exceed the page limit if you apply these standards; or
- Exceed the equivalent of the page limit if you apply other standards.

3. *Submission Dates and Times:*

Applications Available: January 31, 2005.

Deadline for Transmittal of Applications: March 17, 2005. Applications for grants under this competition must be submitted electronically using the Grants.gov Apply site (Grants.gov). For information (including dates and times) about how to submit your application electronically or by mail or hand delivery if you qualify for an exception to the electronic submission requirement, please refer to section IV.6. *Other Submission Requirements* in this notice.

We do not consider an application that does not comply with the deadline requirements.

Deadline for Intergovernmental Review: May 16, 2005.

4. *Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this competition.

5. *Funding Restrictions:* Stipends may be paid only to full-time students. For the payment of stipends to project participants being trained, the Secretary expects to set the stipend maximum at $1,775 per month for full-time students and provide for a $275 allowance per month per dependent during an academic term. The terms ''stipend,'' ''full-time student,'' and ''dependent allowance'' are defined in 34 CFR 263.3. We reference additional regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Other Submission Requirements:* Applications for grants under this competition must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section.

a. *Electronic Submission of Applications.*

Applications for grants under the Professional Development Grants—CFDA Number 84.299B must be submitted electronically using the Grants.gov Apply site. Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not e-mail an electronic copy of a grant application to us.

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement *and* submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement*.

You may access the electronic grant application for Professional Development Grants at: *http://www.grants.gov*. You must search for the downloadable application package for this program by the CFDA number. Do not include the CFDA number's alpha suffix in your search.

Please note the following:

- When you enter the Grants.gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation.
- Applications received by Grants.gov are time and date stamped. Your application must be fully uploaded and submitted with a date/time received by the Grants.gov system no later than 4:30 p.m., Washington, DC time, on the application deadline date. We will not consider your application if it was received by the Grants.gov system later than 4:30 p.m. on the application deadline date. When we retrieve your

application from Grants.gov, we will notify you if we are rejecting your application because it was submitted after 4:30 p.m. on the application deadline date.

• The amount of time it can take to upload an application will vary depending on a variety of factors including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the application process through Grants.gov.

• You should review and follow the Education Submission Procedures for submitting an application through Grants.gov that are included in the application package for this program [competition] to ensure that your application is submitted timely to the Grants.gov system.

• To use Grants.gov, you, as the applicant, must have a D–U–N–S Number and register in the Central Contractor Registry (CCR). You should allow a minimum of five business days to complete the CCR registration.

• You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.

• You must submit all documents electronically, including all information typically included on the Application for Federal Education Assistance (ED 424), Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications. Any narrative sections of your application should be attached as files in a .DOC (document), .RTF (rich text), or .PDF (Portable Document) format.

• Your electronic application must comply with any page limit requirements described in this notice.

• After you electronically submit your application, you will receive an automatic acknowledgement from Grants.gov that contains a Grants.gov tracking number. The Department will retrieve your application from Grants.gov and send you a second confirmation by e-mail that will include a PR/Award number (an ED-specified identifying number unique to your application).

• We may request that you provide us original signatures on forms at a later date.

Exception to Electronic Submission Requirement: You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through the Grants.gov system because—

• You do not have access to the Internet; or

• You do not have the capacity to upload large documents to the Grants.gov system; and

• No later than two weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevent you from using the Internet to submit your application. If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: Cathie Martin, U.S. Department of Education, 400 Maryland Avenue, SW., room 5C152, Washington, DC 20202–6335. FAX: (202) 260–7779.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

b. *Submission of Paper Applications by Mail.*

If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier), your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the applicable following address:

By mail through the U.S. Postal Service: U.S. Department of Education, Application Control Center, Attention: CFDA Number 84.299B,400 Maryland Avenue, SW., Washington, DC 20202–4260; or

By mail through a commercial carrier: U.S. Department of Education, Application Control Center—Stop 4260, Attention: CFDA Number 84.299B, 7100 Old Landover Road, Landover, MD 20785–1506.

Regardless of which address you use, you must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark,

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service,

(3) A dated shipping label, invoice, or receipt from a commercial carrier, or

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark, or

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. *Submission of Paper Applications by Hand Delivery.*

If you qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: CFDA Number 84.299B, 550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8 a.m. and 4:30 p.m., Washington, DC time, except Saturdays, Sundays and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department:

(1) You must indicate on the envelope and—if not provided by the Department—in Item 4 of the Application for Federal Education Assistance (ED 424) the CFDA number—and suffix letter, if any—of the competition under which you are submitting your application.

(2) The Application Control Center will mail a grant application receipt acknowledgment to you. If you do not receive the grant application receipt acknowledgment within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

Selection Criteria: The selection criteria for this competition are from 34 CFR 263.6 and are listed in the application package.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S.

Representative and U.S. Senators and send you a Grant Award Notification (GAN). We may also notify you informally.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as specified by the Secretary in 34 CFR 75.118.

4. *Performance Measures:* The Secretary has established the following key performance measures for assessing the effectiveness of the Professional Development program: (1) The percentage of program participants who receive full state licensure will increase; (2) the percentage of program participants who become teachers in schools with high concentrations of American Indian and Alaska Native students and teach in their licensure area will increase; and (3) the percentage of program participants who become principals/vice principals/school administrators in schools with high concentrations of American Indian and Alaska Native students will increase.

Under the selection criteria ''Quality of project services'' and ''Quality of the project evaluation,'' we will consider the extent to which the applicant demonstrates a strong capacity to provide reliable data on these measures.

All grantees will be expected to submit, as part of their performance report, information documenting their progress with regard to these performance measures.

VII. Agency Contact

FOR FURTHER INFORMATION CONTACT: Cathie Martin, Office of Indian Education, U.S. Department of Education, 400 Maryland Avenue, SW., room 5C152, Washington, DC 20202–6335. Telephone: (202) 260–3774 or by e-mail: *oiegrant@ed.gov.*

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

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

VII. Other Information

Electronic Access to This Document: You may view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister.*

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

Dated: January 25, 2005.

Victoria Vasques,

Assistant Deputy Secretary for Indian Education.

[FR Doc. E5–358 Filed 1–28–05; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Office of Special Education and Rehabilitative Services, Individuals With Disabilities Education Act, as Amended by the Individuals With Disabilities Education Improvement Act of 2004

ACTION: Notice of Public Meeting to seek comments and suggestions on regulatory issues under the Individuals with Disabilities Education Act (IDEA), as amended by the Individuals with Disabilities Education Improvement Act of 2004.

SUMMARY: The Secretary announces plans to hold the last of a series of public meetings to seek comments and suggestions from the public prior to developing and publishing proposed regulations to implement programs under the recently revised Individuals with Disabilities Education Act.

Date and Time of Public Meeting: Thursday, February 24, 2005 from 1 p.m. to 5 p.m. and from 6 p.m. to 8 p.m.

ADDRESSES: Academy for Educational Development, Academy Hall, 1825 Connecticut Avenue, NW., Washington, DC 20009.

FOR FURTHER INFORMATION CONTACT: Troy R. Justesen. Telephone: (202) 245–7468.

SUPPLEMENTARY INFORMATION:

Background

On December 3, 2004, the President signed into law Public Law 108–446, the Individuals with Disabilities Education Improvement Act of 2004, amending the Individuals with Disabilities Education Act (IDEA). Copies of the new law may be obtained at the following Web site: *http://edworkforce.house.gov/issues/108th/education/idea/conferencereport/confrept.htm.*

Enactment of the new law provides an opportunity to consider improvements in the regulations implementing the IDEA (including both formula and discretionary grant programs) that would strengthen the Federal effort to ensure every child with a disability has available a free appropriate public education that—(1) is of high quality, and (2) is designed to achieve the high standards reflected in the No Child Left Behind Act and regulations.

The Office of Special Education and Rehabilitative Services will be holding a series of public meetings during the first few months of calendar year 2005 to seek input and suggestions for developing regulations, as needed, based on the Individuals with Disabilities Education Improvement Act of 2004.

This notice provides specific information about the last of these meetings, scheduled for Washington, DC (*see Date and Time of Public Meeting* earlier in this Notice).

Individuals who need accommodations for a disability in order to attend the meeting (*i.e.*, interpreting services, assistive listening devices, and material in alternative format) should notify the contact person listed under **FOR FURTHER INFORMATION CONTACT.** The meeting location is accessible to individuals with disabilities.

Dated: January 25, 2005.

John H. Hager,

Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. E5–357 Filed 1–28–05; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. IC05–73–000; FERC Form 73]

Commission Information Collection Activities, Proposed Collection; Comment Request; Extension

January 21, 2005.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Notice.

SUMMARY: In compliance with the requirements of Section 3506(c)(2)(a) of the Paperwork Reduction Act of 1995 (Pub. L. No. 104–13), the Federal Energy Regulatory Commission (Commission) is soliciting public comment on the specific aspects of the information collection described below.

DATES: Comments on the collection of information are due by March 29, 2005.

ADDRESSES: Copies of the proposed collection of information can be obtained from Michael Miller, Office of the Executive Director, ED–33, 888 First Street NE., Washington, DC 20426. Comments may be filed either in paper format or electronically. Those parties filing electronically do not need to make a paper filing. For paper filings, the original and 14 copies of such comments should be submitted to the Office of the Secretary, Federal Energy Regulatory Commission, 888 First Street, NE. Washington, DC 20426 and refer to Docket No. IC05–73–000.

Documents filed electronically via the Internet must be prepared in WordPerfect, MS Word, Portable Document Format or ASCII format. To file the document, access the Commission's Web site at *http://www.ferc.gov* and click on ''Make an E-filing,'' and then follow the instructions for each screen. First time users will have to establish a user name and password. The Commission will send an automatic acknowledgement to the sender's E-mail address upon receipt of comments.

All comments may be viewed, printed or downloaded remotely via the Internet through FERC's homepage using the *eLibrary* link. For user assistance, contact *FERConlineSupport@ferc.gov* or toll-free at (866) 208–3676 or for TTY, contact (202) 502–8659.

FOR FURTHER INFORMATION CONTACT: Michael Miller may be reached by telephone at (202) 502–8415, by fax at (202) 273–0873, and by e-mail at *michael.miller@ferc.gov*.

SUPPLEMENTARY INFORMATION: The information collected under the requirements of FERC Form 73 ''Oil Pipelines Service Life Data'' (OMB No. 1902–0019) is used by the Commission to implement the statutory provisions of sections 306 and 402 of the Department of Energy Organization Act, 42 U.S.C. 7155 and 7172, and Executive Order No. 12009, 42 FR 46277 (September 13, 1977). The Commission has authority over interstate oil pipelines as stated in the Interstate Commerce Act, 49 U.S.C. 6501 *et al.* As part of the information necessary for the subsequent investigation and review of an oil pipeline company's proposed depreciation rates, the pipeline companies are required to provide service life data as part of their data submissions if the proposed depreciation rates are based on the remaining physical life calculations. This service life data is submitted on FERC Form No. 73.

The data submitted are used by the Commission to assist in the selection of appropriate service lives and book depreciation rates. Book depreciation rates are used by oil pipeline companies to compute the depreciation portion of their operating expense which is a component of their cost of service which in turn is used to determine the transportation rate to assess customers. FERC staff's recommended book depreciation rates become legally binding when issued by Commission order. These rates remain in effect until a subsequent review is requested and the outcome indicates that a modification is justified. The Commission implements these filings in 18 CFR parts 347 and 357.

Action: The Commission is requesting a three-year approval of the collection of data with no changes to the information that is collected on Form 73. This is a mandatory information collection requirement.

Burden Statement: Public reporting burden for this collection is estimated as follows:

Number of respondents annually (1)	Number of responses per respondent (2)	Average burden hours per response (3)	Total annual burden hours (1)x(2)x(3)
2	1	40	80

The estimated total cost to respondents is $4,176.00 (80 hours divided by 2,080 hours per employee per year times $108,588 per year average salary per employee = $4,176.00 (rounded)).

The reporting burden includes the total time, effort, or financial resources expended to generate, maintain, retain, disclose, or provide the information including: (1) Reviewing instructions; (2) developing, acquiring, installing, and utilizing technology and systems for the purposes of collecting, validating, verifying, processing, maintaining, disclosing and providing information; (3) adjusting the existing ways to comply with any previously applicable instructions and requirements; (4) training personnel to respond to a collection of information; (5) searching data sources; (6) completing and reviewing the collection of information; and (7) transmitting, or otherwise disclosing the information.

The estimate of cost for respondents is based upon salaries for professional and clerical support, as well as direct and indirect overhead costs. Direct costs include all costs directly attributable to providing this information, such as administrative costs and the cost for information technology. Indirect or overhead costs are costs incurred by an organization in support of its mission. These costs apply to activities which benefit the whole organization rather than any one particular function or activity.

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology

e.g. permitting electronic submission of responses.

Magalie R. Salas,

Secretary.

[FR Doc. E5–331 Filed 1–28–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. CP04–370–000 and RP96–383–058]

Dominion Transmission, Inc.; Notice of Motion To Withdraw Application for Approval of Negotiated Rate Agreement and To Terminate Proceeding

January 19, 2005.

On December 22, 2004, Dominion Transmission, Inc. (Dominion) tendered for filing a motion to withdraw its application for approval of a negotiated rate agreement between Dominion and PSEG Energy Resources & Trade, LLC (PSEG), and to terminate the proceeding in the above referenced dockets.

Rule 216 of the Commission's Rules of Practice and Procedure provides that the withdrawal of any pleading becomes effective 15 days after notice of withdrawal, unless it is opposed and the Commission finds good cause to disallow the withdrawal. No comments in opposition to Dominion's motion were filed.

Pursuant to Rule 216, Dominion's motion to withdraw its application and to terminate the subject proceeding will take effect by operation of law.

Magalie R. Salas,

Secretary.

[FR Doc. E5–343 Filed 1–28–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP00–6–012]

Gulfstream Natural Gas System, L.L.C.; Notice of Compliance Filing

January 19, 2005.

Take notice that, on January 12, 2005, Gulfstream Natural Gas System, L.L.C. (Gulfstream) submitted a compliance filing pursuant to the October 8, 2003 order in the above-captioned docket.

Gulfstream states that copies of the filing were served on all customers, interested state commissions, as well as all parties on the official service list in the above-captioned proceeding.

Any person desiring to protest this filing must file in accordance with Rule 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.211). Protests to this filing 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. Such protests must be filed on or before the date as indicated below. Anyone filing a protest must serve a copy of that document on all the parties to the proceeding.

The Commission encourages electronic submission of protests 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 to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible online 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.

Protest Date: 5 p.m. Eastern Time on January 26, 2005.

Magalie R. Salas,

Secretary.

[FR Doc. E5–348 Filed 1–28–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER05–67–000]

Metcalf Energy Center, LLC; Notice of Issuance of Order

January 19, 2005.

Metcalf Energy Center, LLC (Metcalf) filed an application for market-based rate authority, with an accompanying tariff. The proposed tariff provides for wholesale sales of energy, capacity and ancillary services at market-based rates. Metcalf also requested waiver of various Commission regulations. In particular, Metcalf requested that the Commission grant blanket approval under 18 CFR part 34 of all future issuances of securities and assumptions of liability by Metcalf.

On January 12, 2005, the Commission granted the request for blanket approval under part 34, subject to the following:

Any person desiring to be heard or to protest the blanket approval of issuances of securities or assumptions of liability by Metcalf should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure. 18 CFR 385.211, 385.214 (2004).

Notice is hereby given that the deadline for filing motions to intervene or protest, is February 11, 2005.

Absent a request to be heard in opposition by the deadline above, Metcalf is authorized to issue securities and assume obligations or liabilities as a guarantor, indorser, surety, or otherwise in respect of any security of another person; provided that such issuance or assumption is for some lawful object within the corporate purposes of Metcalf, compatible with the public interest, and is reasonably necessary or appropriate for such purposes.

The Commission reserves the right to require a further showing that neither public nor private interests will be adversely affected by continued approval of Metcalf's issuances of securities or assumptions of liability.

Copies of the full text of the Commission's Order are available from the Commission's Public Reference Room, 888 First Street, NE., Washington, DC 20426. The Order may also be viewed on the Commission's Web site at *http://www.ferc.gov*, using the eLibrary link. Enter the docket number excluding the last three digits in the docket number filed to access the document. Comments, protests, and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings.

Magalie R. Salas,

Secretary.

[FR Doc. E5–345 Filed 1–28–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP05–49–000]

Northern Natural Gas Company; Notice of Application

January 19, 2005.

Take notice that on January 10, 2005, Northern Natural Gas Company (Northern), filed in Docket No. CP05–49–000 an application pursuant to section 7 of the Natural Gas Act and part 157 of the Commission's regulations, requesting a certificate of public convenience and necessity to construct, modify and operate certain pipeline and compression facilities located in Wisconsin and Minnesota, all as more fully set forth in the request which is on file with the Commission and open to public inspection. This filing may also be viewed on the Web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERCOnline Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or TTY, contact (202) 502–8659.

Northern proposes to: (1) Construct and operate approximately 3.2 miles of 30-inch diameter pipeline in Lafayette County, Wisconsin at the Bluff Creek Interconnect, located at the terminus of Northern's East Leg pipeline system and (2) increase the horsepower (HP) at its existing Chatfield compressor station (Chatfield) located in Fillmore County, Minnesota by installing a new 2,500 HP electric motor reciprocating compressor on the Tomah Branch Line. Northern states that the proposed Wisconsin pipeline facilities will enable Northern to guarantee a 675 psig operating pressure requested by Wisconsin Gas LLC during two separate open seasons posted November 23 through December 8, 2004. Northern further states that the additional horsepower at Chatfield will increase the peak day capacity on the Tomah Line and is required to meet firm incremental service requested by Wisconsin Gas over a 5-year period of up to 1,785 Dth/d. Northern requests Commission approval no later than August 1, 2005, in order to meet an in-service date of November 1, 2005.

Any questions regarding this application should be directed to Michael T. Loeffler, Director, Certificates and Government Affairs for Northern, 1111 South 103rd Street, Omaha, Nebraska 68124, at (402) 398–7103 or Donna Martens, Senior Regulatory Analyst, at (402) 398–7138.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below, file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenters will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commenters will not be required to serve copies of filed documents on all other parties. However, the non-party commenters will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests and interventions via the Internet in lieu of paper. *See,* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov*) under the ''e-Filing'' link.

Comment Date: February 9, 2005.

Magalie R. Salas,

Secretary.

[FR Doc. E5–344 Filed 1–28–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER05–443–000, et al.]

Midwest Independent Transmission System Operator, Inc., et al.; Electric Rate and Corporate Filings

January 21, 2005.

The following filings have been made with the Commission. The filings are listed in ascending order within each docket classification.

1. Midwest Independent Transmission System Operator, Inc.

[Docket No. ER05–443–000]

Take notice that on January 13, 2005, the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) and American Transmission Systems, Incorporated (ATSI) submitted a Revised and Restated Generator Interconnection and Operating Agreement among FirstEnergy Nuclear Operating Company, ATSI and the Midwest ISO. Midwest ISO requests an effective date of January 1, 2005.

Midwest ISO copy of this filing was served on parties to the Interconnection Agreement.

Comment Date: 5 p.m. Eastern Time on February 3, 2005.

2. Florida Power & Light Company

[Docket No. ER05–444–000]

Take notice that on January 13, 2005, Florida Power & Light Company (FPL) tendered for filing a new Rate Schedule No. 303, Agreement for Specified Services between FPL and Bio-Energy Partners. FPL requests an effective date of January 1, 2005.

Comment Date: 5 p.m. Eastern Time on February 3, 2005.

3. Florida Power & Light Company

[Docket No. ER05–445–000]

Take notice that on January 13, 2005, Florida Power & Light Company (FPL) tendered for filing a new Rate Schedule No. 304, Bio-energy Partners Parallel

Operation Agreement between FPL and Seminole Electric Cooperative, Inc. FPL requests an effective date of January 1, 2005.

Comment Date: 5 p.m. Eastern Time on February 3, 2005.

4. California Independent System Operator Corporation

[Docket No. ER05–449–000]

Take notice that on January 13, 2005, the California Independent System Operator Corporation (ISO) filed an amendment (Amendment No. 4) to revise the Metered Sybsystem Agreement between the ISO and Silicon Valley Power (SVP). The ISO requests an effective date of February 21, 2005.

The ISO states that the non-privileged elements of this filing have been served on SVP, the California Public Utilities Commission, and all entities on the official service lists for Docket Nos. ER02–2321–000, ER04–185–000, ER04–940 and ER05–81–000.

Comment Date: 5 p.m. Eastern Time on February 3, 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. E5–349 Filed 1–28–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EG05–31–000, et al.]

TransAlta Centralia Generation LLC, et al.; Electric Rate and Corporate Filings

January 24, 2005.

The following filings have been made with the Commission. The filings are listed in ascending order within each docket classification.

1. TransAlta Centralia Generation LLC

[Docket No. EG05–31–000]

On January 14, 2005, TransAlta Centralia Generation LLC (TACG) filed with the Commission an application for redetermination of exempt wholesale generator (EWG) status pursuant to part 365 of the Commission's regulations.

TACG states that copies of the application were sent to the Securities and Exchange Commission and the Oregon Public Utility Commission, the Washington Utilities and Transportation Commission, the California Public Utilities Commission, the Wyoming Public Service Commission, the Idaho Public Utility Commission, and the Utah Public Service Commission.

Comment Date: 5 p.m. Eastern Time on February 4, 2005.

2. Florida Power Corporation

[Docket No. ER97–2846–004]

Take notice that on December 23, 2004, Florida Power Corporation submitted a compliance filing pursuant to the Commission's Orders issued May 13, 2004 in Docket No. ER02–1406–001, *et al., Arcadia Power Partners, LLC,* 107 FERC ¶ 61,168 and July 8, 2004 in Docket No. ER96–2495–018, *et al., AEP Power Marketing, Inc.,* 108 FERC ¶ 61,026.

Comment Date: 5 p.m. Eastern Time on February 3, 2005.

3. Central Vermont Public Service Corporation

[Docket No. ER98–2329–005]

Take notice that on January 13, 2005, Central Vermont Public Service Corporation (Central Vermont) tendered for filing information and data in support of its request for renewal of market-based rate authority filed on October 25, 2004 in Docket No. ER98–2329–003, as supplemented on November 9, 2005 in Docket No. ER98–2329–004.

Central Vermont states that a copy of the filing was served upon all parties to the Commission's official service list in Docket Nos. ER98–2329, the Vermont Public Service Board, and the New Hampshire Public Utilities Commission.

Comment Date: 5 p.m. Eastern Time on February 3, 2005.

4. Hermiston Generating Company, L.P.

[Docket No. ER01–2159–005]

Take notice that on January 13, 2005, Hermiston Generating Company, L.P. (Hermiston), submitted for filing a notice of a change in facts with respect to its ownership that represents a departure from the characteristics the Commission relied upon in granting market-based rate authority to Hermiston.

Comment Date: 5 p.m. Eastern Time on February 3, 2005.

5. CalPeak Power—Midway LLC, CalPeak Power—Panoche LLC, CalPeak Power—Vaca Dixon LLC, CalPeak Power—El Cajon LLC, CalPeak Power—Enterprise LLC, CalPeak Power—Border LLC

[Docket Nos. ER01–2537–001, ER01–2543–001, ER01–2544–001, ER01–2545–001, ER01–2546–001, ER01–2547–001]

Take notice that on January 13, 2005, CalPeak Power—Midway LLC, CalPeak Power—Panoche LLC, CalPeak Power—Vaca Dixon LLC, CalPeak Power—El Cajon LLC, CalPeak Power—Enterprise LLC, and CalPeak Power—Border LLC (collectively, the CalPeak Entities) submitted a triennial updated power analysis and revised tariff sheets to incorporate the Commission's market behavior rules adopted in *Investigation of Terms and Conditions of Public Utility Market-Based Rate* Authorizations, 105 FERC ¶ 61,218 (2003), *order on reh'g,* 107 FERC ¶ 61,175 (2004).

The CalPeak Entities state that copies of the filing were served upon parties on the official service lists in above-captioned proceedings.

Comment Date: 5 p.m. Eastern Time on February 3, 2005.

6. HC Power Marketing L.L.C.

[Docket No. ER02–388–003]

Take notice that on January 13, 2005, HC Power Marketing (HCPM) submitted for filing a triennial updated market analysis.

HCPM states that copies of the filing were served upon the parties listed on the official service list compiled by the Secretary in Docket No. ER02–388.

Comment Date: 5 p.m. Eastern Time on February 3, 2005.

7. Southern California Edison Company

[Docket No. ER05–170–001]

Take notice that on January 13, 2005, Southern California Edison Company (SCE) submitted the Devil Canyon Service Agreement for Wholesale Distribution Service, Service Agreement No. 126, under FERC Electric Tariff, First Revised Volume No. 5 as a supplement to its November 2, 2004 filing under Docket No. ER05–170–000.

SCE states that copies of the filing were served upon those persons whose names appear on the official service list compiled by the Commission in this Docket No. ER05–170–000.

Comment Date: 5 p.m. Eastern Time on January 31, 2005.

8. Kansas City Power & Light Company

[Docket No. ER05–177–001]

Take notice that on January 14, 2005, Kansas City Power & Light Company (KCPL) submitted a compliance filing pursuant to the Commission's Order issued December 28, 2004 in Docket No. ER05–177–000. KCPL states that this filing pertains to service schedules for the City of Baldwin City, Kansas.

KCPL states that copies of the filing were served on the City of Baldwin City, Kansas as well as the Missouri Public Service Commission and the Kansas State Corporation Commission.

Comment Date: 5 p.m. Eastern Time on February 4, 2005.

9. Carolina Power & Light Company

[Docket No. ER05–183–000]

Take notice that on January 14, 2005, Carolina Power & Light Company filed a notice of withdrawal of its November 4, 2004 filing in Docket No. ER05–183–000 regarding a Generator Balancing Service Schedule under the Open Access Transmission Tariffs of CP&L and Florida Power Corporation.

Comment Date: 5 p.m. Eastern Time on February 4, 2005.

10. Virginia Electric and Power Company

[Docket No. ER05–197–001]

Take notice that on January 13, 2005, Virginia Electric and Power Company (VEPCO) submitted for filing a response to the deficiency letter issued on December 15, 2004 regarding VEPCO's November 8, 2004 filing in Docket No. ER005–197–000 of an executed Standard Large Generator Interconnection Agreement with CPV Warren, LLC. VEPCO requests an effective date of November 9, 2004.

VEPCO states that copies of the filing were served upon the Commission's official service list in Docket No. ER05–197 and the Virginia State Corporation Commission.

Comment Date: 5 p.m. Eastern Time on February 3, 2005.

11. JPMorgan Chase Bank, N.A.

[Docket No. ER05–283–001]

Take notice that on January 13, 2005, JPMorgan Chase Bank, N.A. (JPMCB) filed an amendment to its December 2, 2004 filing in Docket No. ER05–283–000 for acceptance of JPMCB's Rate Schedule FERC No. 1; the granting of certain blanket approvals, including the authority to sell electricity at market-based rates; and the waiver of certain Commission regulations.

Comment Date: 5 p.m. Eastern Time on February 3, 2005.

12. Avista Energy, Inc.

[Docket No. ER05–313–001]

Take notice that on January 13, 2005, Avista Energy, Inc. (Avista Energy) filed proposed revisions to its First Revised Rate Schedule FERC No. 1 originally filed on December 7, 2004 in Docket No. ER05–313–000.

Comment Date: 5 p.m. Eastern Time on February 3, 2005.

13. American Electric Power Service Corporation

[Docket No. ER05–450–000]

Take notice that on January 14, 2005, the American Electric Power Service Corporation (AEPSC), tendered for filing an Interconnection and Local Delivery Service Agreement between AEPSC and the City of Dowagiac, Michigan, designated as Substitute Service Agreement No. 532 under the Operating Companies of the American Electric Power System FERC Electric Tariff, Third Revised Volume No. 6. AEPSC requests an effective date of January 1, 2005.

AEPSC states that a copy of the filing was served upon the Party and the Michigan Public Service Commission.

Comment Date: 5 p.m. Eastern Time on February 4, 2005.

14. Wisconsin Electric Power Company

[Docket No. ER05–451–000]

Take notice that on January 14, 2005, Wisconsin Electric Power Company (Wisconsin Electric) submitted for filing revised Exhibit No. 4.4 of two Generation-Transmission Must Run Agreements between Wisconsin Electric and American Transmission Company, LLC (ATCLLC) to reflect updated inputs to the formula rate applicable to the sale of must run energy from several Wisconsin Electric generation units. Wisconsin Electric requests an effective date of January 1, 2005.

Wisconsin Electric states that copies of this filing were served upon ATCLLC, the Michigan Public Service Commission and the Public Service Commission of Wisconsin.

Comment Date: 5 p.m. Eastern Time on February 4, 2005.

15. Public Service Company of New Mexico

[Docket No. ER05–452–000]

Take notice that on January 14, 2005, Public Service Company of New Mexico (PNM) submitted for filing an executed service agreement for firm point-to-point transmission service and ancillary services between PNM Transmission Development and Contracts and PNM Wholesale Marketing, under the terms of PNM's open access transmission tariff. PNM requests an effective date of January 1, 2005.

PNM states that copies of the filing have been sent to PNM Wholesale Marketing, PNM Transmission Development and Contracts, the New Mexico Public Regulation Commission and the New Mexico Attorney General.

Comment Date: 5 p.m. Eastern Time on February 4, 2005.

16. Wisconsin River Power Company

[Docket No. ER05–453–000]

Take notice that on January 14, 2005, Wisconsin River Power Company (Wisconsin River) filed a market-based rate tariff for sales of energy and capacity into the Midwest Independent Transmission System Operator, Inc. (MISO) and the PJM Interconnection, L.L.C. (PJM) centralized markets and minor revisions to two power sales agreements to facilitate such sales. Wisconsin River requests an effective date of February 28, 2005.

Wisconsin River states that copies of the filing were served upon PJM, MISO, and the Michigan Public Service Commission.

Comment Date: 5 p.m. Eastern Time on February 4, 2005.

17. Bear Swamp Power Company LLC

[Docket No. ER05–454–000]

Take notice that on January 14, 2005, Bear Swamp Power Company LLC (Bear Swamp) submitted for filing, pursuant to section 205 of the Federal Power Act and Part 35 of the Commission's regulations an application for market-based rate authorization to sell energy, capacity, and ancillary services, and reassign transmission capacity and resell firm transmission rights. Bear Swamp also requests the waivers and exemptions from regulations typically granted to the holders of market-based rate authorization. Bear Swamp requests an effective date of March 15, 2005.

Comment Date: 5 p.m. Eastern Time on February 4, 2005.

18. Bellows Falls Power Company, LLC

[Docket No. ER05–455–000]

Take notice that on January 14, 2005, Bellows Falls Power Company, LLC (Bellows Falls) submitted for filing, pursuant to section 205 of the Federal Power Act and part 35 of the Commission's regulations an application for market-based rate authorization to sell energy, capacity, and ancillary services, and reassign transmission capacity and resell firm transmission rights. Bellow Falls also requests the waivers and exemptions from regulations typically granted to the holders of market-based rate authorization. Bellows Falls requests an effective date as of the date of closing on the lease of the Bellows Falls Hydroelectric Project which is expected to occur by the end of the first quarter of 2005.

Comment Date: 5 p.m. Eastern Time on February 4, 2005.

19. PJM Interconnection, L.L.C.

[Docket No. ER05–456–000]

Take notice that on January 14, 2005, PJM Interconnection, L.L.C. (PJM), submitted for filing an executed interconnection service agreement (ISA) among PJM, American Municipal Power-Ohio, Inc. as agent for Ohio Municipal Electric Generation Joint Venture 5, and American Electric Power Service Corporation as agent for Ohio Power Company doing business as AEP, and a notice of cancellation of an interim service agreement that has been superseded. PJM requests an effective date of December 16, 2004 for the ISA.

PJM states that copies of this filing were served upon the parties to the agreement and the state regulatory commissions within the PJM region.

Comment Date: 5 p.m. Eastern Time on February 4, 2005.

20. Duquesne Light Company

[Docket No. ER05–457–000]

Take notice that on January 14, 2005, Duquesne Light Company (Duquesne) submitted an amendment to an Interchange Agreement between affiliates of FirstEnergy Corp. (FirstEnergy) and Duquesne to reflect the disconnection and retirement from operation of one of the 69kV transmission lines that interconnects the transmission systems of FirstEnergy and Duquesne.

Duquesne states that copies of the filing were served on the state regulatory commissions with jurisdiction over Duquesne and FirstEnergy.

Comment Date: 5 p.m. Eastern Time on February 4, 2005.

21. Wisconsin Electric Power Company

[Docket No. ER05–458–000]

Take notice that on January 14, 2005, Wisconsin Electric Power Company (Wisconsin Electric) submitted proposed amendments to Wisconsin Electric's Electric Tariff, Second Revised Volume No. 2. Wisconsin Electric states that the amendments would revise Service Schedule F—Dynamic Regulation and Frequency Response Service to broaden its applicability to new generators locating within the control area historically (prior to January 1, 2001) operated by Wisconsin Electric Power Company and the historical service territory of Edison Sault Electric Company (Wisconsin Electric Control Area). Wisconsin Electric requests an effective date of March 15, 2005.

Wisconsin Electric states that copies of the filing were served on its CST customers and on the state regulatory bodies in Wisconsin and Michigan.

Comment Date: 5 p.m. Eastern Time on February 4, 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 e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Linda Mitry,

Deputy Secretary.

[FR Doc. E5–354 Filed 1–28–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 287–009—IL]

Midwest Hydro Inc.; Notice of Availability of Environmental Assessment

January 24, 2005.

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's regulations, 18 CFR part 380 (Order No. 486, 52 FR 47879), the Office of Energy Projects has reviewed the application for a new license for the Dayton Hydroelectric Project, located on the Fox River, in La Salle County, Illinois, and has prepared an Environmental Assessment (EA). In the EA, Commission staff analyze the potential environmental effects of relicensing the project and conclude that issuing a new license for the project, with appropriate environmental measures, would not constitute a major federal action that would significantly affect the quality of the human environment.

A copy of the EA is on file with the Commission and is available for public inspection. The EA may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at 1–866–208–3676, or for TTY, (202) 502–8659.

Any comments should be filed within 30 days from the issuance date of this notice, and should be addressed to the Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Room 1–A, Washington, DC 20426. Please affix ''Dayton Project No. 287'' to all comments. Comments may be filed electronically via Internet in lieu of paper. The Commission strongly encourages electronic filings. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web

site under the ''eFiling'' link. For further information, contact Tom Dean at (202) 502–6041.

Magalie R. Salas,

Secretary.

[FR Doc. E5–350 Filed 1–28–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 1855–027]

USGen New England, Inc.; Notice of Availability of Environmental Assessment

January 24, 2005.

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's (Commission) regulations, 18 CFR part 380 (Order No. 486, 52 FR 47897), the Office of Energy Projects' staff has prepared an Environmental Assessment (EA) for an application for a non-capacity related amendment of the Bellows Falls Project. The Bellows Falls Project, FERC No. 1855, is located on the Connecticut River in Chesire and Sullivan Counties, New Hampshire, and Windham and Windsor Counties, Vermont.

The EA contains the staff's analysis of the potential environmental impacts of the proposal and concludes that approval of the proposal would not constitute a major federal action significantly affecting the quality of the human environment.

A copy of the EA is attached to a January 21, 2005 Commission order titled Order Approving Change In Project Boundary, 110 FERC ¶ 62,046, which is available for review and reproduction at the Commission's Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426. The EA may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''elibrary'' link. Enter the docket number (prefaced by P-) and excluding the last three digits, in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or for TTY, contact (202) 502–8659.

For further information, contact Rebecca Martin at (202) 502–6012.

Magalie R. Salas,

Secretary.

[FR Doc. E5–351 Filed 1–28–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PF05–2–000]

Midwestern Gas Transmission Company; Notice of Intent To Prepare an Environmental Assessment for the Proposed MGT Eastern Extension Project, Request for Comments on Environmental Issues, and Notice of Public Scoping Meeting

January 21, 2005.

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental assessment (EA) that will discuss the environmental impacts of Midwestern Gas Transmission Company's (MGT) MGT Eastern Extension Project in Sumner and Trousdale Counties, Tennessee. This notice announces the opening of the scoping process the Commission will use to gather input from the public and interested agencies on the project. Your input will help the Commission staff determine which issues need to be evaluated in the EA. The Commission will use the EA in its decision making process to determine whether or not to authorize the project. Please note that the scoping period will close on March 3, 2005.

Comments may be submitted in written form or verbally. Further details on how to submit written comments are provided in the public participation section of this notice. In lieu of sending written comments, you are invited to attend the public scoping meeting that is scheduled as follows:

Tuesday, February 24, 2005, 7 p.m. (CST): Sumner County Building, 355 No. Belvedere Drive, Gallatin, TN, (615) 452–3604.

This notice is being sent to affected landowners; federal, state, and local government representatives and agencies; environmental and public interest groups; Native American tribes; other interested parties; and local libraries and newspapers in this proceeding. We [1] encourage government representatives to notify their constituents of this planned project and encourage them to comment on their areas of concern.

Summary of the Proposed Project

MGT proposes to construct and operate about 30 miles of 16-inch-diameter pipeline commencing at the MGT Portland Station in Sumner County, Tennessee and traversing southeasterly to proposed interconnects with Columbia Gulf Transmission Company and East Tennessee Natural Gas Company in Trousdale County, Tennessee. The proposed pipeline would deliver up to 120,000 decatherms per day (Dth/d) to Piedmont Natural Gas Company, Inc., a local distribution company, for long-term transportation. Additional pipeline facilities would consist of a pig launcher and piping modifications to existing reciprocating engines at the MGT Portland Station, mainline valve assemblies and a pig receiver at the terminus of the line, ultrasonic meters with electronic flow measurement, flow control valves, and data acquisition control buildings.

MGT plans to file a formal application for this project with the FERC in May 2005. They are requesting approval to begin construction in June 2006, with a proposed in-service date of November 1, 2006.

A map depicting MGT's proposed pipeline route is provided in Appendix 1.[2]

Several issues have already been raised by concerned citizens, which include public safety, eminent domain, proximity to residences, and property values.

The EA Process

Although no formal application for authorizing natural gas facilities has been filed, the FERC staff is initiating its National Environmental Policy Act (NEPA) review now. The purpose of the FERC's Pre-filing Process is to encourage the early involvement of interested stakeholders and to identify and resolve issues before an application is filed with the FERC.

The FERC will use the EA to consider the environmental impact that could result if it issues MGT a Certificate of Public Convenience and Necessity.

This notice formally announces our preparation of the EA and the beginning of the process referred to as ''scoping''. We are soliciting input from the public and interested agencies to help us focus the analysis in the EA on the potentially significant environmental issues related to the proposed action.

Our independent analysis of the issues will be included in an EA that will be mailed to federal, state, and local

[1] ''We'', ''us'', and ''our'' refer to the environmental staff of the Office of Energy Projects.

[2] The appendices referenced in this notice are not being printed in the **Federal Register**. Copies are available on the Commission's Web site at the ''eLibrary'' link or from the Commission's Public Reference and Files Maintenance Branch, Room 2A or call (202) 502–8371. For instructions on connecting to ''eLibrary'' refer to the end of this notice. Copies of the appendices were sent to all those receiving this notice in the mail.

government agencies; elected officials; environmental and public interest groups; affected landowners; other interested parties; Native American tribes; local newspapers and libraries; and the FERC's official service list for this proceeding. A 30-day comment period will be allotted for review of the EA. We will consider all comments on the EA in any Commission Order that is issued for the project.

We have held early discussions with other jurisdictional agencies to identify their issues and concerns. These agencies include the U.S. Army Corps of Engineers, Nashville District; Tennessee Wildlife Resources Agency; and the Tennessee Department of Environment and Conservation, Divisions of Natural Heritage and Water Pollution Control. With this notice, we are asking these and other federal, state, and local agencies with jurisdiction and/or special expertise with respect to environmental issues to formally cooperate with us in the preparation of the EA. Agencies that would like to request cooperating status should follow the instructions for filing comments provided below.

Public Participation

You can make a difference by providing us with your specific comments or concerns about the proposal. Your comments should focus on the potential environmental effects, reasonable alternatives (including alternative locations/routes), and measures to avoid or lessen environmental impact. The more specific your comments, the more useful they will be. To ensure that your comments are timely and properly recorded, please mail your comments so that they will be received in Washington, DC on or before March 3, 2005, and carefully follow these instructions:

- Send an original and two copies of your letter to: Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First St., NE., Room 1A, Washington, DC 20426;
- Label one copy of your comments for the attention of Gas Branch 1; DG2E; and
- Reference Docket No. PF05–2–000 on the original and both copies.

The public scoping meeting to be held on February 24, 2005 in Gallatin, TN is designed to provide another opportunity to offer comments on the proposed project. Interested groups and individuals are encouraged to attend this meeting and to present comments on the environmental issues they believe should be addressed in the EA. Transcripts of the meeting will be made so that your comments will be accurately recorded.

Please note that the Commission encourages electronic filing of comments. *See* 18 Code of Federal Regulations 385.2001(a)(1)(iii) and the instructions on the Commission's Internet Web site at *http://www.ferc.gov* under the ''eFiling'' link and the link to the User's Guide. Prepare your submission in the same manner as you would if filing on paper and save it to a file on your hard drive. Before you can file comments you will need to create an account by clicking on ''Login to File'' and then ''New User Account''. You will be asked to select the type of filing you are making. This filing is considered a ''Comment on Filing''.

When MGT submits its application for authorization to construct and operate the MGT Eastern Extension Project, the Commission will publish a Notice of Application in the **Federal Register** and will establish a deadline for interested persons to intervene in the proceeding. Because the Commission's NEPA Pre-filing Process occurs before an application to begin a proceeding is officially filed, petitions to intervene during this process are premature and will not be accepted by the Commission.

Environmental Mailing List

An effort is being made to send this notice to all individuals, organizations, and government entities interested in and/or potentially affected by the proposed project. This includes all landowners who are potential right-of-way grantors, whose property may be used temporarily for project purposes, or who own homes within distances defined in the Commission's regulations of certain above-ground facilities. If you wish to remain on our environmental mailing list, please return the Information Request Form included in Appendix 2. If you do not return this form, you will be removed from our mailing list.

Availability of Additional Information

A fact sheet prepared by the FERC entitled ''An Interstate Natural Gas Facility On My Land? What Do I Need To Know?'' is also available for viewing on the FERC Internet website. This fact sheet addresses a number of typically asked questions, including the use of eminent domain and how to participate in the Commission's proceedings.

Additional information about the project is available from the Commission's Office of External Affairs at 1–866–208–FERC (3372) or on the FERC Internet Web site (*http://www.ferc.gov*). Using the ''eLibrary'' link, select General Search from the ''eLibrary'' menu, enter the selected date range and Docket Number (*i.e.*, PF05–2), and follow the instructions. Searches may also be done using the phrase MGT Extension Project in the Text Search field. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ ferc.gov* or toll free at 1–866–208–3676, or for TTY, contact (202) 502–8659. The ''eLibrary'' link on the FERC Internet Web site also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rule makings.

In addition, the FERC now offers a free service called ''eSubscription'' that allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. To register for this service, go to *http://www.ferc.gov/esubscribenow.htm.*

Finally, MGT has established an Internet Web site for its project at *http://www.mgt.nborder.com.* The Web site includes a description of the project, overview map, contact information for MGT, and links to related documents.

Magalie R. Salas,

Secretary.

[FR Doc. E5–337 Filed 1–28–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. CP04–36–000, CP04–41–000]

Weaver's Cove Energy, L.L.C., Mill River Pipeline, L.L.C.; Notice of Limited Additional Period for Comment

January 19, 2005.

On July 30, 2004, the Secretary of the Federal Energy Regulatory Commission (FERC or Commission) issued a Notice of Availability of the Draft Environmental Impact Statement (DEIS) and the Draft General Conformity Determination for the Proposed Weaver's Cove LNG Project, in the above-docketed proceedings. Comments on the draft EIS were due to the Secretary by September 20, 2004. As described below in this Notice, because it took the Commission time to process the requests described in the following paragraph, we will allow a limited opportunity for those who receive additional information to submit

supplemental comments based on that information. Responses will be included in the Final Environmental Impact Statement.

The Commission has received numerous requests under its critical energy infrastructure information (CEII) regulation, 18 CFR 388.113, for several documents filed as CEII by Weaver's Cover Energy, L.L.C. (Weaver's Cove). The Commission and the Commission's CEII Coordinator are currently processing these requests. To the extent that a CEII request existing as of January 19, 2005 is granted, notice is given that any such requester is hereby given a period of thirty calendar days after the additional information is made available to the requester within which to submit any additional comments on the DEIS related to the information obtained as part of the CEII request.

Magalie R. Salas,

Secretary.

[FR Doc. E5–342 Filed 1–28–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[P–2601–007]

Duke Power; Notice of Application Ready for Environmental Analysis and Soliciting Comments, Recommendations, Terms and Conditions, and Prescriptions

January 21, 2005.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Subsequent minor license.

b. *Project No.:* 2601–007.

c. *Date filed:* July 22, 2003.

d. *Applicant:* Duke Power.

e. *Name of Project:* Bryson Hydroelectric Project.

f. *Location:* On the Oconaluftee River, in Swain County, North Carolina. The project does not affect Federal lands.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* John C. Wishon, Nantahala Area Relicensing Project Manager, Duke Power, 301 NP&L Loop, Franklin, NC 28734, (828) 369–4604, *jcwishon@duke-energy.com*.

i. *FERC Contact:* Carolyn Holsopple at (202) 502–6407 or *carolyn.holsopple@ferc.gov*.

j. Deadline for filing comments, recommendations, terms and conditions, and prescriptions is 60 days from the issuance of this notice; reply comments are due 105 days from the issuance date of this notice.

All documents (original and eight copies) should be filed with: Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The Commission's Rules of Practice require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

Comments, recommendations, terms and conditions, and prescriptions may be filed electronically via the Internet in lieu of paper. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov*) under the ''eLibrary'' link.

k. This application has been accepted for filing and is now ready for environmental analysis.

l. The existing Bryson Hydroelectric Project operates in a run-of-river mode, within a 6-inch tolerance band. Project operation is dependent on available flow in the Oconaluftee River. The project consists of the following features: (1) A 341-foot-long, 36-foot-high concrete multiple arch dam, consisting of, from left to right facing downstream, (a) a concrete, non-overflow section, (b) two gravity spillway sections, each surmounted by a 16.5-foot-wide by 16-foot-high Tainter gate, and (c) an uncontrolled multiple-arch spillway with four bays; (2) a 1.5-mile-long, 38-acre impoundment at elevation 1828.41 mean sea level (msl); (3) two intake bays, each consisting of an 8.5-foot-diameter steel intake pipe with a grated trashrack having a clear bar spacing of between 2.25 to 2.5 inches; (4) a powerhouse having a brick and concrete superstructure and concrete substructure, containing two turbine/generating units, having a total installed capacity of 980 kilowatts (kW); (5) a switchyard, with three single-phased transformers; and (6) appurtenant facilities.

Duke Power estimates that the average annual generation is 5,534,230 kilowatt hours (kWh). Duke Power uses the Bryson Project facilities to generate electricity for use by retail customers living in the Duke Power-Nantahala Area.

m. A copy of the application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at 1–866–208–3676, or for TTY, (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

n. Public notice of the filing of the initial development application, which has already been given, established the due date for filing competing applications or notices of intent. Under the Commission's regulations, any competing development application must be filed in response to and in compliance with public notice of the initial development application. No competing applications or notices of intent may be filed in response to this notice.

All filings must (1) bear in all capital letters the title ''COMMENTS'', ''REPLY COMMENTS'', ''RECOMMENDATIONS,'' ''TERMS AND CONDITIONS,'' or ''PRESCRIPTIONS;'' (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person submitting the filing; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, recommendations, terms and conditions or prescriptions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Agencies may obtain copies of the application directly from the applicant. Each filing must be accompanied by proof of service on all persons listed on the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b), and 385.2010.

Magalie R. Salas,

Secretary.

[FR Doc. E5–332 Filed 1–28–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[P–2602–007]

Duke Power; Notice of Application Ready for Environmental Analysis and Soliciting Comments, Recommendations, Terms and Conditions, and Prescriptions

January 21, 2005.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Surrender of License.

b. *Project No.:* 2602–007.

c. *Date filed:* May 26, 2004.

d. *Applicant:* Duke Power.

e. *Name of Project:* Dillsboro Hydroelectric Project.

f. *Location:* On the Tuckasegee River, in Jackson County, North Carolina. The project does not affect federal lands.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* John C. Wishon, Nantahala Area Relicensing Project Manager, Duke Power, 301 NP&L Loop, Franklin, NC 28734, (828) 369–4604, *jcwishon@duke-energy.com*

i. *FERC Contact:* Carolyn Holsopple at (202) 502–6407 or *carolyn.holsopple@ferc.gov.*

j. Deadline for filing comments, recommendations, terms and conditions, and prescriptions is 60 days from the issuance of this notice; reply comments are due 105 days from the issuance date of this notice.

All documents (original and eight copies) should be filed with: Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The Commission's Rules of Practice require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

Comments, recommendations, terms and conditions, and prescriptions may be filed electronically via the Internet in lieu of paper. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov*) under the ''e-filing'' link.

k. This application has been accepted for filing and is now ready for environmental analysis.

l. Duke Power filed an application to surrender its major license for the Dillsboro Hydroelectric Project. Duke requests that the Commission approve the following: (1) Continue operating the Dillsboro Project under the terms of the current license until dam removal begins; (2) Decommission the dam and powerhouse and complete dam removal and powerhouse closure/removal within three years following the final FERC approval order; (3) Prepare and obtain FERC approval of, and implement an environmental monitoring plan in association with the dam removal, including completion of the Duke implemented portions of any post-removal stream restoration and annual monitoring within two years following completion of the dam removal. Also included in the surrender application was the Tuckasegee/Nantahala Settlement Agreements which were filed on January 26, 2004 as part of the relicense applications for the East Fork (P–2698), West Fork (P–2686), Nantahala (P–2692), Bryson (P–2601), Franklin (P–2603), and Mission (P–2619) Hydroelectric Projects. The settlement agreements provide various environmental enhancement measures, which include the removal of the Dillsboro Dam and Powerhouse.

m. A copy of the application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at 1–866–208–3676, or for TTY, (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

n. Public notice of the filing of the initial development application, which has already been given, established the due date for filing competing applications or notices of intent. Under the Commission's regulations, any competing development application must be filed in response to and in compliance with public notice of the initial development application. No competing applications or notices of intent may be filed in response to this notice.

All filings must (1) bear in all capital letters the title ''COMMENTS'', ''REPLY COMMENTS'', ''RECOMMENDATIONS,'' ''TERMS AND CONDITIONS,'' or ''PRESCRIPTIONS;'' (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person submitting the filing; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, recommendations, terms and conditions or prescriptions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Agencies may obtain copies of the application directly from the applicant. Each filing must be accompanied by proof of service on all persons listed on the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b), and 385.2010.

Magalie R. Salas,

Secretary.

[FR Doc. E5–333 Filed 1–28–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[P–2686–032]

Duke Power; Notice of Application Ready for Environmental Analysis and Soliciting Comments, Recommendations, Terms and Conditions, and Prescriptions

January 21, 2005.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* New major license.

b. *Project No.:* 2686–032.

c. *Date filed:* January 26, 2004.

d. *Applicant:* Duke Power.

e. *Name of Project:* West Fork Hydroelectric Project.

f. *Location:* On the West Fork of the Tuckasegee River, in Jackson County, North Carolina. The project does not affect federal lands.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* John C. Wishon, Nantahala Area Relicensing Project Manager, Duke Power, 301 NP&L Loop, Franklin, NC 28734, (828) 369–4604, *jcwishon@duke-energy.com.*

i. *FERC Contact:* Carolyn Holsopple at (202) 502–6407 or *carolyn.holsopple@ferc.gov.*

j. Deadline for filing comments, recommendations, terms and conditions, and prescriptions is 60 days from the issuance of this notice; reply comments are due 105 days from the issuance date of this notice.

All documents (original and eight copies) should be filed with: Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The Commission's Rules of Practice require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

Comments, recommendations, terms and conditions, and prescriptions may be filed electronically via the Internet in lieu of paper. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov*) under the ''e-filing'' link.

k. This application has been accepted for filing and is now ready for environmental analysis.

l. The existing West Fork Project operates in a peaking mode and is comprised of two developments: Thorpe and Tuckasegee. The Thorpe development consists of the following features: (1) A 900-foot-long, 150-foot-tall rockfill dam (Glenville Dam), with a 410-foot-long, 122-foot-tall earth and rockfill saddle dam located approximately 500 feet from the main dam left abutment; (2) a spillway for Glenville Dam located at the right abutment; (3) a 1,462-acre reservoir, with a normal reservoir elevation of 3,491.8 feet National Geodetic Vertical Datum and a storage capacity of 72,000-acre-feet; (4) a concrete and brick powerhouse containing one generating unit having an installed capacity of 15.5 megawatts (MW); and (5) appurtenant facilities.

The Tuckasegee development consists of the following features: (1) A 254-foot-long, 61-foot-high concrete arch dam (Tuckasegee Dam), with 24 steel flashboards; (2) a 233.5-foot-long spillway; (3) a 7.9-acre reservoir, with a normal reservoir elevation of 2,778.75 feet National Geodetic Vertical Datum and a storage capacity of 35-acre-feet; (4) a concrete powerhouse containing one generating unit having an installed capacity of 2.6 MW; and (5) appurtenant facilities.

m. A copy of the application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at 1–866–208–3676, or for TTY, (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

n. Public notice of the filing of the initial development application, which has already been given, established the due date for filing competing applications or notices of intent. Under the Commission's regulations, any competing development application must be filed in response to and in compliance with public notice of the initial development application. No competing applications or notices of intent may be filed in response to this notice.

All filings must (1) bear in all capital letters the title ''COMMENTS'', ''REPLY COMMENTS'', ''RECOMMENDATIONS,'' ''TERMS AND CONDITIONS,'' or ''PRESCRIPTIONS;'' (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person submitting the filing; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, recommendations, terms and conditions or prescriptions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Agencies may obtain copies of the application directly from the applicant. Each filing must be accompanied by proof of service on all persons listed on the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b), and 385.2010.

Magalie R. Salas,

Secretary.

[FR Doc. E5–334 Filed 1–28–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[P–2692–032]

Duke Power; Notice of Application Ready for Environmental Analysis and Soliciting Comments, Recommendations, Terms and Conditions, and Prescriptions

January 21, 2005.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* New Major License.

b. *Project No.:* 2692–032.

c. *Date filed:* February 20, 2004.

d. *Applicant:* Duke Power.

e. *Name of Project:* Nantahala Hydroelectric Project.

f. *Location:* On the Nantahala River and its tributaries, in Macon and Clay Counties, North Carolina. There are 41 acres of United States Forest Service managed land (Nantahala National Forest) within the Nantahala Project boundary.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* John C. Wishon, Nantahala Area Relicensing Project Manager, Duke Power, 301 NP&L Loop, Franklin, NC 28734, (828) 369–4604, *jcwishon@duke-energy.com.*

i. *FERC Contact:* Carolyn Holsopple at (202) 502–6407 or *carolyn.holsopple@ferc.gov.*

j. Deadline for filing comments, recommendations, terms and conditions, and prescriptions is 60 days from the issuance of this notice; reply comments are due 105 days from the issuance date of this notice.

All documents (original and eight copies) should be filed with: Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The Commission's Rules of Practice require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

Comments, recommendations, terms and conditions, and prescriptions may be filed electronically via the Internet in lieu of paper. The Commission strongly encourages electronic filings. *See* 18

CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov*) under the ''e-filing'' link. k. This application has been accepted for filing and is now ready for environmental analysis.

l. The existing Nantahala Project operates in a peaking mode and consists of the following features: (1) A 1,042-foot-long, 250-foot-high earth and rockfill dam; (2) a spillway for the dam located at the east abutment; (3) a 1,605-acre reservoir, with a normal reservoir elevation of 3,012.2 feet National Geodetic Vertical Datum and a storage capacity of 38,336 acre-feet; (4) a reinforced concrete powerhouse containing one generating unit having an installed capacity of 42 megawatts (MW); (5) two stream diversions (Dicks Creek and Whiteoak Creek) that provide additional flow into the project; and (6) appurtenant facilities. m. A copy of the application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at FERCOnlineSupport@ferc.gov or toll-free at 1–866–208–3676, or for TTY, (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

n. Public notice of the filing of the initial development application, which has already been given, established the due date for filing competing applications or notices of intent. Under the Commission's regulations, any competing development application must be filed in response to and in compliance with public notice of the initial development application. No competing applications or notices of intent may be filed in response to this notice.

All filings must (1) Bear in all capital letters the title ''COMMENTS'', ''REPLY COMMENTS'', ''RECOMMENDATIONS,'' ''TERMS AND CONDITIONS,'' or ''PRESCRIPTIONS;'' (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person submitting the filing; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, recommendations, terms and conditions or prescriptions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Agencies may obtain copies of the application directly from the applicant. Each filing must be accompanied by proof of service on all persons listed on the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b), and 385.2010.

Magalie R. Salas,

Secretary.

[FR Doc. E5–335 Filed 1–28–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[P–2698–033]

Duke Power; Notice of Application Ready for Environmental Analysis and Soliciting Comments, Recommendations, Terms and Conditions, and Prescriptions

January 21, 2005.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* New Major License.

b. *Project No.:* 2698–033.

c. *Date filed:* February 20, 2004.

d. *Applicant:* Duke Power.

e. *Name of Project:* East Fork Hydroelectric Project.

f. *Location:* On the East Fork of the Tuckasegee River, in Jackson County, North Carolina. There are 23.15 acres of United States Forest Service land (Nantahala National Forest) within the boundary of the project.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* John C. Wishon, Nantahala Area Relicensing Project Manager, Duke Power, 301 NP&L Loop, Franklin, NC 28734, (828) 369–4604, *jcwishon@duke-energy.com.*

i. *FERC Contact:* Carolyn Holsopple at (202) 502–6407 or *carolyn.holsopple@ferc.gov.*

j. Deadline for filing comments, recommendations, terms and conditions, and prescriptions is 60 days from the issuance of this notice; reply comments are due 105 days from the issuance date of this notice.

All documents (original and eight copies) should be filed with: Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The Commission's Rules of Practice require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

Comments, recommendations, terms and conditions, and prescriptions may be filed electronically via the Internet in lieu of paper. The Commission strongly encourages electronic filings. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov*) under the ''e-filing'' link.

k. This application has been accepted for filing and is now ready for environmental analysis.

l. The existing East Fork Project operates in a peaking mode and is comprised of three developments: Cedar Cliff, Bear Creek and Tennessee Creek. The Cedar Cliff development consists of the following features: (1) A 590-foot-long, 173-foot-tall earth core and rockfill dam (Cedar Cliff Dam); (2) a service spillway excavated in rock at the right abutment; (3) a 221-foot-long emergency spillway located at the left abutment; (4) a 121-acre reservoir, with a normal reservoir elevation of 2,330 feet National Geodetic Vertical Datum and a storage capacity of 6,200-acre-feet; (5) a concrete powerhouse containing one generating unit having an installed capacity of 6.1 megawatts (MW); and (6) appurtenant facilities.

The Bear Creek development consists of the following features: (1) A 760-foot-long, 215-foot-tall earth core and rockfill dam (Bear Creek Dam); (2) a spillway on the right abutment; (3) a 473-acre reservoir, with a normal reservoir elevation of 2,560 feet National Geodetic Vertical Datum and a storage capacity of 34,650-acre-feet; (4) a concrete powerhouse containing one generating unit having an installed capacity of 8.2 MW; and (5) appurtenant facilities.

The Tennessee development consists of the following features: (1) A 385-foot-long, 140-foot-tall earth core and rockfill dam (Tanasee Creek Dam) with a 225-foot-long, 15-foot-tall earth and rockfill saddle dam located 600 feet south of the Tanasee Creek Dam left abutment; (2) a spillway located in a channel excavated in the right abutment; (3) a 810-foot-long, 175-foot-tall earth core and rockfill dam (Wolf Creek Dam); (4) a spillway

located in a channel excavated in the right abutment; (5) a 40-acre reservoir (Tanasee Creek Lake), with a normal reservoir elevation of 3,080 feet National Geodetic Vertical Datum and a storage capacity of 1,340-acre-feet; (6) a 176-acre reservoir (Wolf Creek Lake), with a normal reservoir elevation of 3,080 feet National Geodetic Vertical Datum and a storage capacity of 10,040-acre-feet; (7) a concrete powerhouse containing one generating unit having an installed capacity of 8.75 MW.

m. A copy of the application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov using the ''eLibrary''* link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at 1–866–208–3676, or for TTY, (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

n. Public notice of the filing of the initial development application, which has already been given, established the due date for filing competing applications or notices of intent. Under the Commission's regulations, any competing development application must be filed in response to and in compliance with public notice of the initial development application. No competing applications or notices of intent may be filed in response to this notice.

All filings must (1) bear in all capital letters the title ''COMMENTS'', ''REPLY COMMENTS'', ''RECOMMENDATIONS,'' ''TERMS AND CONDITIONS,'' or ''PRESCRIPTIONS;'' (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person submitting the filing; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, recommendations, terms and conditions or prescriptions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Agencies may obtain copies of the application directly from the applicant. Each filing must be accompanied by proof of service on all persons listed on the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b), and 385.2010.

Magalie R. Salas,

Secretary.

[FR Doc. E5–336 Filed 1–28–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Application for Surrender of License andSoliciting Comments, Motions To Intervene, and Protests

January 19, 2005.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Surrender of License.

b. *Project No.:* 8535–039.

c. *Date filed:* December 20, 2004.

d. *Licensee:* Virginia Hydrogeneration and Historical Society, LC.

e. *Name of Project:* Battersea Dam.

f. *Location:* Located on the Appomattox River, in Chesterfield and Dinwiddie Counties, Virginia.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Licensee Contact:* Paul V. Nolan, Esq., 5515 North 17th Street, Arlington, Virginia 22205, (703) 534–5509.

i. *FERC Contact:* Regina Saizan, (202) 502–8765.

j. *Status of Environmental Analysis:* This application is ready for environmental analysis at this time, and the Commission is requesting comments, reply comments, and recommendations for terms and conditions.

k. *Deadline for filing responsive documents:* comments, motions to intervene, protests, and recommendations for terms and conditions concerning the application shall be filed with the Commission by February 22, 2005. All reply comments must be filed with the Commission by March 7, 2005.

Comments, protests, and interventions may be filed electronically via the Internet in lieu of paper; see 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person in the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, the intervenor must also serve a copy of the document on that resource agency.

l. *Description of Proposed Action:* The licensee seeks to surrender the license because its lease of the project lands and facilities has been cancelled and it does not have the means or the intent to reacquire the project lands and to operate the project. The 500 kilowatt project is currently not operating.

m. *Locations of Application:* A copy of the application is available for inspection and reproduction at the Commission in the Public Reference Room, located at 888 First Street NE, Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number, here P–8535, in the docket number field to access the document. For assistance, call toll-free 1–866–208–3676 or e-mail *FERCOnlineSupport@ferc.gov*. For TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item h. above.

n. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

o. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, 385.211, 385.214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

p. Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title ''COMMENTS'', ''REPLY COMMENTS'', ''RECOMMENDATIONS FOR TERMS AND CONDITIONS'', ''PROTEST'', OR ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and eight copies to: Magalie

R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. An additional copy must be sent to the Director, Division of Hydropower Administration and Compliance, Federal Energy Regulatory Commission, at the above-mentioned address. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

q. *Agency Comments:* Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If any agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

Magalie R. Salas,

Secretary.

[FR Doc. E5–341 Filed 1–28–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice Soliciting Comments, and Final Recommendations, Terms and Conditions, and Prescriptions

January 19, 2005.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* New Major License.

b. *Project No.:* 2150–033.

c. *Date Filed:* April 30, 2004.

d. *Applicant:* Puget Sound Energy.

e. *Name of Project:* Baker River Hydroelectric Project.

f. *Location:* On the Baker River, near the Town of Concrete, in Whatcom and Skagit Counties, Washington. The project occupies about 5,207 acres of lands within the Mt. Baker-Snoqualmie National Forest managed by the U.S. Forest Service.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)—825(r).

h. *Applicant Contact:* Connie Freeland, Puget Sound Energy, P.O. Box 97034 PSE–09S Bellevue, WA 98009–9734; (425) 462–3556 or connie.freeland@pse.com.

i. *FERC Contact:* Steve Hocking, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426; (202) 502–8753 or *steve.hocking@ferc.gov*

j. Deadline for filing comments and final recommendations, terms and conditions, and prescriptions is 60 days from the issuance of this notice; reply comments are due 105 days from the issuance date of this notice.

All documents (original and eight copies) should be filed with: Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Please put the project name ''Baker River Project'' and project number ''P–2150–033'' on the first page of all documents.

The Commission's Rules of Practice require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

Comments and final recommendations, terms and conditions, and prescriptions may be filed electronically via the Internet in lieu of paper. The Commission strongly encourages electronic filings. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov* under the ''e-Filing'' link.

k. This application has been accepted for filing.

l. *Project Description:* The Baker River Project has two developments. The Upper Baker development consists of the following existing facilities: (1) A 312-foot-high by 1,200-foot-long concrete gravity dam impounding Baker Lake with a surface area of about 4,980 acres at a normal full pool elevation of 727.77 feet mean sea level (msl); (2) a 122-foot-long, 59-foot wide concrete and steel powerhouse at the base of the dam containing two turbine-generator units, Unit No. 1 with an authorized capacity of 52,400 kilowatts (kW) and Unit No. 2 with an authorized capacity of 38,300 kW; (3) a 115-foot-high by 1,200-foot-long earth and rock-fill dam, known as West Pass dike, located in a depression about 1,500 feet north of Upper Baker dam; (4) a 22-foot-high by 3,000-foot-long earth-filled dike, known as Pumping Pond dike, which impounds Depression Lake with a surface area of 44 acres at a normal full pool elevation of 699 feet msl; (5) a water recovery pumping station adjacent to Pumping Pond; (6) fish passage facilities and fish spawning facilities; and (7) appurtenant facilities.

The Lower Baker development consists of the following existing facilities: (1) A 285-foot-high by 550-foot-long concrete thick arch dam impounding Lake Shannon with a surface area of about 2,278 acres at a normal full pool elevation of 442.35 feet msl; (2) a concrete intake equipped with trashracks and gatehouse located at the dam's left abutment; (3) a 1,410-foot-long concrete and steel-lined pressure tunnel; (4) a concrete surge tank near the downstream end of the pressure tunnel; (5) a 90-foot-long, 66-foot-wide concrete and steel powerhouse containing one turbine-generator unit, Unit No. 3 with an authorized capacity of 79,330 kW; (6) a 750-foot-long, 115-kilovolt transmission line; (7) fish passage facilities including a 150-foot-long by 12-foot-high barrier dam; and (8) appurtenant facilities.

m. A copy of the application is available for review in the Commission's Public Reference Room or may be viewed on the Commission's Web site *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at 1–866–208–3676, or for TTY, (202) 502–8659. A copy is also available for inspection and reproduction at the address in item h above.

n. All filings must (1) bear in all capital letters the title ''COMMENTS,'' ''REPLY COMMENTS,'' ''RECOMMENDATIONS,'' ''TERMS AND CONDITIONS,'' or ''PRESCRIPTIONS;'' (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person submitting the filing; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, recommendations, terms and conditions or prescriptions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Agencies may obtain copies of the application directly from the applicant. Each filing must be accompanied by proof of service on all persons listed on the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

You may register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects.

For assistance, contact FERC Online Support.

o. *Revised Procedural Schedule:* The application will be processed according to the following Revised Hydro Licensing Schedule:

Amended PDEA and Draft Biological Assessment Due: January 31, 2005.

Final Terms and Conditions Due: March 21, 2005.

Last Day to Request Water Quality Certificate: March 21, 2005.

Issue Notice of Draft Environmental Assessment (EA): May 2005.

Issue Notice of Final EA: August 2005.

Ready for Commission Decision on Application: December 2005.

Magalie R. Salas,

Secretary.

[FR Doc. E5–346 Filed 1–28–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Application and Soliciting Comments, Motions To Intervene, and Protests

January 19, 2005.

Take notice that the following application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Non-project use of project lands.

b. *Project No:* 739–017.

c. *Date Filed:* January 3, 2005.

d. *Applicant:* Appalachian Power Company.

e. *Name of Project:* Claytor Hydroelectric Project.

f. *Location:* The project is located on the New River in Pulaski County, Virginia.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Theresa P. Rogers, Hydro Generation Department, American Electric Power, P.O. Box 2021, Roanoke, Virginia 24022–2121, (540) 985–2441.

i. *FERC Contact:* Any questions on this notice should be addressed to Jean Potvin at (202) 502–8928, or by e-mail: *jean.potvin@ferc.gov.*

j. *Deadline for Filing Comments and/or Motions:* February 22, 2005.

All documents (original and eight copies) should be filed with: Ms. Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, DHAC, PJ–12.1, 888 First Street, NE., Washington DC 20426. Please include the project number (739–017) on any comments or motions filed. Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings.

k. *Description of Proposal:* Appalachian Power Company, licensee for the Claytor Project, proposes to grant permission to Conrad Brothers Marina to modify and expand its marina facilities to include: (1) The removal of 18 enclosed boathouses; (2) the installation of 2 stationary, covered boat docks with 15 slips each; and (3) the installation of 6 floating docks slips with 6 slips each for a total addition of 30 covered, stationary boat slips and 36 floating slips at the marina. Existing facilities include a boat ramp, gasoline dispensing facility, one stationary dock with 11 covered slips and 5 existing floating docks with a total of 66 floating slips.

l. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or call toll-free 1–866–208–3676, or for TTY, call (202) 502–8659.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, 385.211, 385.214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Responsive Documents:* Any filings must bear in all capital letters the title ''COMMENTS'', ''RECOMMENDATIONS FOR TERMS AND CONDITIONS'', ''PROTEST'', OR ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

p. *Agency Comments:* Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

Magalie R. Salas,

Secretary.

[FR Doc. E5–347 Filed 1–28–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PR00–9–004]

Gulfterra Texas Pipeline, LP; Notice of Technical Conference

January 21, 2005.

Take notice that a technical conference will be held on Thursday, January 27, 2005, at 10 a.m. (EST), in a room to be designated at the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The conference will address questions related to the July 12, 2004, filing by Gulfterra Texas Pipeline, LP, to comply with the June 11, 2002, Order on Staff Panel and the February 25, 2004, Order on Rehearing and Denying Late Intervention.

FERC conferences are accessible under section 508 of the Rehabilitation Act of 1973. For accessibility accommodations please send an e-mail to *accessibility@ferc.gov* or call toll free (866) 208–3372 (voice) or 202–208–1659 (TTY), or send a FAX to 202–208–2106 with the required accommodations.

All interested parties and staff are permitted to attend.

Magalie R. Salas,

Secretary.

[FR Doc. E5–330 Filed 1–28–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP05–13–000]

Ingleside Energy Center LNG Project; Notice of Technical Conference

January 21, 2005.

On Tuesday, February 8, 2005, at 8:30 a.m. (CST), staff of the Office of Energy Projects will convene a cryogenic design and technical conference regarding the proposed Ingleside Energy Center LNG import terminal. The cryogenic conference will be held in the Sheraton North Houston at George Bush Intercontinental Airport. The hotel is located at 15700 John F. Kennedy Boulevard, Houston, Texas 77032. For hotel details call 281–442–5100.

In view of the nature of the critical energy infrastructure information and security issues to be explored, the cryogenic conference will not be open to the public. Attendance at this conference will be limited to existing parties to the proceeding (anyone who has specifically requested to intervene as a party) and to representatives of interested federal, state, and local agencies. Any person planning to attend the February 8th cryogenic conference *must register* by close of business on Friday, February 4th , 2005. Registrations may be submitted either online at *http://www.ferc.gov/whats-new/registration/cryo-conf-form.asp* or by faxing a copy of the form (found at the referenced online link) to 202–208–0353. All attendees must sign a non-disclosure statement prior to entering the conference. Upon arrival at the hotel, check the reader board in the hotel lobby for venue. For additional information regarding the cryogenic conference, please contact Thach Nguyen at 202–502–6364.

Magalie R. Salas,

Secretary.

[FR Doc. E5–340 Filed 1–28–05; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL –7865–4]

Science Advisory Board Staff Office; EPI Suite Review Panel of the Science Advisory Board; Request for Nominations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The U.S. Environmental Protection Agency (EPA or Agency) Science Advisory Board (SAB) Staff Office (hereinafter, the ''Staff Office'') is announcing the formation of a new SAB review panel known as the EPI Suite Review Panel of the Science Advisory Board (hereinafter, the ''Panel'') and is hereby soliciting nominations for this Panel.

DATES: Nominations should be submitted by February 22, 2005, per the instructions below.

FOR FURTHER INFORMATION CONTACT: Any member of the public wishing further information regarding this Request for Nominations may contact Ms. Kathleen White, Designated Federal Officer (DFO), EPA Science Advisory Board Staff, at telephone/voice mail: (202) 343–9878; or via e-mail at: *white.kathleen@epa.gov.* General information concerning the SAB can be found on the EPA Web site at: *http://www.epa.gov/sab.*

SUPPLEMENTARY INFORMATION:

Background: A mission of the U.S. EPA's Office of Pollution Prevention and Toxics (OPPT) is to evaluate potential risks of commercial chemical substances that are or will be released to the environment. OPPT also has the primary responsibility for implementing Agency policy on pollution prevention (P2), and in this role is a critical provider of information and guidance to risk assessors and risk managers. The understanding of and ability to predict the behavior of a chemical substance in a biological or environmental system depends upon knowledge of the physical, chemical and environmental properties of that substance. Accordingly, OPPT has supported the development of software for estimating these properties from chemical structure known as the Estimation Programs Interface (EPI) suite. EPI Suite is routinely used in evaluating new chemicals under EPA's Premanufacture Notices (PMNs) for new chemicals under section 5 of the Toxic Substances Control Act, and is widely used for predicting physical/chemical properties and environmental fate and transport properties for chemicals already in commerce. Further information about EPI Suite and its applications can be found at: *http://www.epa.gov/opptintr/exposure/docs/episuite.htm.* OPPT has requested that the EPA Science Advisory Board (SAB) review the supporting science, functionality, and appropriate use of EPI Suite.

The SAB's mission, as established by 42 U.S.C. 4365, is to provide independent scientific and technical advice, consultation, and recommendations to the EPA Administrator on the technical bases for EPA policies and regulations. In response to OPPT's request, the SAB will form a review panel to conduct a review of the EPI Suite. The EPI Suite Review Panel will provide advice through the chartered SAB. The Panel will provide advice regarding the comprehensiveness and soundness of the science supporting EPI Suite including method validation, alternative estimation methods, completeness of the software, documentation, and appropriateness of its current applications. The Panel will consider both appropriate use in the PMN program and other uses in screening level assessments. The work of this panel is expected to continue until the review is complete. The EPI Suite Review Panel will comply with the openness provisions of the Federal Advisory Committee Act (FACA) and all appropriate SAB procedural policies, including the SAB process for panel formation described in the *Overview of the Panel Formation Process at the Environmental Protection Agency Science Advisory Board,* which can be found on the SAB's Web site at: *http://www.epa.gov/sab/pdf/ec0210.pdf.*

Request for Nominations: The SAB Staff Office is requesting nominations of recognized scientists and engineers with expertise in one or more of the following areas:

(1) Environmental chemistry and engineering;

(2) Pollution prevention, especially experience deciding whether or not to go into production with a chemical;

(3) Development of estimation models, such as QSARs that predict properties, effects and fate of chemicals from structure; and

(4) Application of EPI Suite or similar tools.

Process and Deadline for Submitting Nominations: Any interested person or organization may nominate individuals qualified in any of the areas of expertise described above to serve on the Panel. Nominations should be submitted in electronic format through the *Form for Nominating Individuals to Panels of the EPA Science Advisory Board* provided on the SAB Web site. The form can be accessed through a link on the blue navigational bar on the SAB Web site, *http://www.epa.gov/sab.* To be considered, all nominations must include the information required on that form.

Anyone who is unable to submit nominations electronically using this form, or who has questions concerning the nomination process may contact Ms. Kathleen White, DFO, as indicated

above in this notice. Nominations should be submitted in time to arrive no later than February 22, 2005. Any questions concerning either this process or any other aspects of this notice should be directed to the DFO.

To be considered, all nominations must include: (a) A current biography, *curriculum vitae* (C.V.) or resume, which provides the nominee's background, experience and qualifications for the Committee; and (b) a brief biographical sketch (''biosketch''). The biosketch should be no longer than one page and must contain the following information for the nominee:

(i) Current professional affiliations and positions held;

(ii) Area(s) of expertise, and research activities and interests;

(iii) Leadership positions in national associations or professional publications or other significant distinctions;

(iv) Educational background, especially advanced degrees, including when and from which institutions these were granted;

(v) Service on other advisory committees, professional societies, especially those associated with issues under discussion in this review; and

(vi) Sources of recent (*i.e.*, within the preceding two years) grant and/or other contract support, from government, industry, academia, etc., including the topic area of the funded activity. Please note that even if there is no responsive information (*e.g.*, no recent grant or contract funding), this must be indicated on the biosketch (by ''N/A'' or ''None''). Incomplete biosketches will result in nomination packages not being accepted.

The EPA SAB Staff Office will acknowledge receipt of the nomination. After considering the nominees (termed the ''Widecast''), the SAB Staff Office will identify a subset (known as the ''Short List'') for more detailed consideration. Criteria used by the Staff Office in developing this Short List are given at the end of the following paragraph. The Short List will be posted on the SAB Web site at: *http://www.epa.gov/sab*, and will include the nominees' names and their biosketches. Public comments will be accepted for 21 calendar days on the Short List. During this comment period, the public may provide information, analysis or other documentation on nominees that the Staff Office should consider in evaluating candidates for the Panel.

For the EPA SAB Staff Office, a balanced Panel is characterized by inclusion of candidates who possess the necessary domains of knowledge, the relevant scientific perspectives (which, among other factors, can be influenced by work history and affiliation), and the collective breadth of experience to adequately address the charge. Public responses to the Short List candidates will be considered in the selection of the Panel, along with information provided by candidates and information independently-gathered by the SAB Staff Office on the background of each candidate (*e.g.*, financial disclosure information and computer searches to evaluate a nominee's prior involvement with the topic under review). Specific criteria to be used in evaluating an individual Panel member include: (a) Scientific and/or technical expertise, knowledge, and experience (primary factors); (b) availability and willingness to serve; (c) absence of financial conflicts of interest; (d) scientific credibility and impartiality; and (e) skills working in advisory committees, subcommittees and review panels.

Short List candidates must submit the ''Confidential Financial Disclosure Form for Special Government Employees Serving on Federal Advisory Committees at the U.S. Environmental Protection Agency'' (EPA Form 3110–48). This confidential form allows Government officials to determine whether there is a statutory conflict between that person's public responsibilities (which includes membership on an EPA Federal advisory committee) and private interests and activities, or the appearance of a lack of impartiality, as defined by Federal regulation. The form may be viewed and downloaded from the following URL address: *http://www.epa.gov/sab/pdf/epaform3110–48.pdf.*

In addition to reviewing background material, Panel members will be asked to attend one public face-to-face meeting over the anticipated course of the advisory activity.

Dated: January 21, 2005.

Vanessa T. Vu,

Director, EPA Science Advisory Board Staff Office.

[FR Doc. 05–1716 Filed 1–28–05; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7865–5]

Science Advisory Board Staff Office; Notification of Advisory Meetings of the Science Advisory Board Radiation Advisory Committee

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Science Advisory Board (SAB) Radiation Advisory Committee (RAC) will receive briefings from the Agency and discuss its advisory agenda for FY 2005.

DATES: February 28, 2005. The SAB RAC will meet on February 28, 2005, via teleconference from 10 a.m. to 1 p.m. eastern standard time.

LOCATION: The public teleconference meeting will take place via teleconference only.

FOR FURTHER INFORMATION CONTACT: Any member of the public who wishes to obtain the teleconference call-in number and access codes; would like to submit written or brief oral comments (3 minutes or less); or who wants further information concerning this public meeting should contact Dr. Jack Kooyoomjian, Designated Federal Officer (DFO), EPA SAB, 1200 Pennsylvania Avenue, NW. (MC 1400F), Washington, DC 20460; via telephone/voice mail: (202) 343–9984; fax: (202) 233–0643; or e-mail at: *kooyoomjian.jack@epa.gov*. General information concerning the SAB can be found on the EPA Web site at: *http://www.epa.gov/sab*.

SUPPLEMENTARY INFORMATION:

Background and Purpose: Pursuant to the Federal Advisory Committee Act, Public Law 92–463, the SAB Staff Office hereby gives notice of a public meeting of the Radiation Advisory Committee (RAC). The EPA Office of Radiation and Indoor Air (ORIA) requested the SAB to provide advice on the National Monitoring System (NMS) upgrade, formerly known as the Environmental Radiation Ambient Monitoring System (ERAMS). The RAC will receive briefings from ORIA about this request and discuss its plan for the coming year.

Availability of Meeting Materials: Copies of the agenda for the SAB meetings described in this notice will be posted on the SAB Web site at: *http://www.epa.gov/sab* prior to the meeting. Persons who wish to obtain background materials on the current ERAMS network may find them at the following Web site: *http://www.epa.gov/narel/erams/index.html*. For copies of the EPA/ORIA briefing materials on the NMS, please contact Dr. Mary E. Clark of the U.S. EPA, Office of Radiation and Indoor Air (Mail Code 6601J), by telephone/voice mail at (202)-343–9348, by fax at (202)-343–2395; or via e-mail at *clark.marye@epa.gov*.

Providing Oral or Written Comments at SAB Meetings: It is the policy of the SAB Staff Office to accept written public comments of any length, and to

accommodate oral public comments wherever possible. The SAB Staff Office expects the public statements presented at its meetings will not be repetitive of previously-submitted oral or written statements.

Oral Comments: In general, each individual or group requesting an oral presentation at a conference call meeting will be limited to a total time of three minutes (unless otherwise indicated). Requests to provide oral comments must be *in writing* (e-mail, fax, or mail) and received by the DFO no later than noon eastern time five business days prior to the meeting in order to reserve time on the meeting agenda. Speakers should bring at least 35 copies of their comments and presentation slides for distribution to the reviewers and public at the meeting.

Written Comments: Although the SAB Staff Office accepts written comments until the date of the meeting (unless otherwise stated), written comments should be received in the SAB Staff Office no later than noon eastern time five business days prior to the meeting so that the comments may be made available to the Panelists for their consideration. Comments should be supplied to the DFO (preferably by e-mail) at the address/contact information noted above in the following formats: one hard copy with original signature, and one electronic copy via e-mail (acceptable file format: Adobe Acrobat PDF, WordPerfect, Word, or Rich Text files (in IBM-PC/Windows 98/2000/XP format)). Those providing written comments and who attend the meeting are also asked to bring 35 copies of their comments for public distribution.

Meeting Access: Individuals requiring special accommodation at this meeting should contact the DFO at the phone number or e-mail address noted above at least five business days prior to the meeting, so that appropriate arrangements can be made.

Dated: January 21, 2005.

Vanessa T. Vu,

Director, EPA Science Advisory Board Staff Office.

[FR Doc. 05–1717 Filed 1–28–05; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7865–6]

Science Advisory Board Staff Office; Notification of Upcoming Science Advisory Board Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The EPA Science Advisory Board (SAB) Staff Office announces a public meeting of the EPA Science Advisory Board (the Board) to discuss the EPA science and research programs and budget, and to conduct other Board activities.

ADDRESSES: The meeting of the Science Advisory Board will be held in the Polaris Room of the Ronald Reagan Building, 1200 Pennsylvania Avenue, NW., Washington, DC 20004.

DATES: February 17–18, 2005. A public meeting of the Board will be held from 8:30 a.m. to 5:30 p.m. on February 17 and 18, 2005 (eastern time).

FOR FURTHER INFORMATION CONTACT: Members of the public who wish to obtain further information regarding the SAB may contact Mr. Thomas O. Miller, Designated Federal Officer (DFO), U.S. EPA Science Advisory Board Staff Office (1400F), 1200 Pennsylvania Avenue, NW., Washington, DC 20460; by telephone/voice mail at (202) 343–9982; or via e-mail at *miller.tom@epa.gov.* The SAB Mailing address is: U.S. EPA, Science Advisory Board (1400F), 1200 Pennsylvania Ave., NW., Washington, DC 20460. General information about the SAB, as well as any updates concerning the meeting announced in this notice, may be found in the SAB Web site at: *http://www.epa.gov/sab.*

SUPPLEMENTARY INFORMATION:

Background: The Science Advisory Board (SAB) was established by 42 U.S.C. 4365 to provide independent scientific and technical advice, consultation, and recommendations to the EPA Administrator on the technical basis for Agency positions and regulations. At this meeting, the SAB will focus on EPA's science and research programs included within the FY 2006 budget proposal. Evaluating and advising the EPA Administrator on the Agency science and research program budget is an annual activity of the Science Advisory Board. At this meeting, the SAB may also conduct a review of one or more draft committee or panel reports that are being sent to it for approval prior to delivery to the U.S. EPA Administrator. Any such reviews will be announced on the above mentioned SAB Web site at least one week prior to the meeting.

For the Science and Research Advisory, the SAB will receive briefings by representatives from various EPA organizations on the science and research programs that are to be conducted under the FY 2006 EPA budget request; members and EPA representatives will discuss how these programs relate to and move forward from existing programs; and the members will then deliberate on the advice they will provide to the Administrator. The final agreed upon Charge to the Board will be placed onto the SAB Web site prior to this meeting.

Availability of Review Material for the Board Meeting: Documents that are the subject of this meeting are available from the SAB Staff Office Web site *http://www.epa.gov/sab/.*

Procedures for Providing Public Comment: It is the policy of the EPA Science Advisory Board (SAB) Staff Office to accept written public comments of any length, and to accommodate oral public comments whenever possible. The EPA SAB Staff Office expects that public statements presented at Board meetings will not be repetitive of previously submitted oral or written statements.

Oral Comments: In general, each individual or group requesting an oral presentation at a face-to-face meeting will be limited to a total time of ten minutes (unless otherwise indicated). For conference call meetings, opportunities for oral comment will usually be limited to no more than three minutes per speaker and no more than fifteen minutes total. Interested parties should contact the Designated Federal Official (DFO) in writing via e-mail at least one week prior to the meeting in order to be placed on the public speaker list for the meeting. Speakers should bring at least 35 copies of their comments and presentation slides for distribution to the participants and public at the meeting.

Written Comments: Although written comments are accepted until the date of the meeting (unless otherwise stated), written comments should be received in the SAB Staff Office at least one week prior to the meeting date so that the comments may be made available to the committee for their consideration. Comments should be supplied to the appropriate DFO at the address/contact information above in the following formats: one hard copy with original signature, and one electronic copy via e-mail (acceptable file format: Adobe Acrobat, WordPerfect, Word, or Rich Text files (in IBM–PC/Windows 98/2000/XP format). Those providing written comments and who attend the meeting are also asked to bring 35 copies of their comments for public distribution.

Meeting Accommodations: Individuals requiring special accommodation to access these meetings, should contact the relevant DFO at least five business days prior to

the meeting so that appropriate arrangements can be made.

Dated: January 24, 2005.

Vanessa T. Vu,

Director, EPA Science Advisory Board Staff Office.

[FR Doc. 05–1718 Filed 1–28–05; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

Docket Number ORD–2005–0005 [FRL–7865–7]

Board of Scientific Counselors, Ecological Research Subcommittee

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of meetings.

SUMMARY: Pursuant to the Federal Advisory Committee Act, Public Law 92–463, the Environmental Protection Agency, Office of Research and Development (ORD), announces three meetings of the Board of Scientific Counselors (BOSC) Ecological Research Subcommittee.

DATES: Two teleconference call meetings will be held, the first on Thursday, February 17, 2005, from 3 a.m. to 5:30 p.m., and the second on Thursday, March 3, 2005, from 3 to 5:30 p.m. A face-to-face meeting will be held beginning Monday, March 7, 2005 (8:30 a.m. to 5:30 p.m.), continuing on Tuesday, March 8, 2005 (8:30 a.m. to 5:30 p.m.), and concluding on Wednesday, March 9, 2005 (8:30 a.m. to 5 p.m.). All times noted are Eastern Standard Time. Meetings may adjourn early if all business is completed.

ADDRESSES: *Conference calls:* Participation in the conference calls will be by teleconference only—meeting rooms will not be used. Members of the public may obtain the call-in number and access code for the teleconference meeting from Greg Susanke, whose contact information is listed under the **FOR FURTHER INFORMATION CONTACT** section of this notice. *Face-to-Face Meeting:* The face-to-face meeting will be held at the U.S. EPA Research Triangle Park (RTP) Campus, National Computer Center Building (Room N110), located at 109 T.W. Alexander Drive, Research Triangle Park, NC 27711.

Document Availability

Draft agendas for the meetings are available from Greg Susanke, whose contact information is listed under the **FOR FURTHER INFORMATION CONTACT** section of this notice. Requests for the draft agendas will be accepted up to 2 business days prior to each conference call/meeting date. The draft agendas also can be viewed through EDOCKET, as provided in Unit I.A. of the **SUPPLEMENTARY INFORMATION** section.

Any member of the public interested in making an oral presentation at one of the conference calls or at the face-to-face meeting may contact Greg Susanke, whose contact information is listed under the **FOR FURTHER INFORMATION CONTACT** section of this notice. Requests for making oral presentations will be accepted up to 2 business days prior to each conference call/meeting date. In general, each individual making an oral presentation will be limited to a total of three minutes.

Submitting Comments

Written comments may be submitted electronically, by mail, or through hand delivery/courier. Follow the detailed instructions as provided in Unit I.B. of this section. Written comments will be accepted up to 2 business days prior to each conference call/meeting date.

FOR FURTHER INFORMATION CONTACT: Greg Susanke, Designated Federal Officer, Environmental Protection Agency, Office of Research and Development, Mail Code 8104R, 1200 Pennsylvania Avenue NW., Washington, DC; telephone (202) 564–9945; fax (202) 565–2925; e-mail *susanke.greg@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

This notice announces three meetings of the BOSC Ecological Research Subcommittee. The purpose of the meetings are to evaluate EPA's Ecological Research Program. Proposed agenda items for the conference calls include, but are not limited to: charge questions, objective of program reviews, background on the U.S. EPA's Ecological Research Program, writing assignments, and planning for the face-to-face meeting. Proposed agenda items for the face-to-face meeting include, but are not limited to: presentations by key EPA staff involved in the Ecological Research Program, poster sessions on ORD's Ecological research, and preparation of the draft report. The conference calls and the face-to-face meeting are open to the public.

Information on Services for the Handicapped: Individuals requiring special accommodations at this meeting should contact Greg Susanke, Designated Federal Officer, at (202) 564–9945 at least five business days prior to the meeting so that appropriate arrangements can be made to facilitate their participation.

A. How Can I Get Copies of Related Information?

1. *Docket.* EPA has established an official public docket for this action under Docket ID No. ORD–2005–0005. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Documents in the official public docket are listed in the index in EPA's electronic public docket and comment system, EDOCKET. Documents are available either electronically or in hard copy. Electronic documents may be viewed through EDOCKET. Hard copies of the draft agendas may be viewed at the Board of Scientific Counselors, Ecological Research Subcommittee Docket in the EPA Docket Center (EPA/DC), EPA West, Room B102, 1301 Constitution Ave., NW, Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the ORD Docket is (202) 566–1752.

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 EDOCKET. You may use EDOCKET at *http://www.epa.gov/edocket/* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in the appropriate docket identification number (ORD–2005–0005).

For those wishing to make public comments, it is important to note that EPA's policy is that comments, whether submitted electronically or on 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, confidential business information (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 mailed or delivered to the docket will be transferred to EPA's electronic public docket. Written public comments mailed or delivered to the Docket will be scanned and placed in EPA's electronic public docket.

B. How and To Whom Do I Submit Comments?

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket identification number (ORD–2005–0005) in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period.

1. *Electronically.* If you submit an electronic comment as prescribed below, 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 it allows EPA to contact you if further information on the substance of the comment is needed or if your comment cannot be read due to technical difficulties. 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 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. *EDOCKET.* 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 EDOCKET at *http://www.epa.gov/edocket/*, and follow the online instructions for submitting comments. To access EPA's electronic public docket from the EPA Internet Home Page, *www.epa.gov*, select ''Information Sources,'' ''Dockets,'' and ''EDOCKET.'' Once in the system, select ''search,'' and then key in Docket ID No. ORD–2005–0005. 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 electronic mail (e-mail) to *ORD.Docket@epa.gov*, Attention Docket ID No. ORD–2005–0005. 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 mailed to the mailing address identified in Unit I.B.2. These electronic submissions will be accepted in Word, WordPerfect or rich text files. Avoid the use of special characters and any form of encryption.

2. *By Mail.* Send your comments to: U.S. Environmental Protection Agency, ORD Docket, EPA Docket Center (EPA/DC), Mailcode: 28221T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, Attention Docket ID No. ORD–2005–0005.

3. *By Hand Delivery or Courier.* Deliver your comments to: EPA Docket Center (EPA/DC), Room B102, EPA West Building, 1301 Constitution Avenue, NW., Washington, DC, Attention Docket ID No. ORD–2005–0005 (note: this is not a mailing address). Such deliveries are only accepted during the docket's normal hours of operation as identified in Unit I.A.1.

Dated: January 25, 2005.

Kevin Y. Teichman,

Director, Office of Science Policy.

[FR Doc. 05–1719 Filed 1–28–05; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7865–8]

Draft Air Quality Criteria for Ozone and Related Photochemical Oxidants E-Docket No. ORD–2004–0015

AGENCY: Environmental Protection Agency.

ACTION: Notice of first external review draft for public review and comment.

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 Ozone and Related Photochemical Oxidants*, EPA–600/AP–93/004aF–cF, published in 1996. Today's **Federal Register** notice announces the availability of a first external review draft of the revised ozone air quality criteria document (AQCD).

DATES: The ninety-day period for submission of comments on the first external review draft of the revised Ozone AQCD begins January 31, 2005, and ends May 2, 2005.

ADDRESSES: The first external review draft of the revised Ozone AQCD will be available on or about January 31, 2005. Internet users will be able to download a copy of this document from the NCEA home page. The URL is *http://www.epa.gov/ncea/*. A limited number of CD–ROM or paper copies will be available. Contact Ms. Diane Ray by phone (919–541–3637), fax (919–541–1818), or e-mail (*ray.diane@epa.gov*) to request either of these. Please provide the draft document's title, *Air Quality Criteria for Ozone and Related Photochemical Oxidants (First External Review Draft), Volumes I, II, and III,* EPA 600/R–05/004aA, bA, and cA, as well as your name and address, to facilitate processing of your request. Public comments on the first external review draft of the revised Ozone AQCD 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 comments from the public, 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 EPA 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.

Ozone is one of six ''criteria'' pollutants for which EPA has established air quality criteria and NAAQS. On September 26, 2000 (65 FR 57810), EPA formally initiated its current review of the criteria and NAAQS for ozone, requesting the submission of recent scientific information on specified topics. Preliminary outlines for the proposed chapters were presented in the draft Project Work Plan that was released for public comment (66 FR 67524, December 31, 2001) and for review by the Clean Air Scientific Advisory Committee (CASAC) of EPA's Science Advisory Board (68 FR 3527, January 24, 2003). Later in 2003, a series of workshops were convened to discuss draft sections and chapters for revising the existing Ozone AQCD (68 FR 17365, April 9, 2003 and 68 FR 60369, October 22, 2003).

After the end of the comment period on the *Air Quality Criteria for Ozone and Related Photochemical Oxidants (First External Review Draft)*, EPA will present the draft at a public meeting for review by the Clean Air Scientific Advisory Committee (CASAC). Public comments received will be provided to the CASAC review panel. There will be a **Federal Register** notice to inform the public of the exact date and time of that CASAC meeting.

How To Submit Comments to EPA's E-Docket

EPA has established an official public docket for information pertaining to the revision of the Ozone AQCD, Docket ID No. ORD–2004–0015. 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 form, 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 closing 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–2004–0015. 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–2004–0015. 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 PDF 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: January 25, 2005.

Peter W. Preuss,

Director, National Center for Environmental Assessment.

[FR Doc. 05–1720 Filed 1–28–05; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of Bank or Bank Holding Companies; Correction

This notice corrects a notice (FR Doc. 05-1047) published on page 3202 of the issue for January 21, 2005.

Under the Federal Reserve Bank of Atlanta heading, the entry for Ghomeshi Mohammad Mehdi, Miami, Florida, is revised to read as follows:

A. Federal Reserve Bank of Atlanta (Sue Costello, Vice President) 1000 Peachtree Street, N.E., Atlanta, Georgia 30303:

1. Mohammad Mehdi Ghomeshi, Miami, Florida; to acquire voting shares of Great Financial Corporation, Miami Lakes, Florida, and thereby indirectly acquire voting shares of Great Florida Bank, Miami, Florida.

Comments on this application must be received by February 2, 2005.

Board of Governors of the Federal Reserve System, January 25, 2005.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 05–1666 Filed 1–28–05; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than February 25, 2005.

A. Federal Reserve Bank of Atlanta (Andre Anderson, Vice President) 1000 Peachtree Street, N.E., Atlanta, Georgia 30303:

1. Community Bancshares of Mississippi, Inc., Employee Stock Ownership Plan, Brandon, Mississippi; to become a bank holding company by acquiring 58.6 percent of the voting shares of the Community Bancshares of Mississippi, Inc., Brandon, Mississippi; and First National Bank of Lucedale, Lucedale, Mississippi; Community Bank of Mississippi, Forest, Mississippi; Community Bank, Ellisville, Mississippi, Ellisville, Mississippi; Community Bank, Amory, Mississippi; Community Bank, Indianola, Mississippi, Indianola, Mississippi; Community Bank, Coast, Biloxi, Mississippi; Community Bank, Desoto County, Southaven, Mississippi; and Community Bank, Meridian, Mississippi, Meridian, Mississippi.

2. Remo Duquoin LLC, Privee LLC, and Privee Financial, Inc., all of Miami, Florida; to acquire 100 percent of the voting shares of Sequoia National Bank, San Francisco, California.

Board of Governors of the Federal Reserve System, January 25, 2005.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 05–1664 Filed 1–28–05; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Notice of Proposals to Engage in Permissible Nonbanking Activities or to Acquire Companies that are Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y (12 CFR Part 225) to engage *de novo*, or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act. Additional information on all bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than February 15, 2005.

A. Federal Reserve Bank of St. Louis (Randall C. Sumner, Vice President) 411 Locust Street, St. Louis, Missouri 63166–2034:

1. Community First Bancshares, Inc., Harrison, Arkansas; to retain voting shares of Mobius Technology Consulting, LLC, Springfield, Missouri, and thereby engage in data processing and management consulting activities, pursuant to sections 225.28(b)(9)(i)(A) and (b)(14)(i) respectively of Regulation Y.

Board of Governors of the Federal Reserve System, January 25, 2005.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 05–1665 Filed 1–28–05; 8:45 am]

BILLING CODE 6210–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–05AZ]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–371–5976 or send comments to Seleda Perryman, CDC Assistant Reports Clearance Officer, 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an email to *omb@cdc.gov.*

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques

or other forms of information technology. Written comments should be received within 60 days of this notice.

Proposed Project

A Library Of Participant Questions To Be Used In Exposure Investigation Questionnaires—New—The Agency for Toxic Substances and Disease Registry (ATSDR).

ATSDR is mandated pursuant to the 1980 Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and its 1986 Amendments, the Superfund Amendments and Reauthorization Act (SARA) to prevent or mitigate adverse human health effects and diminished quality of life resulting from the exposure to hazardous substances in the environment. Exposure Investigations are an approach developed by ATSDR that employs targeted biologic and environmental sampling to assist ATSDR to better characterize past, current, and possible future human exposures to hazardous substances in the environment. The purpose of Exposure Investigations is to determine in a timely manner whether community residents are being exposed to chemical contaminants at levels that might affect their health. Exposure Investigations are usually requested by officials of a state health agency, county health departments, the Environmental Protection Agency, the general public, and ATSDR staff.

During an Exposure Investigation ATSDR conducts biomarker testing or environmental testing or both. Biomarkers may be sampled in urine, blood, or hair. Environmental samples (*e.g.*, air, water, soil, or food) can be taken from the environment where people live, spend leisure time, or other places they might come into contact with contaminants under investigation. In addition to the suspected environmental exposure source being investigated, additional exposure to the contaminant may come from other sources encountered in daily activities such as jobs, hobbies, household products, lifestyle, medicines, and foods.

To assist in interpreting the sampling results, a survey questionnaire appropriate to the specific contaminant will be administered to participants. Only a limited number of questions pertinent to exposure routes of the contaminant of concern will be administered in an investigation. Questions will be asked about the presence or absence of a specific exposure and an estimate of its extent and duration. Exposure to other sources of the contaminant of concern will also be queried in the survey. The information gathered in the survey will allow ATSDR to more accurately interpret its testing results and determine a likely source of elevated biomarker tests.

Questionnaires will generally be administered face-to-face and occasionally by phone or mail. Typically, ATSDR conducts between 10–15 exposure investigations nationally each year that would require a questionnaire. The number of participants per investigation ranges from 10 to less than 50.

ATSDR is seeking approval for a set of 40–43 potential questions. Of these, approximately 12–15 questions about the pertinent environmental pathways in an Exposure Investigation will be used. This number can vary depending on the number of contaminants being investigated, the route of exposure (breathing, eating, touching), and a number of other sources (*e.g.*, products, jobs) of the chemical(s). We will also collect general information (*e.g.*, name, address,) necessary to conduct the investigation; there are approximately 28 questions that will collect demographic information. There are no costs to respondents other than their time.

Topic areas for the complete set of questions include the following:

(1) Media specific which includes: air (indoor/outdoor); water (water source and plumbing); soil, and food (gardening, fish, game, domestic animals).

(2) Other sources such as: occupation; hobbies; household uses or house construction; lifestyle (*e.g.*, smoking); medicines and/or health conditions, and foods.

Respondents	Number of respondents	Number of responses per respondent	Average burden per response in hours)	Total burden (in hours)
Exposure Investigation Participants	750	1	30/60	375
Total				375

Dated: January 25, 2005.

Betsey Dunaway,

Acting Reports Clearance Officer, Office of the Chief Science Officer, Centers for Disease Control and Prevention.

[FR Doc. 05–1713 Filed 1–28–05; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2004N–0441]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Application for Food and Drug Administration Approval to Market a New Drug

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Fax written comments on the collection of information by March 2, 2005.

ADDRESSES: OMB is still experiencing significant delays in the regular mail, including first class and express mail, and messenger deliveries are not being accepted. To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: Fumie Yokota, Desk Officer for FDA, FAX: 202–395–6974.

FOR FURTHER INFORMATION CONTACT: Karen L. Nelson, Office of Management Programs (HFA–250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–1482.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Application for FDA Approval to Market a New Drug—(OMB Control Number 0910–0001)—Extension

Under section 505(a) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 355(a)), a new drug may not be commercially marketed in the United States, imported, or exported from the United States, unless an approval of an application filed with FDA under section 505(b) or 505(j) of the act is effective with respect to such drug. Section 505(b) and 505(j) of the act requires a sponsor to submit to FDA a new drug application (NDA) containing, among other things, full reports of investigations that show whether or not the drug is safe and effective for use, a full list of articles used as components in the drug, a full description of manufacturing methods, samples of the drugs required, specimens of the labeling proposed to be used, and certain patent information as applicable. Under the act, it is the sponsor's responsibility to provide the information needed by FDA to make a scientific and technical determination that the product is safe and effective.

This information collection approval request is for all information requirements imposed on sponsors by the regulations under part 314 (21 CFR 314), who apply for approval of a new drug application in order to market or to continue to market a drug.

Section 314.50(a) requires that an application form (Form FDA 356h) be submitted that includes introductory information about the drug as well as a checklist of enclosures.

Section 314.50(b) requires that an index be submitted with the archival copy of the application and that it reference certain sections of the application.

Section 314.50(c) requires that a summary of the application be submitted that presents a good general synopsis of all the technical sections and other information in the application.

Section 314.50(d) requires that the NDA contain the following technical sections about the new drug: Chemistry, manufacturing, and controls; nonclinical pharmacology and toxicology; human pharmacokinetics and bioavailability; microbiology; clinical data; and statistical section.

Section 314.50(e) requires the applicant to submit samples of the drug if requested by FDA. In addition, the archival copy of the application must include copies of the label and all labeling for the drug.

Section 314.50(f) requires that case report forms and tabulations be submitted with the archival copy.

Section 314.50(h) requires that patent information, as described under § 314.53, be submitted with the application.

Section 314.50(i) requires that patent certification information be submitted in section 505(b)(2) applications for patents claiming the drug, drug product, method of use, or method of manufacturing.

Section 314.50(j) requires that applicants that request a period of marketing exclusivity submit certain information with the application.

Section 314.50(k) requires that an archival, review, and field copy of the application be submitted.

Section 314.52 requires that notice of certification of invalidity or noninfringement of a patent to patent holders and NDA holders be sent by section 505(b)(2) applicants.

Section 314.54 sets forth the content requirements for applications filed under section 505(b)(2) of the act.

Section 314.60 sets forth reporting requirements for sponsors who amend an unapproved application.

Section 314.65 states that the sponsor must notify FDA when withdrawing an unapproved application.

Sections 314.70 and 314.71 require that supplements be submitted to FDA for certain changes to an approved application.

Section 314.72 requires sponsors to report to FDA any transfer of ownership of an application.

Section 314.80(c)(1) and (c)(2) sets forth requirements for expedited adverse drug experience postmarketing reports and followup reports, as well as for periodic adverse drug experience postmarketing reports (Form FDA 3500A). (The burden hours for § 314.80(c)(1) and (c)(2) are already approved by OMB under OMB control numbers 0910–0230 and 0910–0291 and are not included in the hour burden estimates in table 1 of this document.)

Section 314.80(i) establishes recordkeeping requirements for reports of postmarketing adverse drug experiences. (The burden hours for § 314.80(i) are already approved by OMB under OMB control numbers 0910–0230 and 0910–0291 and are not included in the hour burden estimates in table 1 of this document.)

Section 314.81(b)(1) requires that field alert reports be submitted to FDA (Form FDA 3331).

Section 314.81(b)(2) requires that annual reports be submitted to FDA (Form FDA 2252). This form has been revised as a result of the requirements in the final rule ''Postmarketing Studies for Approved Human Drug and Licensed Biological Products; Status Reports,'' published in the **Federal Register** of October 30, 2000 (65 FR 64607). The rule describes the types of postmarketing studies covered by the status reports, the information to be included in the reports, and the type of information that FDA would consider appropriate for public disclosure. The rule implemented section 130(a) of the Food and Drug Administration Modernization Act of 1997 (FDAMA). The changes to the form include adding new spaces for the new status reports, reporting for biological products, and editorial changes.

Section 314.81(b)(3)(i) requires that drug advertisements and promotional labeling be submitted to FDA (Form FDA 2253).

Section 314.81(b)(3)(iii) sets forth reporting requirements for sponsors who withdraw an approved drug product from sale. (The burden hours for § 314.81(b)(3)(iii) are already approved by OMB under OMB control number 0910–0045 and are not included in the hour burden estimates in table 1 of this document.)

Section 314.90 sets forth requirements for sponsors who request waivers from FDA for compliance with §§ 314.50 through 314.81. (The information collection hour burden estimate for NDA waiver requests is included in table 1 of this document under estimates for §§ 314.50, 314.60, 314.70 and 314.71.)

Section 314.93 sets forth requirements for submitting a suitability petition in accordance with § 10.20 (21 CFR 10.20) and § 10.30. (The burden hours for § 314.93 are already approved by OMB under 0910–0183 and are not included in the hour burden estimates in table 1 of this document.)

Section 314.94(a) and (d) requires that an ANDA contain the following information: Application form; table of contents; basis for ANDA submission; conditions of use; active ingredients; route of administration, dosage form, and strength; bioequivalence; labeling; chemistry, manufacturing, and controls; samples; patent certification.

Section 314.95 requires that notice of certification of invalidity or noninfringement of a patent to patent

holders and NDA holders be sent by ANDA applicants.

Section 314.96 sets forth requirements for amendments to an unapproved ANDA.

Section 314.97 sets forth requirements for submitting supplements to an approved ANDA for changes that require FDA approval.

Section 314.98(a) sets forth postmarketing adverse drug experience reporting and recordkeeping requirements for ANDAs. (The burden hours for § 314.98(a) are already approved by OMB under OMB control numbers 0910–0230 and 0910–0291 and are not included in the hour burden estimates in table 1 of this document.)

Section 314.98(c) requires other postmarketing reports for ANDAs: Field alert reports (Form FDA 3331), annual reports (Form FDA 2252), and advertisements and promotional labeling (Form FDA 2253). (The information collection hour burden estimate for field alert reports is included in table 1 of this document under § 314.81(b)(1); the estimate for annual reports is included under § 314.81(b)(2); the estimate for advertisements and promotional labeling is included under § 314.81(b)(3)(i).)

Section 314.99(a) requires that sponsors comply with certain reporting requirements for withdrawing an unapproved ANDA and for a change in ownership of an ANDA.

Section 314.99(b) sets forth requirements for sponsors who request waivers from FDA for compliance with §§ 314.92 through 314.99. (The information collection hour burden estimate for ANDA waiver requests is included in table 1 of this document under estimates for § 314.94(a) and (d) and §§ 314.96 and 314.97.)

Section 314.101(a) states that if FDA refuses to file an application, the applicant may request an informal conference with FDA and request that the application be filed over protest.

Section 314.107(c)(4) requires notice to FDA by ANDA or section 505(b)(2) application holders of any legal action concerning patent infringement.

Section 314.107(e)(2)(iv) requires that an applicant submit a copy of the entry of the order or judgment to FDA within 10 working days of a final judgment.

Section 314.107(f) requires that ANDA or section 505(b)(2) applicants notify FDA of the filing of any legal action filed within 45 days of receipt of the notice of certification. A patent owner may also notify FDA of the filing of any legal action for patent infringement. The patent owner or approved application holder who is an exclusive patent licensee must submit to FDA a waiver that waives the opportunity to file a legal action for patent infringement.

Section 314.110(a)(3) and (a)(4) states that, after receipt of an FDA approvable letter, an applicant may request an opportunity for a hearing on the question of whether there are grounds for denying approval of the application. (The burden hours for § 314.110(a)(3) and (a)(4) are included under parts 10 through 16 (21 CFR part 16) hearing regulations, in accordance with § 314.201, and are not included in the hour burden estimates in table 1 of this document.)

Section 314.110(a)(5) states that, after receipt of an approvable letter, an applicant may notify FDA that it agrees to an extension of the review period so that it can determine whether to respond further.

Section 314.110(b) states that, after receipt of an approvable letter, an ANDA applicant may request an opportunity for a hearing on the question of whether there are grounds for denying approval of the application. (The burden hours for § 314.110(b) are included under parts 10 through 16 hearing regulations, in accordance with § 314.201, and are not included in the hour burden estimates in table 1 of this document.)

Section 314.120(a)(3) states that, after receipt of a not approvable letter, an applicant may request an opportunity for a hearing on the question of whether there are grounds for denying approval of the application. (The burden hours for § 314.120(a)(3) are included under parts 10 through 16 hearing regulations, in accordance with § 314.201, and are not included in the hour burden estimates in table 1 of this document.)

Section 314.120(a)(5) states that, after receipt of a not approvable letter, an applicant may notify FDA that it agrees to an extension of the review period so that it can determine whether to respond further.

Section 314.122(a) requires that an ANDA or a suitability petition that relies on a listed drug that has been voluntarily withdrawn from sale must be accompanied by a petition seeking a determination whether the drug was withdrawn for safety or effectiveness reasons. (The burden hours for § 314.122(a) are already approved by OMB under OMB control number 0910–0183 and are not included in the hour burden estimates in table 1 of this document.)

Section 314.122(d) sets forth requirements for relisting petitions for unlisted discontinued products. (The burden hours for § 314.122(d) are already approved by OMB under OMB control number 0910–0183 and are not included in the hour burden estimates in table 1 of this document.)

Section 314.126(c) sets forth requirements for a petition to waive criteria for adequate and well-controlled studies. (The burden hours for § 314.126(c) are already approved by OMB under 0910–0183 and are not included in the hour burden estimates in table 1 of this document.)

Section 314.151(a) and (b) set forth requirements for the withdrawal of approval of an ANDA and the applicant's opportunity for a hearing and submission of comments. (The burden hours for § 314.151(a) and (b) are included under parts 10 through 16 hearing regulations, in accordance with § 314.201, and are not included in the hour burden estimates in table 1 of this document.)

Section 314.151(c) sets forth the requirements for withdrawal of approval of an ANDA and the applicant's opportunity to submit written objections and participate in a limited oral hearing. (The burden hours for § 314.151(c) are included under parts 10 through 16 hearing regulations, in accordance with § 314.201, and are not included in the hour burden estimates in table 1 of this document.)

Section 314.152(b) sets forth the requirements for suspension of an ANDA when the listed drug is voluntarily withdrawn for safety and effectiveness reasons, and the applicant's opportunity to present comments and participate in a limited oral hearing. (The burden hours for § 314.152(b) is included under parts 10 through 16 hearing regulations, in accordance with § 314.201, and is not included in the hour burden estimates in table 1 of this document.)

Section 314.161(b) and (e) sets forth the requirements for submitting a petition to determine whether a listed drug was voluntarily withdrawn from sale for safety or effectiveness reasons. (The burden hours for § 314.161(b) and (e) are already approved by OMB under OMB control number 0910–0183 and are not included in the hour burden estimates in table 1 of this document.)

Section 314.200(c), (d), and (e) requires that applicants or others subject to a notice of opportunity for a hearing who wish to participate in a hearing file a written notice of participation and request for a hearing as well as the studies, data, and so forth, relied on. Other interested persons may also submit comments on the notice. This section also sets forth the content and format requirements for the applicants' submission in response to notice of

opportunity for hearing. (The burden hours for § 314.200(c), (d), and (e) are included under parts 10 through 16 hearing regulations, in accordance with § 314.201, and are not included in the hour burden estimates in table 1 of this document.)

Section 314.200(f) states that participants in a hearing may make a motion to the presiding officer for the inclusion of certain issues in the hearing. (The burden hours for § 314.200(f) are included under parts 10 through 16 hearing regulations, in accordance with § 314.201, and are not included in the hour burden estimates in table 1 of this document.)

Section 314.200(g) states that a person who responds to a proposed order from FDA denying a request for a hearing provide sufficient data, information, and analysis to demonstrate that there is a genuine and substantial issue of fact which justifies a hearing. (The burden hours for § 314.200(g) are included under parts 10 through 16 hearing regulations, in accordance with § 314.201, and is not included in the hour burden estimates in table 1 of this document.)

Section 314.420 states that an applicant may submit to FDA a drug master file in support of an application, in accordance with certain content and format requirements.

Section 314.430 states that data and information in an application are disclosable under certain conditions, unless the applicant shows that extraordinary circumstances exist. (The burden hours for § 314.430 is included under parts 10 through 16 hearing regulations, in accordance with § 314.201, and is not included in the hour burden estimates in table 1 of this document.)

Section 314.530(c) and (e) states that, if FDA withdraws approval of a drug approved under the accelerated approval procedures, the applicant has the opportunity to request a hearing and submit data and information. (The burden hours for § 314.530(c) and (e) are included under parts 10 through 16 hearing regulations, in accordance with § 314.201, and are not included in the hour burden estimates in table 1 of this document.)

Section 314.530(f) requires that an applicant first submit a petition for stay of action before requesting an order from a court for a stay of action pending review. (The burden hours for § 314.530(f) are already approved by OMB under 0910–0194 and are not included in the hour burden estimates in table 1 of this document.)

In the **Federal Register** of October 8, 2004 (69 FR 60402), FDA announced an opportunity for public comment on these information collection estimates. No comments were submitted that pertained to the information collection estimates in the October 8, 2004, document.

Respondents to this collection of information are all persons who submit an application or abbreviated application or an amendment or supplement to FDA under part 314 to obtain approval of a new drug, and any person who owns an approved application or abbreviated application.

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]

21 CFR Section; [FDA Form Number]	No. of Respondents	No. of Responses per Respondent	Total Annual Responses	Hours Per Response	Total Hours
314.50 (a), (b), (c), (d), (e), (f), (h), and (k)	72	1.44	104	1,642	170,768
314.50(i) and 314.94(a)(12)	194	2.34	454	2	908
314.50(j)	70	3.71	260	2	520
314.52 and 314.95	24	2.25	54	16	864
314.54	16	1	16	300	4,800
314.60	275	19.06	5,242	80	419,320
314.65	10	1	10	2	20
314.70 and 314.71	234	10.99	2,572	150	385,800
314.72	61	4.52	276	2	552
314.81(b)(1) [3331]	115	3.88	447	8	3,576
314.81(b)(2) [2252]	612	12.47	7,632	40	305,280
314.81(b)(3)(i) [2253]	332	44.09	14,638	2	29,276
314.94(a) and (d)	100	4.59	459	480	220,320
314.96	275	23.63	6,500	80	520,000
314.97	200	16.75	3,350	80	268,000
314.99(a)	44	2.02	89	2	178
314.101(a)	2	1	2	.50	1

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]—Continued

21 CFR Section; [FDA Form Number]	No. of Respondents	No. of Responses per Respondent	Total Annual Responses	Hours Per Response	Total Hours
314.107(c)(4), 314.107(e)(2)(iv), and 314.107(f)	3	2	6	1	6
314.110(a)(5)	41	1.26	52	.50	26
314.120(a)(5)	12	1.16	14	.50	7
314.420	403	1.72	694	61	42,334
Total					2,372,556

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Dated: January 25, 2005.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 05–1814 Filed 1–27–05; 12:53 pm]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 1998D–0514]

Draft Guidance for Industry on Abbreviated New Drug Applications: Impurities in Drug Substances; Chemistry, Manufacturing, and Controls Information; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a draft guidance for industry entitled ''ANDAs: Impurities in Drug Substances; Chemistry, Manufacturing, and Controls Information.'' This draft guidance provides recommendations on what chemistry, manufacturing, and controls information to include regarding the reporting, identification, and qualification of impurities in drug substances produced by chemical synthesis when submitting documentation for an abbreviated new drug application (ANDA), drug master file (DMF), or a supplement to support changes in drug substance synthesis or process.

DATES: Submit written or electronic comments on the draft guidance May 2, 2005. General comments on agency guidance documents are welcome at any time.

ADDRESSES: Submit written requests for single copies of the draft guidance to the Division of Drug Information (HFD–240), Center for Drug Evaluation and Research, Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857. Send one self-addressed adhesive label to assist that office in processing your requests. Submit written comments on the draft guidance to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.fda.gov/dockets/ecomments*. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT: Scott Furness, Center for Drug Evaluation and Research (HFD–640), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–5849.

SUPPLEMENTARY INFORMATION:

I. Background

On December 3, 1999, FDA published in the **Federal Register** (64 FR 67917) the guidance for industry entitled ''ANDA's: Impurities in Drug Substances.'' The guidance provided recommendations for including information in ANDAs and supporting DMFs on the content and qualification of impurities in drug substances produced by chemical syntheses.

FDA is announcing the availability of a draft guidance for industry entitled ''ANDAs: Impurities in Drug Substances,'' which revises the December 3, 1999, guidance. The guidance is being revised to update information on listing of impurities, setting acceptance criteria, and qualifying impurities in conformance with the revision of the guidance for industry entitled ''Q3A Impurities in New Drug Substances'' (Q3A(R), published in February 2003). The guidance is also being revised to remove sections of the guidance containing recommendations that are no longer needed because they are addressed in the more recent Q3A(R).

This draft guidance contains information collection provisions that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collection of information in this draft guidance was approved under OMB Control Nos. 0910–0001 and 0910–0032.

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance represents the agency's current thinking on these topics. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

II. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments on the draft guidance. Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. The draft guidance and received comments are available for public examination in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

III. Electronic Access

Persons with access to the Internet may obtain the document at *http://www.fda.gov/cder/guidance/index.htm* or *http://www.fda.gov/ohrms/dockets/default.htm*.

Dated: January 24, 2005.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 05–1752 Filed 1–28–05; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of Inspector General

OIG Supplemental Compliance Program Guidance for Hospitals

AGENCY: Office of Inspector General (OIG), HHS.

ACTION: Notice.

SUMMARY: This **Federal Register** notice sets forth the Supplemental Compliance Program Guidance (CPG) for Hospitals developed by the Office of Inspector General (OIG). Through this notice, the OIG is supplementing its prior compliance program guidance for hospitals issued in 1998. The supplemental CPG contains new compliance recommendations and an expanded discussion of risk areas, taking into account recent changes to hospital payment systems and regulations, evolving industry practices, current enforcement priorities, and lessons learned in the area of corporate compliance. The supplemental CPG provides voluntary guidelines to assist hospitals and hospital systems in identifying significant risk areas and in evaluating and, as necessary, refining ongoing compliance efforts.

FOR FURTHER INFORMATION CONTACT: Darlene M. Hampton, Office of Counsel to the Inspector General, (202) 619–0335.

SUPPLEMENTARY INFORMATION:

Background

Several years ago, the OIG embarked on a major initiative to engage the private health care community in preventing the submission of erroneous claims and in combating fraud and abuse in the Federal health care programs through voluntary compliance efforts. In the last several years, the OIG has developed a series of compliance program guidances (CPGs) directed at the following segments of the health care industry: hospitals; clinical laboratories; home health agencies; third-party billing companies; the durable medical equipment, prosthetics, orthotics, and supply industry; hospices; Medicare+Choice organizations; nursing facilities; physicians; ambulance suppliers; and pharmaceutical manufacturers. CPGs are intended to encourage the development and use of internal controls to monitor adherence to applicable statutes, regulations, and program requirements. The suggestions made in these CPGs are not mandatory, and the CPGs should not be viewed as exhaustive discussions of beneficial compliance practices or relevant risk areas. Copies of these CPGs can be found on the OIG Web page at *http://oig.hhs.gov.*

Supplementing the Compliance Program Guidance for Hospitals

The OIG originally published a CPG for the hospital industry on February 23, 1998. (*See* 63 FR 8987 (February 23, 1998), available on our Web page at *http://oig.hhs.gov/authorities/docs/cpghosp.pdf.*) Since that time, there have been significant changes in the way hospitals deliver, and are reimbursed for, health care services. In response to these developments, on June 18, 2002, the OIG published a notice in the **Federal Register,** soliciting public suggestions for revising the hospital CPG. (*See* 67 FR 41433 (June 18, 2002), available on our Web page at *http://oig.hhs.gov/authorities/docs/cpghospitalsolicitationnotice.pdf.*) After consideration of the public comments and the issues raised, the OIG published a draft supplemental compliance program guidance for hospitals in the **Federal Register** on June 8, 2004, to ensure that all parties had a reasonable and meaningful opportunity to provide input into the final product. (*See* 69 FR 32012 (June 8, 2004), available on our Web page at *http://oig.hhs.gov/authorities/docs/04/060804hospitaldraftsuppCPGFR.pdf.*) The OIG received comments from a variety of parties with interests in the hospital industry and diverse points of view. These comments were carefully considered during the development of this final supplemental CPG. While some commenters preferred a replacement CPG, for efficiency and to create a concise product of particular use to hospitals with existing compliance programs, we have decided to supplement, rather than replace, the 1998 guidance.

Many public commenters sought guidance on the application of specific Medicare rules and regulations related to payment and coverage, an area beyond the scope of this OIG guidance. Hospitals with questions about the interpretation or application of payment and coverage rules or regulations should contact their Fiscal Intermediaries (FIs) or the Centers for Medicare & Medicaid Services, as appropriate.

Supplemental Compliance Program Guidance for Hospitals

I. Introduction

Continuing its efforts to promote voluntary compliance programs for the health care industry, the Office of Inspector General (OIG) of the Department of Health and Human Services (the Department) publishes this Supplemental Compliance Program Guidance (CPG) for Hospitals.[1] This document supplements, rather than replaces, the OIG's 1998 CPG for the hospital industry (63 FR 8987; February 23, 1998), which addressed the fundamentals of establishing an effective compliance program.[2] Neither this supplemental CPG, nor the original 1998 CPG, is a model compliance program. Rather, collectively the two documents offer a set of guidelines that hospitals should consider when developing and implementing a new compliance program or evaluating an existing one.

We are mindful that many hospitals have already devoted substantial time and resources to compliance efforts. We believe that those efforts demonstrate the industry's good faith commitment to ensuring and promoting integrity. For those hospitals with existing compliance programs, this document may serve as a benchmark or comparison against which to measure ongoing efforts and as a roadmap for updating or refining their compliance plans.

In crafting this supplemental CPG, we considered, among other things, the public comments received in response to the solicitation notice published in the **Federal Register**[3] and the draft supplemental CPG,[4] as well as relevant OIG and Centers for Medicare & Medicaid Services (CMS) statutory and regulatory authorities (including the Federal anti-kickback statute, together with the safe harbor regulations and

[1] For purposes of convenience in this guidance, we use the term ''hospitals'' to refer to individual hospitals, multi-hospital systems, health systems that own or operate hospitals, academic medical centers, and any other organization that owns or operates one or more hospitals. Where applicable, the term ''hospitals'' is also intended to include, without limitation, hospital owners, officers, managers, staff, agents, and sub-providers. This guidance primarily focuses on hospitals reimbursed under the inpatient and outpatient prospective payment systems. While other hospitals should find this CPG useful, we recognize that they may be subject to different laws, rules, and regulations and, accordingly, may have different or additional risk areas and may need to adopt different compliance strategies. We encourage all hospitals to establish and maintain ongoing compliance programs.

[2] The 1998 OIG Compliance Program Guidance for Hospitals is available on our Web page at *http://oig.hhs.gov/authorities/docs/cpghosp.pdf.*

[3] *See* 67 FR 41433 (June 18, 2002), ''Solicitation of Information and Recommendations for Revising a Compliance Program Guidance for the Hospital Industry,'' available on our Web page at *http://oig.hhs.gov/authorities/docs/cpghospitalsolicitationnotice.pdf.*

[4] *See* 69 FR 32012 (June 8, 2004), ''OIG Draft Supplemental Compliance Program Guidance for Hospitals,'' available on our Web page at *http://oig.hhs.gov/authorities/docs/04/060804hospitaldraftsuppCPGFR.pdf.*

preambles,[5] and CMS transmittals and program memoranda); other OIG guidance (such as OIG advisory opinions, special fraud alerts, bulletins, and other guidance); experience gained from investigations conducted by the OIG's Office of Investigations, the Department of Justice (DoJ), and the State Medicaid Fraud Units; and relevant reports issued by the OIG's Office of Audit Services and Office of Evaluation and Inspections.[6] We also consulted generally with CMS, the Department's Office for Civil Rights, and DoJ.

A. Benefits of a Compliance Program

A successful compliance program addresses the public and private sectors' mutual goals of reducing fraud and abuse; enhancing health care providers' operations; improving the quality of health care services; and reducing the overall cost of health care services. Attaining these goals benefits the hospital industry, the government, and patients alike. Compliance programs help hospitals fulfill their legal duty to refrain from submitting false or inaccurate claims or cost information to the Federal health care programs[7] or engaging in other illegal practices. A hospital may gain important additional benefits by voluntarily implementing a compliance program, including:

- Demonstrating the hospital's commitment to honest and responsible corporate conduct;
- Increasing the likelihood of preventing, identifying, and correcting unlawful and unethical behavior at an early stage;
- Encouraging employees to report potential problems to allow for appropriate internal inquiry and corrective action; and
- Through early detection and reporting, minimizing any financial loss to government and taxpayers, as well as any corresponding financial loss to the hospital.

The OIG recognizes that implementation of a compliance program may not entirely eliminate improper or unethical conduct from the operations of health care providers. However, an effective compliance program demonstrates a hospital's good faith effort to comply with applicable statutes, regulations, and other Federal health care program requirements, and may significantly reduce the risk of unlawful conduct and corresponding sanctions.

B. Application of Compliance Program Guidance

Given the diversity of the hospital industry, there is no single ''best'' hospital compliance program. The OIG recognizes the complexities of the hospital industry and the differences among hospitals and hospital systems. Some hospital entities are small and may have limited resources to devote to compliance measures; others are affiliated with well-established, large, multi-facility organizations with a widely dispersed work force and significant resources to devote to compliance.

Accordingly, this supplemental CPG is not intended to be one-size-fits-all guidance. Rather, the OIG strongly encourages hospitals to identify and focus their compliance efforts on those areas of potential concern or risk that are most relevant to their individual organizations. Compliance measures adopted by a hospital to address identified risk areas should be tailored to fit the unique environment of the organization (including its structure, operations, resources, and prior enforcement experience). In short, the OIG recommends that each hospital adapt the objectives and principles underlying this guidance to its own particular circumstances.

In section II below, titled ''Fraud and Abuse Risk Areas,'' we present several fraud and abuse risk areas that are particularly relevant to the hospital industry. Each hospital should carefully examine these risk areas and identify those that potentially impact the hospital. Next, in section III, ''Hospital Compliance Program Effectiveness,'' we offer recommendations for assessing and improving an existing compliance program to better address identified risk areas. Finally, in section IV, ''Self-Reporting,'' we set forth the actions hospitals should take if they discover credible evidence of misconduct.

II. Fraud and Abuse Risk Areas

This section is intended to help hospitals identify areas of their operations that present a potential risk of liability under several key Federal fraud and abuse statutes and regulations. This section focuses on areas that are currently of concern to the enforcement community and is not intended to address all potential risk areas for hospitals. Importantly, the identification of a particular practice or activity in this section is not intended to imply that the practice or activity is necessarily illegal in all circumstances or that it may not have a valid or lawful purpose underlying it.

This section addresses the following areas of significant concern for hospitals: (A) Submission of accurate claims and information; (B) the referral statutes; (C) payments to reduce or limit services; (D) the Emergency Medical Treatment and Labor Act (EMTALA); (E) substandard care; (F) relationships with Federal health care beneficiaries; (G) HIPAA Privacy and Security Rules; and (H) billing Medicare or Medicaid substantially in excess of usual charges. In addition, a final section (I) addresses several areas of general interest that, while not necessarily matters of significant risk, have been of continuing interest to the hospital community. This guidance does not create any new law or legal obligations, and the discussions in this guidance are not intended to present detailed or comprehensive summaries of lawful and unlawful activity. Nor is this guidance intended as a substitute for consultation with CMS or a hospital's Fiscal Intermediary (FI) with respect to the application and interpretation of Medicare payment and coverage provisions, which are subject to change. Rather, this guidance should be used as a starting point for a hospital's legal review of its particular practices and for development or refinement of policies and procedures to reduce or eliminate potential risk.

A. Submission of Accurate Claims and Information

Perhaps the single biggest risk area for hospitals is the preparation and submission of claims or other requests for payment from the Federal health care programs. It is axiomatic that all claims and requests for reimbursement from the Federal health care programs—and all documentation supporting such claims or requests—must be complete and accurate and must reflect reasonable and necessary services ordered by an appropriately licensed medical professional who is a participating provider in the health care program from which the individual or entity is seeking reimbursement. Hospitals must disclose and return any overpayments that result from mistaken

[5] *See* 42 U.S.C. 1320a–7b(b). *See also* 42 CFR 1001.952. The safe harbor regulations and preambles are available on our Web page at *http://oig.hhs.gov/fraud/safeharborregulations.html#1.*

[6] The OIG's materials are available on our Web page at *http://oig.hhs.gov.*

[7] The term ''Federal health care programs,'' as defined in 42 U.S.C. 1320a–7b(f), includes any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by the United States Government (other than the Federal Employees Health Benefit Plan described at 5 U.S.C. 8901–8914) or any State health plan (*e.g.,* Medicaid or a program receiving funds from block grants for social services or child health services). In this document, the term ''Federal health care program requirements'' refers to the statutes, regulations, and other rules governing Medicare, Medicaid, and all other Federal health care programs.

or erroneous claims.[8] Moreover, the knowing submission of a false, fraudulent, or misleading statement or claim is actionable. A hospital may be liable under the False Claims Act[9] or other statutes imposing sanctions for the submission of false claims or statements, including liability for civil money penalties (CMPs) or exclusion.[10] Underlying assumptions used in connection with claims submission should be reasoned, consistent, and appropriately documented, and hospitals should retain all relevant records reflecting their efforts to comply with Federal health care program requirements.

Common and longstanding risks associated with claims preparation and submission include inaccurate or incorrect coding, upcoding, unbundling of services, billing for medically unnecessary services or other services not covered by the relevant health care program, billing for services not provided, duplicate billing, insufficient documentation, and false or fraudulent cost reports. While hospitals should continue to be vigilant with respect to these important risk areas, we believe these risk areas are relatively well-understood in the industry and, therefore, they are not generally addressed in this section.[11] Rather, the following discussion highlights evolving risks or risks that appear to the OIG to be under-appreciated by the industry. The risks are grouped under the following topics: Outpatient procedure coding; admissions and discharges; supplemental payment considerations; and use of information technology. By necessity, this discussion is illustrative, not exhaustive, of risks associated with the submission of claims or other information. In all cases, hospitals should consult the applicable laws, rules, and regulations.

1. Outpatient Procedure Coding

The implementation of Medicare's Hospital Outpatient Prospective Payment System (OPPS)[12] increased the importance of accurate procedure coding for hospital outpatient services. Previously, hospital coding concerns mainly consisted of ensuring accurate ICD–9–CM diagnosis and procedure coding for reimbursement under the inpatient prospective payment system (PPS). Hospitals reported procedure codes for outpatient services, but were reimbursed for outpatient services based on their charges for services. With the OPPS, procedure codes effectively became the basis for Medicare reimbursement. Under the OPPS, each reported procedure code is assigned to a corresponding Ambulatory Payment Classification (APC) code. Hospitals are then reimbursed a predetermined amount for each APC, irrespective of the specific level of resources used to furnish the individual service. In implementing the OPPS, CMS developed new rules governing the use of procedure code modifiers for outpatient coding.[13] Because incorrect procedure coding may lead to overpayments and subject a hospital to liability for the submission of false claims, hospitals need to pay close attention to coder training and qualifications.

Hospitals should also review their outpatient documentation practices to ensure that claims are based on complete medical records and that the medical records support the levels of service claimed. Under the OPPS, hospitals must generally include on a single claim all services provided to the same patient on the same day. Coding from incomplete medical records may create problems in complying with this claim submission requirement. Moreover, submitting claims for services that are not supported by the medical record may also result in the submission of improper claims.

In addition to the coding risk areas noted above and in the 1998 hospital CPG, other specific risk areas associated with incorrect outpatient procedure coding include the following:

- *Billing on an outpatient basis for ''inpatient-only'' procedures*—CMS has identified procedures for which reimbursement is typically allowed only if the service is performed in an inpatient setting.[14]
- *Submitting claims for medically unnecessary services by failing to follow the FI's local policies*—Each FI publishes local policies, including local medical review polices (LMRPs) and local coverage determinations (LCDs), that identify certain procedures that are only reimbursable when specific conditions are present.[15] In addition to relying on a physician's sound clinical judgment with respect to the appropriateness of a proposed course of treatment, hospitals should regularly review and become familiar with their individual FI's LMRPs and LCDs. LMRPs and LCDs should be incorporated into a hospital's regular coding and billing operations.[16]
- *Submitting duplicate claims or otherwise not following the National Correct Coding Initiative guidelines*—CMS developed the National Correct Coding Initiative (NCCI) to promote correct coding methodologies. The NCCI identifies certain codes that should not be used together because they are either mutually exclusive or one is a component of another. If a hospital uses code pairs that are listed in the NCCI and those codes are not detected by the editing routines in the hospital's billing system, the hospital may submit duplicate or unbundled claims. Intentional manipulation of code assignments to maximize payments and avoid NCCI edits constitutes fraud. Unintentional misapplication of NCCI coding and billing guidelines may also give rise to overpayments or civil liability for hospitals that have developed a pattern of inappropriate billing. To minimize risk, hospitals

[8] *See* 42 U.S.C. 1320a–7b(a)(3).

[9] The False Claims Act (31 U.S.C. 3729–33), among other things, prohibits knowingly presenting or causing to be presented to the Federal government a false or fraudulent claim for payment or approval, knowingly making or using or causing to be made or used a false record or statement to have a false or fraudulent claim paid or approved by the government, and knowingly making or using or causing to be made or used a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the government. The False Claims Act defines ''knowing'' and ''knowingly'' to mean that ''a person, with respect to the information—(1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.'' 31 U.S.C. 3729(b).

[10] In some circumstances, inaccurate or incomplete reporting may lead to liability under the Federal anti-kickback statute. In addition, hospitals should be mindful that many States have fraud and abuse statutes—including false claims, anti-kickback, and other statutes—that are not addressed in this guidance.

[11] To review the risk areas discussed in the original hospital CPG, *see* 63 FR 8987, 8990 (February 23, 1998), available on our Web page at *http://oig.hhs.gov/authorities/docs/cpghosp.pdf.*

[12] Congress enacted the OPPS in section 4523 of the Balanced Budget Act of 1997. The OPPS became effective on August 1, 2001. CMS promulgated regulations implementing the OPPS at 42 CFR part 419. For more information regarding the OPPS, *see http://www.cms.gov/providers/hopps/.*

[13] The list of current modifiers is listed in the Current Procedural Terminology (CPT) coding manual. However, hospitals should pay particular attention to CMS transmittals and program memoranda that may introduce new or altered application of modifiers for claims submission and reimbursement purposes. *See* chapter 4, section 20.6 of the Medicare Claims Processing Manual at *http://www.cms.gov/manuals/104_claims/clm104c04.pdf.*

[14] The list of ''inpatient-only'' procedures appears in the annual update to the OPPS rule. For the 2004 final rule, the ''inpatient-only'' list is found in Addendum E. *See http://www.cms.gov/regulations/hopps/2004f.*

[15] Effective December 7, 2003, FI's began issuing LCDs instead of LMRPs, and FI's will convert all existing LMRPs into LCDs by December 31, 2005.

[16] A hospital may contact its FI to request a copy of the pertinent LMRPs and LCDs, or visit CMS's Web page at *http://www.cms.gov/mcd* to search existing local and national policies.

should ensure that their coding software includes up-to-date NCCI edit files.[17]

• *Submitting incorrect claims for ancillary services because of outdated Charge Description Masters*—Charge Description Masters (CDMs) list all of a hospital's charges for items and services and include the underlying procedure codes necessary to bill for those items and services. Outdated CDMs create significant compliance risk for hospitals. Because the Healthcare Common Procedure Coding System (HCPCS) codes and APCs are updated regularly, hospitals should pay particular attention to the task of updating the CDM to ensure the assignment of correct codes to outpatient claims. This should include timely updates, proper use of modifiers, and correct associations between procedure codes and revenue codes.[18]

• *Circumventing the multiple procedure discounting rules*—A surgical procedure performed in connection with another surgical procedure may be discounted. However, certain surgical procedures are designated as non-discounted, even when performed with another surgical procedure. Hospitals should ensure that the procedure codes selected represent the actual services provided, irrespective of the discounting status. They should also review the annual OPPS rule update to understand more fully CMS's multiple procedure discounting rule.[19]

• *Improper evaluation and management code selection*—Hospitals should use proper codes to describe the evaluation and management (E/M) services they provide. A hospital's E/M coding guidelines should ensure that services are medically necessary and sufficiently documented and that the codes accurately reflect the intensity of hospital resources required to deliver the services.

• *Improperly billing for observation services*—In certain circumstances, Medicare provides a separate APC payment for observation services for patients with diagnoses of chest pain, asthma, or congestive heart failure. Claims for these observation services must correctly reflect the diagnosis and meet certain other requirements. Seeking a separate payment for observation services in situations that do not satisfy the requirements is inappropriate and may result in hospital liability. Hospitals should become familiar with CMS's detailed policies for the submission of claims for observation services.[20]

2. Admissions and Discharges

Often, the status of patients at the time of admission or discharge significantly influences the amount and method of reimbursement hospitals receive. Therefore, hospitals have a duty to ensure that admission and discharge policies are updated and reflect current CMS rules. Risk areas with respect to the admission and discharge processes include the following:

• *Failure to follow the ''same-day rule''*—The OPPS rules require hospitals to include on the same claim all OPPS services provided at the same hospital, to the same patient, on the same day, unless certain conditions are met. Hospitals should review internal billing systems and procedures to ensure that they are not submitting multiple claims for OPPS services delivered to the same patient on the same day.[21]

• *Abuse of partial hospitalization payments*—Under the OPPS, Medicare provides a *per diem* payment for specific hospital services rendered to behavioral and mental health patients on a partial hospitalization basis. Examples of improper billing under the partial hospitalization program include, without limitation: reducing the range of services offered; withholding services that are medically appropriate; billing for services not covered; and billing for services without a certificate of medical necessity.[22]

• *Same-day discharges and readmissions*—Same-day discharges and readmissions may indicate premature discharges, medically unnecessary readmissions, or incorrect discharge coding. Hospitals should have procedures in place to review discharges and admissions carefully to ensure that they reflect prudent clinical decision-making and are properly coded.[23]

• *Violation of Medicare's post-acute care transfer policy*—The post-acute care transfer policy provides that, for certain designated Diagnosis Related Groups (DRGs), a hospital will receive a per diem transfer payment, rather than the full DRG payment, if the patient is discharged to certain post-acute care settings.[24] CMS may periodically revise the list of designated DRGs that are subject to its post-acute care transfer policy.[25] To avoid improperly billing for discharges, hospitals should pay particular attention to CMS's post-acute care transfer policy and keep an accurate list of all designated DRGs subject to that policy.

• *Improper churning of patients by long-term care hospitals co-located in acute care hospitals*—Long term care hospitals that are co-located within acute care hospitals may qualify for PPS-exempt status if certain regulatory requirements are satisfied.[26] Hospitals should not engage in the practice of churning, or inappropriately transferring, patients between the host hospital and the hospital-within-a-hospital.

3. Supplemental Payment Considerations

Under the Medicare program, in certain limited situations, hospitals may claim payments in addition to, or in some cases in lieu of, the normal reimbursement available to hospitals under the regular payment systems. Eligibility for these payments depends on compliance with specific criteria. Hospitals that claim supplemental payments improperly are liable for fines and penalties under Federal law. Examples of specific risks that hospitals should address include the following:

• *Improper reporting of the costs of ''pass-through'' items*—''Pass-through'' items are certain items of new technology and drugs for which Medicare will reimburse the hospital

[17] More information regarding the NCCI can be obtained from CMS's Web page at *http://www.cms.gov/medlearn/ncci.asp.*

[18] For information relating to HCPCS code updates, *see http://www.cms.gov/medicare/hcpcs/.* For information relating to annual APC updates, *see http://www.cms.gov/providers/hopps/.*

[19] *See http://www.cms.gov/medlearn/refopps.asp.*

[20] *See* CMS Program Transmittal A–02–026, available on CMS's Web page at *http://www.ems.gov/manuals/pm_trans/A02026.pdf.*

[21] *See, e.g.,* chapter 1, section 50.2 of the Medicare Claims Processing Manual, available on CMS's Web page at *http://www.cms.gov/manuals/104_claims/clm104c01.pdf.*

[22] *See* chapter 4, section 260 of the Medicare Claims Processing Manual, available on CMS's Web page at *http://www.cms.gov/manuals/104_claims/clm104c04.pdf.*

[23] *See, e.g.,* OIG Audit Report A–03–01–00011, ''Review of Medicare Same-Day, Same-Provider Acute Care Readmissions in Pennsylvania During Calendar year 1998,'' August 2002, available on our Web page at *http://oig.hhs.gov/oas/reports/region 3/30100011.pdf.*

[24] *See* 42 CFR 412.4(c). *See, e.g.,* OIG Audit Report A–04–00–01220 ''Implementation of Medicare's Postacute Care Transfer Policy,'' October 2001, available on our Web page at *http://oig.hhs.gov/oas/reports/region4/40001220.pdf.*

[25] The initial 10 designated DRGs were selected by the Secretary, pursuant to section 1886(d)(5)(J) of the Social Security Act (42 U.S.C. 1395ww(d)(5)(J)). With the 2004 fiscal year PPS rule, CMS revised the list of DRGs paid under CMS's post-acute care transfer policy, bringing the total number of designated DRGs to 29. *See* 68 FR 45346 (August 1, 2003). Then, with the 2005 fiscal year PPS rule, CMS revised the list again, bringing the current total number of designated DRGs to 30. *See* 69 FR 48916 (August 11, 2004). *See also* chapter 3, section 402.4 of the Medicare Claims Processing Manual, available on CMS's Web page at *http://www.cms.gov/manuals/104_claims/clm104c03.pdf.*

[26] *See* 42 CFR 412.22(e).

based on costs during a limited transitional period.[27]

• *Abuse of DRG outlier payments*—Recent investigations revealed substantial abuse of outlier payments by hospitals with Medicare patients. Hospital management, compliance staff, and counsel should familiarize themselves with CMS's new outlier rules and requirements intended to curb abuses.[28]

• *Improper claims for incorrectly designated ''provider-based'' entities*—Certain hospital-affiliated entities and clinics can be designated as ''provider-based,'' which allows for a higher level of reimbursement for certain services.[29] Hospitals should take steps to ensure that facilities or organizations are only designated as provider-based if they satisfy the criteria set forth in the regulations.

• *Improper claims for clinical trials*—Since September 2000, Medicare has covered items and services furnished during certain clinical trials, as long as those items and services would typically be covered for Medicare beneficiaries, but for the fact that they are provided in an experimental or clinical trial setting. Hospitals that participate in clinical trials should review the requirements for submitting claims for patients participating in clinical trials.[30]

• *Improper claims for organ acquisition costs*—Hospitals that are approved transplantation centers may receive reimbursement on a reasonable cost basis to cover the costs of acquisition of certain organs.[31] Organ acquisition costs are only reimbursable if a hospital satisfies several requirements, such as having adequate cost information, supporting documentation, and supporting medical records.[32] Hospitals must also ensure that expenses not related to organ acquisition, such as transplant and post-transplant activities and costs from other cost centers, are not included in the hospital's organ acquisition costs.[33]

• *Improper claims for cardiac rehabilitation services*—Medicare covers reasonable and necessary cardiac rehabilitation services under the hospital ''incident-to'' benefit, which requires that the services of nonphysician personnel be furnished under a physician's direct supervision. In addition to satisfying the supervision requirement, hospitals must ensure that cardiac rehabilitation services are reasonable and necessary.[34]

• *Failure to follow Medicare rules regarding payment for costs related to educational activities*[35]—Hospitals should pay particular attention to these rules when implementing dental or other education programs, particularly those not historically operated at the hospital.

4. Use of Information Technology

The implementation of the OPPS increased the need for hospitals to pay particular attention to their computerized billing, coding, and information systems. Billing and coding under the OPPS is more data intensive than billing and coding under the inpatient PPS. When the OPPS began, many hospitals' existing systems were unable to accommodate the new requirements and required adjustments.

As the health care industry moves forward, hospitals will increasingly rely on information technology. For example, HIPAA Privacy and Security Rules (discussed below in section II.G), electronic claims submission,[36] electronic prescribing, networked information sharing among providers, and systems for the tracking and reduction of medical errors, among others, will require hospitals to depend more on information technologies. Information technology presents new opportunities to advance health care efficiency, but also new challenges to ensuring the accuracy of claims and the information used to generate claims. It may be difficult for purchasers of computer systems and software to know exactly how the system operates and generates information. Prudent hospitals will take steps to ensure that they thoroughly assess all new computer systems and software that impact coding, billing, or the generation or transmission of information related to the Federal health care programs or their beneficiaries.

B. The Referral Statutes: The Physician Self-Referral Law (the ''Stark'' Law) and the Federal Anti-Kickback Statute

1. The Physician Self-Referral Law

From a hospital compliance perspective, the physician self-referral law (section 1877 of the Social Security Act (Act), commonly known as the ''Stark'' law) should be viewed as a threshold statute. The statute prohibits hospitals from submitting—and Medicare from paying—any claim for a ''designated health service'' (DHS) if the referral of the DHS comes from a physician with whom the hospital has a prohibited financial relationship.[37] This is true even if the prohibited financial relationship is the result of inadvertence or error. In addition, hospitals and physicians that *knowingly* violate the statute may be subject to CMPs and exclusion from the Federal health care programs. Furthermore, under certain circumstances, a knowing violation of the Stark law may also give rise to liability under the False Claims Act. Because all inpatient and outpatient hospital services furnished to Medicare or Medicaid patients

[27] For more information regarding CMS's APC ''pass-through'' payments, *See http://www.cms.gov/providers/hopps/apc.asp.*

[28] *See* 42 CFR 412.84; 68 FR 34493 (June 9, 2003).

[29] The criteria for determining whether a facility or organization is provider-based can be found at 42 CFR 413.65. In April 2003, CMS published Transmittal A–03–030, outlining changes to the criteria for provider-based designation. *See http://www.cms.gov/manuals/pm_trans/A03030.pdf.*

[30] To view Medicare's National Coverage Decision regarding clinical trials, *see http://www.cms.gov/coverage/8d2.asp.* Specific requirements for submitting claims for reimbursement for clinical trials can be accessed on CMS's Web page at *http://www.cms.gov/coverage/8d4.asp.*

[31] *See* 42 CFR 412.2(e)(4), 42 CFR 412.113(d), and 42 CFR 413.203. *See generally* 42 CFR part 413 (setting forth the principles of reasonable cost reimbursement).

[32] *See* Medicare's Provider Reimbursement Manual (PRM), Part I, section 2304 and Part II, section 3610, available on CMS's Web page at *http://www.cms.gov/manuals/cmsfoc.asp.*

[33] *See* 42 CFR 412.100. *See also,* chapter 3, section 90 of the Medicare Claims Processing Manual, available on CMS's Web page at *http://www.cms.gov/manuals/104_claims/clm104c03.pdf.See, e.g.,* OIG Audit Report A–04–02–02017, ''Audit of Medicare Costs for Organ Acquisitions at Tampa General Hospital,'' April 2003, available on our Web page at *http://oig.hhs.gov/oas/reports/region4/40202017.pdf.*

[34] *See* section 35–25 of the Medicare Coverage Issues Manual. *See, e.g.,* OIG Audit Report A–01–03–00516, ''Review of Outpatient Cardiac Rehabilitation Services at the Cooley Dickinson Hospital,'' December 2003, available on our Web page at *http://oig.hhs.gov/oas/reports/region 1/10300516.pdf.*

[35] Payments for direct graduage medical education (GME) and indirect graduate medical education (IME) costs are, in part, based upon the number of full-time equivalent (FTE) residents at each hospital and the proportion of time residents spend in training. Hospitals that inappropriately calculate the number of FTE residents risk receiving inappropriate medical education payments. Hospitals should have in place procedures regarding: (i) Resident rotation monitoring; (ii) resident credentialing; (iii) written agreements with non-hospital providers; and (iv) the approval process for research activities. For more information regarding medical education reimbursement, *see* 42 CFR 413.75 *et. seq.* (GME requirements) and 42 CFR 412.105 (IME requirements). *See, e.g.,* OIG Audit Report A–01–01–00547 ''Review of Graduate Medical Education Costs Claimed by the Hartford Hospital for Fiscal Year Ending September 30, 1999,'' October 2003, available on our Web page at *http://oig.hhs.gov/oas/reports/region 1/10100547.pdf.*

[36] For more information regarding Medicare's Electronic Data Interchange programs, *see http://www.cms.gov/providers/edi/.*

[37] The statute also prohibits physicians from referring DHS to entities, including hospitals, with which they have prohibited financial relationships. However, the billing prohibition and nonpayment sanction apply only to the DHS entity (*e.g.*, the hospital). *See* section 1877(a) of the Act. Section 1903(s) of the Act extends the statutory prohibition to Medicaid-covered services.

(including services furnished directly by a hospital or by others ''under arrangements'' with a hospital) are DHS under the statute,[38] hospitals must diligently review all financial relationships with referring physicians for compliance with the Stark law. Simply put, hospitals face significant financial exposure unless their financial relationships with referring physicians fit squarely in statutory or regulatory exceptions to the Stark law.

For purposes of analyzing a financial relationship under the Stark law, the following three-part inquiry is useful:

- Is there a *referral* from a *physician* for a *designated health service*? If not, then there is no Stark law issue (although other fraud and abuse authorities, such as the anti-kickback statute, may be implicated). If the answer is ''yes,'' the next inquiry is:
- Does the physician (or an immediate family member) have a *financial relationship* with the entity furnishing the DHS (*e.g.*, the hospital)? Again, if the answer is no, the Stark law is not implicated. However, if the answer is ''yes,'' the third inquiry is:
- Does the financial relationship fit in an *exception*? If not, the statute has been violated.

Detailed definitions of the highlighted terms are set forth in regulations at 42 CFR 411.351 through 411.361 (substantial additional explanatory material appears in the regulatory preambles to the final regulations: 66 FR 856 (January 4, 2001); 69 FR 16054 (March 26, 2004); and 69 FR 17933 (April 6, 2004)). Importantly, a financial relationship can be almost any kind of direct or indirect ownership or investment relationship (*e.g.*, stock ownership, a partnership interest, or secured debt) or direct or indirect compensation arrangement, whether in cash or in-kind (*e.g.*, a rental contract, personal services contract, salary, gift, or gratuity), between a referring physician (or immediate family member) and a hospital. Moreover, the financial relationship need not relate to the provision of DHS (*e.g.*, a joint venture between a hospital and a physician to operate a hospice would create an indirect compensation relationship between the hospital and the physician for Stark law purposes).

The statutory and regulatory exceptions are the key to compliance with the Stark law. Any financial relationship between the hospital and a physician who refers to the hospital must fit in an exception. Exceptions exist in the statute and regulations for many common types of business arrangements. To fit in an exception, an arrangement must squarely meet all of the conditions set forth in the exception. Importantly, it is the actual relationship between the parties, and not merely the paperwork, that must fit in an exception. Unlike the anti-kickback safe harbors, which are voluntary, fitting in an exception is mandatory under the Stark law.

Compliance with a Stark law exception does not immunize an arrangement under the anti-kickback statute. Rather, the Stark law sets a minimum standard for arrangements between physicians and hospitals. Even if a hospital-physician relationship qualifies for a Stark law exception, it should still be reviewed for compliance with the anti-kickback statute. The anti-kickback statute is discussed in greater detail in the next subsection.

Because of the significant exposure for hospitals under the Stark law, we recommend that hospitals implement systems to ensure that all conditions in the exceptions upon which they rely are fully satisfied. For example, many of the exceptions, such as the rental and personal services exceptions, require signed, written agreements with physicians. We are aware of numerous instances in which hospitals failed to maintain these signed written agreements, often inadvertently (*e.g.*, a holdover lease without a written lease amendment; a physician hired as an independent contractor for a short-term project without a signed agreement). To avoid a large overpayment, hospitals should ensure frequent and thorough review of their contracting and leasing processes. The final regulations contain a new limited exception for certain inadvertent, temporary instances of noncompliance with another exception. This exception may only be used on an occasional basis. Hospitals should be mindful that this exception is not a substitute for vigilant contracting and leasing oversight. In addition, hospitals should review the new reporting requirements at 42 CFR 411.361, which generally require hospitals to retain records that the hospitals know or should know about in the course of prudently conducting business. Hospitals should ensure that they have policies and procedures in place to address these reporting requirements.

In addition, because many exceptions to the Stark law require fair market value compensation for items or services actually needed and rendered, hospitals should have appropriate processes for making and documenting reasonable, consistent, and objective determinations of fair market value and for ensuring that needed items and services are furnished or rendered. Other areas that may require careful monitoring include, without limitation, the total value of nonmonetary compensation provided annually to each referring physician, the value of medical staff incidental benefits, and the provision of professional courtesy.[39] As discussed further in the anti-kickback section below, hospitals should exercise care when recruiting physicians. Importantly, while the final regulations contain a limited exception for certain joint recruiting by hospitals and existing group practices, the exception strictly forbids the use of income guarantees that shift group practice overhead or expenses to the hospital or any payment structure that otherwise transfers remuneration to the group practice.

Further information about the Stark law and applicable regulations can be found on CMS's Web page at *http://cms.gov/medlearn/refphys.asp.* Information regarding CMS's Stark advisory opinion process can be found at *http://cms.gov/physicians/aop/default.asp*.

2. The Federal Anti-Kickback Statute

Hospitals should also be aware of the Federal anti-kickback statute, section 1128B(b) of the Act, and the constraints it places on business arrangements related directly or indirectly to items or services reimbursable by any Federal health care program, including, but not limited to, Medicare and Medicaid. The anti-kickback statute prohibits in the health care industry some practices that are common in other business sectors, such as offering gifts to reward past or potential new referrals.

The anti-kickback statute is a criminal prohibition against payments (in any form, whether the payments are direct

[38] The statute lists ten additional categories of DHS, including, among others, clinical laboratory services, radiology services, and durable medical equipment. See section 1877(h)(6) of the Act. Hospitals and health systems that own or operate free-standing DHS entities should be mindful of the ten additional DHS categories. CMS has clarified that lithotripsy services furnished to hospital inpatients are not DHS. See 69 FR 16054, 16106 (March 26, 2004).

[39] Hospitals affiliated with academic medical centers should be aware that the regulations contain a special exception for certain academic medical center arrangements. *See* 42 CFR 411.355(e). Specialty hospitals should be mindful of certain limitations on new physician-owned specialty hospitals contained in section 507 of the Medicare Prescription Drug, Improvement and Modernization Act of 2003. *See* CMS's One-Time Notification regarding the 18-month moratorium on physician investment in specialty hospitals, CMS Manual System Pub. 100–20 One-Time Notification, Transmittal 26 (March 19, 2004), available on CMS's Web page at *http://www.cms.gov/manuals/pm_trans/R62OTN.pdf*.

or indirect) made purposefully to induce or reward the referral or generation of Federal health care program business. The anti-kickback statute addresses not only the offer or payment of anything of value for patient referrals, but also the offer or payment of anything of value in return for purchasing, leasing, ordering, or arranging for or recommending the purchase, lease, or ordering of any item or service reimbursable in whole or in part by a Federal health care program. The statute extends equally to the solicitation or acceptance of remuneration for referrals or the generation of other business payable by a Federal health care program. Liability under the anti-kickback statute is determined separately for each party involved. In addition to criminal penalties, violators may be subject to CMPs and exclusion from the Federal health care programs. Hospitals should also be mindful that compliance with the anti-kickback statute is a condition of payment under Medicare and other Federal health care programs. *See, e.g.*, Medicare Federal Health Care Provider/Supplier Application, CMS Form 855A, Certification Statement at section 15, paragraph A.3, available on CMS's Web page at *http://www.cms.gov/providers/enrollment/forms/*. As such, liability may arise under the False Claims Act where the anti-kickback statute violation results in the submission of a claim for payment under a Federal health care program.

Although liability under the anti-kickback statute ultimately turns on a party's intent, it is possible to identify arrangements or practices that may present a significant potential for abuse. For purposes of analyzing an arrangement or practice under the anti-kickback statute, the following two inquiries are useful:

- Does the hospital have any remunerative relationship between itself (or its affiliates or representatives) and persons or entities in a position to generate Federal health care program business for the hospital (or its affiliates) directly or indirectly? Persons or entities in a position to generate Federal health care program business for a hospital include, for example, physicians and other health care professionals, ambulance companies, clinics, hospices, home health agencies, nursing facilities, and other hospitals.
- With respect to any remunerative relationship so identified, could *one* purpose of the remuneration be to induce or reward the referral or recommendation of business payable in whole or in part by a Federal health care program? Importantly, under the anti-kickback statute, neither a legitimate business purpose for the arrangement, nor a fair market value payment, will legitimize a payment if there is also an illegal purpose (*i.e.*, inducing Federal health care program business).

Although any arrangement satisfying both tests implicates the anti-kickback statute and requires careful scrutiny by a hospital, the courts have identified several potentially aggravating considerations that can be useful in identifying arrangements at greatest risk of prosecution. In particular, hospitals should ask the following questions, among others, about any potentially problematic arrangements or practices they identify:

- Does the arrangement or practice have a potential to interfere with, or skew, clinical decision-making?
- Does the arrangement or practice have a potential to increase costs to Federal health care programs, beneficiaries, or enrollees?
- Does the arrangement or practice have a potential to increase the risk of overutilization or inappropriate utilization?
- Does the arrangement or practice raise patient safety or quality of care concerns?

Hospitals that have identified potentially problematic arrangements or practices can take a number of steps to reduce or eliminate the risk of an anti-kickback violation. Detailed guidance relating to a number of specific practices is available from several sources. Most importantly, the anti-kickback statute and the corresponding regulations establish a number of ''safe harbors'' for common business arrangements. The following safe harbors are of most relevance to hospitals:

- Investment interests safe harbor (42 CFR 1001.952(a)),
- Space rental safe harbor (42 CFR 1001.952(b)),
- Equipment rental safe harbor (42 CFR 1001.952(c)),
- Personal services and management contracts safe harbor (42 CFR 1001.952(d)),
- Sale of practice safe harbor (42 CFR 1001.952(e)),
- Referral services safe harbor (42 CFR 1001.952(f)),
- Discount safe harbor (42 CFR 1001.952(h)),
- Employee safe harbor (42 CFR 1001.952(i)),
- Group purchasing organizations safe harbor (42 CFR 1001.952(j)),
- Waiver of beneficiary coinsurance and deductible amounts safe harbor (42 CFR 1001.952(k)),
- Practitioner recruitment safe harbor (42 CFR 1001.952(n)),
- Obstetrical malpractice insurance subsidies safe harbor (42 CFR 1001.952(o)),
- Cooperative hospital service organizations safe harbor (42 CFR 1001.952(q)),
- Ambulatory surgical centers safe harbor (42 CFR 1001.952(r)),
- Ambulance replenishing safe harbor (42 CFR 1001.952(v)), and
- Safe harbors for certain managed care and risk sharing arrangements (42 CFR 1001.952(m), (t), and (u)).[40]

Safe harbor protection requires strict compliance with all applicable conditions set out in the relevant safe harbor.[41] Although compliance with a safe harbor is *voluntary* and failure to comply with a safe harbor does *not* mean an arrangement is illegal per se, we recommend that hospitals structure arrangements to fit in a safe harbor whenever possible. Arrangements that do not fit in a safe harbor must be evaluated on a case-by-case basis.

Other available guidance includes special fraud alerts and advisory bulletins issued by the OIG identifying and discussing particular practices or issues of concern and OIG advisory opinions issued to specific parties about their particular business arrangements.[42] A hospital concerned about an existing or proposed arrangement may request a binding OIG advisory opinion regarding whether the arrangement violates the Federal anti-kickback statute or other OIG fraud and abuse authorities, using the procedures set out at 42 CFR part 1008. The safe harbor regulations (and accompanying **Federal Register** preambles), fraud alerts and bulletins, advisory opinions (and instructions for obtaining them, including a list of frequently asked questions), and other guidance are

[40] Importantly, the anti-kickback statute safe harbors are not the same as the Stark law exceptions described above at section II.B.1 of this guidance. An arrangement's compliance with the anti-kickback statute and the Stark law must be evaluated separately.

[41] Parties to an arrangement cannot obtain safe harbor protection by entering into a sham contract that complies with the written agreement requirement of a safe harbor and appears, on paper, to meet all of the other safe harbor requirements, but does not reflect the actual arrangement between the parties. In other words, in assessing compliance with a safe harbor, the OIG examines not only whether the written contract satisfies all of the safe harbor requirements, but also whether the actual arrangement satisfies the requirements.

[42] While informative for guidance purposes, an OIG advisory opinion is binding only with respect to the particular party or parties that requested the opinion. The analyses and conclusions set forth in OIG advisory opinions are very fact-specific. Accordingly, hospitals should be aware that different facts may lead to different results.

available on the OIG Web page at *http://oig.hhs.gov.*

The following discussion highlights several known areas of potential risk under the anti-kickback statute. The propriety of any particular arrangement can only be determined after a detailed examination of the attendant facts and circumstances. The identification of a given practice or activity as ''suspect'' or as an area of ''risk'' does not mean it is necessarily illegal or unlawful, or that it cannot be properly structured to fit in a safe harbor; nor does it mean that the practice or activity is not beneficial from a clinical, cost, or other perspective. Rather, the areas identified below are areas of activity that have a potential for abuse and that should receive close scrutiny from hospitals. The discussion highlights potential risks under the anti-kickback statute arising from hospitals' relationships in the following seven categories: (a) Joint ventures; (b) compensation arrangements with physicians; (c) relationships with other health care entities; (d) recruitment arrangements; (e) discounts; (f) medical staff credentialing; and (g) malpractice insurance subsidies. (In addition, the kickback risks associated with gainsharing arrangements are discussed below in section II.C of this guidance.)

Physicians are the primary referral source for hospitals, and, therefore, most of the discussion below focuses on hospitals' relationships with physicians. Notwithstanding, hospitals also receive referrals from other health care professionals, including physician assistants and nurse practitioners, and from other providers and suppliers (such as ambulance companies, clinics, hospices, home health agencies, nursing facilities, and other hospitals). Therefore, in addition to reviewing their relationships with physicians, hospitals should also review their relationships with nonphysician referral sources to ensure that the relationships do not violate the anti-kickback statute. The principles described in the following discussions can be used to assess the risk associated with relationships with both physician and nonphysician referral sources.

a. Joint Ventures

The OIG has a long-standing concern about joint venture arrangements between those in a position to refer or generate Federal health care program business and those providing items or services reimbursable by Federal health care programs.[43] In the context of joint ventures, our chief concern is that remuneration from a joint venture might be a disguised payment for past or future referrals to the venture or to one or more of its participants. Such remuneration may take a variety of forms, including dividends, profit distributions, or, with respect to contractual joint ventures, the economic benefit received under the terms of the operative contracts.

When scrutinizing joint ventures under the anti-kickback statute, hospitals should examine the following factors, among others:

• *The manner in which joint venture participants are selected and retained.* If participants are selected or retained in a manner that takes into account, directly or indirectly, the value or volume of referrals, the joint venture is suspect. The existence of one or more of the following indicators suggests that there might be an improper nexus between the selection or retention of participants and the value or volume of their referrals:

—A substantial number of participants are in a position to make or influence referrals to the venture, other participants, or both;
—Participants that are expected to make a large number of referrals are offered a greater or more favorable investment or business opportunity in the joint venture than those anticipated to make fewer referrals;
—Participants are actively encouraged or required to make referrals to the joint venture;
—Participants are encouraged or required to divest their ownership interest if they fail to sustain an ''acceptable'' level of referrals;
—The venture (or its participants) tracks its sources of referrals and distributes this information to the participants; or
—The investment interests are nontransferable or subject to transfer restrictions related to referrals.

• *The manner in which the joint venture is structured.* The structure of the joint venture is suspect if a participant is already engaged in the line of business to be conducted by the joint venture, and that participant will own all or most of the equipment, provide or perform all or most of the items or services, or take responsibility for all or most of the day-to-day operations. With this kind of structure, the co-participant's primary contribution is typically as a captive referral base.

• *The manner in which the investments are financed and profits are distributed.* The existence of one or more of the following indicators suggests that the joint venture may be a vehicle to disguise referrals:

—Participants are offered investment shares for a nominal or no capital contribution;
—The amount of capital that participants invest is disproportionately small, and the returns on the investment are disproportionately large, when compared to a typical investment in a new business enterprise;
—Participants are permitted to borrow their capital investments from another participant or from the joint venture, and to pay back the loan through deductions from profit distributions, thus eliminating even the need to contribute cash;
—Participants are paid extraordinary returns on the investment in comparison with the risk involved; or
—A substantial portion of the gross revenues of the venture are derived from participant-driven referrals.

In light of the obvious risk inherent in joint ventures, whenever possible, hospitals should structure joint ventures to fit squarely in one of the following safe harbors for investment interests:

• The ''small entity'' investment safe harbor (42 CFR 1001.952(a)(2)), which applies to returns on investments as long as no more than 40 percent of the investment interests are held by investors who are in a position to make or influence referrals to, furnish items or services to, or otherwise generate business for the venture (interested investors), no more than 40 percent of revenues come from referrals or business otherwise generated from investors, and all other conditions are satisfied;[44]

• The safe harbor for investment interests in an entity located in an underserved area (42 CFR 1001.952(a)(3)), which applies to ventures located in medically underserved areas (as defined in regulations issued by the Department and set forth at 42 CFR part 51c), as long as no more than 50 percent of the investment interests are held by interested investors and all other conditions are satisfied; or

• The hospital-physician ambulatory surgical center (ASC) safe harbor (42 CFR 1001.952(r)(4)). This safe harbor only protects investments in Medicare-certified ASCs owned by hospitals and certain qualifying physicians. Importantly, it does *not* protect

[43] *See* 1989 Special Fraud Alert on Joint Venture Arrangements, reprinted in the **Federal Register** (59 FR 65372; December 19,1994) and available on our Web page at *http://oig.hhs.gov/fraud/docs/alertsandbulletins/121994.html.*

[44] There is also a safe harbor for investment interests in large entities (*i.e.,* entities with over fifty million dollars in assets) (42 CFR 1001.952(a)(1)).

investments by hospitals and physicians in non-ASC clinical joint ventures, including, for example, cardiac catheterization or vascular laboratories, oncology centers, and dialysis facilities. Investors in such clinical ventures should look to other safe harbors and to the factors noted above.

These safe harbors protect remuneration in the form of returns on investment interests (*i.e.*, money paid by an entity to its owners or investors as dividends, profit distributions, or the like). However, they do not protect payments made by participating investors to a venture or payments made by the venture to other parties, such as vendors, contractors, or employees (although in some cases these arrangements may fit in other safe harbors).

As we originally observed in our 1989 Special Fraud Alert on Joint Venture Arrangements,[45] joint ventures may take a variety of forms, including a contractual arrangement between two or more parties to cooperate in a common and distinct enterprise providing items or services, thereby creating a ''contractual joint venture.'' We elaborated more fully on contractual joint ventures in our 2003 Special Advisory Bulletin on Contractual Joint Ventures.[46] Contractual joint ventures pose the same kinds of risks as equity joint ventures and should be analyzed similarly. Factors to consider include, for example, whether the hospital is expanding into a new line of business created predominately or exclusively to serve the hospital's existing patient base, whether a would-be competitor of the new line of business is providing all or most of the key services, and whether the hospital assumes little or no *bona fide* business risk. An example of a potentially problematic contractual joint venture would be a hospital contracting with an existing durable medical equipment (DME) supplier to operate the hospital's newly formed DME subsidiary (with its own DME supplier number) on essentially a turnkey basis, with the hospital primarily furnishing referrals and assuming little or no business risk.[47]

Hospitals should be aware that, for reasons described in our 2003 Special Advisory Bulletin on Contractual Joint Ventures,[48] safe harbor protection may not be available for contractual joint ventures, and attempts to carve out separate contracts and qualify each separately for safe harbor protection may be ineffectual and leave the parties at risk under the statute.[49]

If a hospital is planning to participate, directly or indirectly, in a joint venture involving referring physicians and the venture does not qualify for safe harbor protection, the hospital should scrutinize the venture with care, taking into account the factors noted above, and consider obtaining advice from an experienced attorney. At a minimum, to reduce (but not necessarily eliminate) the risk of abuse, hospitals should consider (i) barring physicians employed by the hospital or its affiliates from referring to the joint venture; (ii) taking steps to ensure that medical staff and other affiliated physicians are not encouraged in any manner to refer to the joint venture; (iii) notifying physicians annually in writing of the preceding policy; (iv) refraining from tracking in any manner the volume of referrals attributable to particular referrals sources; (v) ensuring that no physician compensation is tied in any manner to the volume or value of referrals to, or other business generated for, the venture; (vi) disclosing all financial interests to patients;[50] and (vii) requiring that other participants in the joint venture adopt similar steps.

b. Compensation Arrangements With Physicians

Hospitals enter into a variety of compensation arrangements with physicians whereby physicians provide items or services to, or on behalf of, the hospital. Conversely, in some arrangements, hospitals provide items or services to physicians. Examples of these compensation arrangements include, without limitation, medical director agreements, personal or management services agreements, space or equipment leases, and agreements for the provision of billing, nursing, or other staff services. Although many compensation arrangements are legitimate business arrangements, compensation arrangements *may* violate the anti-kickback statute if *one* purpose of the arrangement is to compensate physicians for past or future referrals.[51]

The general rule of thumb is that any remuneration flowing between hospitals and physicians should be at fair market value for actual and necessary items furnished or services rendered based upon an arm's-length transaction and should not take into account, directly or indirectly, the value or volume of any past or future referrals or other business generated between the parties. Arrangements under which hospitals (i) provide physicians with items or services for free or less than fair market value, (ii) relieve physicians of financial obligations they would otherwise incur, or (iii) inflate compensation paid to physicians for items or services pose significant risk. In such circumstances, an inference arises that the remuneration may be in exchange for generating business.

In particular, hospitals should review their physician compensation arrangements and carefully assess the risk of fraud and abuse using the following factors, among others:

- Are the items and services obtained from a physician legitimate, commercially reasonable, and necessary to achieve a legitimate business purpose of the hospital (apart from obtaining referrals)? Assuming that the hospital needs the items and services, does the hospital have multiple arrangements with different physicians, so that in the aggregate the items or services provided by all physicians exceed the hospital's actual needs (apart from generating business)?
- Does the compensation represent fair market value in an arm's-length transaction for the items and services? Could the hospital obtain the services from a non-referral source at a cheaper rate or under more favorable terms? Does the remuneration take into

[45] *See* 1989 Special Fraud Alert on Joint Venture Arrangements, *supra* note 43.

[46] This Special Advisory Bulletin is available on our Web page at *http://oig.hhs.gov/fraud/docs/alertsandbulletins/042303SABJointVentures.pdf.*

[47] Contractual ventures with existing clinical laboratories and outpatient therapy providers, among others, are also potentially problematic, particularly if the venture is functionally a turnkey operation that enables a hospital to use its captive referrals to expand into a new line of business with little or no contribution of resources or assumption of real risk.

[48] *See* 2003 Special Advisory Bulletin on Contractual Joint Ventures, *supra* note 46.

[49] The Medicare program permits hospitals to furnish services ''under arrangements'' with other providers or suppliers. Hospitals frequently furnish services ''under arrangements'' with an entity owned, in whole or in part, by referring physicians. Standing alone, these ''under arrangements'' relationships do not fall within the scope of problematic contractual joint ventures described in the Special Fraud Alert; however, these relationships will violate the anti-kickback statute if remuneration is purposefully offered or paid to induce referrals (*e.g.*, paying above-market rates for the services to influence referrals or otherwise tying the arrangements to referrals in any manner). These ''under arrangements'' relationships should be structured, when possible, to fit within an anti-kickback safe harbor. They *must* fit within a Stark exception, even if the service furnished ''under arrangements'' is not itself a DHS. *See* 66 FR 856, 941–2 (January 4, 2001); 69 FR 16054, 16106 (March 26, 2004).

[50] While disclosure to patients does not offer sufficient protection against Federal health care program abuse, effective and meaningful disclosure offers some protection against possible abuses of patient trust.

[51] As previously noted, a hospital should ensure that each compensation arrangement with a referring physician fits squarely in a statutory or regulatory exception to the Stark law.

account, directly or indirectly, the value or volume of any past or future referrals or other business generated between the parties? Is the compensation tied, directly or indirectly, to Federal health care program reimbursement?

• Is the determination of fair market value based upon a reasonable methodology that is uniformly applied and properly documented? If fair market value is based on comparables, the hospital should ensure that the market rate for the comparable services is not distorted (*e.g.,* the market for ancillary services may be distorted if all providers of the service are controlled by physicians).

• Is the compensation commensurate with the fair market value of a physician with the skill level and experience reasonably necessary to perform the contracted services?

• Were the physicians selected to participate in the arrangement in whole or in part because of their past or anticipated referrals?

• Is the arrangement properly and fully documented in writing? Are the physicians documenting the services they provide? Is the hospital monitoring the services?

• In the case of physicians staffing hospital outpatient departments, are safeguards in place to ensure that the physicians do not use hospital outpatient space, equipment, or personnel to conduct their private practices? In addition, physicians working in outpatient departments must bill the appropriate site-of-service modifier. The hospital should take reasonable steps to ensure that physicians are aware of this requirement and should take appropriate action if it identifies physicians engaging in improper site-of-service billing.

Whenever possible, hospitals should structure their compensation arrangements with physicians to fit in a safe harbor. Potentially applicable are the space rental safe harbor (42 CFR 1001.952(b)), the equipment rental safe harbor (42 CFR 1001.952(c)), the personal services and management contracts safe harbor (42 CFR 1001.952(d)), the sale of practice safe harbor (42 CFR 1001.952(e)), the referral services safe harbor (42 CFR 1001.952(f)), the employee safe harbor (42 CFR 1001.952(i)), the practitioner recruitment safe harbor (42 CFR 1001.952(n)), and the obstetrical malpractice insurance subsidies safe harbor (42 CFR 1001.952(o)). *An arrangement must fit squarely in a safe harbor to be protected.* Arrangements that do not fit in a safe harbor should be reviewed in light of the totality of all facts and circumstances. At minimum, hospitals should develop policies and procedures requiring physicians to document, and the hospital to monitor, the services or items provided under compensation arrangements (including, for example, by using written time reports). In some cases, particularly rentals, hospitals should consider obtaining an independent fair market valuation using appropriate health care valuation standards.

Arrangements between hospitals and traditional hospital-based physicians (*e.g.,* anesthesiologists, radiologists, and pathologists) raise some different concerns.[52] In these arrangements, it is typically the hospitals that are in a position to influence the flow of business to the physicians, rather than the physicians making referrals to the hospitals.[53] Such arrangements may violate the anti-kickback statute if the hospital solicits or receives something of value—or the physicians offer or pay something of value—in exchange for access to the hospital's Federal health care program business. Illegal kickbacks between hospitals and hospital-based physicians may take a variety of forms, including, without limitation:

• A hospital requiring physicians to pay more than the fair market value for services provided to the hospital-based physicians by the hospital; or

• A hospital compensating physicians less than the fair market value for goods or services provided to the hospital by the physicians.

Accordingly, arrangements that require physicians to provide Medicare Part A supervision and management services for token or no payment in exchange for the ability to provide physician-billable Medicare Part B services at the hospital potentially violate the anti-kickback statute and should be closely scrutinized.

We are aware that hospitals have long provided for the delivery of certain hospital-based physician services through the grant of an *exclusive* contract to a physician or physician group, which includes management, staffing, and other administrative functions, and in some cases limited clinical duties. These exclusive arrangements affect the cash and non-cash value of the overall arrangement to the respective parties.

Depending on the circumstances, an exclusive contract can have substantial value to the hospital-based physician or group, as well as to the hospital, that may well have nothing to do with the value or volume of business flowing between the hospital and the physicians. By way of example only, an exclusive arrangement may reduce the costs a physician or group would otherwise incur for business development and may eliminate administrative costs otherwise incurred by the hospital. In an appropriate context, an exclusive arrangement that requires a hospital-based physician or physician group to perform *reasonable* administrative or *limited* clinical duties *directly related* to the hospital-based professional services at no or a reduced charge would not violate the anti-kickback statute, provided that the overall arrangement is consistent with fair market value in an arm's-length transaction, taking into account the value attributable to the exclusivity. Depending on the circumstances, examples of directly-related administrative or clinical duties include, without limitation: participation on hospital committees, tumor boards, or similar hospital entities; participation in on-call rotation; and performance of quality assurance and oversight activities. Notwithstanding, whether the scope and volume of the required services in a particular arrangement reasonably reflect the value of the exclusivity will depend on the facts and circumstances of the arrangement.

Nothing in this supplemental CPG should be construed as requiring hospital-based physicians to perform administrative or clinical services at no or a reduced charge. Uncompensated or below-market arrangements for goods or services will be subject to close scrutiny for compliance with the statute.

c. Relationships With Other Health Care Entities

As addressed in the preceding subsection, hospitals may obtain referrals of Federal health care program business from a variety of health care professionals and entities. In addition, when furnishing inpatient, outpatient, and related services, hospitals often direct or influence referrals for items

[52] Arrangements between hospitals and hospital-based physicians were the topic of a Management Advisory Report (MAR) titled ''Financial Arrangements Between Hospitals and Hospital-Based Physicians,'' OEI–09–89–00330, available on our Web page at *http://oig.hhs.gov/oei/reports/oei-09-89-00330.pdf.*

[53] In this regard, arrangements between hospitals and traditional hospital-based physicians generally do not pose the same potential to cause the harms typically associated with kickback schemes. Moreover, a hospital's attending medical staff's quality expectations and a hospital's liability exposure for the malpractice of hospital-based physicians constrain the hospital's choice of a hospital-based physician or group. Finally, to the extent that any qualified group can bid for hospital-based business and the request for proposals clearly includes the entire arrangement, the competition is not unfair. (Of course, an open, competitive bidding process does not protect an otherwise illegal kickback arrangement.)

and services reimbursable by Federal health care programs. For example, hospitals may refer patients to, or order items or services from, home health agencies,[54] skilled nursing facilities, durable medical equipment companies, laboratories, pharmaceutical companies, and other hospitals. In cases where a hospital is the referral source for other providers or suppliers, it would be prudent for the hospital to scrutinize carefully any remuneration flowing to the hospital from the provider or supplier to ensure compliance with the anti-kickback statute, using the principles outlined above. Remuneration may include, for example, free or below-market-value items and services or the relief of a financial obligation.

Hospitals should also review their managed care arrangements to ensure compliance with the anti-kickback statute. Managed care arrangements that do not fit within one of the managed care and risk sharing safe harbors at 42 CFR 1001.952(m), (t), or (u) must be evaluated on a case-by-case basis.

d. Recruitment Arrangements

Many hospitals provide incentives to recruit a physician or other health care professional to join the hospital's medical staff and provide medical services to the surrounding community. When used to bring needed physicians to an underserved community, these arrangements can benefit patients. However, recruitment arrangements pose substantial fraud and abuse risk.

In most cases, the recruited physician establishes a private practice in the community instead of becoming a hospital employee.[55] Such arrangements potentially implicate the anti-kickback statute if one purpose of the recruitment arrangement is to induce referrals to the recruiting hospital. Safe harbor protection is available for certain recruitment arrangements offered by hospitals to attract primary care physicians and practitioners to health professional shortage areas (HPSAs), as defined in regulations issued by the Department.[56] The scope of this safe harbor is very limited. In particular, the safe harbor does not protect (a) recruitment arrangements in areas that are not designated as HPSAs, (b) recruitment of specialists, or (c) joint recruitment with existing physician practices in the area.

Because of the significant risk of fraud and abuse posed by improper recruitment arrangements, hospitals should scrutinize these arrangements with care. When assessing the degree of risk associated with recruitment arrangements, hospitals should examine the following factors, among others:

- *The size and value of the recruitment benefit.* Does the benefit exceed what is reasonably necessary to attract a qualified physician to the particular community? Has the hospital previously tried and failed to recruit or retain physicians?
- *The duration of payout of the recruitment benefit.* Total benefit payout periods extending longer than three years from the initial recruitment agreement should trigger heightened scrutiny.
- *The practice of the existing physician.* Is the physician a new physician with few or no patients or an established practitioner with a ready stream of referrals? Is the physician relocating from a substantial distance so that referrals are unlikely to follow or is it possible for the physician to bring an established patient base?
- *The need for the recruitment.* Is the recruited physician's specialty necessary to provide adequate access to medically necessary care for patients in the community? Do patients already have reasonable access to comparable services from other providers or practitioners in or near the community? An assessment of community need based wholly or partially on the competitive interests of the recruiting hospital or existing physician practices would subject the recruitment payments to heightened scrutiny under the statute.

Significantly, hospitals should be aware that the practitioner recruitment safe harbor excludes any arrangement that directly or indirectly benefits any existing or potential referral source other than the recruited physician. Accordingly, the safe harbor does *not* protect ''joint recruitment'' arrangements between hospitals and other entities or individuals, such as solo practitioners, group practices, or managed care organizations, pursuant to which the hospital makes payments directly or indirectly to the other entity or individual. These joint recruitment arrangements present a high risk of fraud and abuse and have been the subject of recent government investigations and prosecutions. These arrangements can easily be used as vehicles to disguise payments from the hospital to an existing referral source—typically an existing physician practice—in exchange for the existing practice's referrals to the hospital. Suspect payments to existing referral sources may include, among other things, income guarantees that shift costs from the existing referral source to the recruited physician and overhead and build-out costs funded for the benefit of the existing referral source. Hospitals should review all ''joint recruiting'' arrangements to ensure that remuneration does not inure in whole or in part to the benefit of any party other than the recruited physician.

e. Discounts

Public policy favors open and legitimate price competition in health care. Thus, the anti-kickback statute contains an exception for discounts offered to customers that submit claims to the Federal health care programs, if the discounts are properly disclosed and accurately reported.[57] However, to qualify for the exception, the discount must be in the form of a reduction in the price of the good or service based on an arm's-length transaction. In other words, the exception covers only reductions in the product's price. Moreover, the regulation provides that the discount must be given at the time of sale or, in certain cases, set at the time of sale, even if finally determined subsequent to the time of sale (*i.e.,* a rebate).

In conducting business, hospitals sell and purchase items and services reimbursable by Federal health care programs. Therefore, hospitals should thoroughly familiarize themselves with the discount safe harbor at 42 CFR 1001.952(h). In particular, depending on their role in the arrangement, hospitals should pay attention to the discount safe harbor requirements applicable to ''buyers,'' ''sellers,'' or ''offerors.'' Compliance with the safe harbor is determined separately for each party. In general, hospitals should ensure that all discounts—including rebates—are properly disclosed and accurately reflected on hospital cost reports. If a hospital offers a discount on an item or service to a buyer, it should ensure that the discount is properly disclosed on the invoice or other documentation for the item or service.

[54] When referring to home health agencies and skilled nursing facilities, hospitals must comply with section 1861(ee)(2)(D) and (H) of the Act, requiring that Medicare participating hospitals, as part of the discharge planning process, (i) share with each beneficiary a list of Medicare-certified home health agencies or skilled nursing facilities, as applicable, that serve the beneficiary's geographic area, and (ii) identify any home health agency or skilled nursing facility in which the hospital has a disclosable financial interest or that has a financial interest in the hospital. *See also* 42 CFR 482.43.

[55] When paid pursuant to a properly structured employment arrangement, payments to physicians who become hospital employees may be protected by the employee safe harbor at 42 CFR 1001.952(i).

[56] *See* 42 CFR 1001.952(n).

[57] *See* 42 U.S.C. 1320a–7b(b)(3)(A); 42 CFR 1001.952(h).

The discount safe harbor does not protect a discount offered to one payor but not to the Federal health care programs. Accordingly, in negotiating discounts for items and services paid from a hospital's pocket (such as those reimbursed under the Medicare Part A prospective payment system), the hospital should ensure that there is no link or connection, explicit or implicit, between discounts offered or solicited for that business and the hospital's referral of business billable by the seller directly to Medicare or another Federal health care program. For example, a hospital should not engage in ''swapping'' by accepting from a supplier an unreasonably low price on Part A services that the hospital pays for out of its own pocket in exchange for hospital referrals that are billable by the supplier directly to Part B (*e.g.,* ambulance services). Suspect arrangements include below-cost arrangements or arrangements at prices lower than the prices offered by the supplier to other customers with similar volumes of business, but without Federal health care program referrals.

Hospitals may also receive discounts on items and services purchased through group purchasing organizations (GPOs). Discounts received from a vendor in connection with a GPO to which a hospital belongs should be properly disclosed and accurately reported on the hospital cost reports. Although there is a safe harbor for payments made by a vendor to a GPO as part of an agreement to furnish items or services to a group of individuals or entities (42 CFR 1001.952(j)), the safe harbor does not protect the discount received by the individual or entity.[58]

f. Medical Staff Credentialing

Certain medical staff credentialing practices may implicate the anti-kickback statute.[59] For example, conditioning privileges on a particular number of referrals or requiring the performance of a particular number of procedures, beyond volumes necessary to ensure clinical proficiency, potentially raise substantial risks under the statute. On the other hand, a credentialing policy that *categorically* refuses privileges to physicians with significant conflicts of interest would not appear to implicate the statute in most situations. Whether a particular credentialing policy runs afoul of the anti-kickback statute would depend on the specific facts and circumstances, including the intent of the parties. Hospitals are advised to examine their credentialing practices to ensure that they do not run afoul of the anti-kickback statute. The OIG has solicited comments about, and is considering, whether further guidance in this area is appropriate.[60]

g. Malpractice Insurance Subsidies

The OIG historically has been concerned that a hospital's subsidy of malpractice insurance premiums for potential referral sources, including hospital medical staff, may be suspect under the anti-kickback statute, because the payments may be used to influence referrals. The OIG has established a safe harbor for medical malpractice premium subsidies provided to obstetrical care practitioners in health professional shortage areas.[61] Depending on the circumstances, premium support may also be structured to fit in other safe harbors.

We are aware of the current disruption (*i.e.,* dramatic premium increases, insurers' withdrawals from certain markets, and/or sudden termination of coverage based upon factors other than the physicians' claims history) in the medical malpractice liability insurance markets in some geographic areas.[62] Notwithstanding, hospitals should review malpractice insurance subsidy arrangements closely to ensure that there is no improper inducement to referral sources. Relevant factors include, without limitation:

- Whether the subsidy is being provided on an interim basis (*e.g.,* until an unrelated insurer is commercially available) for a reasonable fixed period in a geographic area experiencing severe access or affordability problems;
- Whether the subsidy is being offered only to current active medical staff (or physicians new to the locality or in practice less than a year, *i.e.,* physicians with no or few established patients);
- Whether the criteria for receiving a subsidy is unrelated to the volume or value of referrals or other business generated by the subsidized physician or his practice;
- Whether physicians receiving subsidies are paying at least as much as they currently pay for malpractice insurance (*i.e.,* are windfalls to physicians avoided);
- Whether physicians are required to perform services or relinquish rights, which have a value equal to the fair market value of the insurance assistance; and
- Whether the insurance is available regardless of the location at which the physician provides services, including, but not limited to, other hospitals.

No one of these factors is determinative, and this list is illustrative, not exhaustive, of potential considerations in connection with the provision of malpractice insurance subsidies. Parties contemplating malpractice subsidy programs that do not fit into one of the safe harbors may want to consider obtaining an advisory opinion. Parties should also be mindful that these subsidy arrangements also implicate the Stark law.

C. Payments To Reduce or Limit Services: Gainsharing Arrangements

The CMP set forth in section 1128A(b)(1) of the Act prohibits a hospital from knowingly making a payment directly or indirectly to a physician as an inducement to reduce or limit items or services furnished to Medicare or Medicaid beneficiaries under the physician's direct care.[63] Hospitals that make (and physicians that receive) such payments are liable for CMPs of up to $2,000 per patient covered by the payments.[64] The statutory proscription is very broad. The payment need not be tied to an actual diminution in care, so long as the hospital knows that the payment may influence the physician to reduce or limit services to his or her patients. There is no requirement that the prohibited payment be tied to a specific patient or to a reduction in medically necessary care. In short, any hospital incentive plan that encourages physicians through payments to reduce

[58] To preclude improper shifting of discounts, the safe harbor excludes GPOs that wholly own their members or have members that are subsidiaries of the parent company that wholly owns the GPO. Hospitals with affiliated GPOs should be mindful of these limitations.

[59] In addition to the anti-kickback statute, hospitals should make sure that their credentialing policies comply with all other applicable Federal and State laws and regulations, some of which may prohibit or limit economic credentialing.

[60] *See* our ''Solicitation of New Safe Harbors and Special Fraud Alerts'' (67 FR 72894; December 9, 2002), available on our Web page at *http://oig.hhs.gov/authorities/docs/solicitationannsafeharbor.pdf.*

[61] *See* 42 CFR 1001.952(o).

[62] *See* the OIG's letter on a hospital corporaiton's medical malpractice insurance assistance program, available on our Web page at *http://oig.hhs.gov/fraud/docs/alertsandbulletins/MalpracticeProgram.pdf*

[63] The prohibition applies only to reductions or limitations of items or services provided to Medicare and Medicaid fee-for-service beneficiaries. *See* section 1128A(b)(1)(A) of the Act. *See also* our August 19, 1999 letter regarding ''Social Security Act sections 1128A(b)(1) and (2) and hospital-physician incentive plans for Medicare or Medicaid beneficiaries enrolled in managed care plans,'' available on our Web page at *http://oig.hhs.gov/fraud/docs/alertsandbulletins/gsletter.htm.*

[64] *See* sections 1128A(b)(1)(B) and (b)(2) of the Act.

or limit clinical services directly or indirectly violates the statute.

We are aware that a number of hospitals are engaged in, or considering entering into, incentive arrangements commonly called ''gainsharing.'' While there is no fixed definition of a ''gainsharing'' arrangement, the term typically refers to an arrangement in which a hospital gives physicians a percentage share of any reduction in the hospital's costs for patient care attributable in part to the physicians' efforts. We recognize that, properly structured, gainsharing arrangements can serve legitimate business and medical purposes, such as increasing efficiency, reducing waste, and, thereby, potentially increasing a hospital's profitability. However, the plain language of section 1128A(b)(1) of the Act prohibits tying the physicians' compensation for services to reductions or limitations in items or services provided to patients under the physicians' clinical care.[65]

In addition to the CMP risks described above, gainsharing arrangements can also implicate the anti-kickback statute if the cost-savings payments are used to influence referrals. For example, the statute is potentially implicated if a gainsharing arrangement is intended to influence physicians to ''cherry pick'' healthy patients for the hospital offering gainsharing payments and steer sicker (and more costly) patients to hospitals that do not offer gainsharing payments. Similarly, the statute may be implicated if a hospital offers a cost-sharing program with the intent to foster physician loyalty and attract more referrals. In addition, we have serious concerns about overly broad arrangements under which a physician continues for an extended time to reap the benefits of previously-achieved savings or receives cost-savings payments unrelated to anything done by the physician, whether work, services, or other undertaking (*e.g.,* a change in the way the physician practices).

Wherever possible, hospitals should consider structuring cost-saving arrangements to fit in the personal services safe harbor. However, in many cases, protection under the personal services safe harbor is not available because gainsharing arrangements typically involve a percentage payment (*i.e.,* the aggregate fee will not be set in advance, as required by the safe harbor). Finally, gainsharing arrangements may also implicate the Stark law.

D. Emergency Medical Treatment and Labor Act (EMTALA)

Hospitals should review their obligations under EMTALA (section 1867 of the Act) to evaluate and treat individuals who come to their emergency departments and, in some circumstances, other facilities. Hospitals should pay particular attention to when an individual must receive a medical screening exam to determine whether that individual is suffering from an emergency medical condition. When such a screening or treatment of an emergency medical condition is required, it cannot be delayed to inquire about an individual's method of payment or insurance status. If the hospital's emergency department (ED) is ''on diversion'' and an individual comes to the ED for evaluation or treatment of a medical condition, the hospital is required to provide such services despite its diversionary status.

Generally, hospital emergency departments may not transfer an individual with an unstable emergency medical condition unless a physician certifies that the benefits outweigh the risks. In such circumstances, the hospital must provide stabilizing treatment to minimize the risks of transfer. Further, the hospital must ensure that the receiving facility has available space and qualified personnel to treat the individual and has agreed to accept transfer of that individual. Moreover, certain medical records must accompany the individual and a hospital that has specialized capabilities or facilities must accept an appropriate transfer of an individual who requires such specialized capabilities or facilities if the hospital has the capacity to treat the individual.

A hospital must provide appropriate screening and treatment services within the full capabilities of its staff and facilities. This includes access to specialists who are on call. Thus, hospital policies and procedures should be clear on how to access the full services of the hospital, and all staff should understand the hospital's obligations to individuals under EMTALA. In particular, on-call physicians need to be educated as to their responsibilities under EMTALA, including the responsibility to accept appropriately transferred individuals from other facilities. In addition, all persons working in emergency departments should be periodically trained and reminded of the hospital's EMTALA obligations and hospital policies and procedures designed to ensure that such obligations are met.

For further information about EMTALA, hospitals are directed to: (i) The EMTALA statute at section 1867 of the Act; (ii) the EMTALA statute's implementing regulations at 42 CFR part 489; (iii) our 1999 Special Advisory Bulletin on the Patient Anti-Dumping Statute (64 FR 61353; November 10, 1999), available on our Web page at *http://oig.hhs.gov/fraud/docs/alertsandbulletins/frdump.pdf;* and (iv) CMS's EMTALA resource Web page located at *http://www.cms.gov/providers/emtala/emtala.asp.*

E. Substandard Care

The OIG has authority to exclude any individual or entity from participation in Federal health care programs if the individual or entity provides unnecessary items or services (*i.e.*, items or services in excess of the needs of a patient) or substandard items or services (*i.e.*, items or services of a quality which fails to meet professionally recognized standards of health care).[66] Significantly, neither knowledge nor intent is required for exclusion under this provision. The exclusion can be based upon unnecessary or substandard items or services provided to any patient, even if that patient is not a Medicare or Medicaid beneficiary.

We are mindful that the vast majority of hospitals are fully committed to providing quality care to their patients. To achieve their quality-related goals, hospitals should continually measure their performance against comprehensive standards. Medicare participating hospitals must meet all of the Medicare hospital conditions of participation (COPs), including without limitation, the COP pertaining to a quality assessment and performance improvement program at 42 CFR 482.21 and the hospital COP pertaining to the medical staff at 42 CFR 482.22. Compliance with the COPs is determined by State survey agencies or accreditation organizations, such as the Joint Commission on Accreditation of Healthcare Organizations or the American Osteopathic Association. In addition, hospitals should develop their own quality of care protocols and implement mechanisms for evaluating compliance with those protocols.

In reviewing the quality of care provided, hospitals must not limit their review to the quality of their nursing and other ancillary services. Hospitals must monitor the quality of medical

[65] A detailed discussion of gainsharing can be found in our July 1999 Special Advisory Bulletin titled ''Gainsharing Arrangements and CMPs for Hospital Payments to Physicians to Reduce or Limit Services to Beneficiaries,'' available on our Web page at *http://oig.hhs.gov/fraud/docs/altersandbulletins/gainsh.htm.*

[66] *See* section 1128(b)(6)(B) of the Act, which is available through the Internet at *http://www4.law.cornell.edu/uscode/42/1320a-7.html.*

services provided at the hospital by appropriately overseeing the credentialing and peer review of their medical staffs.

F. Relationships With Federal Health Care Beneficiaries

Hospitals' relationships with Federal health care beneficiaries may also implicate the fraud and abuse laws. In particular, hospitals should be aware that section 1128A(a)(5) of the Act authorizes the OIG to impose CMPs on hospitals (and others) that offer or transfer remuneration to a Medicare or Medicaid beneficiary that the offeror knows or should know is likely to influence the beneficiary to order or receive items or services from a particular provider, practitioner, or supplier for which payment may be made under the Medicare or Medicaid programs. The definition of ''remuneration'' expressly includes the offer or transfer of items or services for free or other than fair market value, including the waiver of all or part of a Medicare or Medicaid cost-sharing amount.[67] In other words, hospitals may not offer valuable items or services to Medicare or Medicaid beneficiaries to attract their business. In this regard, hospitals should familiarize themselves with the OIG's August 2002 Special Advisory Bulletin on Offering Gifts and Other Inducements to Beneficiaries.[68]

1. Gifts and Gratuities

Hospitals should scrutinize any offers of gifts or gratuities to beneficiaries for compliance with the CMP provision prohibiting inducements to Medicare and Medicaid beneficiaries. The key inquiry under the CMP is whether the remuneration is something that the hospital knows or should know is likely to influence the beneficiary's selection of a particular provider, practitioner, or supplier for Medicare or Medicaid payable services. As interpreted by the OIG, section 1128A(a)(5) of the Act does not apply to the provision of items or services valued at less than $10 per item and $50 per patient in the aggregate on an annual basis.[69] A special exception for incentives to promote the delivery of preventive care services is discussed below at section II.I.2.

2. Cost-Sharing Waivers

In general, hospitals are obligated to collect cost-sharing amounts owed by Federal health care program beneficiaries. Waiving owed amounts may constitute prohibited remuneration to beneficiaries under section 1128A(a)(5) of the Act or the anti-kickback statute. Certain waivers of Part A inpatient cost-sharing amounts may be protected by structuring them to fit in the safe harbor for waivers of beneficiary inpatient coinsurance and deductible amounts at 42 CFR 1001.952(k). In particular, under the safe harbor, waived amounts may not be claimed as bad debt; the waivers must be offered uniformly across the board without regard to the reason for admission, length of stay, or DRG; and waivers may not be made as part of any agreement with a third party payer, unless the third party payer is a Medicare SELECT plan under section 1882(t)(1) of the Act.[70]

In addition, hospitals (and others) may waive cost-sharing amounts on the basis of a beneficiary's financial need, so long as the waiver is not routine, not advertised, and made pursuant to a good faith, individualized assessment of the beneficiary's financial need or after reasonable collection efforts have failed.[71] The OIG recognizes that what constitutes a good faith determination of ''financial need'' may vary depending on the individual patient's circumstances and that hospitals should have flexibility to take into account relevant variables. These factors may include, for example:

- The local cost of living;
- A patient's income, assets, and expenses;
- A patient's family size; and
- The scope and extent of a patient's medical bills.

Hospitals should use a reasonable set of financial need guidelines that are based on objective criteria and appropriate for the applicable locality. The guidelines should be applied uniformly in all cases. While hospitals have flexibility in making the determination of financial need, we do not believe it is appropriate to apply inflated income guidelines that result in waivers for beneficiaries who are not in genuine financial need. Hospitals should consider that the financial status of a patient may change over time and should recheck a patient's eligibility at reasonable intervals sufficient to ensure that the patient remains in financial need. For example, a patient who obtains outpatient hospital services several times a week would not need to be rechecked every visit. Hospitals should take reasonable measures to document their determinations of Medicare beneficiaries' financial need. We are aware that in some situations patients may be reluctant or unable to provide documentation of their financial status. In those cases, hospitals may be able to use other reasonable methods for determining financial need, including, for example, documented patient interviews or questionnaires.

In sum, hospitals should review their waiver policies to ensure that the policies and the manner in which they are implemented comply with all applicable laws. For more information about cost-sharing waivers, hospitals should review our February 2, 2004 paper on ''Hospital Discounts Offered To Patients Who Cannot Afford To Pay Their Hospital Bills,'' containing a section titled ''Reductions or Waivers of Cost-Sharing Amounts for Medicare Beneficiaries Experiencing Financial Hardship'' and available on our Web page at *http://oig.hhs.gov/fraud/docs/alertsandbulletins/2004/FA021904hospitaldiscounts.pdf.*[72]

3. Free Transportation

The plain language of the CMP prohibits offering free transportation to Medicare or Medicaid beneficiaries to influence their selection of a particular provider, practitioner, or supplier. Notwithstanding, hospitals can offer free local transportation of *low* value (*i.e.*, within the $10 per item and $50 annual limits).[73] Luxury and specialized transportation, such as limousines or ambulances, would exceed the low value threshold and are problematic, as are arrangements tied in any manner to the volume or value of referrals and arrangements tied to particularly lucrative treatments or medical conditions. However, we have indicated that we are considering developing a regulatory exception for some complimentary local transportation provided to beneficiaries residing in a

[67] *See* section 1128A(i)(6) of the Act.

[68] The Special Advisory Bulletin on Offering Gifts and Other Inducements to Beneficiaries (67 FR 55855; August 30, 2002) is available on our Web page at *http://oig.hhs.gov/fraud/docs/alertsandbulletins/SABGiftsandInducements.pdf.*

[69] *See id.*

[70] The OIG has proposed a rule to extend this safe harbor to protect waivers of Part B cost-sharing amounts pursuant to agreements with Medicare SELECT plans. *See* 67 FR 60202 (September 25, 2002), available on our Web page at *http://oig.hhs.gov/fraud/docs/safeharborregulations/MedicareSELECTNPRMFederalRegister.pdf.* However, the OIG is still considering comments on this rule, and it has not been finalized.

[71] *See* section 1128A(i)(6)(A) of the Act.

[72] *See also* the OIG's Special Fraud Alert on Routine Waiver of Copayments or Deductibles Under Medicare Part B, issued May 1991, republished in the **Federal Register** at 59 FR 65372, 65374 (December 19, 1994), and available on our Web page at *http://oig.hhs.gov/fraud/docs/alertsandbulletins/121994.html.*

[73] Our position on local transportation of nominal value is more fully set forth in the preamble to the final rule enacting 42 CFR 1003.102(b)(13). *See* 65 FR 24400, 24411 (April 26, 2000).

hospital's primary service area.[74] Accordingly, until such time as we promulgate a final rule on complimentary local transportation under section 1128A(a)(5) of the Act or indicate our intention not to proceed with such rule, we have indicated that we will not impose administrative sanctions for violations of section 1128A(a)(5) of the Act in connection with hospital-based complimentary transportation programs that meet the following conditions:

- The program was in existence prior to August 30, 2002, the date of publication of the Special Advisory Bulletin on Offering Gifts and Other Inducements to Beneficiaries.
- Transportation is offered uniformly and without charge or at reduced charge to all patients of the hospital or hospital-owned ambulatory surgical center (and may also be made available to their families).
- The transportation is only provided to and from the hospital or a hospital-owned ambulatory surgical center and is for the purpose of receiving hospital or ambulatory surgical center services (or, in the case of family members, accompanying or visiting hospital or ambulatory surgical center patients).
- The transportation is provided only within the hospital's or ambulatory surgical center's primary service area.
- The costs of the transportation are not claimed directly or indirectly by any Federal health care program cost report or claim and are not otherwise shifted to any Federal health care program.
- The transportation does not include ambulance transportation.

Other arrangements are subject to a case-by-case review under the statute to ensure that no improper inducement exists.

G. HIPAA Privacy and Security Rules

As of April 14, 2003, all hospitals that conduct electronic transactions for which standards have been adopted under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) were required to comply with the Privacy Rule promulgated pursuant to HIPAA. Generally, the HIPAA Privacy Rule addresses the use and disclosure of individuals' identifiable health information (protected health information or PHI) by covered hospitals and other covered entities, as well as standards for individuals' privacy rights to understand and control how their health information is used. The Privacy Rule (45 CFR parts 160 and 164, subparts A and E) and other helpful information about how it applies, including frequently asked questions, can be found on the Web page of the Department's Office for Civil Rights (OCR) at *http://www.hhs.gov/ocr/hipaa/.* Questions about the privacy rule should be submitted to OCR. Hospitals can contact OCR by following the instructions on its Web page, *http://www.hhs.gov/ocr/contact.html,* or by calling the HIPAA toll-free number, (866) 627–7748.

To ease the burden of complying with the new requirements, the Privacy Rule gives covered hospitals and other covered entities some flexibility to create their own privacy procedures. Each hospital should make sure that it is compliant with all applicable provisions of the Privacy Rule, including provisions pertaining to required disclosures (such as required disclosures to the Department when it is undertaking a Privacy Rule investigation or compliance review) in developing its privacy procedures that are tailored to fit its particular size and needs.

The final HIPAA Security Rule (45 CFR parts 160 and 164, subparts A and C) was published in the **Federal Register** on February 20, 2003. It is available on CMS's Web page at *http://www.cms.gov/hipaa/hipaa2.* The Security Rule specifies a series of administrative, technical, and physical security safeguards for hospitals that are covered entities and other covered entities to use to assure, among other provisions, the confidentiality of electronic PHI. Hospitals that are covered entities must be compliant with the Security Rule by April 20, 2005. The Security Rule requirements are flexible and scalable, which allows each covered entity to tailor its approach to compliance based on its own unique circumstances. Covered entities can consider their organization and capabilities, as well as costs, in designing their security plans and procedures. Questions about the HIPAA Security Rule should be submitted to CMS. Hospitals can contact CMS by following the instructions on its Web page, *http://www.cms.gov/hipaa/hipaa2/contact,* or by calling the HIPAA toll-free number, (866) 627–7748.

H. Billing Medicare or Medicaid Substantially in Excess of Usual Charges

Section 1128(b)(6)(A) of the Act provides for the permissive exclusion from Federal health care programs of any provider or supplier that submits a claim *based on costs or charges* to the Medicare or Medicaid programs that is ''substantially in excess'' of its usual charge or cost, unless the Secretary finds there is ''good cause'' for the higher charge or cost. The exclusion provision does not require a provider to charge everyone the same price; nor does it require a provider to offer Medicare or Medicaid its ''best price.'' However, providers cannot routinely charge Medicare or Medicaid substantially more than they usually charge others. Hospitals have raised concerns regarding the impact of the exclusion authority on hospital services, and the OIG is considering those concerns in the context of the rulemaking process.[75] The OIG's policy regarding application of the exclusion authority to discounts offered to uninsured and underinsured patients is discussed below.

I. Areas of General Interest

Although in most cases the following areas do not pose significant fraud and abuse risk, the OIG has received numerous inquiries from hospitals and others on these topics. Therefore, we offer the following guidance to assist hospitals in their review of these arrangements.

1. Discounts to Uninsured Patients

No OIG authority, including the Federal anti-kickback statute, prohibits or restricts hospitals from offering discounts to uninsured patients who are unable to pay their hospital bills.[76] In addition, the OIG has never excluded or attempted to exclude any provider or supplier for offering discounts to uninsured or underinsured patients under the permissive exclusion authority at section 1128(b)(6)(A) of the Act. However, to provide additional assurance to the industry, the OIG recently proposed regulations that would define key terms in the statute.[77] Among other things, the proposed regulations would make clear that free or substantially reduced charges to

[74] *See supra* note 68.

[75] *See* Notice of Proposed Rulemaking regarding ''Clarification of Terms and Application of Program Exclusion Authority for Submitting Claims Containing Excessive Charges'' (68 FR 53939; September 15, 2003), available on our Web page at *http://oig.hhs.gov/authorities/docs/FRSIENPRM.pdf.*

[76] Discounts offered to *underinsured* patients potentially raise a more significant concern under the anti-kickback statute, and hospitals should exercise care to ensure that such discounts are not tied directly or indirectly to the furnishing of items or services payable by a Federal health care program. For more information, *see* our February 2, 2004 paper on ''Hospital Discounts Offered To Patients Who Cannot Afford To Pay Their Hospital Bills,'' available on our Web page at *http://oig.hhs.gov/fraud/docs/alertsandbulletins/2004/FA021904hospitaldiscounts.pdf*, and CMS's paper titled ''Questions On Charges For The Uninsured,'' dated February 17, 2004, and available on CMS's Web page at *http://www.cms.gov/FAQ_Uninsured.pdf.*

[77] *See* 68 FR 53939 (September 15, 2003), available on our Web page at *http://oig.hhs.gov/authorities/docs/FRSIENPRM.pdf.*

uninsured persons would not affect the calculation of a provider's or supplier's ''usual'' charges, as the term ''usual charges'' is used in the exclusion provision. The OIG is currently reviewing the public comments to the proposed regulations. Until such time as a final regulation is promulgated or the OIG indicates its intention not to promulgate a final rule, it will continue to be the OIG's enforcement policy that when calculating their ''usual charges'' for purposes of section 1128(b)(6)(A) of the Act, individuals and entities do not need to consider free or substantially reduced charges to (i) uninsured patients or (ii) underinsured patients who are self-paying patients for the items or services furnished. In offering such discounts, a hospital should report full uniform charges, rather than the discounted amounts, on its Medicare cost report and make the FI aware that it has reported its full charges.[78]

Under CMS rules, Medicare generally reimburses a hospital for a percentage of its ''bad debt'' (*i.e.*, uncollectible Medicare deductible or coinsurance amounts), but only if the hospital bills the Medicare patient for unpaid amounts first, and engages in reasonable, good faith collection efforts that are consistent with the degree of effort applied to collecting similar debts from non-Medicare patients.[79] However, as explained in CMS's paper titled ''Questions On Charges For The Uninsured,'' a hospital can forgo collection efforts aimed at a Medicare patient, if the hospital, using its customary methods, documents that the patient is indigent or medically indigent[80] and that no source other than the patient is legally responsible for the unpaid deductibles and coinsurance.

CMS Medicare bad debt reimbursement guidelines provide that a hospital should apply its customary indigency criteria to Medicare patients; however, the hospital must document such determination for such patients. To claim Medicare bad debt reimbursement, the hospital must follow the guidance laid out in sections 310, 312, and 322 of the Provider Reimbursement Manual.[81] A hospital should examine a patient's total resources, which could include, but are not limited to, an analysis of assets, liabilities, income, expenses, and any extenuating circumstances that would affect the determination. The hospital should document the method by which it determined the indigency and include all backup information used to substantiate the determination. If, instead of making such a determination, a hospital attempts to collect the outstanding amounts from the Medicare beneficiary, such efforts must be documented in the patient's file with copies of the bill(s), follow-up letters, and reports of telephone and personal contacts. In the case of a dually-eligible patient (*i.e.*, a patient entitled to both Medicare and Medicaid), the hospital should document the bad debt claim by including a denial of payment from the State.

2. Preventive Care Services

Hospitals frequently participate in community-based efforts to deliver preventive care services. The Medicare and Medicaid programs encourage patients to access preventive care services. The prohibition against beneficiary inducements at section 1128A(a)(5) of the Act does not apply to incentives offered to promote the delivery of certain preventive care services, if the programs are structured in accordance with the regulatory requirements at 42 CFR 1003.101. Generally, to fit within the preventive care exception, a service must be a prenatal service or post-natal well-baby visit or a specific clinical service described in the current U.S. Preventive Services Task Force's *Guide to Clinical Preventive Services*[82] that is reimbursed by Medicare or Medicaid. Obtaining the service may not be tied directly or indirectly to the provision of other Medicare or Medicaid services. In addition, the incentives may not be in the form of cash or cash equivalents and may not be disproportionate to the value of the preventive care provided. From an anti-kickback perspective, the chief concern is whether an arrangement to induce patients to obtain preventive care services is intended to induce other business payable by a Federal health care program. Relevant factors in making this evaluation would include, but not be limited to: the nature and scope of the preventive care services; whether the preventive care services are tied directly or indirectly to the provision of other items or services and, if so, the nature and scope of the other services; the basis on which patients are selected to receive the free or discounted services; and whether the patient is able to afford the services.

3. Professional Courtesy

Although historically ''professional courtesy'' referred to the practice of physicians waiving the entire professional fee for other physicians, the term is variously used in the industry now to describe a range of practices involving free or discounted services (including ''insurance only'' billing) furnished to physicians and their families and staff. Some hospitals have used the term ''professional courtesy'' to describe various programs that offer free or discounted hospital services to medical staff, employees, community physicians, and their families and staff. Although many professional courtesy programs are unlikely to pose a significant risk of abuse (and many may be legitimate employee benefits programs eligible for the employee safe harbor), some hospital-sponsored ''professional courtesy'' programs may implicate the fraud and abuse statutes.

In general, whether a professional courtesy program runs afoul of the anti-kickback statute turns on whether the recipients of the professional courtesy are selected in a manner that takes into account, directly or indirectly, any recipient's ability to refer to, or otherwise generate business for, the hospital. Also relevant is whether the physicians have solicited the professional courtesy in return for referrals. With respect to the Stark law, the key inquiry is whether the arrangement fits in the exception for professional courtesy at 42 CFR 411.357(s). Finally, hospitals should evaluate the method by which the courtesy is granted. For example, ''insurance only'' billing offered to a Federal program beneficiary potentially implicates the anti-kickback statute, the False Claims Act, and the CMP

[78] For more information, *see* CMS's paper titled ''Questions On Charges For The Uninsured,'' dated February 17, 2004, and available on CMS's Web page at *http://www.cms.gov/FAQ_Uninsured.pdf*.

[79] *See* 42 CFR 413.89 and Medicare's Provider Reimbursement Manual, Part I, Chapter 3, Section 310, available on CMS's Web page at *http://www.cms.hhs.gov/manuals/pub151/PUB_15_1.asp; see also* Provider Reimbursement Manual, Part II, chapter 11, section 1102.3.L, available on CMS's Web page at *http://www.cms.gov/manuals/pub152/PUB_15_2.asp*.

[80] *See* ''Questions On Charges For The Uninsured,'' dated February 17, 2004 and available on CMS's Web page at *http://www.cms.gov/FAQ_Uninsured.pdf*. In the paper, CMS further explains that hospitals may, but are not required to, determine a patient's indigency using a sliding scale. In this type of arrangement, the provider would agree to deem the patient indigent with respect to a portion of the patient's account (*e.g.*, a flat percentage of the debt based on the patient's income, assets, or the size of the patient's liability relative to income). In the case of a Medicare patient who is determined to be indigent using this method, the amount the hospital decides, pursuant to its policy, not to collect from the patient can be claimed by the provider as Medicare bad debt. The hospital must, however, engage in a reasonable collection effort to collect the remaining balance before claiming such balance as reimbursable bad debt. *Id.*

[81] See Medicare's Provider Reimbursement Manual, Part I, chapter 3, available on CMS's Web page at *http://www.cms.hhs.gov/manuals/pub151/PUB_15_1.asp*.

[82] Available on the Internet at *http://www.ahrq.gov/clinic/cps3dix.htm*.

provision prohibiting inducements to Medicare and Medicaid beneficiaries (discussed in section II.F above). Notably, the Stark law exception for professional courtesy requires that insurers be notified if ''professional courtesy'' includes ''insurance only'' billing.

III. Hospital Compliance Program Effectiveness

Hospitals with an organizational culture that values compliance are more likely to have effective compliance programs and, thus, are better able to prevent, detect, and correct problems. Building and sustaining a successful compliance program rarely follows the same formula from organization to organization. However, such programs generally include: The commitment of the hospital's governance and management at the highest levels; structures and processes that create effective internal controls; and regular self-assessment and enhancement of the existing compliance program. The 1998 CPG provided guidance for hospitals on establishing sound internal controls.[83] This section discusses the important roles of corporate leadership and self-assessment of compliance programs.

A. Code of Conduct

Every effective compliance program necessarily begins with a formal commitment to compliance by the hospital's governing body and senior management. Evidence of that commitment should include active involvement of the organizational leadership, allocation of adequate resources, a reasonable timetable for implementation of the compliance measures, and the identification of a compliance officer and compliance committee vested with sufficient autonomy, authority, and accountability to implement and enforce appropriate compliance measures. A hospital's leadership should foster an organizational culture that values, and even rewards, the prevention, detection, and resolution of problems. Moreover, hospitals' leadership and management should ensure that policies and procedures, including, for example, compensation structures, do not create undue pressure to pursue profit over compliance. In short, the hospital should endeavor to develop a culture that values compliance from the top down and fosters compliance from the bottom up. Such an organizational culture is the foundation of an effective compliance program.

Although a clear statement of detailed and substantive policies and procedures—and the periodic evaluation of their effectiveness—is at the core of a compliance program, the OIG recommends that hospitals also develop a general organizational statement of ethical and compliance principles that will guide the entity's operations. One common expression of this statement of principles is a code of conduct. The code should function in the same fashion as a constitution, *i.e.*, as a document that details the fundamental principles, values, and framework for action within an organization. The code of conduct for a hospital should articulate a commitment to compliance by management, employees, and contractors, and should summarize the broad ethical and legal principles under which the hospital must operate. The Code of Conduct should also include a requirement that professionals follow the ethical standards dictated by their respective professional organizations. Unlike the more detailed policies and procedures, the code of conduct should be brief, easily readable, and cover general principles applicable to all members of the organization.

As appropriate, the OIG strongly encourages the participation and involvement of the hospital's board of directors, officers (including the chief executive officer (CEO)), members of senior management, representatives from the medical and clinical staffs, and other personnel from various levels of the organizational structure in the development of all aspects of the compliance program, especially the code of conduct. Management and employee involvement in this process communicates a strong and explicit commitment by management to foster compliance with applicable Federal health care program requirements. It also communicates the need for all directors, officers, managers, employees, contractors, and medical and clinical staff members to comply with the organization's code of conduct and policies and procedures.

B. Regular Review of Compliance Program Effectiveness

Hospitals should regularly review the implementation and execution of their compliance program elements. This review should be conducted at least annually and should include an assessment of each of the basic elements individually, as well as the overall success of the program. This review should help the hospital identify any weaknesses in its compliance program and implement appropriate changes.

A common method of assessing compliance program effectiveness is measurement of various outcomes indicators (*e.g.*, billing and coding error rates, identified overpayments, and audit results). However, we have observed that exclusive reliance on these indicators may cause an organization to miss crucial underlying weaknesses. We recommend that hospitals examine program outcomes and assess the underlying structure and process of each compliance program element. We have identified a number of factors that may be useful when evaluating the effectiveness of basic compliance program elements. Hospitals should consider these factors, as well as others, when developing a strategy for assessing their compliance programs. While no one factor is determinative of program effectiveness, the following factors are often observed in effective compliance programs.

1. Designation of a Compliance Officer and Compliance Committee

The compliance department is the backbone of the hospital's compliance program. The compliance department should be led by a well-qualified compliance officer, who is a member of senior management, and should be supported by a compliance committee. The purpose of the compliance department is to implement the hospital's compliance program and to ensure that the hospital complies with all applicable Federal health care program requirements. To ensure that the compliance department is meeting this objective, each hospital should conduct an annual review of its compliance department. Some factors that the organization may wish to consider in its evaluation include the following:

- Does the compliance department have a clear, well-crafted mission?
- Is the compliance department properly organized?
- Does the compliance department have sufficient resources (staff and budget), training, authority, and autonomy to carry out its mission?
- Is the relationship between the compliance function and the general counsel function appropriate to achieve the purpose of each?
- Is there an active compliance committee, comprised of trained

[83] Among other things, the 1998 hospital CPG includes a detailed discussion of the structure and processes that make up the recommended seven elements of a compliance program. The seven basic elements of a compliance program are: Designation of a compliance officer and compliance committee; development of compliance policies and procedures, including standards of conduct; development of open lines of communication; appropriate training and education; response to detected offenses; internal monitoring and auditing; and enforcement of disciplinary standards.

representatives of each of the relevant functional departments, as well as senior management?

• Are *ad hoc* groups or task forces assigned to carry out any special missions, such as conducting an investigation or evaluating a proposed enhancement to the compliance program?

• Does the compliance officer have direct access to the governing body, the president or CEO, all senior management, and legal counsel?

• Does the compliance officer have independent authority to retain outside legal counsel?

• Does the compliance officer have a good working relationship with other key operational areas, such as internal audit, coding, billing, and clinical departments?

• Does the compliance officer make regular reports to the board of directors and other hospital management concerning different aspects of the hospital's compliance program?

2. Development of Compliance Policies and Procedures, Including Standards of Conduct

The purpose of compliance policies and procedures is to establish bright-line rules that help employees carry out their job functions in a manner that ensures compliance with Federal health care program requirements and furthers the mission and objective of the hospital itself. Typically, policies and procedures are written to address identified risk areas for the organization. As hospitals conduct a review of their written policies and procedures, some of the following factors may be considered:

• Are policies and procedures clearly written, relevant to day-to-day responsibilities, readily available to those who need them, and re-evaluated on a regular basis?

• Does the hospital monitor staff compliance with internal policies and procedures?

• Have the standards of conduct been distributed to all directors, officers, managers, employees, contractors, and medical and clinical staff members?

• Has the hospital developed a risk assessment tool, which is re-evaluated on a regular basis, to assess and identify weaknesses and risks in operations?

• Does the risk assessment tool include an evaluation of Federal health care program requirements, as well as other publications, such as the OIG's CPGs, work plans, special advisory bulletins, and special fraud alerts?

3. Developing Open Lines of Communication

Open communication is essential to maintaining an effective compliance program. The purpose of developing open communication is to increase the hospital's ability to identify and respond to compliance problems. Generally, open communication is a product of organizational culture and internal mechanisms for reporting instances of potential fraud and abuse. When assessing a hospital's ability to communicate potential compliance issues effectively, a hospital may wish to consider the following factors:

• Has the hospital fostered an organizational culture that encourages open communication, without fear of retaliation?

• Has the hospital established an anonymous hotline or other similar mechanism so that staff, contractors, patients, visitors, and medical and clinical staff members can report potential compliance issues?

• How well is the hotline publicized; how many and what types of calls are received; are calls logged and tracked (to establish possible patterns); and is the caller informed of the hospital's actions?

• Are all instances of potential fraud and abuse investigated?

• Are the results of internal investigations shared with the hospital governing body and relevant departments on a regular basis?

• Is the governing body actively engaged in pursuing appropriate remedies to institutional or recurring problems?

• Does the hospital utilize alternative communication methods, such as a periodic newsletter or compliance intranet website?

4. Appropriate Training and Education

Hospitals that fail to train and educate their staff adequately risk liability for the violation of health care fraud and abuse laws. The purpose of conducting a training and education program is to ensure that each employee, contractor, or any other individual that functions on behalf of the hospital is fully capable of executing his or her role in compliance with rules, regulations, and other standards. In reviewing their training and education programs, hospitals may consider the following factors:

• Does the hospital provide qualified trainers to conduct annual compliance training for its staff, including both general and specific training pertinent to the staff's responsibilities?

• Has the hospital evaluated the content of its training and education program on an annual basis and determined that the subject content is appropriate and sufficient to cover the range of issues confronting its employees?

• Has the hospital kept up-to-date with any changes in Federal health care program requirements and adapted its education and training program accordingly?

• Has the hospital formulated the content of its education and training program to consider results from its audits and investigations; results from previous training and education programs; trends in hotline reports; and OIG, CMS, or other agency guidance or advisories?

• Has the hospital evaluated the appropriateness of its training format by reviewing the length of the training sessions; whether training is delivered via live instructors or via computer-based training programs; the frequency of training sessions; and the need for general and specific training sessions?

• Does the hospital seek feedback after each session to identify shortcomings in the training program, and does it administer post-training testing to ensure attendees understand and retain the subject matter delivered?

• Has the hospital's governing body been provided with appropriate training on fraud and abuse laws?

• Has the hospital documented who has completed the required training?

• Has the hospital assessed whether to impose sanctions for failing to attend training or to offer appropriate incentives for attending training?

5. Internal Monitoring and Auditing

Effective auditing and monitoring plans will help hospitals avoid the submission of incorrect claims to Federal health care program payors. Hospitals should develop detailed annual audit plans designed to minimize the risks associated with improper claims and billing practices. Some factors hospitals may wish to consider include the following:

• Is the audit plan re-evaluated annually, and does it address the proper areas of concern, considering, for example, findings from previous years' audits, risk areas identified as part of the annual risk assessment, and high volume services?

• Does the audit plan include an assessment of billing systems, in addition to claims accuracy, in an effort to identify the root cause of billing errors?

• Is the role of the auditors clearly established and are coding and audit personnel independent and qualified, with the requisite certifications?

• Is the audit department available to conduct unscheduled reviews and does a mechanism exist that allows the compliance department to request additional audits or monitoring should the need arise?

• Has the hospital evaluated the error rates identified in the annual audits?

• If the error rates are not decreasing, has the hospital conducted a further investigation into other aspects of the hospital compliance program in an effort to determine hidden weaknesses and deficiencies?

• Does the audit include a review of all billing documentation, including clinical documentation, in support of the claim?

6. Response to Detected Deficiencies

By consistently responding to detected deficiencies, hospitals can develop effective corrective action plans and prevent further losses to Federal health care programs. Some factors a hospital may wish to consider when evaluating the manner in which it responds to detected deficiencies include the following:

• Has the hospital created a response team, consisting of representatives from the compliance, audit, and any other relevant functional areas, which may be able to evaluate any detected deficiencies quickly?

• Are all matters thoroughly and promptly investigated?

• Are corrective action plans developed that take into account the root causes of each potential violation?

• Are periodic reviews of problem areas conducted to verify that the corrective action that was implemented successfully eliminated existing deficiencies?

• When a detected deficiency results in an identified overpayment to the hospital, are overpayments promptly reported and repaid to the FI?

• If a matter results in a probable violation of law, does the hospital promptly disclose the matter to the appropriate law enforcement agency? [84]

7. Enforcement of Disciplinary Standards

By enforcing disciplinary standards, hospitals help create an organizational culture that emphasizes ethical behavior. Hospitals may consider the following factors when assessing the effectiveness of internal disciplinary efforts:

• Are disciplinary standards well-publicized and readily available to all hospital personnel?

• Are disciplinary standards enforced consistently across the organization?

• Is each instance involving the enforcement of disciplinary standards thoroughly documented?

• Are employees, contractors and medical and clinical staff members checked routinely (*e.g.*, at least annually) against government sanctions lists, including the OIG's List of Excluded Individuals/Entities (LEIE) [85] and the General Services Administration's Excluded Parties Listing System.

In sum, while no single factor is conclusive of an effective compliance program, the preceding seven areas form a useful starting point for developing and maintaining an effective compliance program.

IV. Self-Reporting

Where the compliance officer, compliance committee, or a member of senior management discovers credible evidence of misconduct from any source and, after a reasonable inquiry, believes that the misconduct may violate criminal, civil, or administrative law, the hospital should promptly report the existence of misconduct to the appropriate Federal and State authorities [86] within a reasonable period, but not more than 60 days,[87] after determining that there is credible evidence of a violation.[88] Prompt voluntary reporting will demonstrate the hospital's good faith and willingness to work with governmental authorities to correct and remedy the problem. In addition, reporting such conduct will be considered a mitigating factor by the OIG in determining administrative sanctions (*e.g.,* penalties, assessments, and exclusion), if the reporting hospital becomes the subject of an OIG investigation.[89] To encourage providers to make voluntary disclosures, the OIG published the Provider Self-Disclosure Protocol.[90]

When reporting to the government, a hospital should provide all information relevant to the alleged violation of applicable Federal or State law(s)and the potential financial or other impact of the alleged violation. The compliance officer, under advice of counsel and with guidance from the governmental authorities, could be requested to continue to investigate the reported violation. Once the investigation is completed, and especially if the investigation ultimately reveals that criminal, civil, or administrative violations have occurred, the compliance officer should notify the appropriate governmental authority of the outcome of the investigation, including a description of the impact of the alleged violation on the applicable Federal health care programs or their beneficiaries.

V. Conclusion

In today's environment of increased scrutiny of corporate conduct and increasingly large expenditures for health care, it is imperative for hospitals to establish and maintain effective compliance programs. These programs should foster a culture of compliance that begins at the highest levels and extends throughout the organization. This supplemental CPG is intended as a resource for hospitals to help them operate effective compliance programs that decrease errors, fraud, and abuse and increase compliance with Federal health care program requirements for the benefit of the hospitals and public alike.

[FR Doc. 05–1620 Filed 1–27–05; 8:45 am]

BILLING CODE 4150–01–P

[84] For more information on when to self-report, *see* section IV, below.

[85] *See http://oig.hhs.gov/fraud/exclusions.html.* The OIG also makes available Monthly Supplements for Standard LEIE, which can be compared to existing hospital personnel lists.

[86] Appropriate Federal and State authorities include the OIG, CMS, the Criminal and Civil Divisions of the Department of Justice, the U.S. Attorney in relevant districts, the Food and Drug Administration, the Department's Office for Civil Rights, the Federal Trade Commission, the Drug Enforcement Administration, the Federal Bureau of Investigation, and the other investigative arms for the agencies administering the affected Federal or State health care programs, such as the State Medicaid Fraud Control Unit, the Defense Criminal Investigative Service, the Department of Veterans Affairs, the Health Resources and Services Administration, and the Office of Personnel Management (which administers the Federal Employee Health Benefits Program).

[87] In contrast, to qualify for the ''not less than double damages'' provision of the False Claims Act, the provider must provide the report to the government within 30 days after the date when the provider first obtained the information. *See* 31 U.S.C. 3729(a).

[88] Some violations may be so serious that they warrant immediate notification to governmental authorities prior to, or simultaneous with, commencing an internal investigation. By way of example, the OIG believes a provider should immediately report misconduct that: (i) Is a clear violation of administrative, civil, or criminal laws; (ii) has a significant adverse effect on the quality of care provided to Federal health care program beneficiaries; or (iii) indicates evidence of a systemic failure to comply with applicable laws or an existing corporate integrity agreement, regardless of the financial impact on Federal health care programs.

[89] The OIG has published criteria setting forth those factors that the OIG takes into consideration in determining whether it is appropriate to exclude an individual or entity from program participation pursuant to 42 U.S.C. 1320a–7(b)(7) for violations of various fraud and abuse laws. *See* 62 FR 67392 (December 24, 1997).

[90] *See* 63 FR 58399 (October 30, 1998), available on our Web page at *http://oig.hhs.gov/authorities/docs/selfdisclosure.pdf.*

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Clinical Center; Amended Notice of Meeting

Notice is hereby given of change in the meeting of the NIH Advisory Board for Clinical Research, January 31, 2005, 2 p.m. to January 31, 2005, 5 p.m., National Institutes of Health, Building 10, 10 Center Drive, Medical Board Room 2C116, Bethesda, MD 20892 which was published in the **Federal Register** on January 12, 2005, 70 FR 2177.

The open session will start from 10 a.m.–2 p.m. The closed session will be held from 2 p.m. until adjournment. The meeting will be held in Room 4–2551, CRC Medical Board Room. The meeting is partially Closed to the public.

Dated: January 27, 2005.

Anna Snouffer,

Deputy Director, Office of Federal Advisory Committee Policy.

[FR Doc. 05–1884 Filed 1–27–05; 4:53 pm]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed 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 the following 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 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 Cancer Institute Special Emphasis Panel, Breast Cancer Surveillance Consortium.

Date: January 28, 2005.

Time: 1 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: EPN–C, 6130 Executive Blvd., Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Timothy C. Meeker, MD, Scientific Review Administrator, Special Referral and Resources Branch, Division of Extramural Activities, National Cancer Institute, 6116 Executive Boulevard, Room 8088, Rockville, MD 20852, 301/594–1279.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS.)

Dated: January 24, 2005.

Anna P. Snouffer,

Acting Director, Office of Federal Advisory Committee Policy.

[FR Doc. 05–1682 Filed 1–28–05; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; 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: Center for Scientific Review Special Emphasis Panel, Biological Rhythms and Sleep.

Date: February 9, 2005.

Time: 9 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Michael Selmanoff, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3134, MSC 7844, Bethesda, MD 20892, 301–435–1119, *mselimanoff@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Musculoskeletal Rehabilitation Special Emphasis Panel.

Date: February 15, 2005.

Time: 11:30 a.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Daniel F. McDonald, PhD, Chief, Renal and Urological Sciences IRG, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4214, MSC 7814, Bethesda, MD 20892, (301) 435–1215, *mcdonald@csr.nih.gov.*

Name of Committee: Biobehavioral and Behavioral Processes Integrated Review Group, Child Psychopathology and Developmental Disabilities Study Section.

Date: February 17–18, 2005.

Time: 8:30 a.m. to 12 p.m.

Agenda: To review and evaluate grant application.

Place: The Watergate, 2650 Virginia Avenue, NW., Washington, DC 20037.

Contact Person: Karen Sirocco, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3176, MSC 7848, Bethesda, MD 20892, 301–435–0676, *siroccok@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Urologic and Kidney Development Small Business.

Date: February 18, 2005.

Time: 10 a.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: The Fairmont Washington, DC, 2401 M Street, NW., Washington, DC 20037.

Contact Person: M. Chris Langub, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4112, MSC 7814, Bethesda, MD 20892, 301–496–8551, *langubm@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Learning and Behavior in Children with Extremely Low Birthweight.

Date: February 18, 2005.

Time: 1 p.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: The Watergate, 2650 Virginia Avenue, NW., Washington, DC 20037.

Contact Person: Karen Sirocco, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3176, MSC 7848, Bethesda, MD 20892, 301–435–0676, *siroccok@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Reviews in Bipolar Disorder.

Date: February 18, 2005.

Time: 12 p.m. to 1 p.m.

Agenda: To review and evaluate grant applications.

Place: The Watergate, 2650 Virginia Avenue, NW., Washington, DC 20037.

Contact Person: Karen Sirocco, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3176, MSC 7848, Bethesda, MD 20892, 301–435–0676, *siroccok@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Fellowship

Review: Sensory, Motor and Cognitive Neuroscience.

Date: February 23, 2005.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Beacon Hotel and Corporate Quarters, 1615 Rhode Island Avenue, NW., Washington, DC 20036.

Contact Person: John Bishop, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5180, MSC 7844, Bethesda, MD 20892, 301–435–1250, *bishopj@csr.nih.gov.*

Name of Committee: Biobehavioral and Behavioral Processes Integrated Review Group, Language and Communication Study Section.

Date: February 24–25, 2005.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Alexandria at Old Town, 1767 King Street, Alexandria, VA 22314.

Contact Person: Weijia Ni, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3190, MSC 7848, (for overnight mail use room # and 20817 zip), Bethesda, MD 20892, 301–435–1507, *niw@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Fellowship Study Section.

Date: February 24–25, 2005.

Time: 8 a.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda Residence Inn, 7335 Wisconsin Ave., Bethesda, MD 20814.

Contact Person: Calbert A. Laing, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4210, MSC 7812, Bethesda, MD 20892, 301–435–1221, *laingc@csr.nih.gov.*

Name of Committee: Molecular, Cellular and Developmental Neuroscience Integrated Review Group, Neurotransporters, Receptors, and Calcium Signaling Study Section.

Date: February 24–25, 2005.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Georgetown Suites, 1111 30th Street, NW., Washington, DC 20007.

Contact Person: Peter B. Guthrie, Phd, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4142, MSC 7850, Bethesda, MD 20892, (301) 435–1239, *guthriep@csr.nih.gov.*

Name of Committee: Health of the Population Integrated Review Group, Health Services Organization and Delivery Study Section.

Date: February 24–25, 2005.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda North Marriott Hotel, 5701 Marinelli Road, North Bethesda, MD 20852.

Contact Person: Kathy Salaita, Phd, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1014–2, MSC 7770, Bethesda, MD 20892, 301–451–8504, *salaitak@csr.nih.gov.*

Name of Committee: Cardiovascular Sciences Integrated Review Group, Myocardial Ischemia and Metabolism Study Section.

Date: February 24–25, 2005.

Time: 8 a.m. to 1 p.m.

Agenda: To review and evaluate grant applications.

Place: Georgetown Inn, 1310 Wisconsin Avenue, NW., Washington, DC 20007.

Contact Person: Joyce C. Gibson, DSC, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4130, MSC 7814, Bethesda, MD 20892, 301–435–4522, *gibsonj@csr.nih.gov.*

Name of Committee: Genes, Genomes, and Genetics Integrated Review Group, Molecular Genetics C Study Section.

Date: February 24–25, 2005.

Time: 8 a.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: Holiday Inn Select, 480 King Street, Alexandria, VA 22314.

Contact Person: Barbara Whitmarsh, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2206, MSC 7890, Bethesda, MD 20892, 301/ 435–4511, *whitmarshb@csr.nih.gov.*

Name of Committee: Oncological Sciences Integrated Review Group, Developmental Therapeutics Study Section.

Date: February 24–25, 2005.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: The Sheraton Suites, 801 North Saint Asaph Street, Alexandria, VA 22314.

Contact Person: Sharon K. Gubanich, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6204, MSC 7804, Bethesda, MD 20892, (301) 435–1767, *gubanics@csr.nih.gov.*

Name of Committee: Endrocrinology, Metabolism, Nutrition and Reproductive Sciences Integrated Review Group, Cellular, Molecular and Integrative Reproduction Study Section.

Date: February 24–25, 2005.

Time: 8 a.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda Marriott (Pooks Hill), 5151 Pooks Hill Road, Bethesda, MD 20814.

Contact Person: Dennis Leszczynski, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6170, MSC 7892, Bethesda, MD 20892, (301) 435–1044, *leszczyd@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, EMNR: Endrocrinology, Metabolism, Nutrition and Reproductive Sciences.

Date: February 24–25, 2005.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Krish Krishan, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6164, MSC 7892, Bethesda, MD 20892, (301) 435–1041, *krishnak@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Immunity and Host Defense Special Emphasis Panel.

Date: February 24–25, 2005.

Time: 8 a.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: Holiday Inn Georgetown, 2101 Wisconsin Avenue, NW., Washington, DC 20007.

Contact Person: Patrick K. Lai, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2215, MSC 7812, Bethesda, MD 20892, (301) 435–1052, *laip@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Vaccines Against Microbial Diseases.

Date: February 24–25, 2005.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: The Watergate Hotel, 2650 Virginia Ave., NW., Washington, DC 20037.

Contact Person: Jian Wang, MD, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4095D, MSC 7812, Bethesda, MD 20892, (301) 435–2778, *waingjia@csr.nih.gov.*

Name of Committee: Biobehavioral and Behavioral Processes Integrated Review Group, Cognition and Perception Study Section.

Date: February 24–25, 2005.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Radisson Barcello, 2121 P Street, NW., Washington, DC 20037.

Contact Person: Cheri Wiggs, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3180, MSC 7848, Bethesda, MD 20892, (301) 435–1261, *wiggsc@csr.nih.gov.*

Name of Committee: Health of the Population Integrated Review Group, Behavior Genetics and Epidemiology Study Section.

Date: February 24–25, 2005.

Time: 8:30 a.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: The Watergate, 2650 Virginia Avenue, NW., Washington, DC 20037.

Contact Person: Yvette M. Davis, VMD, MPH, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3152, MSC 7770, Bethesda, MD 20892, (301) 435–0906, *davisy@csr.nih.gov.*

Name of Committee: Biological Chemistry and Macromolecular Biophysics Integrated Review Group, Synthetic and Biological Chemistry B Study Section.

Date: February 24–25, 2005.
Time: 8:30 a.m. to 6 p.m.
Agenda: To review and evaluate grant applications.
Place: Holiday Inn Georgetown, 2101 Wisconsin Avenue, NW., Washington, DC 20007.
Contact Person: Mike Radtke, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4176, MSC 7806, Bethesda, MD 20892, (301) 435–1728, *radtkem@csr.nih.gov.*

Name of Committee: Biological Chemistry and Macromolecular Biophysics Integrated Review Group, Biochemistry and Biophysics of Membranes Study Section.
Date: February 24–25, 2005.
Time: 8:30 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Double Tree Rockville, 1750 Rockville Pike, Rockville, MD 20852.
Contact Person: Gopa Rakhit, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4154, MSC 7806, Bethesda, MD 20892, (301) 435–1721, *rakhitg@csr.nih.gov.*

Name of Committee: Risk, Prevention and Health Behavior Integrated Review Group, Social Psychology, Personality and Interpersonal Processes Study Section.
Date: February 24–25, 2005.
Time: 8:30 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Holiday Inn Select Bethesda, 8120 Wisconsin Ave, Bethesda, MD 20814.
Contact Person: Anna L. Riley, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3114, MSC 7759, Bethesda, MD 20892, (301) 435–2889, *rileyann@csr.nih.gov.*

Name of Committee: Risk, Prevention and Health Behavior Integrated Review Group, Behavioral Medicine, Interventions and Outcomes Study Section.
Date: February 24–25, 2005.
Time: 8:30 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Marriott Annapolis Waterfront, 80 Compromise Street, Annapolis, MD 21401.
Contact Person: Lee S. Mann, MA, JD, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3186, MSC 7848, Bethesda, MD 20892, (301) 435–0677, *mannl@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Clinical Neuroimmunology and Brain Tumors (CNBT).
Date: February 24–25, 2005.
Time: 8:30 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Hilton Washington Embassy Row, 2015 Massachusetts Ave., NW., Washington, DC 20036.
Contact Person: Jay Joshi, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5184, MSC 7846, Bethesda, MD 20892, (301) 435–1184, *joshij@csr.nih.gov.*

Name of Committee: Health of the Population Integrated Review Group, Social Sciences and Population Studies Study Section.
Date: February 24–25, 2005.
Time: 8:30 a.m. to 6:30 p.m.
Agenda: To review and evaluate grant applications.
Place: Holiday Inn Select Bethesda, 8120 Wisconsin Ave, Bethesda, MD 20814.
Contact Person: Bob Weller, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3160, MSC 7770, Bethesda, MD 20892, (301) 435–0694, *wellerr@csr.nih.gov.*

Name of Committee: Infectious Diseases and Microbiology Integrated Review Group, Virology—A Study Section.
Date: February 24–25, 2005.
Time: 8:30 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Holiday Inn Select, 480 King Street, Old Towne Alexandria, VA 22314.
Contact Person: Joanna M. Pyper, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3198, MSC 7808, Bethesda, MD 20892, (301) 435–1151, *pyperj@csr.nih.gov.*

Name of Committee: Biobehavioral and Behavioral Processes Integrated Review Group, Adult Psychopathology and Disorders of Aging Study Section.
Date: February 24–25, 2005.
Time: 8:30 a.m. to 6 p.m.
Agenda: To review and evaluate grant applications.
Place: Holiday Inn Select Bethesda, 8120 Wisconsin Ave, Bethesda, MD 20814.
Contact Person: Mariela Shirley, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3186, MSC 7848, Bethesda, MD 20892, (301) 435–0913, *shirleym@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, SBIR: Early Childhood and Teen Risk Behaviors.
Date: February 24, 2005.
Time: 1 p.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Hotel Washington, Pennsylvania Ave at 15th Street, NW., Washington, DC 20004.
Contact Person: Claire E. Gutkin, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3138, MSC 7759, Bethesda, MD 20892, (301) 435–3139, *gutkincl@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, SBIR\S 50R: Bioengineering Nanotechnology Initiative.
Date: February 24, 2005.
Time: 1 p.m. to 3 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).
Contact Person: Xiang-Ning Li, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5217, MSC 7854, Bethesda, MD 20892, 301–435–1744, *lixiang@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Social Science and Population Studies R03s, R21s, and F32s.
Date: February 25, 2005.
Time: 8:30 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: George Washington University Inn, 824 New Hampshire Ave., NW., Washington, DC 20037.
Contact Person: Valerie Durrant, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3148, MSC 7770, Bethesda, MD 20892, (301) 435–3554, *durrantv@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, SBIR; Alcohol, Tobacco and Substance Abuse.
Date: February 25, 2005.
Time: 8:30 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Hotel Washington, Pennsylvania Ave at 15th Street, NW., Washington, DC 20004.
Contact Person: Claire E. Gutkin, PhD, MPH, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3138, MSC 7759, Bethesda, MD 20892, 301–594–3139, *gutkincl@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Diagnosis, Course, and Outcome in Anxiety, Mood and Eating Disorders.
Date: February 25, 2005.
Time: 12 p.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Holiday Inn Select Bethesda, 8120 Wisconsin Ave, Bethesda, MD 20814.
Contact Person: Mariela Shirley, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3186, MSC 7848, Bethesda, MD 20892, 301–435–0913, *shirleym@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine, 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: January 24, 2005.

Anna Snouffer,

Acting Director, Office of Federal Advisory Committee Policy.

[FR Doc. 05–1681 Filed 1–28–05; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Prospective Grant of Exclusive License: Commercializing Instruments, Reagents and Related Products Used for Template-Dependent Sequencing-by-Synthesis of Nucleic Acids at the Single Molecule Level, Wherein a Polymerase Carries the Donor Label

AGENCY: National Institutes of Health, Public Health Service, HHS.

ACTION: Notice.

SUMMARY: This is notice, in accordance with 35 U.S.C. 209(c)(1) and 37 CFR 404.7(a)(1)(i), that the National Institutes of Health (NIH), Department of Health and Human Services, is contemplating the grant of an exclusive license to practice the invention embodied in Patent Applications U.S. 60/151,580, filed August 29, 1999; PCT/US00/23736, filed August 29, 2000 and U.S. 10/070,053, filed June 10, 2002; entitled ''High Speed Parallel Molecular Nucleic Acid Sequencing'', to VisiGen Biotechnologies, Inc., having a place of business in Houston, Texas. The patent rights in this invention have been assigned to the United States of America.

DATES: Only written comments and/or application for a license that are received by the NIH Office of Technology Transfer on or before April 1, 2005, will be considered.

ADDRESSES: Requests for a copy of the patent application, inquiries, comments and other materials relating to the contemplated license should be directed to: Cristina Thalhammer-Reyero, Ph.D., M.B.A., Office of Technology Transfer, National Institutes of Health, 6011 Executive Boulevard, Suite 325, Rockville, MD 20852–3804; e-mail: *ThalhamC@mail.nih.gov;* telephone: 301–435–4507; facsimile: 301–402–0220.

SUPPLEMENTARY INFORMATION: The invention relates to a method and apparatus for DNA and RNA sequencing, also known as Two Dye Sequencing (TDS). This invention is based on Fluorescence Resonance Energy Transfer (FRET), a technology increasingly in use for several molecular analysis purposes. In particular, the method consists of: (1) Attachment of engineered DNA polymerases labeled with a donor fluorophore to the surface (chamber) of a microscope field of view, (2) addition to the chamber of DNA with an annealed oligonucleotide primer, which is bound by the polymerase, (3) further addition of four nucleotide triphosphates, each labeled on the base with a different fluorescent acceptor dye, (4) excitation of the donor fluorophore with light of a wavelength specific for the donor but not for any of the acceptors, resulting in the transfer of the energy associated with the excited state of the donor to the acceptor fluorophore for a given nucleotide, which is then radiated via FRET, (5) identification of the nucleotides most recently incorporated into the complementary nucleic acid strand by recording the fluorescent spectrum of the individual dye molecules at specific locations in the microscope field, and (6) converting the sequential spectrum into a DNA sequence for each DNA molecule in the microscope field of view.

The prospective exclusive license will be royalty bearing and will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR 404.7. The prospective exclusive license may be granted unless, within 60 days from the date of this published Notice, NIH receives written evidence and argument that establishes that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR 404.7.

The field of use may be limited to ''Commercializing Instruments, Reagents and Related Products Used for Template-Dependent Sequencing-by-Synthesis of Nucleic Acids at the Single Molecule Level, wherein a Polymerase Carries the Donor Label.''

Properly filed competing applications for a license filed in response to this notice will be treated as objections to the contemplated license. Comments and objections submitted in response to this notice will not be made available for public inspection, and, to the extent permitted by law, will not be released under the Freedom of Information Act, 5 U.S.C. 552.

Dated: January 21, 2005.

Mark L. Rohrbaugh,

Director, Office of Technology Transfer, National Institutes of Health.

[FR Doc. 05–1683 Filed 1–28–05; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Departmental Advisory Committee on Commercial Operations of Customs and Border Protection and Related Functions (COAC)

ACTION: Notice of meeting and announcement of membership.

SUMMARY: This notice announces the date, time, and location for the first meeting of the ninth term of the Departmental Advisory Committee on Commercial Operations of Customs and Border Protection and Related Functions (COAC) and the expected agenda for its consideration. It also announces the new members of the committee.

DATES: The next meeting of the COAC will be held on Tuesday, February 15, 2005, 9 a.m. to 1 p.m.

ADDRESSES: The meeting of the Departmental Advisory Committee on Commercial Operations of Customs and Border Protection and Related Functions (COAC) will be held in The Ronald Reagan International Trade Center Horizon Ballroom, 1300 Pennsylvania Avenue, NW., Washington, DC 20229 (phone 202–344–1440; fax 202–344–1969).

FOR FURTHER INFORMATION CONTACT: Ms. Monica Frazier, Office of the Assistant Secretary for Border and Transportation Security, Department of Homeland Security, Washington, DC 20528; telephone (202) 282–8431; facsimile (202) 282–8504.

SUPPLEMENTARY INFORMATION: The first meeting of the ninth term of Departmental Advisory Committee on Commercial Operations of Customs and Border Protection and Related Functions (COAC) will be held at the date, time and location specified above. This notice announces the expected agenda for its consideration and the new members of the committee. This meeting is open to the public; however, participation in COAC deliberations is limited to COAC members, Homeland Security and Treasury Department officials, and persons invited to attend the meeting for special presentations. Since seating is limited, all persons attending this meeting should provide notice by 2 p.m. e.s.t. on Wednesday, February 9, 2005, to Ms. Monica Frazier, Office of the Assistant Secretary for Border and Transportation Security, Department of Homeland Security, Washington, DC 20528; telephone (202) 282–8431; facsimile (202) 282–8504.

Information on Services for Individuals with Disabilities: For information on facilities or services for individuals with disabilities or to request special assistance at the meeting, contact Ms. Monica Frazier, Office of the Assistant Secretary for Border and Transportation Security, Department of Homeland Security, Washington, DC 20528; telephone (202) 282–8431; facsimile (202) 282–8504, as soon as possible.

Draft Agenda: The COAC is expected to pursue the following agenda, which may be modified prior to the meeting:

1. MTSA Subcommittee.
2. Security Subcommittee.
   a. Advance Cargo Information.
   b. WCO Security.
   c. C–TPAT Process Review.
3. Automation Issues.
   a. ACE funding and development schedule.
   b. ACS downtime.
4. International Trade Data System (ITDS).
5. Creation of Infrastructure Subcommittee.
6. Bioterrorism Act.
7. Focused Assessment Program.

Membership: The twenty members for the ninth term of COAC are: Anthony Barone, Pfizer; Sandra M. Fallgatter, JC Penny Purchasing Corp.; Jonathan Gold, Retail Industry Leaders Assn.; D. Scott Johnson, Gap, Inc.; Chris Koch, World Shipping Council; Marian Ladner, Strasburger and Price; Bruce Leeds, Boeing; Mary Jo Muoio, Barthco International, Inc.; Karen Phillips, Canadian National; Peggy Rutledge, Hapag-Lloyd Container Line; Norman Schenk, United Parcel Service; Lisa Schimmelpfenning, Wal-Mart Stores; Robert Schueler, Jr., Delphi Corporation; Kevin M. Smith, General Motors Corp.; Curtis Spencer, IMS Worldwide; Katherine M. Terricciano, Philips Electronics N. America; Thomas G. Travis, Sandler, Travis & Rosenberg; Henry White, Institute of International Container Lessors; J Michael Zachary, Port of Tacoma; Federico Zúñiga, National Customs Brokers and Forwarders Association of America.

Dated: January 26, 2005.

C. Stewart Verdery, Jr.,

Assistant Secretary for Border and Transportation Security Policy and Planning.

[FR Doc. 05–1769 Filed 1–28–05; 8:45 am]

BILLING CODE 4810–25–P

DEPARTMENT OF HOMELAND SECURITY

[Docket No. DHS–0002–2005]

Directorate of Science and Technology; Notice of Meeting of Homeland Security Science and Technology Advisory Committee

AGENCY: Office of the Under Secretary for Science and Technology, DHS.

ACTION: Notice.

SUMMARY: The Homeland Security Science and Technology Advisory Committee (HSSTAC) will meet in closed session.

DATES: February 23, 2005, and February 24, 2005.

ADDRESS: The offices of Booz Allen Hamilton, Virginia Square Plaza, 3811 Fairfax Drive, Arlington, VA 22203.

FOR FURTHER INFORMATION CONTACT: Brenda Leckey, Homeland Security Science and Technology Advisory Committee, Department of Homeland Security, Directorate of Science and Technology, Washington, DC 20528; telephone 202–254–5041; e-mail *HSSTAC@dhs.gov.*

SUPPLEMENTARY INFORMATION: Notice of this meeting is given under the Federal Advisory Committee Act (FACA), Pub. L. 92–463, as amended (5 U.S.C. App.2 *et seq.*). The HSSTAC will meet for purposes of: (1) Conducting annual administrative sessions (ethics and security briefings); (2) receiving detailed briefings on future Department and Directorate priorities; (3) identifying special issues that HSSTAC should pursue in 2005; (4) identifying special challenges (and resulting responses by) as well as major changes or initiatives facing the Directorate and its operating units for the coming year; (5) receiving subcommittee updates; and (6) receiving briefings on activities, programs, and accomplishments of the Office of Research & Development, the Homeland Security Advanced Projects Research Agency, and the Office of Systems Engineering and Development. In accordance with section 10(d) of the Federal Advisory Committee Act, Pub. L. 92–463, as amended (5 U.S.C. App. 2 *et seq.*), the Under Secretary for Science and Technology has determined that this HSSTAC meeting will concern matters which, if prematurely disclosed, would significantly frustrate implementation of proposed agency actions. Moreover, the administrative portions of the meeting will relate solely to the internal personnel rules and practices of the agency. Accordingly, pursuant to 5 U.S.C. 552b(c)(2) and (9)(B), the meeting will be closed to the public.

Public Comments: You may submit comments, identified by DHS–0002–2005, by *one* of the following methods:

- EPA Federal Partner EDOCKET Web Site: *http://www.epa.gov/feddocket.* Follow instructions for submitting comments on the Web site.

The Department of Homeland Security has joined the Environmental Protection Agency (EPA) online public docket and comment system on its Partner Electronic Docket System (Partner EDOCKET). The Department of Homeland Security and its agencies (excluding the United States Coast Guard and Transportation Security Administration) will use the EPA Federal Partner EDOCKET system. The USCG and TSA (legacy Department of Transportation (DOT) agencies) will continue to use the DOT Docket Management System until full migration to the electronic rulemaking federal docket management system in 2005.

- Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.
- E-mail: *hsstac@dhs.gov.* Include DHS–0002–2005 in the subject line of the message.
- Fax: 202–254–6177.
- Mail: Homeland Security Science and Technology Advisory Committee, Department of Homeland Security, Washington, DC 20528.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to *http://www.epa.gov/feddocket,* including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to *http://www.epa.gov/feddocket.*

Dated: January 21, 2005.

Charles E. McQueary,

Under Secretary for Science and Technology.

[FR Doc. 05–1726 Filed 1–28–05; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[NM–030–1610–DS]

Notice of Availability (NOA) of the Draft Environmental Impact Statement (DEIS) for the McGregor Range Resource Management Plan Amendment (RMPA) and Notice of Opening of Public Comment Period With Public Meetings

AGENCY: Bureau of Land Management (BLM), Interior.

ACTION: NOA of a DEIS for the McGregor Range RMPA, New Mexico.

SUMMARY: In accordance with Section 202 of the National Environmental Policy Act of 1969 (NEPA), the BLM announces the availability of the DEIS for the McGregor Range RMPA.

The DEIS documents the direct, indirect, and cumulative environmental impacts of four alternative management plans for BLM-administered withdrawn public lands within the McGregor Range. When completed, the RMPA will fulfill the obligations set forth by NEPA, the Federal Land Policy and

Management Act, and associated Federal regulations.

DATES: The McGregor Range DEIS and RMPA will be available for review for 90 calendar days from the date the Environmental Protection Agency (EPA) publishes its NOA in the **Federal Register**. The BLM can best utilize your comments and resource information submissions within the 90-day review period provided above. Formal hearings and open house meetings will be scheduled to provide the public additional opportunities to submit comments on the McGregor Range DEIS and RMPA.

All hearings or meetings and any other public involvement activities will be announced at least 15 days in advance through public notices, media news releases, New Mexico BLM Web site announcements, or mailings.

ADDRESSES: A copy of the DEIS/RMPA has been sent to affected Federal, State, and local government agencies and to interested parties. The document will be available electronically on the following Web site: *http://www.nm.blm.gov.* Copies of the DEIS/RMPA will be available for public inspection at the following locations: BLM New Mexico State Office, 1474 Rodeo Road, Santa Fe, NM 87505; BLM Las Cruces Field Office, 1800 Marquess, Las Cruces, NM 88005. The current RMPs/EISs, and all other documents relevant to this planning process, are available for public review at the Las Cruces Field Office at the above address.

Written comments may be mailed directly, or delivered to the BLM at: Draft McGregor Range RMPA/EIS, BLM Las Cruces Field Office, 1800 Marquess, Las Cruces, NM 88005. Comments may be electronically mailed to: *LCFO_RMP@nm.blm.gov.* Comments may be faxed to the BLM at: (505) 525–4412. Comments that are e-mailed or faxed must include ''Comments on Draft McGregor RMPA/EIS'' in the subject line. Interested parties may also provide written comments during the public open house meetings and hearings. The BLM will only accept comments on the Draft McGregor Range RMPA/EIS if they are submitted in one of the four ways described above. To be given consideration by the BLM all DEIS/RMPA comment submittals must include the commenter's name and street address.

Our practice is to make comments, including the names and street addresses of each respondent, available for public review at the BLM office listed above during business hours 7:45 a.m. to 4:30 p.m., Monday through Friday, except for Federal holidays. Your comments may be published as part of the EIS process. Individual respondents may request confidentiality. If you wish to withhold your name or street address, or both, from public review or from disclosure under the Freedom of Information Act, you must state this prominently at the beginning of your written comments. Such requests will be honored to the extent allowed by law. We will not consider anonymous comments. All submissions from organizations and businesses will be made available for public inspection in their entirety.

FOR FURTHER INFORMATION CONTACT: Mr. Tom Phillips, RMPA Team Leader, at the BLM Las Cruces Field Office (see address above), telephone (505) 525–4377. Requests for information may be sent electronically to: *LCFO_RMP@nm.blm.gov* with ''Attention: McGregor RMPA Information Request'' in the subject line.

SUPPLEMENTARY INFORMATION: In 1990, the BLM approved the McGregor Range RMPA that established management direction for the BLM managed withdrawn public lands and resources administered by the BLM Las Cruces Field Office, New Mexico. The administrative area is located in southern Otero County, New Mexico, and includes approximately 606,233 acres of withdrawn public lands within McGregor Range, which is a military training range managed by Ft. Bliss, Texas. Within the McGregor Range, Ft. Bliss administers an additional 70,884 acres owned by the Department of Defense and 17,864 acres managed by the U.S. Forest Service. In 1999, the Military Lands Withdrawal Act (PL 106–65) reauthorized the withdrawn public lands within McGregor Range for use by the Secretary of the Army for military maneuvering, training, and equipment development and testing; training for aerial gunnery, rocketry, electronic warfare; and tactical maneuvering and air support associated with the Air Force Tactical Target Complex; and other defense-related purposes. The Military Lands Withdrawal Act also directed the Secretary of the Interior, after consultation with the Secretary of the Army, to develop a plan for the management of withdrawn public lands. The DEIS documents the direct, indirect, and cumulative environmental impacts of four alternative plans for BLM-administered withdrawn public lands within the McGregor Range. The DEIS describes the physical, biological, cultural, historic, and socioeconomic resources in and around the surrounding planning area. The focus for impact analysis was based on resource issues and concerns identified during scoping and public involvement activities and opportunities. Potential impacts of concern regarding possible management direction and planning decisions (not in priority order) are: development of energy resources and mineral-related issues; special management designations; resource accessibility; special status species management; recreation access and opportunity; and cultural resources management.

Four alternatives were analyzed in detail: The No-action Alternative represents the continuation of existing management plans, policies, and decisions as established in the 1990 McGregor Range RMPA. Alternative A represents a balance of resource use and conservation. Alternative B emphasizes resource use and production. Alternative C represents an emphasis of resource conservation, protection, and enhancement of natural and cultural resources. The BLM's preferred alternative is Alternative A.

Since the publication of the Notice of Intent (NOI) to prepare an RMPA and EIS in the **Federal Register** on May 15, 2001, open house meetings, scoping meetings, and mailings have been conducted to solicit public comments and input. The Las Cruces Field Office has been providing updates on the development of this RMPA to the Otero County Board of Commissioners and the New Mexico Resource Advisory Council. Tribal governments with interests in the McGregor Range area were also contacted. From the publication date of the NOI in the **Federal Register**, through September 30, 2004, the BLM solicited for and received approximately 42 written comments from interested parties. In addition, two public meetings were held to provide the public with an opportunity to acquire information about the RMPA process and its status, and to submit comments. These public meetings were held in Alamogordo, New Mexico, on June 20, 2001, and in Las Cruces, New Mexico, on June 21, 2001. The two meetings resulted in 47 oral comments from the public. All comments presented throughout the process have been considered. Background information and maps used in developing the DEIS and RMPA are available for public viewing at the Las Cruces Field Office at the above address.

Dated: November 23, 2004.

Linda S.C. Rundell,

New Mexico State Director.

[FR Doc. 05–1689 Filed 1–28–05; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY–100–05–1310–DB]

Notice of Meeting of the Pinedale Anticline Working Group

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act (1976) and the Federal Advisory Committee Act (1972), the U.S. Department of the Interior, Bureau of Land Management (BLM) Pinedale Anticline Working Group (PAWG) will meet in Pinedale, Wyoming, for a business meeting. Group meetings are open to the public.

DATES: The PAWG will meet March 2 and 3, 2005, from 9 a.m. until 5 p.m.

ADDRESSES: The meeting of the PAWG will be held in the Lovatt room of the Pinedale Library, 155 S. Tyler Ave., Pinedale, WY.

FOR FURTHER INFORMATION CONTACT: Carol Kruse, BLM/PAWG Liaison, Bureau of Land Management, Pinedale Field Office, 432 E. Mills St., PO Box 738, Pinedale, WY, 82941; 307–367–5352.

SUPPLEMENTARY INFORMATION: The Pinedale Anticline Working Group (PAWG) was authorized and established with release of the Record of Decision (ROD) for the Pinedale Anticline Oil and Gas Exploration and Development Project on July 27, 2000. The PAWG advises the BLM on the development and implementation of monitoring plans and adaptive management decisions as development of the Pinedale Anticline Natural Gas Field (PAPA) proceeds for the life of the field.

After the ROD was issued, Interior determined that a Federal Advisory Committees Act (FACA) charter was required for this group. The charter was signed by Secretary of the Interior, Gale Norton, on August 15, 2002, and renewed on August 13, 2004. An announcement of committee initiation and call for nominations was published in the **Federal Register** on February 21, 2003, (68 FR 8522). PAWG members were appointed by Secretary Norton on May 4, 2004.

The agenda for these meetings will include discussions and recommendations on proposed monitoring plans submitted by individual task groups. At a minimum, public comments will be heard prior to lunch and adjournment of the meeting each day.

Dated: January 17, 2004.

Priscilla E. Mecham,

Field Office Manager.

[FR Doc. 05–1673 Filed 1–28–05; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[OR–027–1020–PI–020H; G–05–0052]

Notice To Cancel a Public Meeting, Steens Mountain Advisory Council

AGENCY: Bureau of Land Management (BLM), Interior.

ACTION: Cancellation notice of public meeting for the Steens Mountain Advisory Council.

SUMMARY: The February 7 and 8, 2005, Steens Mountain Advisory Council Meeting, previously scheduled to be held at the Bureau of Land Management (BLM), Burns District Office, 28910 Highway 20 West, Hines, Oregon 97738, has been cancelled. The original **Federal Register** notice announcing the meeting was published Tuesday, December 14, 2004, page number 74535.

FOR FURTHER INFORMATION CONTACT: Additional information concerning the SMAC may be obtained from Rhonda Karges, Management Support Specialist, Burns District Office, 28910 Highway 20 West, Hines, Oregon, 97738, (541) 573–4400 or *Rhonda_Karges@or.blm.gov* or from the following Web site: *http://www.or.blm.gov/Steens.*

Dated: January 25, 2005.

Karla Bird,

Andrews Resource Area Field Manager.

[FR Doc. 05–1715 Filed 1–28–05; 8:45 am]

BILLING CODE 4310–AG–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[ID 933–1430–ET; DK–G05–0001; ID–15248]

Public Land Order No. 7624; Revocation of Secretarial Order Dated October 22, 1920; Idaho

AGENCY: Bureau of Land Management, Interior.

ACTION: Public Land Order.

SUMMARY: This order revokes a Secretarial Order in its entirety as it affects 36,578.69 acres of land withdrawn for the Bureau of Reclamation's Minidoka Project, American Falls Reservoir. The land is located within the Fort Hall Indian Reservation and would return to the management and jurisdiction of the Bureau of Indian Affairs.

EFFECTIVE DATES: January 31, 2005.

FOR FURTHER INFORMATION CONTACT: Jackie Simmons, BLM Idaho State Office, 1387 South Vinnell Way, Boise, Idaho, 208–373–3867.

SUPPLEMENTARY INFORMATION: A copy of the original Secretarial Order dated October 22, 1920 describing the land involved is available at the BLM Idaho State Office at the address above.

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:

The Secretarial Order dated October 22, 1920, which withdrew 36,578.69 acres of land for the Bureau of Reclamation's Minidoka Project American Falls Reservoir, is hereby revoked in its entirety.

Dated: January 6, 2005.

Rebecca W. Watson,

Assistant Secretary—Land and Minerals Management.

[FR Doc. 05–1690 Filed 1–28–05; 8:45 am]

BILLING CODE 4310–33–P

DEPARTMENT OF THE INTERIOR

National Park Service

National Register of Historic Places; Notification of Pending Nominations and Related Actions

Nominations for the following properties being considered for listing or related actions in the National Register were received by the National Park Service before January 8, 2005. Pursuant to § 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 February 15, 2005.

Carol D. Shull,

Keeper of the National Register of Historic Places.

ARKANSAS

Conway County

Mellettown United Methodist Church, (Mixed Masonry Buildings of Silas Owens, Sr. MPS) 274 Mallett Town Rd., Mallet Town, 05000041.

Faulkner County

Church of Christ, (Mixed Masonry Buildings of Silas Owens, Sr. MPS) AR 310, Guy, 05000040.
Hooten, E.E., House, (Mixed Masonry Buildings of Silas Owens, Sr. MPS) 400 AR 25 N, Guy, 05000039.
Lee Service Station, (Mixed Masonry Buildings of Silas Owens, Sr. MPS) 28 South Broadway, Damascus, 05000044.
Merritt, S.D., House, (Mixed Masonry Buildings of Silas Owens, Sr. MPS) 45 AR 25 N, Greenbrier, 05000038.
Owens, Silas, Sr., House, (Mixed Masonry Buildings of Silas Owens, Sr. MPS) 157 Solomon Grove Rd., Twin Groves, 05000045.
Sellers House, (Mixed Masonry Buildings of Silas Owens, Sr. MPS) 89 Acklin Gap Rd., Conway, 05000042.
Spears House, (Mixed Masonry Buildings of Silas Owens, Sr. MPS) 1235 AR 65 N, Greenbrier, 05000043.

Washington County

Morton, Mack, Barn, 11516 Appleby Rd., Appleby, 05000047.

CALIFORNIA

Los Angeles County

Petitfils—Boos House, 545 Plymouth Blvd., Los Angeles, 05000049.
Storrier—Stearns Japanese Garden, 270 Arlington Dr., Pasadena, 05000050.
Textile Center Building, 315 E. Eighth St., Los Angeles, 05000048.

DISTRICT OF COLUMBIA

District of Columbia

Woodward and Lothrop Service Warehouse, 131 M St. NE., Washington, 05000046.

FLORIDA

Broward County

Hammerstein House, 1520 Polk St., Hollywood, 05000051.
Hollywood Garden Club, 2940 Hollywood Blvd., Hollywood, 05000052.

GEORGIA

Bibb County

League, Ellamae Ellis, House, 1790 Waverland Dr., Macon, 05000053.

MAINE

Cumberland County

Caswell Public Library (Former), (Maine Public Libraries MPS) 42 Main St., Harrison, 05000056.
Dyke Mountain Annex, 319 Dyke Mountain Rd., Sebago, 05000059.
Payson House at Thornhurst, 48 Thornhurst Rd., Falmouth, 05000057.

Kennebec County

Heald House, 19 West St., Waterville, 05000058.

Oxford County

Otisfield Town House (Former), 53 Bell Hill Rd., Otisfield, 05000055.

York County

Parsons—Piper—Lord—Roy Farm, 309 Cramm Rd., Parsonsfield, 05000054.

NORTH DAKOTA

Ward County

Our Savior's Scandinavian Lutheran Church, 1 mi. N of NM 50 and 0.25 mi. W of Ward Cty Hwy 1, Coulee, 05000060.

PENNSYLVANIA

Fayette County

Summit Hotel, 101 Skyline Dr., North Union, 05000062.

Northampton County

Bethlehem Silk Mill, 238 W. Goepp St., Bethlehem, 05000065.

Philadelphia County

Plaza Apartments, 1719–1725 N 33rd Sts., 3226–3228 Clifford St., Philadelphia, 05000063.
St. Anthony Hall House, 3637 Locust Walk, University of Pennsylvania, Philadelphia, 05000064.

PUERTO RICO

San Juan Municipality

Edificio Patio Espanol, 153 Cruz St., San Juan, 05000061.

WASHINGTON

Mason County

taba das, Address Restricted, Potlatch, 05000066.

[FR Doc. 05–1662 Filed 1–28–05; 8:45 am]

BILLING CODE 4312–51–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

Meeting of the Yakima River Basin Conservation Advisory Group, Yakima River Basin Water Enhancement Project, Yakima, WA

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of meeting.

SUMMARY: As required by the Federal Advisory Committee Act, notice is hereby given that the Yakima River Basin Conservation Advisory Group, Yakima River Basin Water Enhancement Project, Yakima, Washington, established by the Secretary of the Interior, will hold a public meeting. The purpose of the Conservation Advisory Group is to provide technical advice and counsel to the Secretary of the Interior and Washington State on the structure, implementation, and oversight of the Yakima River Basin Water Conservation Program.

DATES: Wednesday, February 23, 2005, 9 a.m.–4 p.m.

ADDRESSES: Bureau of Reclamation Office, 1917 Marsh Road, Yakima, Washington.

FOR FURTHER INFORMATION CONTACT: Mr. James Esget, Manager, Yakima River Basin Water Enhancement Project, 1917 Marsh Road, Yakima, Washington, 98901; 509–575–5848, extension 267.

SUPPLEMENTARY INFORMATION: The purpose of the meeting will be to review the staff reports requested at the last meeting and provide program oversite. This meeting is open to the public.

Dated: January 12, 2005.

James A. Esget,

Program Manager.

[FR Doc. 05–1714 Filed 1–28–05; 8:45 am]

BILLING CODE 4310–MN–M

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Summary of Decisions Granting in Whole or in Part Petitions for Modification

AGENCY: Mine Safety and Health Administration (MSHA), Labor.

ACTION: Notice of affirmative decisions issued by the Administrators for Coal Mine Safety and Health and Metal and Nonmetal Mine Safety and Health on petitions for modification of the application of mandatory safety standards.

SUMMARY: Under section 101 of the Federal Mine Safety and Health Act of 1977, the Secretary of Labor (Secretary) may allow the modification of the application of a mandatory safety standard to a mine if the Secretary determines either that an alternate method exists at a specific mine that will guarantee no less protection for the miners affected than that provided by the standard, or that the application of the standard at a specific mine will result in a diminution of safety to the affected miners.

Final decisions on these petitions are based on the petitioner's statements, comments and information submitted by interested persons, and a field investigation of the conditions at the mine. MSHA, as designee of the

Secretary, has granted or partially granted the requests for modification listed below. In some instances, the decisions are conditioned upon compliance with stipulations stated in the decision. The term FR Notice appears in the list of affirmative decisions below. The term refers to the **Federal Register** volume and page where MSHA published a notice of the filing of the petition for modification.

FOR FURTHER INFORMATION CONTACT: Petitions and copies of the final decisions are available for examination by the public in the Office of Standards, Regulations, and Variances, MSHA, 1100 Wilson Boulevard, Room 2350, Arlington, Virginia 22209. For further information contact Barbara Barron at 202–693–9447.

Dated at Arlington, Virginia, this 25th day of January 2005.

Rebecca J. Smith,

Deputy Director, Office of Standards, Regulations, and Variances.

Affirmative Decisions on Petitions for Modification

Docket No.: M–2004–015–C.
FR Notice: 69 FR 23540.
Petitioner: Oxbow Mining, Inc.
Regulation Affected: 30 CFR 75.1100–2(b).
Summary of Findings: Petitioner's proposal is to use an alternative method for installing water lines for the entire length of the belt conveyors in lieu of keeping water line charged with water at all times. The Elk Creek Mine belt entry portal sits at approximately 6300 feet elevation, and in winter weather conditions causes freezing in the existing water line in the conveyor entry. This is considered an acceptable alternative method for the Elk Creek Mine. MSHA grants the petition for modification for the North Mains belt conveyor from crosscut 11 outby for the Elk Creek Mine with conditions.

Docket No.: M–2004–016–C.
FR Notice: 69 FR 23540.
Petitioner: Dolet Hills Lignite Company.
Regulation Affected: 30 CFR 77.803.
Summary of Findings: Petitioner's proposal is to use an alternative method of compliance when raising or lowering the boom and mast at construction sites during initial Dragline assembly. This method would only be used during the boom and mast raising or lowering process. The machine will not be performing mining operations when raising or lowering the boom for construction and maintenance. This is considered an acceptable alternative method for the Dolet Hills Lignite Mine. MSHA grants the petition for modification for dragline boom or mast raising, lowering, assembling, disassembling, or during major repairs which require raising or lowering the dragline boom or mast by the on-board generators for the Dolet Hills Lignite Mine with conditions.

Docket No.: M–2004–019–C.
FR Notice: 69 FR 27955.
Petitioner: Oak Grove Resources, LLC.
Regulation Affected: 30 CFR 75.507.
Summary of Findings: Petitioner's proposal is to use high-voltage submersible pumps in boreholes in an area of the Oak Creek Mine where water has accumulated. The pumps will be equipped with probes to determine a high and low water level, and will consist of redundant electronic pressure transducers that are suitable for submersible pump control application. This is considered an acceptable alternative method for the Oak Grove Mine. MSHA grants the petition for modification for the use of three-phase, alternating current submersible pump(s) installed in return and bleeder entries and in sealed areas in the Oak Grove Mine with conditions.

Docket No.: M–2004–020–C.
FR Notice: 69 FR 30726.
Petitioner: D & D Anthracite Coal Company.
Regulation Affected: 30 CFR 75.335.
Summary of Findings: Petitioner's proposal is to use wooden materials of moderate size and weight for constructing seals due to the difficulty in accessing previously driven headings and breasts containing inaccessible abandoned workings; to accept a design criteria in the 10 psi range; and to permit the water trap to be installed in the gangway seal and sampling tube in the monkey seal for seals installed in pairs. This is considered an acceptable alternative method for the Primrose Slope Mine. MSHA grants the petition for modification for seals installed in the Primrose Slope Mine with conditions.

Docket No.: M–2004–024–C.
FR Notice: 69 FR 35686.
Petitioner: Consolidation Coal Company.
Regulation Affected: 30 CFR 75.364(b)(2).
Summary of Findings: Petitioner's proposal is to establish evaluation check points 1 and 2 to evaluate and confirm the proper ventilation between the Sugar Run Seals and the 3 North Bleeder Seals areas through the Main North headings, due to deteriorating rib and roof conditions which will expose personnel to hazardous conditions if the affected area is traveled in its entirety. This is considered an acceptable alternative method for the Loveridge No. 22 Mine. MSHA grants the petition for modification for the unsafe-to-travel segment (approximately 950 feet) of the Sugar Run Bottom area designated return entries used in ventilating between the Sugar Run Seals and the 3 North Bleeder Seals of the Loveridge No. 22 Mine with conditions.

Docket No.: M–2004–025–C.
FR Notice: 69 FR 43628.
Petitioner: Consolidation Coal Company.
Regulation Affected: 30 CFR 75.312(c) and (d).
Summary of Findings: Petitioner's proposal is to test automatic closing doors and the automatic fan signal device at least every 31 days without removing miners from the mine. The petitioner will install an alarm system on the fans. The alarm system will have a mechanical switch mounted to the fan housing and designed to activate a relay in the fan monitoring panel when the air reversal prevention door is in the closed position. The relay will activate a warning light near the door location, and an audible and visible alarm will be provided at a location where a responsible person is always on duty in the working sections and will have a two-way communication while miners are working underground. This is considered an acceptable alternative method for the Loveridge No. 22 Mine. MSHA grants the petition for modification for tests of (1) the automatic fan stoppage signal device and (2) the automatically closing airflow-reversal-prevention doors to be performed without shutting down the mine fan, and without removing the miners from the mine at the Loveridge No. 22 Mine with conditions.

Docket No.: M–2004–027–C.
FR Notice: 69 FR 43628.
Petitioner: Snyder Coal Company.
Regulation Affected: 30 CFR 49.2.
Summary of Findings: Petitioner's proposal is to use two mine rescue teams of three members with one alternate to serve both teams in lieu of two mine rescue teams with five members and one alternate. The petitioner asserts that to use five or more rescue team members in the confined working places of the mine would result in a diminution of safety to the miners and the rescue team. This is considered an acceptable alternative method for the No. 1 Rock Slope Mine. MSHA grants the petition for modification for the No. 1 Rock Slope Mine with conditions.

Docket No.: M–2004–031–C.
FR Notice: 69 FR 43628.
Petitioner: Eastern Associated Coal Corporation.

Regulation Affected: 30 CFR 75.507.

Summary of Findings: Petitioner's proposal is to use a 480-volt, three-phase alternating current electric power circuit for its non-permissible deep well submersible pump installed in the Shriver Shaft. This petition was filed for existing safety standard 30 CFR 75.364(b)(7). The applicable section of the regulation is 30 CFR 75.507, because item 4 of the special terms and conditions in a previous petition for modification, docket number M–86–35–C, granted November 17, 1986, and made final December 20, 1986, states ''Air passing through the tunnel shall not be used to ventilate non-permissible electric equipment or components.'' MSHA is requiring, for this 30 CFR 75.507 petition only, that the surface pump installations and control and power circuits(s) be examined under the 30 CFR 77.502 requirements because the circuit(s) that enter into the underground areas of the mine cannot be examined in their entirety to satisfy the requirements of 30 CFR 75.512 or the 30 CFR 75.364(b)(7) week examination requirement. This is considered an acceptable alternative method for the Federal No. 2 Mine. MSHA grants the petition for modification for the Federal No. 2 Mine with conditions.

Docket No.: M–2004–037–C.

FR Notice: 69 FR 55841.

Petitioner: Eastern Associated Coal Corporation.

Regulation Affected: 30 CFR 75.503.

Summary of Findings: Petitioner's proposal is to use trailing cables longer than the cable length specified in 30 CFR 18.35 for certain roof bolters, mobile roof supports, and shuttle cars. The cables for roof bolters will not exceed 900 feet, and 850 feet for shuttle cars. The cables for the 480-volt mobile roof supports will not be smaller than a No. 4 A.W.G., the trailing cables for roof bolters (e) will not be smaller than No. 2 A.W.G., and the cables for shuttle cars will not be smaller than No. 1/0. This is considered an acceptable alternative method for the Harris No. 1 Mine. MSHA grants the petition for modification for the Harris No. 1 Mine with conditions.

[FR Doc. 05–1694 Filed 1–28–05; 8:45 am]

BILLING CODE 4510–43–P

LEGAL SERVICES CORPORATION

Sunshine Act Meetings of the Board of Directors and Four of the Board's Committees

TIMES AND DATES: The Legal Services Corporation Board of Directors and four of its Committees will meet February 4–5, 2005 in the order in which set forth in the following schedule.

Meeting Schedule

Friday, February 4, 2005

9 a.m.

1. Annual Performance Reviews Committee
2. Finance Committee
3. Provision for the Delivery of Legal Services Committee
4. Operations & Regulations Committee

Saturday, February 5, 2005

9:15 a.m.

1. Operations & Regulations Committee
2. Board of Directors

LOCATION: The Melrose Hotel, 2430 Pennsylvania Avenue, NW.

STATUS OF MEETINGS: Open, except as noted below.

• *Status:* February 4, 2005 Annual Performance Reviews Committee Meeting—Closed. The Performance Reviews Committee meeting will be closed to the public. The closing is authorized by the relevant provisions of the Government in the Sunshine Act [5 U.S.C. 552b(c)(2) and (6)] and the Legal Services Corporation's corresponding regulation 45 CFR 1622.5(a) and (e). A copy of the General Counsel's Certification that the closing is authorized by law will be available upon request.

• *Status:* February 5, 2005 Board of Directors Meeting—Open, except that a portion of the meeting of the Board of Directors may be closed pursuant to a vote of the Board of Directors to hold an executive session. At the closed session, the Corporation's General Counsel will report to the Board on litigation to which the Corporation is or may become a party, and the Board may act on the matters reported. The closing is authorized by 5 U.S.C. 552b(c)(2) and LSC's corresponding regulation 45 CFR 1622.5(a); 5 U.S.C. 552b(c)(6) and LSC's corresponding regulation 45 CFR 1622.5(e); 5 U.S.C. 552b(c)(7) and LSC's implementing regulation 45 CFR 1622.5(f)(4), and 5 U.S.C. 522b(c)(9)(B) and LSC's implementing regulation 45 CFR 1622.5(g); and 5 U.S.C. 552b(c)(10) and LSC's corresponding regulation 45 CFR 1622.5(h). A copy of the General Counsel's Certification that the closing is authorized by law will be available upon request.

MATTERS TO BE CONSIDERED:

Friday, February 4, 2005

Annual Performance Reviews Committee (February 4, 2004)

Closed Session

1. Approval of agenda
2. Approval of the minutes of the Executive Session of the Committee's meeting of November 19, 2004
3. Consider and act on internal procedures for annual performance evaluations of LSC President and Inspector General
4. Meet with Helaine Barnett
5. Consider and act on other business

Finance Committee

Open Session

1. Approval of agenda
2. Approval of the minutes of the Committee's meeting of November 20, 2004
3. Approval of the minutes of the Executive Session of the Committee's meeting of November 20, 2004
4. Presentation by Inspector General of the FY 2004 annual financial audit
5. Presentation of LSC's Financial Reports for the two-Month Period Ending November 30, 2004
6. Consider and act on the President's and Inspector General's recommendations for the FY 2005 Consolidated Operating Budget
7. Discussion of FY 2006 Budget Request
8. Review and act on a resolution to amend the LSC Flexible Benefits Plan
9. Report on Veterans Program
   - David Isbell, Chair of the Veterans Consortium Pro Bono Program
   - Chief Judge Ivers of the U.S. Court of Appeals for Veterans Claims
   - Bristow Hardin, OPP Staff
10. Public comment
11. Consider and act on other business
12. Consider and act on adjournment of meeting

Closed Session

13. Briefing [1] on OIG Budget

Committee on Provision for the Delivery of Legal Services

1. Approval of agenda

[1] Any portion of the closed session consisting solely of staff briefings does not fall within the Sunshine Act's definition of the term ''meeting'' and, therefore, the requirements of the Sunshine Act do not apply to any such portion of the closed session. 5 U.S.C. 552(b)(a)(2) and (b). See also 45 CFR 1622.2 and 1622.3.

2. Approval of the Committee's meeting minutes of November 19, 2004
3. Presentation on Mapping Project
   • Introduction by Kirt West, Inspector General
   • Report by David Maddox, OIG Staff
4. Presentation on Technology Initiative Grants
   • Introduction by Michael Genz, Director, OPP
   • Report by Joyce Raby and Glenn Rawdon, OPP Staff
5. Report on Mentoring Project
   • Introduction by Helaine Barnett
   • Report by members of the LSC Mentoring Committee
6. Public comment
7. Consider and act on other business
8. Consider and act on adjournment of meeting

Operations & Regulations Committee (February 4–5, 2005)

Open Session

1. Approval of agenda
2. Approval of the Committee's meeting minutes of November 19–20, 2004
3. Approval of the minutes of the Executive Sessions of the Committee's meetings of November 19–20, 2004
4. Consider and act on Notice of Proposed Rulemaking on Financial Eligibility, 45 CFR Part 1611
   a. Staff report;
   b. OIG's report; and
   c. Public comment
5. Consider and act on Mr. Dean Andal's petition for rulemaking to amend LSC regulations on Class Actions, 45 CFR Part 1617
   a. Staff report;
   b. OIG's report; and
   c. Public Comment
6. Briefing by OIG and OCE on Compliance Responsibilities

Closed Session

7. Briefing on Salaries and Benefits of LSC Employees
   • Kirt West and Helaine Barnett
8. Inspector General's Briefing on the OIG's Review of the Lease for 3333 K Street

Open Session

9. Other public comment
10. Consider and act on other business
11. Consider and act on adjournment of meeting

Saturday, February 5, 2005

Operations & Regulations Committee (February 4–5, 2005)

Open Session

1. Approval of agenda
2. Approval of the Committee's meeting minutes of November 19–20, 2004
3. Approval of the minutes of the Executive Sessions of the Committee's meetings of November 19–20, 2004
4. Consider and act on Notice of Proposed Rulemaking on Financial Eligibility, 45 CFR Part 1611
   d. Staff report;
   e. OIG's report; and
   f. Public comment
5. Consider and act on Mr. Dean Andal's petition for rulemaking to amend LSC regulations on Class Actions, 45 CFR Part 1617
   b. Staff report;
   b. OIG's report; and
   c. Public Comment
6. Briefing by OIG and OCE on Compliance Responsibilities

Board of Directors Annual Meeting

Open Session

1. Consider and act on nominations for the Chairman of the Board of Directors
2. Consider and act on nominations for the Vice Chairman of the Board of Directors
3. Consider and act on delegation to Chairman of authority to make committee assignments
4. Approval of minutes of the Board's meeting of November 20, 2004
5. Approval of minutes of the Executive Session of the Board's meeting of November 20, 2004
6. Approval of minutes of the Executive Session of the Search Committee's meeting of July 19, 2004
7. Approval of minutes of the Executive Session of the Search Committee's meeting of August 12, 2004
8. Chairman's Report
9. Members' Reports
10. President's Report
11. Inspector General's Report
12. Consider and act on the report of the Committee on the Provision for the Delivery of Legal Services
13. Consider and act on the report of the Finance Committee
14. Consider and act on the report of the Operations & Regulations Committee
15. Consider and act on the report of the Annual Performance Reviews Committee
16. Consider and act on Board's meeting schedule for calendar year 2005
17. Report on LSC Pilot Loan Repayment Assistance Program (LRAP)
18. Consider and act on other business
19. Public comment
20. Consider and act on whether to authorize an executive session of the Board to address items listed below under Closed Session

Closed Session

21. Briefing by the Inspector General on the activities of the Office of Inspector General
22. Consider and act on General Counsel's report on potential and pending litigation involving LSC
23. Briefing on Board Travel Policies
24. Consider and act on motion to adjourn meeting

CONTACT PERSON FOR INFORMATION: Patricia D. Batie, Manager of Board Operations, at (202) 295–1500.

SPECIAL NEEDS: Upon request, meeting notices will be made available in alternate formats to accommodate visual and hearing impairments. Individuals who have a disability and need an accommodation to attend the meeting may notify Patricia D. Batie, at (202) 295–1500.

Dated: January 27, 2005.

Victor M. Fortuno,

Vice President for Legal Affairs, General Counsel & Corporate Secretary.

[FR Doc. 05–1781 Filed 1–27–05; 10:37 am]

BILLING CODE 7050–01–P

NATIONAL SCIENCE FOUNDATION

Agency Information Collection Activities: Comment Request

AGENCY: National Science Foundation.

ACTION: Submission for OMB Review: comment request.

SUMMARY: The National Science Foundation (NSF) has submitted the following information collection requirement to OMB for review and clearaqnce under the Paperwork Reduction Act of 1995, Public Law 104–13. This is the second notice for public comment; the first was published in the **Federal Register** at 69 FR 62304, and no comments were received. NSF is forwarding the proposed renewal submission to the Office of Managaement and Budget (OMB) for clearance simultaneously with the publication of this second notice. 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: Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for National Science Foundation, 725–17th Street, NW., Room 10235, Washington, DC 20503, and to Suzanne H. Plimpton, Reports Clearance Officer, National Science Foundation, 4201 Wilson Boulevard, Suite 295, Arlington, Virginia 22230 or send an e-mail to *splimpto@nsf.gov.* 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 703–292–7556.

NSF 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.

SUPPLEMENTARY INFORMATION:

Abstract: The National Science Foundation (NSF), Division of Human Resources Management (HRM), as part of its Workforce Planning efforts, is continuing to reengineer its business processes. Part of this reengineering effort is devoted to making the application and referral process for both internal and external applicants easier to use, more efficient and timely. Applicants apply on-line using a Web-based résumé, which prompts them to provide pertinent personal data necessary to apply for a position.

Use of the Information: The information is used by NSF to provide applicants with the ability to apply electronically for NSF positions and receive notification as to their qualifications, application dispensation and to request to be notified of future vacancies for which they may qualify.

In order to apply for vacancies, applicants are encouraged to submit certain data in order to receive consideration. Users only need access to the Internet for this system to work. This information is used to determine which applicants are best qualified for a position, based on applicant responses to a series of job related ''yes/no'' or ''multiple choice'' questions. The resume portion requires applicants to provide the same information they would provide were they submitting a paper OF–612. The obvious benefit being that the applicant may do so online, 24 hours a day/seven days a week and receive electronic notification about the status of their application or information on other vacancies for which they may qualify. Staff members of the Division of Human Resource Management and the selecting official(s) for specific positions for which applicants apply are the only ones privy to the applicant data. The most significant data is not the applicant personal data such as address or phone number but rather their description of their work experience and their corresponding responses to those questions, which determine their overall rating, ranking, and referral to the selecting official.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 45 minutes to create the on line resume and potentially less than 45 minutes to apply for jobs on-line.

There is no financial burden on the applicant, infact this relieves much of the burden the former paper-intensive process puts on applicants.

Respondents: Individuals. 7971 applicants applied for NSF vacancies between October 2003 and September 2004.

Average Number of Applicants: Approximately 42 responses per job opening for vacancy announcements between October 2003 and September 2004.

Estimated Total Annual Burden on Respondents: Approximately 45 minutes per respondent total time is all that is needed to complete the on-line application, for a total of 5,978.25 hours annually.

Frequency of Responses: Applicants need only complete the resume one time, and they may use that resume to apply as often as they wish for any NSF job opening.

Dated: January 25, 2005.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 05–1677 Filed 1–28–05; 8:45 am]

BILLING CODE 7555–01–M

NATIONAL SCIENCE FOUNDATION

National Science Board and Its Subdivisions; Sunshine Act Meeting

DATE AND TIME: February 8, 2005.

February 8, 2005: 9:15 a.m.–3:30 p.m.

Concurrent Sessions

9:15 a.m.–10:30 a.m. Open
10:30 a.m.–10:45 a.m. Closed
10:45 a.m.–11:30 a.m. Open
11:30 a.m.–12:15 p.m. Open
12:15 p.m.–12:30 p.m. Closed
12:30 p.m.–12:45 p.m. Open
12:45 p.m.–1 p.m. Closed
1:30 p.m.–1:35 p.m. Closed
1:35 p.m.–1:45 p.m. Closed
1:45 p.m.–3:30 p.m. Open

PLACE: The University of Texas El Paso (UTEP), Geological Sciences Building (Geology Building), 500 W. University Avenue, El Paso, TX 79968, *http://www.nsf.gov/nsb.*

FOR FURTHER INFORMATION CONTACT: NSF Information Center (703) 292–5111.

STATUS: Part of this meeting will be closed to the public.

Part of this meeting will be open to the public.

MATTERS TO BE CONSIDERED:

Tuesday, February 8, 2005

Open

Committee on Education & Human Resources (9:15 a.m.–10:30 a.m.), Room 308, Geological Sciences Building, UTEP
- Approval of Minutes
- Discussions on Strategic Plans for EHR Committee

Committee on Programs & Plans (10:45 a.m.–11:30 a.m.), Room 318, Geological Sciences Building, UTEP
- Approval of Minutes
- Working Group Report: Long-lived Data Collections Task Group: Status of Draft Report
- Report on Major Research Facilities: Status of Report and Facility Guide Revisions

Committee on Strategy & Budget (11:30 a.m.–12:15 p.m.), Room 318, Geological Sciences Building, UTEP
- Approval of Minutes
- Status of FY 2006 budget request to Congress

Executive Committee (12:30 p.m.–12:45 p.m.), Room 318, Geological Sciences Building, UTEP
- Approval of Minutes
- Updates or new business from Committee Members

Closed

Committee on Programs & Plans (10:30 a.m.–10:45 a.m.), Room 318, Geological Sciences Building, UTEP
- NSB Information—Inter-American Institute for Global Change Research

Committee on Strategy & Budget (12:15 p.m.–12:30 p.m.), Room 318, Geological Sciences Building, UTEP
- Discussion of budget and programmatic tradeoffs

Executive Committee (12:45 p.m.–1 p.m.), Room 318, Geological Sciences Building, UTEP

- Director's Items

Plenary Session of the Board (1:30 p.m.–3:30 p.m.)

Executive Closed Plenary Session (1:30 p.m.–1:35 p.m.), Room 318, Geological Sciences Building, UTEP

- Approval of Executive Closed Minutes

Closed Plenary Session (1:35 p.m.–1:45 p.m.), Room 318, Geological Sciences Building, UTEP

- Approval of Closed Session Minutes
- Closed Committee Reports

Open Plenary Session of the Board (1:45 p.m.–3:30 p.m.), Reading Room, Geological Sciences Building, UTEP

- Approval of Open Session Minutes
- Resolution to Close March 2005 Meeting
- NSB Chairman's Report
- NSF Director's Report
- Committee Reports

Michael P. Crosby,

Executive Officer, NSB.

[FR Doc. 05–1763 Filed 1–26–05; 4:01 pm]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 30–5980 and 30–5982; ASLBP No. 04–833–07–MLA]

Safety Light Corporation; Notice of Reconstitution

Pursuant to 10 CFR 2.321, the Atomic Safety and Licensing Board in the above captioned *Safety Light Corporation* proceeding is hereby reconstituted by appointing Administrative Judge Alan S. Rosenthal in place of Administrative Judge Ann M. Young.

In accordance with 10 CFR 2.302, henceforth all correspondence, documents, and other material relating to any matter in this proceeding over which this Licensing Board has jurisdiction should be served on Administrative Judge Rosenthal as follows: Administrative Judge Alan S. Rosenthal, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission,Washington, DC 20555–0001.

Issued at Rockville, Maryland, this 25th day of January 2005.

G. Paul Bollwerk, III,

Chief Administrative Judge, Atomic Safety and Licensing Board Panel.

[FR Doc. 05–1687 Filed 1–28–05; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 030–31689]

Notice of Availability of Environmental Assessment and Finding of NoSignificant Impact for License Amendment for the Department of Health and Human Services' Facility in Kensington, MD

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of availability.

FOR FURTHER INFORMATION CONTACT: Bryan A. Parker, Health Physicist, Commercial and R&D Branch, Division of Nuclear Materials Safety, Region I, 475 Allendale Road, King of Prussia, Pennsylvania, 19406, telephone (404) 562–4728, fax (610) 337–5269; or by email: *bap@nrc.gov*.

SUPPLEMENTARY INFORMATION:

I. Introduction

The Nuclear Regulatory Commission (NRC) is issuing a license amendment to the Department of Health and Human Services for Materials License No. 19–07538–05, to authorize release of its facility in Kensington, Maryland for unrestricted use. NRC has prepared an Environmental Assessment (EA) in support of this action in accordance with the requirements of 10 CFR Part 51. Based on the EA, the NRC has concluded that a Finding of No Significant Impact (FONSI) is appropriate. The amendment will be issued following the publication of this Notice.

II. EA Summary

The purpose of the action is to authorize the release of the licensee's Kensington, Maryland facility for unrestricted use. The Department of Health and Human Services was authorized by NRC from May 29,1990, to use radioactive materials for research and development purposes at the site. On September 21, 2004, the Department of Health and Human Services requested that NRC release the facility for unrestricted use. The Department of Health and Human Services has conducted surveys of the facility and provided information to the NRC to demonstrate that the site meets the license termination criteria in Subpart E of 10 CFR Part 20 for unrestricted use.

The NRC staff has prepared an EA in support of the license amendment. The facility was remediated and surveyed prior to the licensee requesting the license amendment. The NRC staff has reviewed the information and final status survey submitted by the Department of Health and Human Services. Based on its review, the staff has determined that there are no additional remediation activities necessary to complete the proposed action. Therefore, the staff considered the impact of the residual radioactivity at the facility and concluded that since the residual radioactivity meets the requirements in Subpart E of 10 CFR Part 20, a Finding of No Significant Impact is appropriate.

III. Finding of No Significant Impact

The staff has prepared the EA (summarized above) in support of the license amendment to release the facility for unrestricted use. The NRC staff has evaluated the Department of Health and Human Services's request and the results of the surveys and has concluded that the completed action complies with the criteria in Subpart E of 10 CFR Part 20. The staff has found that the environmental impacts from the action are bounded by the impacts evaluated by NUREG–1496, Volumes 1–3, ''Generic Environmental Impact Statement in Support of Rulemaking on Radiological Criteria for License Termination of NRC-Licensed Facilities' (ML042310492, ML042320379, and ML042330385). On the basis of the EA, the NRC has concluded that the environmental impacts from the action are expected to be insignificant and has determined not to prepare an environmental impact statement for the action.

IV. Further Information

Documents related to this action, including the application for the license amendment and supporting documentation, are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html*. From this site, you can access the NRC's Agencywide Document Access and Management System (ADAMS), which provides text and image files of NRC's public documents. The ADAMS accession number for the document related to this Notice is ML042680139. Please note that on October 25, 2004, the NRC terminated public access to ADAMS and initiated an additional security review of publicly available documents to ensure that potentially sensitive information is removed from the ADAMS database accessible through the NRC's Web site. Interested members of the public may obtain copies of the referenced documents for review and/or copying by contacting the Public document Room pending resumption of public access to ADAMS. The NRC

Public Documents Room is located at NRC Headquarters in Rockville, MD, and can be contacted at (800) 397–4209 or (301) 415–4737, or by email to *pdr@nrc.gov*. The PDR reproduction contractor will copy documents for a fee. The PDR is open from 7:45 a.m. to 4:15 p.m., Monday through Friday, except on Federal holidays.

Dated at King of Prussia, Pennsylvania this 24th day of January, 2005.

For the Nuclear Regulatory Commission.

James P. Dwyer,

Chief, Commercial and R&D Branch,Division of Nuclear Materials Safety,Region I.

[FR Doc. 05–1685 Filed 1–28–05; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 030–36602]

Notice of Availability of Environmental Assessment and Finding of No Significant Impact for License Amendement for SWATCH Group(U.S.), Inc.'s Facility in Lancaster, PA

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of availability.

FOR FURTHER INFORMATION CONTACT: Marjorie McLaughlin, Decommissioning Branch, Division of Nuclear Materials Safety, Region I, 475 Allendale Road, King of Prussia, Pennsylvania, 19406, telephone (610) 337–5240, fax (610) 337–5269; or by email: *mmm3@nrc.gov*.

SUPPLEMENTARY INFORMATION:

I. Introduction

The Nuclear Regulatory Commission (NRC) is issuing a license amendment to Swatch Group (U.S.), Inc. for Materials License No. 29–30923–01, to authorize release of its facility in Lancaster, Pennsylvania for unrestricted use. NRC has prepared an Environmental Assessment (EA) in support of this action in accordance with the requirements of 10 CFR Part 51. Based on the EA, the NRC has concluded that a Finding of No Significant Impact (FONSI) is appropriate. The amendment will be issued following the publication of this Notice.

II. EA Summary

The purpose of the action is to authorize the release of the licensee's Lancaster, Pennsylvania, facility for unrestricted use. Swatch Group (U.S.), Inc. was authorized by NRC from August, 1986, to use radioactive materials for manufacturing and distribution purposes at the site. On August 16, 2004, Swatch Group (U.S.), Inc. requested that NRC release the facility for unrestricted use. Swatch Group (U.S.), Inc. has conducted surveys of the facility and provided information to the NRC to demonstrate that the site meets the license termination criteria in Subpart E of 10 CFR Part 20 for unrestricted use.

The NRC staff has prepared an EA in support of the license amendment. The facility was remediated and surveyed prior to the licensee requesting the license amendment. The NRC staff has reviewed the information and final status survey submitted by Swatch Group (U.S.), Inc. Based on its review, the staff has determined that there are no additional remediation activities necessary to complete the proposed action. Therefore, the staff considered the impact of the residual radioactivity at the facility and concluded that since the residual radioactivity meets the requirements in Subpart E of 10 CFR Part 20, a Finding of No Significant Impact is appropriate.

III. Finding of No Significant Impact

The staff has prepared the EA (summarized above) in support of the license amendment to release the facility for unrestricted use. The NRC staff has evaluated Swatch Group (U.S.), Inc.''s request and the results of the surveys and has concluded that the completed action complies with the criteria in Subpart E of 10 CFR Part 20. The staff has found that the environmental impacts from the action are bounded by the impacts evaluated by NUREG–1496, Volumes 1–3, ''Generic Environmental Impact Statement in Support of Rulemaking on Radiological Criteria for License Termination of NRC-Licensed Facilities' (ML042310492, ML042320379, and ML042330385). On the basis of the EA, the NRC has concluded that the environmental impacts from the action are expected to be insignificant and has determined not to prepare an environmental impact statement for the action.

IV. Further Information

Documents related to this action, including the application for the license amendment and supporting documentation, are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html*. From this site, you can access the NRC's Agencywide Document Access and Management System (ADAMS), which provides text and image files of NRC's public documents. The ADAMS accession numbers for the documents related to this Notice are: The Environmental Assessment (ML043410211), the letter dated August 16, 2004, requesting amendment of the license (ML042680179), the Final Status Survey, dated September 9, 2004 (ML042670407), additional information submitted October 19, 2004 containing survey maps (ML043010357), and a facsimile dated November 15, 2004 containing radwaste shipping papers (ML043340152). Please note that on October 25, 2004, the NRC terminated public access to ADAMS and initiated an additional security review of publicly available documents to ensure that potentially sensitive information is removed from the ADAMS database accessible through the NRC's web site. Interested members of the public may obtain copies of the referenced documents for review and/or copying by contacting the Public Document Room pending resumption of public access to ADAMS. The NRC Public documents Room is located at NRC Headquarters in Rockville, MD, and can be contacted at (800) 397–4209 or (301) 415–4737, or by e-mail to *pdr@nrc.gov*. The PDR reproduction contractor will copy documents for a fee. The PDR is open from 7:45 a.m. to 4:15 p.m., Monday through Friday, except on Federal holidays.

Dated at King of Prussia, Pennsylvania this 24th day of January, 2005.

For the Nuclear Regulatory Commission.

James Dwyer,

Chief, Commercial & R&D Branch,Division of Nuclear Materials Safety,Region I.

[FR Doc. 05–1686 Filed 1–28–05; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards; Subcommittee Meeting on Thermal-Hydraulic Phenomena; Notice of Meeting

The ACRS Subcommittee on Thermal-Hydraulic Phenomena will hold a meeting on February 15, 2005, Room T–2B3, 11545 Rockville Pike, Rockville, Maryland.

The agenda for the subject meeting shall be as follows:

Tuesday, February 15, 2005–8:30 a.m. until the conclusion of business.

The Subcommittee will continue review of the development of the TRACE thermal-hydraulic computer code. The Subcommittee will hear presentations by and hold discussions with representatives of the NRC staff and their contractors regarding this

matter. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official, Mr. Ralph Caruso (Telephone: 301–415–8065) five days prior to the meeting, if possible, so that appropriate arrangements can be made. Electronic recordings will be permitted.

Further information regarding this meeting can be obtained by contacting the Designated Federal Official between 7:30 a.m. and 4:15 p.m. (e.t.). Persons planning to attend this meeting are urged to contact the above named individual at least two working days prior to the meeting to be advised of any potential changes to the agenda.

Dated: January 25, 2005.

John H. Flack,

Acting Branch Chief, ACRS/ACNW.

[FR Doc. 05–1688 Filed 1–28–05; 8:45 am]

BILLING CODE 7590–01–P

RAILROAD RETIREMENT BOARD

Proposed Collection; Comment Request

SUMMARY: In accordance with the requirement of section 3506 (c)(2)(A) of the Paperwork Reduction Act of 1995 which provides opportunity for public comment on new or revised data collections, the Railroad Retirement Board (RRB) will publish periodic summaries of proposed data collections.

Comments are invited on: (a) Whether the proposed 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: Medical Reports; OMB 3220–0038.

Under Sections 2(a)(1)(iv), 2(a)(2) and 2(a)(3) of the Railroad Retirement Act (RRA), annuities are payable to qualified railroad employees whose physical or mental condition is such that they are unable to (1) work in their regular occupation (occupational disability); or (2) work at all (permanent total disability). The requirements for establishment of disability and proof of continuance of disability are prescribed in 20 CFR part 220.

Under sections 2(c)(1)(ii)(c) and 2(d)(1)(ii) of the RRA, annuities are also payable to qualified spouses and widow(ers), respectively, who have a qualified child who is under a disability which began before age 22. Annuities are also payable to surviving children on the basis of disability under section 2(d)(1)(iii)(C) if the child's disability began before age 22 and to widow(ers) on the basis of disability under section 2(d)(1) (i)(B). To meet the disability standard, the RRA provides that individuals must have a permanent physical or mental condition such that they are unable to engage in any regular employment.

Under section 2(d)(1)(v) of the RRA, annuities are also payable to remarried and surviving divorced spouses on the basis of, *inter alia,* disability or having a qualified disabled child in care. However, the disability standard in these cases is that found in the Social Security Act. That is, individuals must be able to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment. The RRB also determines entitlement to a period of early disability and early Medicare entitlement for qualified claimants in accordance with Section 216 of the Social Security Act.

When making disability determinations, the RRB needs evidence from acceptable medical sources. The RRB currently utilizes Forms G–3EMP, Report of Medical Condition by Employer; G–250, Medical Assessment; G–250a, Medical Assessment of Residual Functional Capacity; G–260, Report of Seizure Disorder; RL–11b, Disclosure of Hospital Medical Records; and RL–11d, Disclosure of Medical Records from a State Agency; to obtain the necessary medical evidence.

The RRB proposes significant changes to the information collection. The primary change is to add proposed Form G–197, Authorization to Release Medical Information, to the information collection. Proposed Form G–197 will be the standard Health Insurance Portability and Accountability Act (HIPAA) compliant release form used by the RRB to obtain consent for the release of medical evidence under the RRA. The RRB also proposes to revise, renumber, and rename current Form G–250 to proposed Form RL–250, Request for Medical Assessment. Currently, Form G–250, requests a narrative report, copies of office records of the claimant's treatment, requests completion of Form G–250a, and includes a consent statement that the claimant must sign. Proposed Form RL–250 will not request the narrative report nor contain a consent statement. A new Form G–250, titled Medical Assessment is proposed. It is intended to provide more complete information while being more user-friendly by formatting responses into a question and answer format by body system being evaluated. Forms G–3EMP, and RL–11b are being revised to delete the consent portions from the versions currently in use. Minor editorial changes are proposed to Form G–250a which will continue to be used by agency hearings officers as a means to clarify, when necessary, information previously received or to obtain precise information needed to make a residual functional capacity determination. No changes are proposed to Form G–260. Completion is voluntary. One response is requested of each respondent.

ESTIMATE OF RESPONDENT BURDEN

Form No.	Annual response	Time (min)	Burden (hours)
G–3EMP	600	10	100
G–197	6,000	10	1,000
G–250	11,950	30	5,975
G–250a	50	20	17
G–260	100	25	42
RL–11b	5,000	10	833
RL–250	11,950	10	1,992
Total	35,900		9,501

FOR FURTHER INFORMATION CONTACT: 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 send an e-mail request to *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 send an e-mail to *Ronald.Hodapp@RRB.GOV.* Written comments should be received within 60 days of this notice.

Charles Mierzwa,

Clearance Officer.

[FR Doc. 05–1670 Filed 1–28–05; 8:45 am]

BILLING CODE 7905–01–P

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:* Financial Disclosure Statement.

(2) *Form(s) submitted:* DR–423.

(3) *OMB Number:* 3220–0127.

(4) *Expiration date of current OMB clearance:* 05/31/2005.

(5) *Type of request:* Revision of a currently approved collection.

(6) *Respondents:* Individuals or households.

(7) *Estimated annual number of respondents:* 1,200.

(8) *Total annual responses:* 1,200.

(9) *Total annual reporting hours:* 1,700.

(10) *Collection description:* Under the Railroad Retirement and the Railroad Unemployment Insurance Acts, the Railroad Retirement Board has authority to secure from an overpaid beneficiary a statement of the individual's assets and liabilities if waiver of the overpayment is requested.

FOR FURTHER INFORMATION CONTACT: 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. 05–1671 Filed 1–28–05; 8:45 am]

BILLING CODE 7905–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 35–27941]

Filings Under the Public Utility Holding Company Act of 1935, as Amended (''Act'')

January 24, 2005.

Notice is hereby given that the following filing(s) has/have been made with the Commission pursuant to provisions of the Act and rules promulgated under the Act. All interested persons are referred to the application(s) and/or declaration(s) for complete statements of the proposed transaction(s) summarized below. The application(s) and/or declaration(s) and any amendment(s) is/are available for public inspection through the Commission's Branch of Public Reference.

Interested persons wishing to comment or request a hearing on the application(s) and/or declaration(s) should submit their views in writing by February 18, 2005, to the Secretary, Securities and Exchange Commission, Washington, DC 20549–0609, and serve a copy on the relevant applicant(s) and/or declarant(s) at the address(es) specified below. Proof of service (by affidavit or, in the case of an attorney at law, by certificate) should be filed with the request. Any request for hearing should identify specifically the issues of facts or law that are disputed. A person who so requests will be notified of any hearing, if ordered, and will receive a copy of any notice or order issued in the matter. After February 18, 2005, the application(s) and/or declaration(s), as filed or as amended, may be granted and/or permitted to become effective.

Allegheny Energy, Inc., et al. (70–10251)

Allegheny Energy, Inc. (''Allegheny''), a registered holding company, and Allegheny Energy Supply Company, LLC (''AE Supply,'' and together with Allegheny, ''Applicants''),[1] a registered holding company and public-utility company subsidiary of Allegheny; Allegheny Energy Service Corp. (''AESC''), the system service company; the Allegheny wholly-owned public-utility subsidiaries, Monongahela Power Company (''Monongahela''), Mountaineer Gas Company (''Mountaineer''),[2] The Potomac Edison Company (''Potomac Edison''), West Penn Power Company (''West Penn''), and Allegheny Generating Company (''AGC'') (Monongahela, Mountaineer, Potomac Edison, West Penn and AGC, collectively, ''Utility Applicants'', and along with AE Supply and Allegheny, collectively, ''Money Pool Applicants'')), and the current and future nonutility subsidiaries of Allegheny (''Nonutility Applicants''),[3] 800 Cabin Hill Drive, Greensburg, Pennsylvania 15601, have filed an application-declaration (''Application'') under sections 6, 7, 9(a), 10, 11, 12(b), 12(c), and 13 of the Act and rules 43, 45, 46, 54, 86, 87, 90 and 91 under the Act.

The Applicants request authority to engage in financing transactions necessary to their ongoing operations and those of their subsidiaries through November 30, 2007 (''Authorization Period'') as well as authority to engage in certain other transactions described below that are necessary to the overall operations of the Allegheny system. In addition, the Money Pool Applicants and AESC request authority to continue the current Allegheny system money pool (''Money Pool'').

On December 31, 2001, the Commission issued an order[4] authorizing the Applicants to engage in a broad range of financing transactions through July 31, 2005. The Applicants intend that the authority sought in this

[1] AE Supply is a public utility company within the meaning of the Act, but it is not subject to state regulation. It is the principal electric generating company for the Allegheny system.

[2] On August 4, 2004, Allegheny announced it had entered into an agreement to sell Mountaineer and all of Allegheny's West Virginia gas assets to a partnership composed of IGS Utilities LLC, IGS Holdings LLC, and affiliates of ArcLight Capital Partners LLC. See *SEC* File No. 70–10270.

[3] Other than AE Supply and the Utility Applicants, the direct or indirect subsidiaries of Allegheny, whether existing or to be formed or acquired in the future, are referred to as the Nonutility Applicants. The current Nonutility Applicants are Allegheny Energy Solutions, Inc., Allegheny Ventures, Inc. (''Ventures''), Mountaineer Gas Services, Inc., and the West Virginia Power & Transmission Company (collectively, ''Existing Nonutility Subsidiaries'').

[4] *See* Holding Co. Act Release No. 27486 (Dec. 31, 2001) (''2001 Financing Order''), as supplemented by Holding Co. Act Release No. 27521 (April 17, 2002), Holding Co. Act Release No. 27579 (Oct. 17, 2002), and Holding Co. Act Release No. 27652 (Feb. 21, 2003) (''Capitalization Order'').

Application replace all existing authority granted through orders issued in Commission File Nos. 70–7888, 70–9897 and 70–10100.

A. Summary of Requested Authority

The following authority is sought:

(1) Authority (i) for Allegheny to issue and sell directly, additional common stock or options, warrants, equity-linked securities or stock purchase contracts convertible into or exercisable for common stock, and preferred stock, or to buy or sell derivative securities to hedge these transactions; and (ii) for the Applicants to issue and sell directly, or indirectly through one or more Capital Corps, as defined below, forms of preferred securities other than preferred stock (including, without limitation, trust preferred securities or monthly income preferred securities (collectively, ''Preferred Securities''), all of which in the aggregate will not exceed $1.55 billion (''External Equity Cap'')).

During the Authorization Period, Allegheny may issue common stock to the public in the amount of up to $350 million as previously authorized by the Commission.[5] In addition, Allegheny may issue common stock in the following amounts for other purposes: (i) Up to $205 million in connection with Allegheny's employee pension plan, and (ii) up to $300 million in connection with the conversion of convertible trust preferred securities previously authorized by the Commission.[6] The balance of the requested authority covered by the External Equity Cap would be used to issue equity securities other than common stock as warranted by circumstances;

(2) Authority for (i) Applicants, AGC, and the Nonutility Applicants to issue and sell to non-associated third parties short- and long-term debt, secured (except for Allegheny) and unsecured, and (ii) for Applicants and the Utility Applicants to engage in short-term debt financing in connection with the Money Pool and for general corporate purposes, all of which in the aggregate will not exceed $4.575 billion (''External Debt Cap'');

(3) Authority (i) for Applicants and the Utility Applicants to enter into guarantees, obtain letters of credit, extend credit, enter into guarantee-type expense agreements or otherwise provide credit support and guarantees of contractual obligations with respect to the obligations of their direct or indirect subsidiaries, and (ii) for the Nonutility Applicants, to the extent not exempt under rules 45 or 52, to provide guarantees, on behalf or for the benefit of other Nonutility Applicants, in an aggregate amount not to exceed $3.0 billion any time outstanding;

(4) Authority for the Applicants and, to the extent not exempt under rule 52, for the Utility Applicants and the Nonutility Applicants (i) to enter into hedging transactions with respect to the indebtedness of these companies in order to manage and minimize interest rate costs and (ii) to enter into hedging transactions with respect to anticipatory debt issuances in order to lock-in current interest rates and/or manage interest rate risk exposure;

(5) Authority for Applicants and the Nonutility Applicants to engage in intra-system financings, to the extent not exempt under rules 45 or 52, in an aggregate amount not to exceed $3.0 billion any time outstanding.

(6) Authority for AE Supply, AGC, and the Nonutility Applicants to pay dividends out of capital and unearned surplus in an amount up to $2 billion and for the Nonutility Applicants to acquire, retire, or redeem their securities that are held by any associate company, affiliate, or affiliate of an associate company, to the extent permitted under applicable law and the terms of any credit arrangements to which they may be parties;

(7) Authority for Applicants to change the terms of the authorized capitalization of a Nonutility Applicant's capital stock or equivalent ownership interests;

(8) Authority (to the extent not otherwise exempt) for Applicants to transfer securities or assets of existing and new direct or indirect Nonutility Applicants to other direct or indirect Nonutility Applicants or to liquidate or merge Nonutility Applicants;

(9) To the extent not exempt under rule 90(d), authority for Nonutility Applicants to perform services for each other and to sell goods to each other at fair market prices, without regard to ''cost,'' as determined in accordance with rules 90 and 91; and

(10) Authority for Allegheny, the Utility Applicants, and AESC to continue the utility money pool as discussed in further detail below.

B. Financing Parameters

The financing transactions for which the Applicants, Utility Applicants and Nonutility Applicants seek authority would be subject to the following terms and conditions:

(1) Effective Cost of Money on Debt Securities and Borrowings Under Credit Agreements

The effective cost of capital on any security issued by Allegheny or AE Supply will not exceed competitive market rates available at the time of issuance for securities having the same or reasonably similar terms and conditions issued by similar companies of reasonably comparable credit quality, provided that in no event will (a) the interest rate on any debt securities issued under a bank credit facility exceed the greater of (i) 500 basis points over the comparable term London Interbank Offered Rate of (ii) the sum of 8 percent plus the prime rate as announced by a nationally recognized money center bank and (b) the interest rate on any debt securities issued to any other financial investor exceed the sum of 10 percent plus the prime rate as announced by a nationally recognized money center bank.

(2) Maturities

The maturity of long-term debt will be between one and 50 years after the issuance. Preferred Securities and equity-linked securities will be redeemed no later than 50 years after the issuance, unless converted into common stock. Preferred stock issued directly by Allegheny may be perpetual in duration.

(3) Issuance Expenses

The underwriting fees, commissions, and other similar remuneration paid in connection with the issuance of any security will not, in the case of a competitive issuance, exceed prevailing market rates for similar companies of reasonably comparable credit quality, and, in the case of a non-competitive issuance, will not exceed the greater of (1) five percent of the principal or total amount of the securities being issued or (2) issuances expenses that are paid at the time in respect of the issuance of securities having the same or reasonably similar terms and conditions issued by similar companies of reasonably comparable credit quality.

(4) Use of Proceeds

The proceeds from the sale of securities in external financing transactions will be added to the respective treasuries of the issuing parties and subsequently used principally for general corporate purposes including:

(a) The financing of capital expenditures;

(b) The financing of working capital requirements;

[5] *See* Allegheny Energy, Inc., Holding Co. Act Release No. 27796 (Feb. 3, 2004).

[6] *See* Allegheny Energy, Inc., Holding Co. Act Release No. 27701 (July 23, 2003).

(c) The repayment and/or refinancing of debt;

(d) The acquisition, retirement, or redemption of securities previously issued by the issuing party;

(e) To fund Allegheny's pension plan with common stock; and

(f) Other lawful purposes, including direct or indirect investment in rule 58 companies, as defined below, by Allegheny, other subsidiaries approved by the Commission, exempt wholesale generators (''EWGs''), and foreign utility companies (''FUCOs'') in accordance with the provisions and commitments described below.[7]

(5) Investment Grade Rating

Reestablishing investment grade for all of the Applicants' debt securities is a part of Allegheny's overall plan for returning to financial health. Applicants have a goal of obtaining investment grade ratings for their debt by the end of 2007.

(6) Equity Ratio

Applicants state that they do not have common equity ratios of at least 30 percent, which is the traditional Commission standard applicable to registered holding companies. As reflected in Allegheny's unaudited financial statements, as of September 30, 2004, Allegheny's common equity ratio was 17.4% [8] and AE Supply's was 10.3%. Applicants request that the Commission adopt a flexible approach with regard to the common equity ratio standard. The Applicants state that they have experienced significant financial difficulties arising out of developments within the electric utility industry. They maintain that they have carefully analyzed their current situation and have made significant efforts to develop a systematic plan for returning to a financial condition that is consistent with the Commission's traditional standards. They maintain that the authorizations sought in this Application are essential to continuing their progress toward financial health.

Allegheny commits that at any time its ratio of common equity to total capitalization is less than 30%, neither it nor any of its subsidiaries will invest or commit to invest any funds in any new projects that qualify as EWGs or FUCOs under the Act; provided, however, that Allegheny may increase its investment in EWGs as a result of the qualification of existing projects as EWGs, and Allegheny may make additional investments in an existing EWG to the extent necessary to complete any project or desirable to preserve or enhance the value of Allegheny's investment in the EWG. Allegheny requests that the Commission reserve jurisdiction over any additional investment by Allegheny and its subsidiaries in EWGs and FUCOs during the period that Allegheny's common equity ratio is below 30 percent.

Allegheny commits that at any time its ratio of common equity to total capitalization is less than 30%, neither it nor any of its subsidiaries will invest or commit to invest any funds in any new energy-related company within the meaning of rule 58 under the Act (''Rule 58 Company''); provided, however, that Allegheny may increase its investment in an existing Rule 58 Company to the extent necessary to complete any project or desirable to preserve or enhance the value of Allegheny's investment in the company.[9] In addition, Allegheny and AE Supply request authority to invest in one or more new Rule 58 Companies which may be created in connection with the restructuring and/or reorganization of the existing energy trading business of AE Supply and its subsidiaries. Allegheny requests that the Commission reserve jurisdiction pending completion of the record over any additional investment by Allegheny and its subsidiaries in Rule 58 Companies during the period that Allegheny's common equity ratio is below 30 percent.

C. Description of Proposed Securities Issuances and Related Transactions

All external financing will be at rates or prices and under conditions based upon, or otherwise determined by, competitive capital markets.

(1) Common Stock

Allegheny seeks authority to issue and sell common stock and to issue and sell options, warrants, equity-linked securities, or other stock purchase rights exercisable for common stock or to buy or sell derivative securities to hedge these transactions. Allegheny will not engage in speculative transactions. The aggregate amount of financing obtained by Allegheny during the Authorization Period from the issuance and sale of common stock will not cause Allegheny to exceed the External Equity Cap. Common stock financings may be effected through underwriting agreements of a type generally standard in the industry. Public distributions may be effected through private negotiation with underwriters, dealers, or agents as discussed below, or through competitive bidding among underwriters. In addition, sales may be made through private placements or other non-public offerings to one or more persons. All sales of common stock will be at rates or prices and under conditions negotiated or based upon, or otherwise determined by, competitive capital markets.

During the Authorization Period, Allegheny may issue common stock to the public in the amount of up to $350 million.[10] In addition, Allegheny may issue common stock in the following amounts for other purposes: (i) Up to $205 million in connection with Allegheny's employee pension plan,[11] and (ii) up to $300 million in connection with the conversion of convertible trust preferred securities.[12] The balance of the requested authority covered by the External Equity Cap would be used to issue equity securities other than common stock as warranted by circumstances.

Common stock may be offered to the public either through an underwriting syndicate (which may be represented by a managing underwriter or underwriters designated by Allegheny) or directly by

[7] In the 2001 Financing Order, Allegheny received authority to exceed the rule 53 aggregate investment limitation and to utilize a portion of the proceeds of the equity issuances, short-term debt, long-term debt and guarantees in any combination to increase its ''aggregate investment'' (as defined in rule 53(a)) up to $2 billion in EWGs and FUCOs. As discussed in this Application, Allegheny's ability to invest in EWGs and FUCOs is subject to certain restrictions as long as its common equity is less than 30 percent of total capitalization.

[8] For the third quarter of 2004, Allegheny recorded a $427.5 million consolidated net loss from discontinued operations that includes a non-cash asset impairment charge of $209.4 million pre-tax ($129.2 million after tax) from the previously announced sale of the Lincoln generating facility; a non-cash asset impairment charge of $35.1 million pre-tax ($20.7 million after tax) associated with the previously announced agreement to sell the West Virginia natural gas operations; and non-cash asset impairment charges of $445.4 million pre-tax ($274.7 million after tax) as a result of the previously announced decision to sell the Gleason and Wheatland generating facilities. Discontinued operations also included an after-tax loss of $2.9 million from operating results at these units. As a result of these charges, the unaudited common equity ratios for Allegheny and AE Supply, respectively, will decrease to 17.4 percent and 10.3 percent as of September 30, 2004. Allegheny notes, however, that its common equity ratio has improved somewhat since the recent issuance of approximately $152 million of Common Stock. The common equity ratios of the Operating Companies as of September 30, 2004, are as follows: West Penn, 57.6 percent; Potomac Edison, 49.5 percent; and Monongahela, 36.0 percent.

[9] *See* the Capitalization Order.

[10] The Commission previously authorized this amount in Holding Co. Act Release No. 27796 (Feb. 3, 2004).

[11] The requested authority is in addition to stock issuances authorized under Allegheny's employment compensation plans. See Holding Co. Act Release Nos. 27892 (Sept. 22, 2004), 27869 (June 30, 2004), and 27858 (June 17, 2004).

[12] The Commission previously authorized this amount in Holding Co. Act Release No. 27701 (July 23, 2003).

one or more underwriters acting alone. The aggregate price of the common stock being sold through any underwriter or dealer shall be calculated based on either the specified selling price to the public or the closing price of the common stock on the day the offering is announced. The offering would be effected under an underwriting agreement of a type generally standard in the industry, and Allegheny may grant the underwriters a ''green shoe'' option to purchase additional shares at the same price then offered to the public solely for the purpose of covering over-allotments (provided that the total number of shares offered initially, together with the number of shares issued under any option, shall not exceed the number of shares authorized for issuance by the Commission).[13] It is also possible that common stock will be sold by Allegheny through dealers, agents, or directly to a limited number of purchasers or a single purchaser. If dealers are utilized in the sale of any common stock, Allegheny will sell that common stock to the dealers as principals. Any dealer may then resell the securities to the public at varying prices to be determined by the dealer at the time of resale.

(2) Preferred Stock, Preferred Securities, and Equity Linked Securities

Allegheny and AE Supply seek the flexibility to issue preferred stock and Preferred Securities directly or indirectly through one or more financing subsidiaries (''Capital Corps'') organized by them specifically for this purpose.[14] The aggregate amount of financing obtained by Allegheny and AE Supply during the Authorization Period from the issuance and sale of preferred stock, Preferred Securities, and equity linked securities will not cause Allegheny and AE Supply to exceed the External Equity Cap.

Preferred stock or Preferred Securities may be issued in one or more series with the rights, preferences, and priorities as may be designated in the instrument creating each series, as determined by the board of directors of the Applicant undertaking the issuance. Dividends or distributions on preferred stock and Preferred Securities will be made periodically and to the extent funds are legally available for this purpose, but may be made subject to terms that allow the issuer to defer dividend payments for specified periods.

Equity-linked securities, including units consisting of a combination of incorporated options, warrants, and/or forward equity purchase contracts with debt, preferred stock, or Preferred Securities, will be exercisable or exchangeable for or convertible into, either mandatorily or at the holder's option, common stock or indebtedness. Alternatively, equity linked securities will allow the holder to surrender to the issuer or apply the value of a security issued by Allegheny, as approved by the Commission, to the holder's obligation to make a payment on another security of Allegheny issued under Commission authorization.[15] Any convertible or equity-linked securities will be convertible into or linked to common stock, Preferred Securities, or unsecured debt that Allegheny otherwise is authorized by Commission order to issue directly, or indirectly through Capital Corps.

(3) Long-Term Debt

Applicants, on their own behalf and on behalf of the Nonutility Applicants and AGC, request Commission authorization to issue during the Authorization Period secured[16] and unsecured long-term debt securities in an aggregate principal amount outstanding at any time that will not cause them to exceed the External Debt Cap. Applicants, the Nonutility Applicants, and AGC may issue unsecured long-term debt directly, or, in the case of Applicants and the Nonutility Applicants, through one or more Capital Corps, in the form of bonds, notes, medium-term notes, or debentures under one or more indentures, or long-term indebtedness under agreements with banks or other institutional lenders. Each series of long-term debt issued directly by Applicants, the Nonutility Applicants, and AGC will have a designation, aggregate principal amount, maturity, interest rate(s) or methods of determining the same, terms of payment of interest, redemption provisions, sinking fund terms, and other terms and conditions as Applicants, the Nonutility Applicants, and AGC may determine at the time of issuance.

If applicable, the terms of the long-term debt will be designed to parallel the terms of the security issued by any Capital Corp to which the long-term debt relates. Any long-term debt (a) may be convertible into any other securities of Allegheny, AE Supply, the Nonutility Applicants, or AGC; (b) will have maturities up to 50 years; (c) may be subject to optional and/or mandatory redemption, in whole or in part, at par or at a premium above the principal amount of them; (d) may be entitled to mandatory or optional sinking fund provisions; (e) may provide for reset of the coupon under a remarketing arrangement; (f) may be subject to tender or the obligation of the issuer to repurchase at the election of the holder or upon the occurrence of a specified event; (g) may be called from existing investors by a third party; and (h) may be entitled to the benefit of affirmative or negative financial or other covenants.

The maturity dates, interest rates, redemption and sinking fund provisions, tender or repurchase and conversion features, if any, with respect to the long-term debt of a particular series, as well as any associated placement, underwriting or selling agent fees, commissions and discounts, if any, will be established by negotiation or competitive bidding. Allegheny, AE Supply, the Nonutility Applicants, and AGC will determine the specific terms of any long-term debt at the time of issuance and will comply in all regards with the financing parameters set forth above.

(4) Short-Term Debt

Applicants and the Nonutility Applicants seek authority to issue directly, or indirectly through a Capital Corp, commercial paper, promissory notes and other forms of short-term indebtedness having varying maturities not to exceed one year, but which may be subject to extension to a final

[13] The aggregate amount of the additional common stock for which authorization is sought also takes into account the permitted increase in the size of the offering that could occur under rule 462(b) of the Securities Act of 1933 through an automatically effective amendment to an Allegheny registration statement.

[14] Allegheny, AE Supply, and their subsidiaries, other than the Utility Applicants, were authorized in Holding Co. Act Release No. 27486 (Dec. 31, 2001) to form one or more Capital Corps as direct or indirect subsidiaries to serve as financing entities and to issue debt and equity securities, including trust preferred securities to third parties. In addition, Allegheny and AE Supply and the Nonutility Applicants received authorization: (a) To issue debentures or other evidences of indebtness to Capital Corps in return for the proceeds of the financing, (b) to acquire voting interests or equity securities issued by Capital Corps, and (c) to guarantee the obligations of Capital Corps.

[15] For example, Allegheny may issue common stock or common stock warrants linked with debt securities. The holder will be obligated to pay to the issuer an additional amount of consideration at a specified date for the common stock but is authorized to surrender the linked debt security to or for the benefit of the issuer in lieu of the cash payment.

[16] Allegheny does not seek authorization at this time to issue secured long-term debt securities. Applicants note, however, that the requested authority does include outstanding debt held by AE Supply that is secured by substantially all of its assets, including cash, utility assets, accounts receivables, and its power sales and lease agreements with the Utility Applicants.

maturity not to exceed 390 days [17] (''Short-Term Debt'') in an aggregate amount that will not cause them to exceed the External Debt Cap, to make loans to subsidiaries, and for their own corporate purposes. Allegheny, AE Supply and the Utility Applicants, other than AGC, request authority to issue Short-Term Debt to fund the Money Pool. The Utility Applicants also seek authority to issue Short-Term Debt for general corporate purposes. In no case will the issuance of Short-Term Debt cause any of these companies to exceed the External Debt Cap. The Utility Applicants seek Short-Term Debt authority in amounts itemized further below. Maturities will be determined at the time of issuance by market conditions, the effective interest costs, and the issuer's anticipated cash flow, including the proceeds of other borrowings.

Commercial paper will be sold in established domestic or European commercial paper markets. It will be sold directly or to dealers at the discount rate or the coupon rate per annum prevailing at the date of issuance for commercial paper of comparable quality and maturities sold directly or to commercial paper dealers generally. Allegheny and AE Supply expect that the dealers acquiring commercial paper from them, any Capital Corp or the Nonutility Applicants will re-offer the paper at a discount to corporate and institutional investors. Institutional investors are expected to include commercial banks, insurance companies, pension funds, investment trusts, foundations, colleges and universities, finance companies, money market funds, and other funds.

The Applicants propose that they, the Utility Applicants, the Nonutility Applicants, and any Capital Corp may establish and maintain back-up credit lines with banks or other institutional lenders to support their commercial paper program(s) and to establish other credit arrangements and/or borrowing facilities generally available to borrowers with comparable credit ratings, as each of them may deem appropriate in light of its needs and existing market conditions. Allegheny and AE Supply propose, in general, taking appropriate long and short-term considerations into account, to utilize the most economical means available at any time to meet their short-term financing requirements and will ensure that the Utility Applicants, the Nonutility Applicants, and any Capital Corp will do likewise.

Applicants, the Utility Applicants, the Nonutility Applicants, and any Capital Corp propose to engage in other types of short-term financing generally available to borrowers with comparable credit ratings as each of them individually may deem appropriate in light of its needs and market conditions at the time of issuance.

AE Supply, the Utility Applicants and the Nonutility Applicants also seek the flexibility to issue secured short-term debt as circumstances warrant to provide maximum flexibility for their financial operations. AE Supply currently has debt that is secured by substantially all of its assets, including cash, utility assets, accounts receivable, and power sales and lease agreements with the Utility Applicants. Any secured short-term debt issued by the Utility Applicants would similarly be secured by the respective Utility Applicant's cash, utility assets or accounts receivable.

(5) Credit Enhancement

Applicants, the Utility Applicants, and the Nonutility Applicants may obtain credit enhancement for securities authorized by the Commission. This credit enhancement could include insurance, a letter of credit, or a liquidity facility. Applicants, the Utility Applicants, and the Nonutility Applicants anticipate they may be required to provide credit enhancement if they issue floating rate securities, while credit enhancement would be a purely economic decision for fixed rate securities. Applicants, the Utility Applicants, and the Nonutility Applicants anticipate that if they are required to pay a premium or fee to obtain credit enhancement, it is likely that they would realize a net benefit through a reduced interest rate on the new securities. Applicants, the Utility Applicants, and the Nonutility Applicants will obtain credit enhancement only if it is economically beneficial, taking into consideration fees required to obtain the product and market conditions.

(6) Hedging Transactions

Applicants, the Utility Applicants, and the Nonutility Applicants may enter into interest rate hedging transactions with respect to existing indebtedness (''Interest Rate Hedges''), subject to the limitations and restrictions set forth here, in order to reduce or manage interest rate cost or risk. Interest Rate Hedges would only be entered into with counterparties (''Approved Counterparties'') with senior debt ratings, as published by Standard and Poor's Ratings Group (''Standard and Poor's''), equal to or greater than BBB, or an equivalent rating from Moody's Investors' Service (''Moody's'') or Fitch Investor Service (''Fitch''). Interest Rate Hedges will involve the use of financial instruments and derivatives commonly used in today's capital markets, such as interest rate swaps, options, caps, collars, floors, and structured notes (*i.e.*, a debt instrument in which the principal and/or interest payments are indirectly linked to the value of an underlying asset or index), or transactions involving the purchase or sale, including short sales, of U.S. Treasury obligations (collectively, ''Instruments''). The transactions would be for fixed periods and stated notional amounts. In no case will the notional principal amount of any interest rate swap exceed that of the underlying debt instrument and related interest rate exposure. Applicants, the Utility Applicants, and the Nonutility Applicants will not engage in speculative transactions. Fees, commissions, and other amounts payable to the counterparty or exchange (excluding the swap or option payments) in connection with an Interest Rate Hedge will not exceed those generally obtainable in competitive markets for parties of comparable credit quality.

Applicants, the Utility Applicants, and the Nonutility Applicants also propose to enter into interest rate hedging transactions with respect to anticipated debt offerings (''Anticipatory Hedges''). Applicants, the Utility Applicants, and the Nonutility Applicants would enter into these transactions only with Approved Counterparties and subject to certain limitations and restrictions as set forth here. Anticipatory Hedges would be used to fix and/or limit the interest rate risk associated with any new issuance through (i) a forward sale of exchange-traded U.S. Treasury futures contracts, U.S. Treasury obligations and/or a forward swap (each, ''Forward Sale''); (ii) the purchase of put options on U.S. Treasury obligations (''Put Options Purchase''); (iii) a Put Options Purchase in combination with the sale of call options on U.S. Treasury obligations (''Zero Cost Collar''); (iv) transactions involving the purchase or sale, including short sales, of U.S. Treasury obligations; or (v) some combination of a Forward Sale, Put Options Purchase,

[17] The ability to extend the maturity of commercial paper notes is a feature of an extendible commercial notes program. The maturity of commercial paper notes issued under an extendible commercial notes program is 365 days or less; however, if the principal of any commercial paper note is not paid at maturity, the maturity of the commercial paper note will be automatically extended to 390 days from the date of original issuance.

Zero Cost Collar, and/or other derivative or cash transactions, including, but not limited to structured notes, options, caps, and collars, appropriate for the Anticipatory Hedges. Anticipatory Hedges may be executed on-exchange (''On-Exchange Trades'') with brokers through the opening of futures and/or options positions traded on the Chicago Board of Trade or the Chicago Mercantile Exchange, the opening of over-the-counter positions with one or more counterparties (''Off-Exchange Trades''), or a combination of On-Exchange Trades and Off-Exchange Trades. Each Applicant, Utility Applicant, or Nonutility Applicant will determine the optimal structure of each Anticipatory Hedge transaction at the time of execution and may decide to lock in interest rates and/or limit exposure to interest rate increases. Applicants and the Utility Applicants represent, and Applicants represent on behalf of the Nonutility Applicants, that each Interest Rate Hedge and Anticipatory Hedge will be treated for accounting purposes under generally accepted accounting principles. Applicants, the Utility Applicants, and the Nonutility Applicants will comply with Statement of Financial Accounting Standard (''SFAS'') 133 (Accounting for Derivative Instruments and Hedging Activities) and SFAS 138 (Accounting for Certain Derivative Instruments and Certain Hedging Activities) or other standards relating to accounting for derivative transactions as are adopted and implemented by the Financial Accounting Standards Board (''FASB''). They also will comply with any future FASB financial disclosure requirements associated with hedging transactions.

(7) Guarantees

Allegheny, AE Supply and the Utility Applicants request authority to enter, directly or, in the case of the Applicants, indirectly through one or more Capital Corps, into guarantees, obtain letters of credit, support or expense agreements, or otherwise to provide credit support with respect to debt securities or other contractual obligations of any of their direct or indirect subsidiaries from time to time through the Authorization Period (''Guarantees'') in an amount not to exceed $3 billion (''Aggregate Guarantee Limitation'') based on the amount at risk at any one time. The amount of any parent guarantees respecting the obligations of any subsidiaries also will be subject to the limitations of rule 53(a)(1) or rule 58(a)(i), as applicable. Allegheny, AE Supply and the Utility Applicants also request authority to guarantee the performance obligations of their direct or indirect subsidiaries as may be appropriate or necessary to enable the subsidiaries to carry on the ordinary course of their businesses. Any guarantees will be subject to the Aggregate Guarantee Limitation.

Allegheny and AE Supply request authority for the Nonutility Applicants to enter, directly or indirectly through one or more Capital Corps, into guarantees, obtain letters of credit, support or expense agreements, or otherwise to provide credit support with respect to debt securities or other contractual obligations of other Nonutility Applicants from time to time through the Authorization Period in an aggregate principal amount that, together with the Guarantees will not exceed the Aggregate Guarantee Limitation at any one time, exclusive of any guarantees and other forms of credit support that are exempt under rule 45(b) and rule 52(b). The amount of Nonutility Applicant guarantees in respect of obligations of any Rule 58 Companies shall remain subject to the limitations of rule 58(a)(i). Allegheny and AE Supply also request authority for the Nonutility Applicants to guarantee the performance obligations of other Nonutility Applicants as may be appropriate or necessary to enable the company whose obligations are being guaranteed to carry on the ordinary course of its business. These guarantees will be subject to the Aggregate Guarantee Limitation.

Applicants and the Utility Applicants anticipate that during the Authorization Period they may need to issue guarantees and obtain letters of credit for various purposes. One likely instance in which these issuances may occur is the posting of collateral in connection with participation in wholesale energy markets. Another likely issuance involves the expected divestiture of certain assets as part of the Applicants' overall plans for returning to financial health. The Application states that it may be necessary to issue certain guarantees in connection with those transactions. Applicants and the Utility Applicants are seeking an amount of guarantee authority they expect will be sufficient for these purposes and to have an appropriate amount of additional authority available to them to respond to unanticipated circumstances or opportunities.

Certain of the guarantees for which authority is sought may be in support of the obligations of subsidiaries or associate companies that are not capable of exact quantification. In these cases, the company issuing the guarantee will determine the exposure of the instrument for purposes of measuring compliance with the Aggregate Guarantee Limitation by appropriate means, including estimation of exposure based on loss experience or projected potential payment amounts. With regard to financial guarantees, the terms of the securities of the subsidiaries or associate companies for which a guarantee is issued will comply with the financing parameters set forth above. If appropriate, these estimates will be made in accordance with GAAP, and these estimates will be re-evaluated periodically.

A company issuing a guarantee authorized under this request may receive a fee for each guarantee from the company on whose behalf the guarantee was issued. This fee will not be greater than the costs, if any, of obtaining the liquidity necessary to perform the guarantee for the period of time the guarantee remains outstanding. Any guarantee that is outstanding at the end of the Authorization Period will remain in force until it expires or terminates in accordance with its terms.

(8) Intra-System Financing

Applicants request authorization, consistent with the requirements of section 12(a) of the Act, to engage in intra-system financings with each other and the Existing Nonutility Subsidiaries, and for the Existing Nonutility Subsidiaries to engage in intra-system financings among themselves, in an aggregate amount not to exceed $3.0 billion outstanding at any time during the Authorization Period. Generally, Allegheny's and AE Supply's or the financing Nonutility Applicant's loans to, and purchase of capital stock from, the financed Nonutility Applicants will be exempt under rule 52, and capital contributions and open account advances without interest will be exempt under rule 45(b). Loans by Applicants or a Nonutility Applicant to a Nonutility Applicant generally will have interest rates and maturity dates that are designed to parallel the lending company's effective cost of capital, in accordance with rule 52(b). To the extent that any intra-system loans or extensions of credit are not exempt under rule 45(b) or rule 52, as applicable, the company making the loan or extending the credit may charge interest at the same effective rate of interest as the daily weighted average effective rate of commercial paper, revolving credit and/or other short-term borrowings of that company, including an allocated share of commitment fees and related expenses. If none of these borrowings are outstanding, then the interest rate shall be predicated on the

Federal Funds effective rate of interest as quoted daily by the Federal Reserve Bank of New York. In the limited circumstances where the Nonutility Applicant effecting the borrowing is not a direct or indirect wholly-owned subsidiary of Allegheny, authority is requested under the Act for the Applicants or Nonutility Applicant to make the loan to this Nonutility Applicant at an interest rate and maturity designed to provide a return to the lending company of not less than its effective cost of capital. If these loans are made to a Nonutility Applicant, that Nonutility Applicant will not provide any services to any associate Nonutility Applicant, except a company that meets one of the conditions for rendering of services on a basis other than at cost as described below Allegheny and AE Supply will comply with the requirements of rule 45(c) regarding tax allocations unless they receive further approval from the Commission to alter this requirement.

(9) Payment of Dividends and Certain Transactions Involving Affiliate and Associate Company Securities

Applicants seek authority for AE Supply, the Utility Applicants and the Nonutility Applicants to pay through the Authorization Period, to the extent permitted under applicable corporate law, up to $2.0 billion in dividends out of capital or unearned surplus and to acquire, retire, or redeem any securities of these companies that are held by an associated company, an affiliate, or an affiliate of an associate company.

There may be situations in which AE Supply, AGC, or a Nonutility Applicant will have unrestricted cash available for distribution in excess of current and retained earnings resulting from a disposition of assets, a restructuring or other accounting charge that eliminated retained earnings, or from its normal operations (excluding debt financing). For example, the Commission already has granted AGC authority to pay dividends out of capital and unearned surplus through December 31, 2005.[18] As noted in the AGC Dividend Order, AGC is a single asset company with declining capital needs. Because AGC has only one asset, a 40 percent interest in a 2100 megawatt hydroelectric station, and other Allegheny public utility company subsidiaries take all of the capacity from that asset, the company, by design, has no growth opportunity. Cash received from revenues exceeds the cash requirements for operating expenses and return primarily because of the recovery of depreciation expense. AGC's owners, AE Supply and Monongahela Power, expect a return on, as well as a return of, their investment. By design, the annual dividends must exceed the annual earnings to avoid a cash buildup approximately equal to the annual depreciation. Similarly, the Commission granted AE Supply authority to pay dividends out of capital and unearned surplus through July 31, 2005 in the Capitalization Order. As explained in that order, dividend payments were necessary to maintain debt repayment at the Allegheny level using funds generated from assets sales by AE Supply. The Commission has likewise authorized payment of dividends out of capital and unearned surplus for the Existing Nonutility Subsidiaries under certain circumstances.[19]

With respect to the remaining Utility Applicants, the requested dividend authority is intended only to permit Allegheny to comply with its obligations under an intercreditor agreement between Allegheny, AE Supply and their respective lenders. Specifically, when Allegheny and AE Supply restructured their debt in February 2003, the lenders required that Allegheny and AE Supply enter into an intercreditor agreement under which, if either company or any of their subsidiaries were to issue debt or equity, a percentage of the proceeds under certain circumstances would be paid as a dividend to Allegheny in the case where AE Supply (or one of its subsidiaries) is the issuer, or as a capital contribution to AE Supply if Allegheny (or one of its subsidiaries (other than AE Supply or its subsidiaries)) is the issuer. This intercreditor agreement continues in place until November 2007, when debt held by certain parties to the intercreditor agreement matures. Until then, should Allegheny or any of its subsidiaries issue debt or equity under the circumstances specified in the intercreditor agreement, an amount equal to the proceeds must be contributed to AE Supply. In order for Allegheny to accomplish this, if any of Allegheny's subsidiaries (other than AE Supply or its subsidiaries) is the issuer, it must pay dividends to Allegheny to provide Allegheny with sufficient funds to make the required contribution to AE Supply.

The dividend authority requested for the remaining Utility Applicants, then, is intended solely to enable Allegheny to comply with the terms of the intercreditor agreement. Any amounts paid to Allegheny by these Utility Applicants will be immediately contributed back to the applicable Utility Applicant so the dividends will have no effect on the Utility Applicant's paid-in capital account. Simply put, although such payments technically constitute dividends, they do not have the effect on capitalization that dividends are normally understood to have as they do not result in any permanent shifts of capital from subsidiary to parent.[20]

Consistent with these considerations, Applicants request authorization for AE Supply, AGC, the Utility Applicants and the Nonutility Applicants to pay dividends out of capital and unearned surplus through the Authorization Period in the amounts specified above, provided, however, that, without further approval of the Commission, no Nonutility Applicant will declare or pay any dividend out of capital or unearned surplus if that Nonutility Applicant derives any material part of its revenues from the sale of goods, services or electricity to an Allegheny subsidiary that is a public utility company under the Act. In addition, none of AE Supply, AGC, or the Nonutility Applicants will declare or pay any dividend out of capital or unearned surplus unless it: (i) Has received excess cash as a result of the sale of its assets; (ii) has engaged in a restructuring or reorganization; and/or (iii) is returning capital to an associate company.

(10) Money Pool and Utility Applicant Short-Term Debt Limits

In a series of prior orders,[21] the Money Pool Applicants were

[18] Holding Co. Act Release No. 27571 (Sept. 27, 2002) (''AGC Dividend Order''). An extension of this authority through the Authorization Period is sought to ensure that the system financing authority is consolidated into a single authorization period.

[19] Holding Co. Act. Release No. 27878 (July 27, 2004).

[20] As noted, the intercreditor agreement applies equally to other Allegheny subsidiaries as well, including AE Supply, AGC and the Non-Utility Subsidiaries. Accordingly, certain of the dividend authority requested for AE Supply, AGC, and the Non-Utility Subsidiaries may be used to satisfy obligations under the intercreditor agreement. As with the Utility Applicants, however, any dividends paid by these companies under the intercreditor agreement will have no effect on their paid-in capital accounts as any payments made are immediately returned. The structure of the intercreditor agreement has been previously explained in File No. 70–10100.

[21] See orders dated January 29, 1992 (Holding Co. Act Release No. 25462), February 28, 1992 (Holding Co. Act Release No. 25481), July 14, 1992 (Holding Co. Act Release No. 22581), November 5, 1993 (Holding Co. Act Release No. 25919), November 28, 1995 (Holding Co. Act Release No. 26418), April 18, 1996 (Holding Co. Act Release No. 26506), December 23, 1997 (Holding Co. Act Release No. 26804), May 19, 1999 (Holding Co. Act Release No. 27030), October 8, 1999 (Holding Co. Act Release No. 27084), December 17, 2001 (Holding Co. Act Release No. 27475), October 24, 2002 (Holding Co. Act Release No. 27585), July 14, 2000 (Holding Co. Act Release No. 27199) (''Prior Money Pool Orders'').

authorized, among other things, to establish and participate in the Money Pool. This authority currently exists through April 30, 2005. The Money Pool Applicants request authority to continue the Money Pool through the Authorization Period, subject to the same terms and conditions set forth in the Prior Money Pool Orders.[22] The Money Pool Applicants request that the Commission authorize (i) Monongahela Power, Mountaineer, Potomac Edison, and West Penn to continue participation in the Money Pool as both lenders and borrowers to the extent not exempt under rule 52; (ii) AGC to continue participation in the Money Pool as a borrower only, to the extent not exempt under rule 52; (iii) Allegheny and AE Supply to continue participation as lenders only.

The Money Pool will continue to be administered on behalf of the Money Pool Applicants by AESC and under the direction of an officer of AESC. AESC will not be a participant in the Money Pool. The Money Pool will consist principally of surplus funds received from the Money Pool Applicants. In addition to surplus funds, funds borrowed by Allegheny, AE Supply, Monongahela, Potomac Edison, and West Penn through the issuance of short-term notes or other debt, or by the selling of commercial paper, as described above (''External Funds''), may be a source of funds for making loans or advances to companies borrowing from the Money Pool.

The Money Pool Applicants do not propose any material changes to the operation of the Money Pool as currently authorized. Transactions under the Money Pool will be designed to match, on a daily basis, the surplus funds of the pool participants with the short-term borrowing requirements of the pool participants (other than the pool participants who are lenders only), thereby minimizing the need for short-term debt to be incurred by the pool participants from external sources. The Money Pool Applicants believe that the cost of the proposed borrowings through the Money Pool generally will be more favorable to the borrowing participants than the comparable cost of external short-term borrowings, and the yield to the participants contributing available funds to the Money Pool generally will be higher than the typical yield on short-term investments.

The funds available through the Money Pool will be loaned on a short-term basis to those eligible pool participants that have short-term debt requirements. If no such short-term requirements match the amount of funds that are available for the Money Pool for the period such funds are available, AESC will invest the funds, directly or indirectly, as described below and will allocate the interest earned on these investments among the pool participants providing the funds on a pro rata basis according to the amount of the funds provided:

(1) Direct or indirect obligations of the United States Government;

(2) Certificates of Deposit of commercial banks with assets exceeding $2.5 billion;

(3) Bankers acceptances of commercial banks with assets exceeding $2.5 billion;

(4) Commercial paper of companies having a minimum net worth of $150 million having a ''1'' commercial paper rating by at least two of the three recognized rating services (Moody's, Standard & Poor's, and Fitch);

(5) Taxable or tax exempt institutional money market funds with assets of at least $500M which restrict investments to high quality money market instruments; and

(6) Other investments as are permitted by section 9(c) of the Act and rule 40 under the Act.

All borrowings from and contributions to the Money Pool will be documented and will be evidenced on the books of each pool participant that is borrowing from or contributing surplus funds to the Money Pool. Any pool participant contributing funds to the Money Pool may withdraw those funds at any time without notice to satisfy its daily need for funds. All short-term debt through the Money Pool (other than from External Funds) will be payable on demand, may be prepaid by any borrowing pool participant at any time without penalty, and will bear interest for both the borrower and lender. Interest income and expense will be calculated using the previous day's Fed Funds Effective Interest Rate (''Fed Funds Rate'') as quoted by the Federal Reserve Bank of New York, as long as this rate is at least, four basis points lower than the previous day's seven-day commercial paper rate as quoted by the same source. Whenever the Fed Funds Rate is not at least four basis points lower than the seven-day commercial paper rate, then the seven-day commercial paper rate minus four basis points should be used. Interest income and expense will be calculated daily and settled on a cash basis on the first business day of the following month. Each of the Utility Applicants may use the proceeds it borrows from the Money Pool (i) for the interim financing of its construction and capital expenditure programs; (ii) for its working capital needs; (iii) for the repayment, redemption, or refinancing of its debt and preferred stock; (iv) to meet unexpected contingencies, payment and timing differences, and cash requirements; and (v) to otherwise finance its own business and for other lawful general corporate purposes. Each of the following companies requests authority to borrow up to an amount at any one time outstanding from the Money Pool as set forth below: AGC, $100 million; Monongahela Power, $125 million; Mountaineer, $100 million; Potomac Edison, $150 million; and West Penn, $200 million.

Allegheny, AE Supply and the Utility Applicants also request authority to raise External Funds through short-term borrowing, as discussed above. Any External Funds raised by the Utility Applicants will be in an amount equal to the Utility Applicant's authority to borrow from the Money Pool. Allegheny, AE Supply and the Utility Applicants, other than AGC, would use the External Funds received in this way either to make loans or advances to companies borrowing from the Money Pool or for general corporate purposes. AGC would use these External Funds for general corporate purposes only.

D. Changes in Capitalization and Internal Reorganizations of Nonutility Applicants

Allegheny and AE Supply cannot ascertain at this time the portion of an individual Nonutility Applicant's aggregate financing to be effected through the sale of capital stock or equivalent interests in the form of limited liability company or general partnership interests during the Authorization Period under rule 52 or by order of the Commission. However, a proposed sale of capital stock or equivalent interests may in some cases exceed the capital stock or equivalent interests of a Nonutility Applicant authorized at that time. In addition, a Nonutility Applicant may elect to use capital stock with no par value, or convert from one form of business organization (*e.g.*, a corporation) to another (*e.g.*, a limited liability company). A Nonutility Applicant also may wish to undertake a reverse stock split in order to reduce franchise taxes or for other corporate purposes. Applicants, therefore, request authority to change the terms of any Nonutility Applicant's authorized capitalization, as needed to accommodate any proposed transactions and to provide for future issuances of securities, by an amount

[22] The Commission has authorized Mountaineer to participate in the Money Pool through December 31, 2005.

the Applicants or another parent company deem appropriate, provided that the consent of all other shareholders or owners of equivalent interests to a change has been obtained if the Nonutility Applicant in question is not a direct or indirect wholly-owned subsidiary company of one of the Applicants. The requested authority would permit a Nonutility Applicant to increase the number of its authorized shares of capital stock or equivalent interests, change the par value of its capital stock, change between par value and no-par value stock, or convert from one form of business organization to another without additional Commission approval.

In addition, to the extent that these transactions are not otherwise exempt under the Act or the Commission's rules under the Act, Applicants request approval to consolidate, sell, transfer, or otherwise reorganize all or any part of their direct and indirect ownership interests in Nonutility Applicants, as well as investment interests in entities that are not subsidiary companies. To effect any consolidation or other reorganization, Applicants may wish either to contribute the equity securities of one Nonutility Applicant to another Nonutility Applicant, including a newly formed intermediate company (''Intermediate Company''),[23] or sell (or cause a Nonutility Applicant to sell) the equity securities or all or part of the assets of one Nonutility Applicant to another. These transactions also may occur through a Nonutility Applicant selling or transferring the equity securities of a subsidiary or all or part of the subsidiary's assets as a dividend to an Intermediate Company or to another Nonutility Applicant, and the acquisition, directly or indirectly, of the equity securities or assets of the subsidiary, either by purchase or by receipt of a dividend. The purchasing Nonutility Applicant in any transaction structured as an intra-system sale of equity securities or assets may execute and deliver its promissory note evidencing all or a portion of the consideration given. Allegheny and AE Supply also may liquidate or merge Nonutility Applicants.

E. Exemption of Certain Transactions From At-Cost Requirements

Allegheny and AE Supply seek an exemption under rule 13(b) for the Nonutility Applicants to provide certain services in the ordinary course of their business to each other, in certain circumstances described below, including but not limited to cost or fair market prices.[24] Any services provided by the Nonutility Applicants to the Operating Companies and Mountaineer will continue to be provided ''at cost'' consistent with rules 90 and 91. A Nonutility Applicant will not provide services at other than cost to any other Nonutility Applicant that, in turn, provides these services, directly or indirectly, to any other associate company that is not a Nonutility Applicant, except under the requirements of the Commission's rules and regulations under Section 13(b) or an exemption from those rules and regulations obtained from the Commission.

Applicants request authority for the Nonutility Applicants to provide services to each other at other than cost in any case where the Nonutility Applicant receiving the services is:

(a) A FUCO or an EWG that derives no part of its income, directly or indirectly, from the generation, transmission, or distribution of electric energy for sale within the United States;

(b) An EWG that sells electricity at market-based rates that have been approved by the Federal Energy Regulatory Commission (''FERC''), provided that the purchaser of the electricity is not an associate public utility company;

(c) A ''qualifying facility'' (''QF'') within the meaning of the Public Utility Regulatory Policies Act of 1978, as amended (''PURPA''), that sells electricity exclusively (a) at rates negotiated at arm's-length to one or more industrial or commercial customers purchasing the electricity for their own use and not for resale, and/or (b) to an electric utility company (other than an associate utility company) at the purchaser's avoided cost as determined in accordance with FERC's regulations under PURPA;

(d) A domestic EWG or QF that sells electricity at rates based upon its cost of service, as approved by FERC or any state public utility commission having jurisdiction, provided that the purchaser of the electricity is not an associate public utility company; or

(e) A direct or indirect subsidiary of Allegheny formed under rule 58 under the Act or any other nonutility company that (i) is partially owned by Allegheny, provided that the ultimate recipient of the services is not an associate public utility company, or (ii) is engaged solely in the business of developing, owning, operating, and/or providing services to Nonutility Applicants described in clauses (a) through (d) immediately above, or (iii) does not derive, directly or indirectly, any material part of its income from sources within the United States and is not a public utility company operating within the United States.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E5–356 Filed 1–31–05; 8:45 am]

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[23] The Commission previously authorized AE Supply to organize Intermediate Companies to facilitate development and consummation of investments in exempt activities (Holding Co. Act Release No. 27383 (April 20, 2001)).

[24] By order dated October 27, 1995 (Holding Co. Act Release No. 26401), Allegheny has received authorization for Ventures to provide, direclty or through a special purpose subsidiary, energy management services and demand side management services to non-associate companies at market prices.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–51070; File No. SR–Amex–2005–008]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the American Stock Exchange LLC Relating to Options Transaction Fees in Connection With the Standard & Poor's Depositary Receipts

January 21, 2005.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 13, 2005, the American Stock Exchange LLC (''Amex'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The 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 Exchange proposes to modify its Options Fee Schedule by adopting a per contract license fee in connection with specialist and registered options traders (''ROTs'') transactions in options on Standard & Poor's Depositary Receipts (''SPDRs'') and by updating the symbol for the NASDAQ–100 Index Tracking Stock. The text of the proposed rule change is available on Amex's Web site at *http://www.amex.com*, at the Amex's

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Office of the Secretary, and at the Commission's Public Reference Room.

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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange has entered into numerous agreements with issuers and owners of indexes for the purpose of trading options on certain exchange-traded funds (''ETFs''). The requirement to pay an index license fee to third parties is a condition to the listing and trading of these ETF options. In many cases, the Exchange is required to pay a significant licensing fee to issuers or index owners that may not be reimbursed. In an effort to recoup the costs associated with index licenses, the Exchange has previously established a per contract licensing fee for specialists and ROTs that is collected on every transaction in designated products in which a specialist and ROT is a party. The licensing fees currently imposed on specialists and ROTs are set forth in the Exchange's Options Fee Schedule.

The purpose of the proposed fee is for the Exchange to recoup its costs in connection with the index license fee for the trading SPDR (SPY) options. The proposed licensing fee will be collected on every option transaction of the SPDR in which the specialist or ROT is a party. The Exchange proposes to charge $0.10 per contract side for options on the SPDR. Accordingly, the Exchange believes that requiring the payment of a per contract licensing fee by those specialists units and ROTs that are the beneficiaries of the Exchange's index license agreements is justified and is consistent with the rules of the Exchange. In addition, the Exchange believes that passing the license fee (on a per contract basis) along to the specialist(s) allocated to options on the SPDR and the ROTs trading such product is efficient and is consistent with the intent of the Exchange to pass on its non-reimbursed costs to those market participants that are the beneficiaries of such license agreements.

The Exchange notes that it has increased recently a number of member fees to better align Exchange fees with the actual cost of delivering services and reduce Exchange subsidies of such services.[3] Implementation of this proposal is consistent with the reduction and/or elimination of these subsidies.

The Exchange submits that the proposed license fee will provide the Exchange with additional revenue and will allow the Exchange to recoup its costs associated with the trading of options on the SPDR. In addition, the Amex believes that this fee will help to allocate to those specialists and ROTs transacting in options on the SPDR a fair share of the related costs of offering such options. Accordingly, the Exchange believes that the proposed fee is reasonable.

In addition, the Exchange proposes to update its Options Fee Schedule, including the list of products in Section V (Options Licensing Fee) and the text in footnote 1, to reflect the symbol change, from QQQ to QQQQ, that accompanied the transfer of the listing of the NASDAQ–100 Index Tracking Stock to The Nasdaq Stock Market, Inc., which took place on December 1, 2004.[4]

2. Statutory Basis

The Exchange believes that the proposed fee change is consistent with Section 6(b) of the Act,[5] in general, and Section 6(b)(4) of the Act,[6] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among exchange members and other persons using exchange facilities.

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 by the Exchange 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 has become effective immediately pursuant to Section 19(b)(3)(A)(ii) of the Act[7] and Rule 19b–4(f)(2)[8] thereunder, in that it establishes or changes a due, fee, or other charge imposed by 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 of appropriate in the public interest, for the protection of investors, or otherwise in the 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–2005–008 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–2005–008. 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

[3] *See* Securities Exchange Act Release Nos. 45360 (Jan. 29, 2002), 67 FR 5626 (Feb. 6, 2002) (order approving a proposed rule change relating to a retroactive increase in floor, membership and options trading fees, including licensing fees); and 44286 (May 9, 2001), 66 FR 27187 (May 16, 2001) (relating to fees imposed on members and member organizations, including member fees, floor fees, booth rental fees, and membership registration fees).

[4] Telephone conversation between Jeffrey Burns, Associate General Counsel, Amex, and Richard Holley III, Attorney, Division of Market Regulation, Commission, on January 21, 2005.

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(4).

[7] 15 U.S.C. 78s(b)(3)(A)(ii).

[8] 17 CFR 240.19b–4(f)(2).

communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal offices 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–Amex–2005–008 and should be submitted on or before February 22, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[9]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E5–352 Filed 1–28–05; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–51078; File No. SR–NASD–2004–173]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the National Association of Securities Dealers, Inc., To Establish Rules Governing the Operation of Nasdaq's Brut Facility

January 25, 2005.

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 3, 2004, the National Association of Securities Dealers, Inc. (''NASD''), through its subsidiary, The Nasdaq Stock Market, Inc. (''Nasdaq''), filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. On January 24, 2005, Nasdaq submitted Amendment No. 1 to the proposed rule change.[3] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Nasdaq proposes to establish rules governing the operation of its Brut trading facility. Nasdaq will implement the proposed rule change, as amended, immediately upon approval by the Commission. Below is the text of the proposed rule change, as amended. Proposed new language is *italicized;* proposed deletions are in [brackets].

4900. BRUT SYSTEM (System)

4901. Definitions

Unless stated otherwise, the terms described below shall have the following meaning:

(a) The term ''System securities'' shall mean Nasdaq Market Center eligible securities as that term is defined in NASD Rule 4701(s) and exchange-listed Intermarket Trading System (ITS) eligible securities as defined in NASD Rule 5210(c).

(b) The term ''Effective Time'' shall mean, for orders so designated, the time at which the order shall become eligible for display and potential execution with other orders in the System.

(c) The term ''Immediate or Cancel'' shall mean, for limit orders so designated, that if after entry into the System the order (or a portion thereof) is not marketable, the order (or unexecuted portion thereof) shall be canceled and returned to the entering Participant.

(d) The term ''limit order'' shall mean an order to buy or sell a stock at a specified price or better. This order type is available for Nasdaq-listed and Exchange-listed securities.

(e) The term ''market order'' shall mean an unpriced order to buy or sell a stock at the market's current best price. A market order may have a limit price beyond which the order shall not be executed. This order type is available for Nasdaq-listed and Exchange-listed securities.

(f) The term ''mixed lot'' shall mean an order that is for more than a normal unit of trading but not a multiple thereof.

(g) The term ''Nasdaq Market Center'' shall mean the automated system owned and operated by The Nasdaq Stock Market, Inc. pursuant to NASD Rule 4700 Series.

(h) The term ''The BRUT ECN System,'' or ''System,'' shall mean the automated system owned and operated by Brut, which is owned and operated by The Nasdaq Stock Market, Inc., which enables Participants to execute transactions in System securities; to have reports of the transactions automatically forwarded to the appropriate National Market Trade Reporting System, if required, for dissemination to the public and the industry, and to ''lock in'' these trades by sending both sides to the applicable clearing corporation(s) designated by the System Participant(s) for clearance and settlement; and to provide System Participants with sufficient monitoring and updating capability to participate in an automated execution environment.

(i) The term ''Participant'' shall mean an NASD member that fulfills the obligations contained in Rule 4902 regarding participation in the System.

(j) The term ''System Book Feed'' shall mean a data feed for System eligible securities that Brut will make available to Participants and third-party vendors.

(k) The term ''odd-lot order'' shall mean an order that is for less than a normal unit of trading.

(l) The term ''Reserve Size'' shall mean the functionality that permits a Participant to display a portion of an order, with the remainder held in reserve on an undisplayed basis.

(m) The term ''Good-till-Cancelled'' shall mean, for orders so designated, that if after entry into the System, the order is not fully executed, the order (or unexecuted portion thereof) shall remain available for potential display and/or execution only until 4 p.m. Eastern Time on the day they are submitted unless cancelled before then by the entering party.

(n) The term ''Good-till-Cancelled-Overnight'' shall mean, for orders so designated, that if after entry into the System, the order is not fully executed, the order (or unexecuted portion thereof) shall remain available for potential display and/or execution until 4 p.m. Eastern Time, after which it shall be held by the System in a pending state, ineligible for display or execution, until the following trading day, when it will become eligible for display and execution from 7:30 a.m. until 4 p.m. Eastern Time on that and all subsequent trading days, until a date provided by the entering party (or if no such date is given, indefinitely) until cancelled by the entering party.

(o) The term ''Good-till-Time,'' shall mean, for orders so designated, that if after entry into System, the order is not fully executed, the order (or unexecuted portion thereof) shall remain available for potential display and/or execution until the time designated by the entering party, after which the order will be cancelled by the system. This time may

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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] Amendment No. 1 replaced and superseded the originally filed proposed rule change.

be relative time (e.g. 30 minutes after entry) or an actual time (e.g. 2 p.m.).

(p) The term ''Day'' shall mean, for orders so designated, that if after entry into the System, the order is not fully executed, the order (or unexecuted portion thereof) shall remain available for potential display and/or execution only until 4 p.m. Eastern Time on the day they are submitted unless cancelled before then by the entering party.

(q) The term ''End-of-Day'' shall mean, for orders so designated, that if after entry into the System, the order is not fully executed, the order (or unexecuted portion thereof) shall remain available for potential execution and/or display until 8 p.m. Eastern Time, after which it shall be returned to the entering party.

(r) The term ''Pegged'' shall mean, for priced limit orders so designated, that after entry into the System, the price of the order is automatically adjusted by the System in response to changes in the Nasdaq inside bid or offer (for Nasdaq-listed securities) or the national best bid or offer (for ITS securities), as appropriate. The Participant entering a Pegged Order can specify that order's price will either equal the inside quote or improves the inside quote by an amount set by the entering party on the same side of the market (a ''Regular Pegged Order'') or offset the inside quote on the contra side of the market by an amount (the ''Offset Amount'') set by the Participant (e.g., $0.01 less than the inside offer or $0.02 more than the inside bid) (a ''Reverse Pegged Order''). The Participant entering a Pegged Order may (but is not required to) specify a limit price, to define a price at which pegging of the order will stop and the order will be permanently converted into an un-pegged limit order at limit price. This order type is available for Nasdaq-listed and Exchange-listed securities.

(s) The term ''Discretionary'' shall mean an order that when entered into System has both a displayed bid or offer price, as well as a non-displayed discretionary price range and size (which shall be equal to or less than the Order's Reserve Size) at which the Participant is also willing to buy or sell, if necessary. This order type is available for Nasdaq-listed and Exchange-listed securities.

(t) The term ''Post Only'' shall mean, for To Brut limit orders so designated, that if an order is marketable against an order then-displayed in the System upon receipt, it shall be rejected and returned to the entering Participant. If the order is marketable against a quote displayed outside of Brut, the price of the order is adjusted to a price $0.01 inferior to the best bid (or offer, as appropriate) then displayed in the Nasdaq Market Center, and then displayed in the System. This order type is available for Nasdaq-listed and Exchange-listed securities.

(u) The term ''Agency Away'' shall mean an agency order designated by the entering Participant as eligible for execution at a price inferior to the then-current national best bid/offer. This order type is available only for Nasdaq-listed securities.

(v) The term ''Principal Inside Only'' shall mean a principal order designated by the entering Participant as only eligible for execution at a price equal or better than the then-current national best bid/offer. This order type is available for Nasdaq-listed and Exchange-listed securities.

(w) The term ''normal unit of trading'' shall mean one hundred (100) shares.

4902. System Participant Registration

(a) Participation in Brut requires current registration with the System and is conditioned upon the Participant's initial and continuing compliance with the following requirements:

(1) Execution of a System Subscriber Agreement;

(2) Satisfaction of the Brut New Accounts Policies & Procedures requirements;

(3) Membership in, or access arrangement with a participant of, a clearing agency registered with the Commission that maintains facilities through which System compared trades may be settled;

(4) Acceptance and settlement of each System trade that System identifies as having been effected by such Participant, or if settlement is to be made through another clearing member, guarantee of the acceptance and settlement of such identified System trade by the clearing member on the regularly scheduled settlement date;

(5) Compliance with all applicable rules and operating procedures of the Association and the Securities and Exchange Commission.

(b) Access to the System by non-System participants is available through the Nasdaq Market Center as defined in NASD Rule 4701(r) and related rules.

4903. Order Entry Parameters

(a) To Brut Orders—

(1) General. A To Brut Order is an order that is displayed in the System and is executable only against marketable contra-side orders in the System. This order type is available for Nasdaq-listed and Exchange-listed securities. The following requirements shall apply to To Brut Orders entered by Participants:

(A) A To Brut Order shall be a limit order, and shall indicate whether it is a buy, short sale, short-sale exempt, or long sale. A To Brut Order can be designated as End-of-Day, Immediate or Cancel, Good-till-Cancelled, Day, Good-till-Canceled Overnight, Good-till-Time, Effective Time, Post Only, Pegged or Discretionary.

(B) To Brut Orders shall be executed pursuant to the Brut Book Process as described in Rule 4905(a).

(C) A To Brut Order to sell short shall not be executed if the execution of such order would violate NASD Rule 3350 or, in the case of ITS Securities, SEC Rule 10a–1. In said circumstances, the price of the To Brut Order shall be adjusted to $.01 above the Nasdaq inside bid for Nasdaq-listed securities or, in the case of exchange-listed securities, $.01 above the national best bid or offer, and thereafter be processed as if a Reverse Pegged Order.

(D) The System shall not accept To Brut Orders that are All-or-None, or have a minimum size of execution.

(b) Brut Cross Orders—

(1) General. A Brut Cross Order is an order that is displayed in the System, and is executable against marketable contra-side orders in the System. The order also is eligible for routing to other market centers. If marketable upon receipt against both orders in the System as well as other market centers, the order shall execute first against System orders. With the exception of Directed Cross Orders, once a Brut Cross Order is routed (in whole or in part) to another market center, any remaining unexecuted or returned portion of the order shall be posted in System and shall no longer be eligible for routing to other market centers.

(A) A Brut Cross Order shall be a limit order, and shall indicate whether it is a buy, short sale, short-sale exempt, or long sale. A Brut Cross Order can be designated as Immediate or Cancel, End-of-Day, Good-till-Cancelled, Day, Good-till-Cancelled Overnight, Good-till-Time, Effective Time.

(B) A Brut Cross Order may also be designated as an Aggressive Cross Order. An Aggressive Cross Order is an order that is displayed in the System during market hours and is executable against marketable contra-side orders in the System. The order also is eligible for routing to other market centers. If marketable upon receipt against both orders in the System as well as other market centers, the order shall execute first against System orders. If, after being posted in the Brut System, and after it has exhausted available liquidity

in the Brut System, the Aggressive Cross Order has its price crossed by the displayed quote of another market center, the System will be routed by Brut to that market center for potential execution. Aggressive Cross Orders may comply with paragraph (A) of this rule.

(C) A Brut Cross Order may also be designated as a Super Aggressive Cross Order. A Super Aggressive Cross Order is an order that is displayed in the System during market hours and is executable against marketable contra-side orders in the System. The order also is eligible for routing to other market centers. If marketable upon receipt against both orders in the System as well as other market centers, the order shall execute first against System orders. If, after being posted in the Brut System, and after it has exhausted available liquidity in the Brut System, the Aggressive Cross Order has its price locked or crossed by the displayed quote of another market center the System will be routed by Brut to that market center for potential execution.

(D) A Brut Cross Order may also be designated as a Directed Cross Order. A Directed Cross Order is an order that entered in the System during market hours and is executable against marketable contra-side orders in the System. The order also is eligible for routing to other market centers. If, after being processed in the Brut System and exhausting available liquidity in the Brut System, the order is automatically routed by Brut to the specific market center selected by the entering party for potential execution. Any portion of the Directed Cross Order that remains unfilled after being routed to the selected market center will be returned to the entering party.

(E) Brut Cross Orders, including those designated as Aggressive Cross Orders, Super Aggressive Cross Orders and Directed Cross Orders, shall be executed pursuant to:

(i) The To Brut Order Process described in Rule 4905(a) to the extent marketable against an order resident in the System; and

(ii) With the exception of Directed Cross Orders, the Brut Order Routing Process described in Rule 4905(b) to the extent not marketable against an order resident in the System.

(F) A Brut Cross Order, including those designated as an Aggressive Cross Order, Super Aggressive Cross Order and Directed Cross Order, to sell short shall not be executed in the System if the execution of such order would violate NASD Rule 3350 or, in the case of ITS Securities, SEC Rule 10a–1. In said circumstances, the price of the Brut Cross Order shall be adjusted to $.01 above the Nasdaq inside bid for Nasdaq-listed securities or, in the case of exchange-listed securities, $.01 above the national best bid or offer, and thereafter be processed as if a Reverse Pegged Order.

(c) Thru Brut Orders—

(1) General. A Thru Brut Order is an order submitted to the System that is designated for routing to another market center. This order type is available for Nasdaq-listed and Exchange-listed securities. The following requirements shall apply to Thru Brut Orders:

(A) A Thru Brut Order shall be a market order or a limit order, and must indicate whether it is a buy, short sale, short-sale exempt, or long sale. A Thru Brut Order can be designated as Immediate or Cancel, End-of-Day, Good-till-Cancelled, Day, or Good-till-Time, or Effective Time.

(B) Thru Brut Orders do not participate in Brut Routing Process as described in Rule 4905(b). Instead such orders are sent directly to the market center selected by the entering party. If unexecuted, the order (or unexecuted portion thereof) shall be returned to the entering party.

(d) Hunter Orders—

(1) General. A Hunter Order is a non-displayed order that will execute against trading interest in the System or another market center. This order type is available only for Nasdaq-listed securities. After 6:30 p.m. Eastern Time, Hunter Orders will execute only against other orders in the System. The following requirements shall apply to Hunter Orders:

(A) A Hunter Order shall be a limit order, and must indicate whether it is a buy, short sale, short-sale exempt, or long sale. A Hunter Order can be designated as Immediate or Cancel, End-of-Day, Good-till-Cancelled, Day, or Good-till-Time, or Effective Time.

(B) Hunter Orders shall be executed as follows:

(i) To the extent marketable upon receipt against orders in the System, pursuant to the Brut Book Process as described in Rule 4905(a); then/or

(ii) If not marketable upon receipt against orders in the System but marketable against the displayed quotes of other market centers, pursuant to the Brut Routing Process as described in Rule 4905(b).

(iii) If not marketable upon receipt against any quote displayed in the System or another market center, the order shall be retained, but not be displayed, in the System and shall remain available for execution via the Brut Book and/or Brut Routing Processes should the order become marketable.

(e) Entry of Agency and Principal Orders—Participants are permitted to submit agency, riskless principal, and principal orders for processing in the System. Participants shall correctly note their capacity at the time of entry of an order(s) into the System.

(1) Unless designated as ''Agency Away'', no agency order shall be executed at a price inferior to the then current National Best Bid (for sell orders) or Best Offer (for buy orders), taking into account prior efforts to execute against the bids/offers of other market centers.

(2) Unless designated as ''Principal Inside Only'', principal and riskless principal orders may be executed at a price inferior to the then current National Best Bid (for sell orders) or Best Offer (for buy orders).

(f) Order Size—Any order in whole shares up to 1,000,099 shares may be entered into the System, subject to a dollar volume limitation of $25,000,000.

4904. Entry and Display of Orders

(a) Entry of Orders—Participants can enter orders into the System, subject to the following requirements and conditions:

(1) Participants shall be permitted to transmit to the System multiple orders at a single as well as multiple price levels. Each order shall indicate the amount of reserve size (if applicable).

(2) The System shall time-stamp an order upon receipt, which time-stamp shall determine the ranking of the order for purposes of processing To Brut Orders and Brut Cross Orders.

(3) Good-till-Cancelled, Day, orders can be entered into the System (or previously entered orders cancelled) between the hours 7:30 a.m. to 4 p.m. Eastern Time. Pegged, Discretionary, Immediate-or-Cancel and End-of-Day To Brut Orders, Good-till-Time, Good-till-Canceled Overnight and GTX orders can be entered into System (or previously entered orders cancelled) between the hours 7:30 a.m. to 8 p.m. Eastern Time. Orders entered prior to market open and Good-till-Time orders carried over from previous trading days, shall not become available for execution until 7:30 a.m. Eastern Time. Good-till-Time orders carried over from previous trading days with an Effective Time will not become available for execution until the Effective Time on all subsequent trading days the order is held by the System.

(b) Display of Orders—The System will display orders submitted to the System as follows:

(1) System Book Feed—orders resident in the System will be displayed to Participants via the System Book Feed.

(2) Nasdaq Market Center—For each Nasdaq Market Center eligible security, the best priced order to buy and sell resident in the System shall be displayed and eligible for execution within the Nasdaq Market Center. The System may also provide to the Nasdaq Market Center additional orders, up to and including all orders in System, in Nasdaq Market Center eligible securities.

(3) Exceptions—The following exceptions shall apply to the display parameters set forth in paragraphs (1) and (2) above:

(A) Odd-lots, Mixed Lots, and Rounding—The System Book Feed shall be capable of displaying trading interest in round lot and mixed-lot amounts, and sub-penny increments for quotations priced under $1.00.

For Nasdaq Market Center display purposes, the System shall aggregate all shares, including odd-lot share amounts, entered by Participants at a single price level and round the total share amount down to the nearest round-lot amount. Any odd-lot portion of an order that is not displayed as a result of the rounding process shall remain available for execution, in accordance with the time-priority of their original entry time. Round-lots that are subsequently reduced by executions to a mixed lot amount shall also be rounded for to the nearest round-lot amount for purposes of display in the Nasdaq Market Center. Any odd-lot number of shares that do not get displayed as a result of rounding will remain available for execution, in accordance with the time-priority of their original entry time.

(B) Minimum Increments and Rounding—The minimum trading increment for System quotations priced $1.00 and above is $.01. For quotations priced below $1.00 the minimum increment is $.0001.

(i) For System display purposes, quotations in sub-penny increments $1.00 and above will be rounded down (for bids) or up (for offers) by the System to the nearest $.01 increment. Orders so rounded shall have no superior execution priority compared to orders previously submitted at the relevant $.01 increment.

(ii) For Nasdaq Market Center display purposes, any quotations in sub-penny increments shall be rounded down (for bids) and up (for offers) to the nearest $.01 increment. Sub-penny quotations that are rounded for display purposes shall be executed at their actual price, rather than the rounded price at which they are displayed.

(C) Reserve Size—Reserve Size shall not be displayed in the System, but shall be accessible as described in Rule 4905.

(D) Discretionary & Hunter Orders—Hunter Orders, and the discretionary portion of Discretionary Orders shall be available for execution only upon the appearance of contra-side marketable trading interest, and shall be executed pursuant to Rule 4905.

4905. Order Processing

(a) Brut Book Order Process

Orders subject to the Brut Book Order Process shall be executed as follows:

(1) Default Execution Algorithm—Price/Time—The System shall execute interest within the System in price/time priority in the following order:

(A) Displayed Orders;

(B) Reserve Size;

(C) Discretionary Orders within the Discretionary Order's discretionary price range; and

(D) Hunter Orders.

(2) Decrementation—Upon execution, an order shall be reduced by an amount equal to the size of that execution. In the case of orders that have both a displayed and reserve share component, share amounts shall be reduced starting first with their reserve portions.

(3) Processing of Locking/Crossing Orders: If during market hours, a Participant enters a To Brut order that will lock/cross the market (as defined in NASD Rule 4613(e) or in NASD Rule 5263(a) or (b)), the System shall adjust the price of the order to $.01 less than the current best bid quotation (for buy orders) or $.01 more than the current best offer quotation (for sell orders) and thereafter be processed as a Reverse Pegged Order.

(4) Processing of Directed, Aggressive and Super Aggressive Cross Orders—The System shall process crossed Directed and Aggressive Cross Orders, and locked or crossed Super Aggressive Cross Orders as follows:

(A) Displayed orders which are designated as ''Directed Cross Orders'' by a Participant shall be routed to the market center selected by the entering party for potential execution by the System. This order type is available Nasdaq-listed and Exchange-listed securities.

(B) Displayed orders which are designated as ''Aggressive Cross Orders'' by a Participant that are subsequently crossed by the displayed quotation of another market center shall be executed pursuant to the Brut Order Routing Process upon being so crossed. This order type is available for Nasdaq-listed and Exchange-listed securities.

(C) Displayed orders which are designated as ''Super Aggressive Cross Orders'' by a Participant that are subsequently locked or crossed by the displayed quotation of another market center shall be executed pursuant to the Brut Order Routing Process upon being so locked or crossed. This order type is available for Nasdaq-listed and Exchange-listed securities.

(b) Brut Order Routing Process

(1) The Brut Order Routing Process shall be available to Participants from 7:30 a.m. to 6:30 p.m. Eastern Time, and shall route orders in accordance with parameters described in Rule 4903 for a particular order type.

(2) With the exception of Thru Brut and Directed Cross Orders that specifically direct which market center an order is to be routed, orders routed out of the Brut System to other market centers for potential execution are generally delivered to other market centers in price/size priority. If the routed order is smaller in size than the total combined displayed share amounts of accessible market centers at the best price level, the Brut System delivers the routed order to the available market centers in price/size priority. If the routed order is larger than the total combined displayed share amounts of accessible market centers at the best price level, the Brut System delivers over-sized orders to each displayed market center's quote in proportion to the individual market's center share of that total displayed share amount.

(3) In the event an order routed to another market center is not executed in its entirety, the remaining portion of the order shall be returned to the System and, if upon return the order is marketable against a System order then priced at the NBBO, it will be subjected to Brut Book Process prior to any further routing.

(4) An order that has been routed to another market shall have no time standing in the System execution queue relative to other orders in the System. A request from a Participant to cancel an order while it is outside the System shall be processed subject to the applicable rules of the market center to which the order has been routed.

4906. Clearance and Settlement

All transactions executed in, or reported through, System shall be cleared and settled by and between the System Participant and Brut, through a registered clearing agency using a continuous net settlement system.

4907. Obligation To Honor System Trades

(a) If a Participant, or clearing member acting on a Participant's behalf, is reported by the System, or shown by the activity reports generated by the System, as constituting a side of a System trade, such Participant, or clearing member acting on its behalf, shall honor such trade on the scheduled settlement date.

(b) Brut and/or Nasdaq shall have no liability if a Participant, or a clearing member acting on the Participant's behalf, fails to satisfy the obligations in paragraph (a).

4908. Compliance With Rules and Registration Requirements

(a) Failure by a Participant to comply with any of the rules or registration requirements applicable to the System identified herein shall subject such Participant to censure, fine, suspension or revocation of its registration a Participant or any other fitting penalty under the Rules of the Association.

(b) If a Participant fails to maintain a clearing relationship to honor its obligations under Rule 4906, it shall have its access to the System restricted until such time as a clearing arrangement is reestablished.

(c) The authority and procedures contained in paragraph (b) do not otherwise limit the Association's authority, contained in other provisions of the Association's Rules, to enforce its rules or impose any fitting sanction.

4909. Adjustment of Open Orders

Except when a cash dividend or distribution is less than one cent ($0.01), on the ex-date of a corporate action, the System shall automatically adjust the price and/or size of Good-till-Cancelled Overnight orders resident in the System in response to issuer corporate actions related to a cash dividend as follows:

(a) Sell Orders—Sell orders shall not be adjusted by the System and must be modified, if desired, by the entering party,

(b) Buy Orders—Buy orders shall be reduced by the dividend amount. To the extent that the dividend includes a sub-penny increment, the order will be displayed and processed as set forth in Rule 4904(b)(3)(B). Open buy and sell orders that are adjusted by the System pursuant to the above rules, and that thereafter continuously remain in the System, shall retain the time priority of their original entry.

4910. Anonymity

(a) Transactions executed in the System shall be cleared and settled with Brut. The transaction reports produced by the System will indicate the details of the transactions, and shall not reveal contra party identities other than Brut.

(b) Brut shall reveal a member's identity in the following circumstances:

(1) When the National Securities Clearing Corporation (''NSCC'') ceases to act for a member, or the member's clearing firm, and NSCC determines not to guarantee the settlement of the member's trades;

(2) For regulatory purposes or to comply with an order of an arbitrator or court;

4911. Clearly Erroneous Transactions

All matters related to clearly erroneous transactions executed in the System shall be initiated and adjudicated pursuant to NASD Rule 11890.

[4912. Minimum Quotation Increment

The minimum quotation increment in the BRUT ECN System for quotations of $1.00 or above in Nasdaq-listed securities and in securities listed on a national securities exchange shall be $0.01. The minimum quotation increment in the BRUT ECN System for quotations below $1.00 in Nasdaq-listed securities and in securities listed on a national securities exchange shall be $0.0001.]

4912. Normal Business Hours

The Brut System operates from 6:30 a.m. to 8 p.m. Eastern Time on each business day.

4913. Limitation of Liability

The Association and its subsidiaries, as well as Nasdaq and Brut and their subsidiaries, shall not be liable for any losses, damages, or other claims arising out of the System or its use. Any losses, damages, or other claims, related to a failure of the System to deliver, display, transmit, execute, compare, submit for clearance and settlement, adjust, retain priority for, or otherwise correctly process an order, Quote/Order, message, or other data entered into, or created by, the System shall be absorbed by the member, or the member sponsoring the customer, that entered the order, Quote/Order, message, or other data into the System.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change, as amended. The text of these statements may be examined at the places specified in Item IV below. Nasdaq has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Background

On September 7, 2004, Nasdaq completed its purchase of Brut, LLC (''Brut''), a registered broker-dealer and member of the NASD, and operator of the Brut ECN (the ''Brut System'' or ''System'').[4] According to Nasdaq, as a member of the NASD, Brut remains subject to all NASD rules applicable to its activities as a broker-dealer, including those requiring its participation in market surveillance and audit trail programs conducted by Nasdaq and the NASD. Nasdaq states that, as an ECN, Brut participates in the Nasdaq Market Center system as an Order-Delivery ECN pursuant to the NASD Rule 4700 Series, and as an ITS Market Maker pursuant to the NASD Rule 5200 Series. Brut continues to act as a counter-party to all trades taking place in its system, for anonymity as well as clearance and settlement purposes. Brut also continues to provide outbound order routing services to other market centers for its subscribers. According to Nasdaq, to meet its limit order display obligations, Brut currently provides the Nasdaq Market Center its best single ''top-of-file'' priced orders in individual securities Brut has within the System.

Nasdaq states that, once purchased by Nasdaq, the Brut System became a ''facility'' of a national securities association subject to the standards set forth in Sections 15A and 19(b)(1) of the Exchange Act.[5] As such, Nasdaq is obligated to file with the Commission rules to govern the operation of the Brut System. This filing is intended to meet that obligation and includes a description of the Brut System, its

[4] Nasdaq owns Brut via Nasdaq's 100% ownership interest in Toll Associates LLC. Toll Associates LLC, in turn, owns 99.78% Brut LLC and 100% of Brut Inc., which owns the remaining 0.22% of Brut LLC. Both Toll Associates LLC and Brut Inc. conduct no business other than serving as holding entities for their respective ownership interests in Brut LLC, the entity that operates the Brut ECN.

[5] Nasdaq currently operates Brut pursuant to a Temporary Conditional Exemption from Rule 19(b) of the Exchange Act issued by the Commission. See Exchange Act Release No. 50311 (September 3, 2004), 69 FR 54818 (September 10, 2004).

various features, order processing method, and a proposed set of Brut System rules.

The Brut System

1. Order Display/Matching System

The Brut System allows subscribers to enter market and priced limit orders to buy and sell Nasdaq and Exchange-listed securities. Such orders may be in round-lots, mixed-lots, or odd-lots of any size up to 1,000,099 shares up to a maximum single order dollar cap amount of $25,000,000, and may be entered on a principal, riskless principal, or agency basis. Nasdaq states that Brut acts only as an agent on behalf of its subscribers and engages in no proprietary trading save that necessary to correct system errors. Subscribers may enter multiple orders at single or multiple price levels. Subscribers have the option to have a portion of their order held in reserve and not displayed to the marketplace. Brut, in turn, makes available to System subscribers and market data vendors a data feed of all displayable orders on both the bid and offer side of the market (excluding reserve size share amounts) for all price levels at which shares are available within its System. According to Nasdaq, to the extent that Brut displays orders in the Nasdaq Market Center, those orders are displayed under the same terms and conditions generally applicable to Nasdaq Quoting Market Participants, including the rounding and aggregation procedures contained in NASD Rule 4707. Although Brut currently provides only its best top-of-file prices to the Nasdaq Market Center, Nasdaq proposes that Brut be given the option to provide the Nasdaq Market Center additional orders at other price levels, up to and including Brut's full depth-of-book, so that Nasdaq Market Center users may have the full benefit of Brut's liquidity.

Brut also currently accepts sub-penny amounts for orders priced under $1.00 a share. Nasdaq states that, for orders priced $1.00 a share and above, Brut accept orders only in penny increments.[6] Sub-penny order prices are viewable by System subscribers. If a sub-penny order is required to be displayed via the Nasdaq Market Center, the Brut system rounds such orders down (for bids) or up (for offers) to the nearest $.01 increment. Sub-penny orders executed via the Nasdaq Market Center, however, will be executed at their actual price, rather than the rounded price at which they are displayed.[7]

2. Access Standards

According to Nasdaq, to obtain access to the Brut System as a system participant, a user must execute a Brut subscriber agreement and be a participant in, or have an access arrangement with a participant in, a Commission-registered clearing agency. In addition, the Brut subscriber must also agree to:

a. Comply with all applicable rules of the NASD and the Commission; and

b. Accept all Brut System trades identified by the System as being effected by the subscriber.

Broker-dealers may also access System orders through the Nasdaq Market Center, regardless of their status as a system participant as described above, provided they have met the conditions for access to the Nasdaq Market Center.

3. Order Types

The Brut System makes available to subscribers several order types. These order types are described below.

Limit Order—an order to buy or sell a stock at a specified price or better. This order type is available for Nasdaq-listed and Exchange-listed securities.

Market Order—an un-priced order to buy or sell a stock at the market's current best price. A market order may have a limit price beyond which the order shall not be executed. This order type is available for Nasdaq-listed and Exchange-listed securities.

Agency Away Order—an agency order that is designated by the entering party as eligible for execution at a price inferior to the then-current national best bid/offer. This order type is available for Nasdaq-listed securities.

Principal Inside Only Order—a principal order that is designated by the party as only eligible for execution at a price equal or better than the then-current national best bid/offer. This order type is available for Nasdaq-listed and Exchange-listed securities.

Brut Cross Order—an order that is displayed in Brut and executable against marketable contra-side orders in any market center, including the Brut System, at the time of receipt. If equally-priced executable orders are available both in Brut and another market center, the order will first execute against Brut System orders. Once a Brut Cross Order is routed out in whole or in part to another market center, any remaining unexecuted or returned portion of the order will be posted in the Brut System and will no longer be routed out for potential execution, unless the order is designated as an Aggressive Cross Order or Super Aggressive Cross Order. This order type is available for Nasdaq-listed and Exchange-listed securities.

Example:

The market is 10.00 bid—10.01 offer.

Brut receives a Brut Cross sell order, priced at 10.00.

Brut will route this order out to any crossing market center for potential execution.[8] If the routed order is only partially executed, the outstanding shares remaining will be posted in the Brut book on the offer at 10.00. Once posted, the order will no longer be routed out for execution.

Directed Cross Order—an order that if, after entry into the Brut System and after it has exhausted available liquidity in the Brut System is routed by Brut to that specific market center for potential execution. This order type is available for Nasdaq-listed and Exchange-listed securities.

Example:

The market is 10.00 bid—10.01 offer.

Brut receives a Directed Cross sell order, priced at 10.00 and directed to Market Center A.

After checking the Brut system for available liquidity, the system will route this order to Market Center A for potential execution. If the routed order is only partially executed, the outstanding shares are returned to the entering party.

Aggressive Cross Order—a Brut Cross Order that if, after being posted in the Brut System and after it has exhausted available liquidity in the Brut System, has its price crossed by the displayed quote of another market center is routed by Brut to that market center for potential execution. This order type is available for Nasdaq-listed and Exchange-listed securities.

Example:

The market is 10.00 bid—10.01 offer.

Brut receives an Aggressive Cross sell order, priced at 10.01.

Brut will first post this order on the offer at 10.01. Soon thereafter, another market center posts a bid price at 10.02. Since this 10.02 price is marketable against the Aggressive Cross Order's limit price of 10.01, the order will be routed out by Brut to the other market center for execution. If the liquidity priced at 10.02 is depleted, and the Aggressive Cross Order still has outstanding shares remaining, the order

[6] *See* Securities Exchange Act Release No. 50956 (January 3, 2005), 70 FR 1746 (January 10, 2005) (NASD–2004–190).

[7] This filing relocates the standards governing the Brut System's acceptance and processing of sub-penny orders from current NASD Rule 4912 to proposed NASD Rule 4904(b)(3)(B).

[8] For all order type examples, the term ''market center'' refers to any trading venue other than Brut, including the Nasdaq Market Center.

will be re-posted in the Brut book at its price of 10.01. If the price of returned shares is again crossed, the shares will again be routed for potential execution.

Super Aggressive Cross Order—a Brut Cross Order that, if after being posted in the Brut System, has its price locked or crossed by the displayed quote of another market center, is routed by Brut for potential execution. This order type is available for Nasdaq-listed and Exchange-listed securities.

Example:

The market is 10.00 bid—10.01 offer

Brut receives a Super Aggressive Cross sell order, priced at 10.01.

Brut will first post this order on the offer at 10.01. Soon thereafter, another market center posts a bid price at 10.01. Since this 10.01 price is equal to the Super Aggressive Cross Order's limit price of 10.01, the order will be routed out by Brut to the other market center for execution. If the liquidity priced at 10.01 is depleted, and the Super Aggressive Cross Order still has shares remaining, the order will be re-posted in the Brut book at its price of 10.01. This same process would be followed if the other market center had posted a price that crossed the Super Aggressive Cross Order. If the price of returned shares is again locked or crossed, the shares will again be routed for potential execution.

Thru Brut Order—an order that is directed to a market center other than Brut for execution. This order type is available for Nasdaq-listed and Exchange-listed securities.

To Brut Order—an order eligible for execution upon receipt solely against Brut System orders, and displayed in the System to the extent the order cannot be executed upon receipt. This order type is available for Nasdaq-listed and Exchange-listed securities.

Hunter Order—an order that is not displayed in the System, but will execute against available trading interest residing in the Brut System or another market center. This order type is available for Nasdaq-listed and Exchange-listed securities.

Example:

The market is 10.00 bid—10.02 offer.

Brut receives a Hunter Order to buy, priced at 10.01.

Since there is no liquidity at the 10.01 price, Brut will hold the order undisplayed until marketable trading interest is available. If thereafter an offer is posted at 10.01 either in Brut or in another market center Brut will execute or route the Hunter Order to access that liquidity. Any unexecuted shares will remain/return to the book and wait undisplayed until another order is marketable against the Hunter Order or the Hunter Order times out. If the returned shares of the Hunter Order again become marketable, the shares will again be routed for potential execution.

Pegged Order—a To Brut limit order that, after entry, has its price automatically adjusted by the System in response to changes in the Nasdaq Market Center (for Nasdaq-listed securities) or national best bid or offer (for Exchange-listed securities), as appropriate. Pegged Orders can specify that its price will either equal the inside quote on the same side of the market or improves the inside quote by an amount set by the entering party (a ''Regular Pegged Order''), or a price that is offset from the inside quote on the contra side of the market by an amount (the ''Offset Amount'') set by the entering party (*e.g.*, $0.01 less than the inside offer or $0.02 more than the inside bid) (a ''Reverse Pegged Order''). The Pegged Order only moves towards, or up to, the best price as appropriate. The entering party may voluntarily specify a limit price at which pegging price changes of the order will stop and the order will be permanently converted into an un-pegged limit order at the limit price. This order type is available for Nasdaq-listed and Exchange-listed securities. Pegged orders may not be combined with other order processing designations.

Example:

The market is 10.00 bid—10.01 offer.

Brut receives a Regular Pegged buy order, with a peg limit of 10.05.

Brut will post the order at 10.00. If the inside bid moves to 10.01, Brut will move the Pegged Order also to the 10.01 bid price. This process will continue until the order is executed or its price reaches the peg limit of 10.05.

Discretionary Order—an order that has both a displayed price, as well as a non-displayed discretionary price range and size (which shall be equal to or less than the order's reserve size) in which the entering party, if necessary, is also willing to buy or sell. This order type is available for Nasdaq-listed and Exchange-listed securities.

Example:

The market is 10.00 bid—10.50 offer.

Brut receives a Discretionary buy order, with a limit price of 10.00 and a display quantity of 200 shares, a discretion price of 10.25 and a discretion quantity of 1,000 shares.

Brut posts the order at 10.00. Thereafter, another market participant posts an offer for 1,000 shares at 10.20. Since this is within the Discretionary Order's price range, Brut will route the full discretion quantity (*i.e.*, 1,000 shares) for potential execution while the displayed portion remains in the Brut book.

Post Only Order—a To Brut Limit Order that, if marketable upon receipt against an order then-displayed in the System, is rejected and returned to the entering party. If the order is marketable against a quote displayed outside of Brut, the price of the order is adjusted to a price $0.01 inferior to the best bid (or offer, as appropriate) then displayed in the Nasdaq Market Center, and then displayed in Brut. This order type is available for Nasdaq-listed and Exchange-listed securities.

Example:

The market is at 10.00 bid—10.01 offer. Brut is at the 10.00 bid.

Brut receives Post-Only sell order, priced at 10.00.

Normally, this order would execute against the Brut 10.00 bid, but since the order is post-only, the order is rejected back to the entering party. Had the 10.00 bid not been in Brut but another venue, Brut would not reject the order but instead adjust the order's price and post it in the Brut System.

4. Time in Force Designations

Orders entered into the Brut System may be designated by the entering party to remain in force and available for display and/or potential execution for varying periods of time. Unless cancelled earlier, once these time periods expire, the order (or the unexecuted portion thereof) is returned to the entering party. These ''time in force'' designations are described below:

Immediate or Cancel (IOC)—limit orders with this designation are returned to the sender if not immediately executed. If partially executed, un-executed remainders of these orders are returned immediately to the entering party.

Good-till-Canceled (GTC)—orders with this designation (or the unexecuted portions of such orders) are held by the Brut System and remain available for potential display/execution until 4 p.m. Eastern Time on the day they are submitted unless cancelled before then by the entering party.[9]

Day (DAY)—orders with this designation (or the unexecuted portions of such orders) are held by the Brut System and remain available for potential display/execution until 4 p.m. Eastern Time on the day they are submitted unless cancelled before then by the entering party. This is the default

[9] Currently, the Brut System processes orders designated as GTC and Day in the exact same manner. In the near future, Nasdaq states that Brut will modify the names of its order types to eliminate this duplication.

time in force where none is provided by the entering party.

Good-till-Canceled-Overnight (GTCO)—orders with this designation (or the unexecuted portions of such orders) are treated like GTC orders, but are held by the Brut System overnight and remain available for potential display/execution until 4 p.m. of a date provided by the entering party, or indefinitely, unless and until cancelled by the entering party. GTCO orders are not eligible for execution between 4 p.m. and 8 p.m. Eastern Time.

End-of-Day (GTX)—orders with this designation (or the unexecuted portions of such orders) are held by the Brut System and remain available for potential display/execution until 8 p.m. Eastern Time on the day they are submitted unless cancelled before then by the entering party.

Good-till-Time (GTT)—orders with this designation (or the unexecuted portions of such orders) are held by the Brut System and remain available for potential display/execution until the time designated by the entering party. This time may be a relative time (*e.g.*, 30 minutes after receipt) or an actual time (*e.g.*, 2 p.m.).

Effective Time (EFT)—orders with this designation (or the unexecuted portions of such orders) are held by the Brut System and only become available for potential display/execution at an actual time during the trading day selected by entering party (*e.g.*, 3 p.m.).

Nasdaq states that the Brut System normally operates between the hours of 6:30 a.m. and 8 p.m. Eastern Time. Orders with the above time in force designations may be entered into the Brut System, or previously entered orders cancelled, starting at 6:30 a.m. Eastern Time. With the exception of the GTC and DAY designations, which may only be entered until 4 p.m. Eastern Time, all time in force designations may be entered into Brut until 8 p.m. Eastern Time. Though the entry of various time in force designations is permitted throughout the System's hours of operation, the Brut System will not execute an order in contravention of the time in force period selected by the entering party, and instead will hold all such entries until they can be processed in conformity with the time in force parameters selected upon entry.

5. Routing

The Brut System provides the capability to route orders to other available market centers between the hours of 7:30 a.m. and 6:30 p.m. Eastern Time.[10] The entering party designates, through the order type it selects (*e.g.*, Thru Brut, Brut Cross, Aggressive Cross, Super Aggressive Cross, Directed Cross, or Hunter), whether the System should first seek to execute the order against contra-side marketable orders in the System prior to routing. Nasdaq states that in no event, however, does the router give an order to a market center displaying an inferior-priced order until the router has attempted to access better-priced displayed orders in that or other market centers.[11]

According to Nasdaq, with the exception of Thru Brut and Directed Cross Orders that specifically direct which market center an order is to be routed, orders routed out of the Brut System to other market centers for potential execution are generally delivered to other market centers in price/size priority. If the Nasdaq Market Center has displayed shares at the best price level, the System will first deliver to the displayed Nasdaq Market Center quote/order before routing to other market centers. If the routed order is smaller in size than the total combined displayed share amounts of accessible market centers at the best price level, the Brut System delivers the routed order to the available market centers in price/size priority. If the routed order is larger than the total combined displayed share amounts of accessible market centers at the best price level, the Brut System delivers over-sized orders to each displayed market center's quote in proportion to the individual market's center share of that total displayed share amount. For example, if Market Center A is showing 60% of the total amount of displayed shares across all markets at the best price level, and Brut has a routable order greater in size than the total displayed share amount across all markets, Brut will send an oversized order to Market Center A representing 60% of the total amount of shares Brut is attempting to execute via the routed order. The other market centers at that price will likewise receive oversized orders in proportion to their displayed amounts.

Nasdaq states that orders routed by Brut to another market do not retain time priority with respect to other orders in Brut's System and Brut continues to execute other orders while the routed order is away at another market. Once routed by Brut, an order becomes subject to the rules and procedures of the destination market including, but not limited to, short-sale regulation and order cancellation.

6. Execution Algorithm

Nasdaq states that the Brut System has an execution algorithm of price/time priority. For each order, among equally-priced trading interest, the System executes against available contra-side displayed share amounts in full, in price/time priority, before then moving to reserve shares which are likewise executed in price/time priority. After display and reserve size are exhausted at a particular price level, the Brut System will then access, if available, share amounts of Discretionary Orders within the Discretionary Order's discretionary price range at that same price level, followed by executable Hunter Orders before moving on to the next price level.

For example, assume the following orders in particular security at the best price level in System:

2 p.m.—Order #1 BUY 100 at 20.00 (100 displayed, 0 reserved).
2:02 p.m.—Order #2 BUY 2,500 at 20.00 (1,500 displayed, 1,000 reserved).
2:03 p.m.—Order #3 BUY 1,000 at 20.00 (discretion to 20.07) (500 displayed, 500 reserved).
2:04 p.m.—Order #4 BUY 400 at 20.00 (Hunter Order) (0 displayed, 400 reserved).
2:05 p.m.—Order #5 BUY 500 at 20.00 (200 displayed, 300 reserved).

Thereafter, the system receives a 10,000 share To Brut limit order to sell at 19.99.

Matching

In the above situation, the System will match Order #1 for 100 shares, then match the 1,500 share displayed portion of Order #2, followed by the 500 share displayed portion of Order #3, and finally the 200 share displayed portion of Order #5 for a total of 2,300 shares. Since 7,700 shares are still needed to fill the market sell order in full, the system will then match the 1,000 share reserve amount of Order #2, and then 500 share displayed portion of Order #3, followed next by the 300 share reserve amount of Order #5.

[10] Nasdaq states that Brut routes to other market centers trading Nasdaq securities as well as to National Securities Exchanges, including the American and New York stock exchanges and other regional stock exchanges using the Intermarket Trading System (''ITS''). Access to the New York Stock Exchange's DOT system is currently provided to Brut through an agreement with NYSE-member SunGuard Global Execution Services. As part of this access arrangement, Brut allows subscribers to send orders for immediate pass-through to SunGuard and then to DOT, including market on open/close and limit on open/close orders and orders with the fill-or-kill and all-or-none share amount designations.

[11] According to Nasdaq, use of the Brut router is voluntary. Users can select, by the type of order entered, if they want the Brut System to route their order to another market center for potential execution.

Decrementation

Having determined which orders are eligible for execution via the matching process, the Brut System then proceeds to decrement (reduce) share amounts from those orders. These share amounts are decremented from the matched orders starting with reserve size of the orders, if any.[12] (Order #1—no reserve, 100 shares display portion decremented in full; Order #2—1,000 shares reserve decremented followed by 500 shares of displayed 1,500 shares, leaving 1,000 shares displayed; Order # 3—500 shares (discretionary amount treated as reserve = 500 executed, 500 share displayed portion remains); Order #5—300 shares reserve decremented by 200 shares, leaving 300 shares). Finally, the System will execute the 400 share Hunter Order #4. Having exhausted all trading interest at the best price level in the system, the order would then move on to seek additional shares at the next price level in the System.

7. Clearly Erroneous Trade Procedures

According to Nasdaq, Brut adjudicates clearly erroneous trade disputes for executions taking place exclusively within its System. While generally reviewing clearly erroneous trade claims in response to subscriber requests, Brut reserves the right to take action on its own initiative if it determines that a trade is clearly erroneous and needs to be modified or cancelled. Nasdaq states that, in the normal course, Brut limits its clearly erroneous review to only those Brut System trades that execute at prices that are a certain percentage or raw dollar price away from the National Best Bid/Offer at the time of execution. These parameters, which vary based on the execution price of the asserted clearly erroneous trade, are summarized below:

Execution price	Range away from the NBBO
$.01–$.99	10%.
$1–$19.99	5%.
$20 and above	1 Point.

According to Nasdaq, if a Brut-only trade satisfies the above, Brut considers the trade potentially erroneous and conducts a facts and circumstances analysis to determine what, if any, action should be taken. In addition to the individual facts and circumstances of the trade, Brut also considers other factors in evaluating clearly erroneous trade claims including: If the trade created a new high or low in the stock; if the trade consisted of an excessive number of shares; if the trade took place in close proximity to news released on the security; if the trade took place during a locked or crossed market or during a period of extreme volatility; if the trade took place before or after normal market hours; if the trade took place in close proximity to halt and subsequent resumed trading in the security; how soon after the trade the subscriber notified Brut of the potentially erroneous trade; and if the trade or trades at issue involves a security whose issuer was recently reorganized.

Nasdaq states that, while Brut follows the above procedures today, when Brut operates pursuant to rules approved by the Commission, Brut will automatically cease operating an independent clearly erroneous review process and instead trades taking place in its System will immediately become subject to NASD Rule 11890 that already governs trades in the Nasdaq Market Center and grants authority to designated Nasdaq officers ''to review any transaction arising out of the use or operation of any execution or communication System owned or operated by Nasdaq and approved by the Commission, * * *''[13]

8. Other System Features and Standards

As part of the proposed set of rules governing its Brut Facility, Nasdaq is also proposing to codify current Brut system functions and, where appropriate, establish similar standards regarding operational issues between the Nasdaq Market Center and Brut. For example, Nasdaq is proposing that the Brut System have a limitation of liability rule substantially similar to that already in place for the Nasdaq Market Center.[14] Nasdaq is also proposing that the Brut system adjust open orders in its system in a manner substantially similar to the way they are adjusted in the Nasdaq Market Center,[15] as well codifying standards regarding the obligation of users to honor system trades,[16] and the removal of users for failing to maintain a required clearing relationship.[17]

9. Brut/Nasdaq Integration Plan

Though now sharing common ownership, Brut and Nasdaq currently operate separate order display and execution systems. With respect to the processing of quotes/orders, Nasdaq states that the interaction between the entities is limited to Brut participating in the Nasdaq Market Center as a Nasdaq Order-Delivery ECN pursuant to the NASD Rule 4700 Series and as an ITS Market Maker pursuant to NASD Rule 5200 Series. In these capacities Brut provides the Nasdaq Market Center its best single ''top-of-file'' price orders in individual securities Brut has within the System.

Nasdaq states that its goal is to increase the scope and quality of the interaction between its two systems to ensure that the users of either the Nasdaq Market Center or Brut have access to the best-priced orders in both systems. According to Nasdaq, as currently contemplated and proposed in this filing, Nasdaq's first step in integrating Brut's System and its orders more closely into the Nasdaq Market Center will be to have Brut provide its full depth of its order book to the Nasdaq Market Center. In addition, Brut will connect to the Nasdaq Market Center using a dedicated direct voluntary linkage that Nasdaq makes available to any Nasdaq Order-Delivery ECN that wants it.

Nasdaq states that its long-term vision is to have Brut and Nasdaq unified in a single technology platform that will further enhance execution quality for system users. Nasdaq currently contemplates using the Brut broker-dealer in a manner ancillary to the market execution system as an outbound access broker dealer to other market centers.

2. Statutory Basis

Nasdaq believes that the proposed rule change, as amended, is consistent with section 15A of the Act,[18] in general, and furthers the objectives of section 15A(b)(6),[19] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change, as amended, will

[12] This decrementation process differs from that of the Nasdaq Market Center, which decrements shares directly from the matched portion of quotes/orders and then refreshes those matched portions from any remaining reserve share amounts. See NASD Rule 4710.

[13] *See* NASD Rule 11890(a)–(b) and proposed NASD Rule 4911. Telephone conversation between Thomas Moran, Associate General Counsel, Nasdaq, and David Liu, Attorney, Division of Market Regulation, Commission, on January 25, 2005.

[14] *See* NASD Rule 4705(h).

[15] *See* proposed NASD Rule 4909.

[16] *See* proposed NASD Rule 4907.

[17] *See* proposed NASD Rules 4908.

[18] 15 U.S.C. 78*o*–3.

[19] 15 U.S.C. 78*o*–3(b)(6).

impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which Nasdaq consents, the Commission will:

(A) By order approve such proposed rule change, as amended; or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NASD–2004–173 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–NASD–2004–173. 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 such filing also will be available for inspection and copying at the principal office of Nasdaq. 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-NASD–2004–173 and should be submitted on or before February 22, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[20]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 05–1697 Filed 1–28–05; 8:45 am]

BILLING CODE 8010–01–P

[20] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–51071; File No. SR-Phlx-2005–05]

Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Notice of Filing and Order Granting Accelerated Approval to a Proposed Rule Change to Increase Position Limits and Exercise Limits for Options on Standard and Poor's Depositary Receipts (SPDRs®)

January 21, 2005.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b-4 thereunder,[2] notice is hereby given that on January 19, 2005, the Philadelphia Stock Exchange, Inc., (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons. In addition, the Commission is granting accelerated approval of the proposed rule change.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Exchange Rule 1001, Position Limits, to increase position limits and exercise limits for options on the Standard and Poor's Depositary Receipts (''SPDRs®'').[3] The text of the proposed rule change is available on the Phlx's Web site (*http://www.phlx.com*), at the Phlx's Office of the Secretary, and at the Commission's Public Reference Room.

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 had received on the proposed rule change. The text of these statements may be examined at the places specified in item III 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 Exchange proposes to amend Exchange Rule 1001 to increase the position limits and exercise limits[4] applicable to options on SPDRs from 75,000 to 300,000 contracts on the same side of the market. The Exchange began trading options on SPDRs on the Exchange's electronic trading platform for options, Phlx XL, on January 10, 2005. Given the expected institutional demand for options on SPDRs, the Exchange believes that the current equity position limit of 75,000 contracts[5] is too low and could be a deterrent to the successful trading of the product. Options on SPDRs are 1/10th the size of options on the Standard and Poor's 500 Index (''SPX''). Thus, a position limit of 75,000 contracts in options on SPDRs is equivalent to a

[3] ''Standard & Poor's®'', ''S&P®'', ''S&P 500®'', ''Standard & Poor's 500'', and ''500'' are trademarks of The McGraw-Hill Companies, Inc. Neither Standard & Poor's nor its index compilation agent makes any recommendation concerning the advisability of investing in options on SPDRs®.

[4] Exchange Rule 1002, Exercise Limits, refers to exercise limits that correspond to aggregate long positions as described in Exchange Rule 1001. The position limit established in a given option under Exchange Rule 1001 is also the exercise limit for such option.

[5] *See* Exchange Rule 1001, Commentary .05(a).

7,500 contract position limit in options on SPX. Traders who trade options on SPDRs to hedge positions in SPX options are likely to find a position limit of 75,000 contracts in options on SPDRs too restrictive, which may adversely affect the Exchange's ability to provide liquidity in this product.

Comparable products, such as options on the Nasdaq-100 Index Tracking Stock (''QQQ''),[6] are subject to a 300,000 contract limit.[7] The Exchange proposes that options on SPDRs similarly be subject to position limits and exercise limits of 300,000 contracts. The Exchange believes that increasing position limits and exercise limits for options on SPDRs would lead to a more liquid and competitive market environment for options on SPDRs that would benefit customers interested in this product.

Consistent with the reporting requirement for QQQ options, the Exchange would require that each member or member organization that maintains a position on the same side of the market, for its own account or for the account of a customer, report certain information.[8] This data would include, but would not be limited to, the option position, whether such position is hedged and if so, a description of the hedge and if applicable, the collateral used to carry the position. Exchange specialists and Registered Options Traders (''ROTs'') would continue to be exempt from this reporting requirement as specialist and ROT information can be accessed through the Exchange's market surveillance systems. In addition, the general reporting requirement for customer accounts that maintain an aggregate position of 200 or more option contracts would remain at this level for options on SPDRs.[9]

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with section 6(b) of the Act,[10] in general, and furthers the objectives of section 6(b)(5) of the Act,[11] in particular, in that it is designed to perfect the mechanisms of a free and open market and the national market system, promote just and equitable principles of trade and 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 inappropriate burden on competition.

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. 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-2005–05 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR-Phlx-2005–05. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/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 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 publicly available. All submissions should refer to File Number SR-Phlx-2005–05 and should be submitted on or before February 22, 2005.

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder, applicable to a national securities exchange,[12] and, in particular, the requirements of Section 6(b)(5) of the Act.[13] Specifically, the Commission finds that the proposed rule change should ensure that the Exchange's position limits and exercise limits on options on SPDRs provide its members and member organizations with sufficient flexibility to participate in the market for such options in a manner that should provide greater depth and liquidity for all market participants.

The Commission finds good cause for approving this proposed rule change prior to the thirtieth day after publication of notice thereof in the **Federal Register**. Specifically, the Commission believes that granting accelerated approval to the proposed rule change should permit greater depth and liquidity in the options on SPDRs market that should benefit all market participants, including retail investors. Because the higher position limits and exercise limits mirror those that the Commission has previously approved for like products, the Commission believes it is consistent with sections 6(b)(5)[14] and 19(b)(2)[15] of the Act to approve the Phlx's proposed rule change on an accelerated basis.

V. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[16] that the proposed rule change (SR–Phlx–2005–

[6] The Nasdaq-100®, Nasdaq-100 Index®, Nasdaq®, The Nasdaq Stock Market®, Nasdaq-100 Shares℠, Nasdaq-100 Trust℠, Nasdaq-100 Index Tracking Stock℠, and QQQ℠ are trademarks or service marks of The Nasdaq Stock Market, Inc. (''Nasdaq'') and have been licensed for use for certain purposes by the Phlx pursuant to a license agreement with Nasdaq. The Nasdaq-100 Index® (''Index'') is determined, composed, and calculated by Nasdaq without regard to the licensee, the Nasdaq-100 Trust℠, or the beneficial owners of Nasdaq-100 Shares℠. Nasdaq has complete control and sole discretion in determining, comprising, or calculating the Index or in modifying in any way its method for determining, comprising, or calculating the Index in the future.

[7] *See* Exchange Rule 1001.

[8] *See* Exchange Rule 1003.

[9] *See* Exchange Rule 1003.

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

[12] In approving this proposal, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[13] 15 U.S.C. 78f(b)(5).

[14] 15 U.S.C. 78f(b)(5).

[15] 15 U.S.C. 78s(b)(2).

[16] 15 U.S.C. 78s(b)(2).

05) is hereby approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[17]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E5–353 Filed 1–28–05; 8:45 am]

BILLING CODE 8010–01–P

[17] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice 4982]

Culturally Significant Objects Imported for Exhibition Determinations: ''Degas Sculptures''

AGENCY: Department of State.

ACTION: Notice.

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.*; 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236 of October 19, 1999, as amended, and Delegation of Authority No. 257 of April 15, 2003 [68 FR 19875], I hereby determine that the objects to be included in the exhibition ''Degas Sculptures'', imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners. I also determine that the exhibition or display of the exhibit objects at the Milwaukee Art Museum, from on or about February 19, 2005, until on or about June 5, 2005, and at possible additional venues yet to be determined, is in the national interest. Public Notice of these Determinations is ordered to be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Richard Lahne, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202–453–8058). The address is U.S. Department of State, SA–44, 301 4th Street, SW., Room 700, Washington, DC 20547–0001.

Dated: January 21, 2005.

C. Miller Crouch,

Principal Deputy Assistant Secretary for Educational and Cultural Affairs, Department of State.

[FR Doc. 05–1741 Filed 1–28–05; 8:45 am]

BILLING CODE 4710–08–P

DEPARTMENT OF STATE

[Public Notice 4981]

Culturally Significant Objects Imported for Exhibition Determinations: ''Fra Angelico''

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.*; 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, and Delegation of Authority No. 236 of October 19, 1999, as amended, and Delegation of Authority No. 257 of April 15, 2003 [68 FR 19875], I hereby determine that the objects to be included in the exhibition ''Fra Angelico,'' imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to a loan agreement with the foreign owners. I also determine that the exhibition or display of the exhibit objects at The Metropolitan Museum of Art, New York, NY from on or about October 25, 2005 to on or about January 29, 2006, and at possible additional venues yet to be determined, is in the national interest. Public Notice of these determinations is ordered to be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Carol B. Epstein, Attorney-Adviser, Office of the Legal Adviser, Department of State, (telephone: 202/453–8048). The address is Department of State, SA–44, 301 4th Street, SW., Room 700, Washington, DC 20547–0001.

Dated: January 25, 2005.

C. Miller Crouch,

Principal Deputy Assistant Secretary for Educational and Cultural Affairs, Department of State.

[FR Doc. 05–1742 Filed 1–28–05; 8:45 am]

BILLING CODE 4710–08–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Determination Regarding Waiver of Discriminatory Purchasing Requirements With Respect to Goods and Services Covered by Chapter 15 of the U.S.-Australia Free Trade Agreement

AGENCY: Office of the United States Trade Representative.

ACTION: Determination under Trade Agreements Act of 1979.

EFFECTIVE DATE: January 24, 2005.

FOR FURTHER INFORMATION CONTACT: Jean Heilman Grier, Senior Procurement Negotiator, Office of the United States Trade Representative, (202) 395–5097, or Melida Hodgson, Assistant General Counsel, Office of the United States Trade Representative, (202) 395–9512.

On May 18, 2004, the United States and Australia entered into the United States-Australia Free Trade Agreement (''the USAFTA''). Chapter 15 of the USAFTA sets forth certain obligations with respect to government procurement of goods and services, as specified in Annex 15–A of the USAFTA. On August 3, 2004, the President signed into law the United States-Australia Free Trade Agreement Implementation Act (''the USAFTA Act'') (Pub. L. 108–286, 19 U.S.C. 3805 note). In section 101 of the USAFTA Act, the Congress approved the USAFTA and the statement of administrative action proposed to implement the USAFTA that the President submitted to Congress. The USAFTA entered into force on January 1, 2005.

Section 1–201 of Executive Order 12260 of December 31, 1980 (46 FR 1653) delegates the functions of the President under Sections 301 and 302 of the Trade Agreements Act of 1979 (''the Trade Agreements Act'') (19 U.S.C. 2511, 2512) to the United States Trade Representative.

Now, therefore, I, Robert B. Zoellick, United States Trade Representative, in conformity with the provisions of Sections 301 and 302 of the Trade Agreements Act, and Executive Order 12260, and in order to carry out U.S. obligations under Chapter 15 of the USAFTA, do hereby determine that:

1. Australia is a country, which, pursuant to the USAFTA, will provide appropriate reciprocal competitive government procurement opportunities to United States products and suppliers of such products. In accordance with section 301(b)(3) of the Trade Agreements Act, Australia is designated for purposes of section 301(a) of the Trade Agreements Act.

2. With respect to eligible products of Australia (*i.e.*, goods and services covered by the Schedules of the United States in Annex 15–A of the USAFTA) and suppliers of such products, the application of any law, procedure, or practice regarding government procurement that would, if applied to such products and suppliers, result in treatment less favorable than accorded—

(A) To United States products and suppliers of such products; or

(B) To eligible products of another foreign country or instrumentality which is a party to the Agreement on Government Procurement referred to in section 101(d)(17) of the Uruguay Round Agreements Act (19 U.S.C. 3511(d)(17)) and suppliers of such products, shall be waived.

This waiver shall be applied by all entities listed in the Schedule of the United States to Section 1 of Annex 15–A of the USAFTA, and in list A of the Schedule of the United States to Section 3 of Annex 15–A of the USAFTA.

3. The designation in paragraph 1 and the waiver in paragraph 2 are subject to modification or withdrawal by the United States Trade Representative.

Dated: January 24, 2005.

Robert B. Zoellick,

United States Trade Representative.

[FR Doc. 05–1663 Filed 1–28–05; 8:45 am]

BILLING CODE 3190–W5–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[LR–1214]

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning an existing final regulation, LR–1214 (TD 7430), Discharge of Liens(§ 301.7425–3(b)(2)).

DATES: Written comments should be received on or before April 1, 2005 to be assured of consideration.

ADDRESSES: Direct all written comments to Paul Finger, Internal Revenue Service, room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be directed to Allan Hopkins, at (202) 622–6665, or at Internal Revenue Service, room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet, at *Allan.M.Hopkins@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Discharge of Liens.

OMB Number: 1545–0854.

Regulation Project Number: LR–1214.

Abstract: The Internal Revenue Service needs this information in processing a request to sell property subject to a tax lien to determine if the taxpayer has equity in the property. This information will be used to determine the amount, if any, to which the tax lien attaches.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals, business or other for-profit organizations, and farms.

Estimated Number of Respondents: 500.

Estimated Time Per Respondent: 24 minutes.

Estimated Total Annual Burden Hours: 200.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: January 21, 2005.

Paul Finger,

IRS Reports Clearance Officer.

[FR Doc. 05–1733 Filed 1–28–05; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 12196

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 12196, Small Business Office Order Blank.

DATES: Written comments should be received on or before April 1, 2005 to be assured of consideration.

ADDRESSES: Direct all written comments to Paul Finger, Internal Revenue Service, room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Allan Hopkins, at (202) 622–6665, or at Internal Revenue Service, room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the internet, at *Allan.M.Hopkins@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Small Business Office Order Blank.

OMB Number: 1545–1638.

Form Number: Form 12196.

Abstract: Form 12196 is used by Small Business Information and Development Centers and One-Stop Capital Shops to order IRS tax forms and publications for distribution to their clients. The form can be faxed directly to the IRS Area Distribution Center for order fulfillment, packaging and mailing.

Current Actions: There are currently no changes to Form 12196.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 500.

Estimated Time Per Respondent: 5 minutes.

Estimated Total Annual Burden Hours: 42.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record.

Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: January 25, 2005.

Paul Finger,

IRS Reports Clearance Officer.

[FR Doc. 05–1735 Filed 1–28–05; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[REG–136193–01]

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning existing final regulation, REG–136193–01, Notice of Significant Reduction in the Rate of Future Benefit Accrual.

DATES: Written comments should be received on or before April 1, 2005 to be assured of consideration.

ADDRESSES: Direct all written comments to Paul Finger, Internal Revenue Service, room 6512, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulations should be directed to Larnice Mack at Internal Revenue Service, room 6512, 1111 Constitution Avenue, NW., Washington, DC 20224, or at (202) 622–3179, or through the Internet at *(Larnice.Mack@irs.gov).*

SUPPLEMENTARY INFORMATION:

Title: Notice of Significant Reduction in the Rate of Future Benefit Accrual.

OMB Number: 1545–1780.

Regulation Project Number: REG–136193–01.

Abstract: In order to protect the rights of participants in qualified pension plans, plan administrators must provide notice to plan participants and other parties, if the plan is amended in a particular manner. No government agency receives this information.

Current Actions: There are no changes being made to this existing regulation.

Type of Review: Extension of currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 4,000.

Estimated Time Per Respondent: 10 hours.

Estimated Total Annual Burden Hours: 40,000.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: January 24, 2005.

Paul Finger,

IRS Reports Clearance Officer.

[FR Doc. 05–1737 Filed 1–28–05; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[REG–142299–01 & REG–209135–88]

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13(44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning existing final regulations, REG–142299–01 and REG–209135–88, Certain Transfers of Property to Regulated Investment Companies (RICs) and Real Estate Investment Trusts (REITs).

DATES: Written comments should be received on or before April 1, 2005 to be assured of consideration.

ADDRESSES: Direct all written comments to Paul Finger, Internal Revenue Service, room 6512, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulations should be directed to Larnice Mack at Internal Revenue Service, room 6512, 1111 Constitution Avenue, NW., Washington, DC 20224, or at (202)622–3179, or through the Internet at (Larnice.Mack@irs.gov).

SUPPLEMENTARY INFORMATION:

Title: Certain Transfers of Property to Regulated Investment Companies (RICs) and Real Estate Investment Trusts (REITs).

OMB Number: 1545–1672. Regulation Project Number: REG–142299–01 and REG–209135–88.

Abstract: The regulation applies with respect to the net built-in gain of C corporation property that becomes property of a Regulated Investment Company (RIC) or Real Estate Investment Trust (REIT) by the qualification of a C corporation as a RIC or REIT or by the transfer of property of a C corporation to a RIC or REIT in certain tax-free transactions. Depending on the date of the transfer of property or qualification as a RIC or REIT, the regulation provides that either (1) the C corporation will recognize gain as if it had sold the property at fair market value unless the RIC or REIT elects section 1374 treatment or (2) the RIC or REIT will be subject to section 1374 treatment with respect to the net recognized built-in-gain, unless the C corporation elects deemed sale treatment. The regulation provides that a section 1374 election is made by filing a statement, signed by an official authorized to sign the income tax return of the RIC or REIT and attached to the RIC's or REIT's Federal income tax return for the taxable year in which the property of the C corporation becomes the property of the RIC or REIT. The regulation provides that a deemed sale election is made by filing a statement, signed by an official authorized to sign the income tax return of the C corporation and attached to the C corporation's Federal income tax return for the taxable year in which the deemed sale occurs.

Current Actions: There are no changes being made to this existing regulation.

Type of Review: Extension of currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 140.

Estimated Time Per Respondent: 30 minutes.

Estimated Total Annual Burden Hours: 70.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: January 21, 2005.

Paul Finger,

IRS Reports Clearance Officer.

[FR Doc. 05–1738 Filed 1–28–05; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 8849

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Pub. L. 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 8849,Claim for Refund of Excise Taxes.

DATES: Written comments should be received on or before April 1, 2005 to be assured of consideration.

ADDRESSES: Direct all written comments to Paul Finger, Internal Revenue Service, room 65165, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Allan Hopkins, at (202) 622–6665, or at Internal Revenue Service, room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the internet, at *Allan.M.Hopkins@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Claim for Refund of Excise Taxes.

OMB Number: 1545–1420.

Form Number: 8849.

Abstract: Sections 6402, 6404, sections 301.6402–2, 301.6404–1, and 301.6404–3 of the regulations allow for refunds of taxes (except income taxes) or refund, abatement, or credit or interest, penalties, and additions to tax in the event of errors or certain actions by the IRS. Form 8849 is used by taxpayers to claim refunds of excise taxes.

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations, individuals or households, and not-for-profit institutions, farms, and Federal, state, local or tribal governments.

Estimated Number of Respondents: 125,292.

Estimated Time Per Respondent: 14 hours, 56 minutes.

Estimated Total Annual Burden Hours: 1,871,713.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All

comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: January 19, 2005.

Paul Finger,

IRS Reports Clearance Officer.

[FR Doc. 05–1739 Filed 1–28–05; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[REG–120168–97]

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Pub. L. 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning an existing final regulation, REG–120168–97 (TD 8798), Preparer Due Diligence Requirements for Determining Earned Income Credit Eligibility.

DATES: Written comments should be received on or before April 1, 2005, to be assured of consideration.

ADDRESSES: Direct all written comments to Paul Finger, Internal Revenue Service, room 6416, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulation should be directed to Allan Hopkins, at (202) 622–6665, or at Internal Revenue Service, room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet, at *Allan.M.Hopkins@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Preparer Due Diligence Requirements for Determining Earned Income Credit Eligibility.

OMB Number: 1545–1570.

Regulation Project Number: REG–120168–97.

Abstract: Income tax return preparers who satisfy the due diligence requirements in this regulation will avoid the imposition of the penalty section 6695(g) of the Internal Revenue Code for returns or claims for refund due after December 31, 1997. The due diligence requirements include soliciting the information necessary to determine a taxpayer's eligibility for, and amount of, the Earned Income Tax Credit and the retention of this information.

Current Actions: There are no changes being made to this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit.

Estimated Number of Respondents: 100,000.

Estimated Time Per Respondent: 5 hours, 4 minutes.

Estimated Total Annual Burden Hours: 507,136.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: January 21, 2005.

Paul Finger,

IRS Reports Clearance Officer.

[FR Doc. 05–1740 Filed 1–28–05; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Earned Income Tax Credit Committee of the Taxpayer Advocacy Panel

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice.

SUMMARY: An open meeting of the Earned Income Tax Credit Committee of the Taxpayer Advocacy Panel will be conducted (via teleconference). The Committee will be discussing issues pertaining to the IRS administration of the Earned Income Tax Credit.

DATES: The meeting will be held Thursday, February 17, 2005.

FOR FURTHER INFORMATION CONTACT: Audrey Y. Jenkins at 1–888–912–1227 (toll-free), or 718–488–2085 (non toll-free).

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Earned Income Tax Credit Committee of the Taxpayer Advocacy Panel will be held Thursday, February 17, 2005 from 2 p.m. to 3:30 p.m. ET via a telephone conference call. The public is invited to make oral comments. Individual comments will be limited to 5 minutes. Due to limited conference lines, notification of intent to participate in the telephone conference call meeting must be made in advance by contacting Audrey Y. Jenkins. To confirm attendance or for more information, Ms. Jenkins may be reached at 1–888–912–1227 or (718) 488–2085. If you would like a written statement to be considered, send written comments to Audrey Y. Jenkins, TAP Office, 10 MetroTech Center, 625 Fulton Street, Brooklyn, NY 11201 or post your comments to the Web site: *www.improveirs.org.* The agenda will include various IRS issues.

Dated: January 25, 2005.

Bernard Coston,

Director, Taxpayer Advocacy Panel.

[FR Doc. 05–1736 Filed 1–28–05; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

Submission for OMB Review; Comment Request—Lending and Investment

AGENCY: Office of Thrift Supervision (OTS), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act of 1995. OTS is soliciting public comments on the proposal.

DATES: Submit written comments on or before March 2, 2005.

ADDRESSES: Send comments, referring to the collection by title of the proposal or by OMB approval number, to OMB and OTS at these addresses: Mark D. Menchik, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10236, New Executive Office Building, Washington, DC 20503, or e-mail to *mmenchik@omb.eop.gov;* and Information Collection Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552, by fax to (202) 906–6518, or by e-mail to *infocollection.comments@ots.treas.gov.* OTS will post comments and the related index on the OTS Internet Site at *http://www.ots.treas.gov.* In addition, interested persons may inspect comments at the Public Reading Room, 1700 G Street, NW., by appointment. To make an appointment, call (202) 906–5922, send an e-mail to *publicinfo@ots.treas.gov,* or send a facsimile transmission to (202) 906–7755.

FOR FURTHER INFORMATION CONTACT: To obtain a copy of the submission to OMB, contact Marilyn K. Burton at *marilyn.burton@ots.treas.gov,* (202) 906–6467, or facsimile number (202) 906–6518, Regulations and Legislation Division, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION: OTS may not conduct or sponsor an information collection, and respondents are not required to respond to an information collection, unless the information collection displays a currently valid OMB control number. As part of the approval process, we invite comments on the following information collection.

Title of Proposal: Lending and Investment.

OMB Number: 1550–0078.

Form Number: N/A.

Regulation requirement: 12 CFR Parts 560 and 564; §§ 562.1, 563.41, 563.170, and 590.4.

Description: This information collection requires savings associations to maintain adequate documentation to support their lending and investment activities. OTS staff may request the information during examinations.

Type of Review: Reinstatement.

Affected Public: Savings Associations.

Estimated Number of Respondents: 902.

Estimated Frequency of Response: Event-generated.

Estimated Total Burden: 321,487 hours.

Clearance Officer: Marilyn K. Burton, (202) 906–6467, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

OMB Reviewer: Mark D. Menchik, (202) 395–3176, Office of Management and Budget, Room 10236, New Executive Office Building, Washington, DC 20503.

Dated: January 24, 2005.

By the Office of Thrift Supervision.

James E. Gilleran,

Director.

[FR Doc. 05–1668 Filed 1–28–05; 8:45 am]

BILLING CODE 6720–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0052]

Proposed Information Collection Activity: Proposed Collection; Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection and allow 60 days for public comment in response to the notice. This notice solicits comments for information needed from claimants prior to undergoing a VA medical examination for disability benefits.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before April 1, 2005.

ADDRESSES: Submit written comments on the collection of information to Nancy J. Kessinger, Veterans Benefits Administration (20M35), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail: *irmnkess@vba.va.gov.* Please refer to ''OMB Control No. 2900–0052'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 273–7079 or FAX (202) 275–5947.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Public Law 104–13; 44 U.S.C., 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed 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, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Report of Medical Examination for Disability Evaluation, VA Form 21–2545.

OMB Control Number: 2900–0052.

Type of Review: Extension of a currently approved collection.

Abstract: VA Form 21–2545 is completed by claimants prior to undergoing a VA examination for disability benefits and by the examining physician to record the findings of such examination. A VA examination is required where the reasonable probability of a valid claim is indicated in claims for disability compensation or pension, including claims for benefits based on the need of a veteran, surviving spouse, or parent for regular aid and attendance, and for benefits

based on a child's' incapacity of self-support. VA uses the data to determine the level of disability.

Affected Public: Individuals or households.

Estimated Annual Burden: 45,000 hours.

Estimated Average Burden Per Respondent: 15 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 180,000.

Dated: January 19, 2005.

By direction of the Secretary.

Loise Russell,

Director, Records Management Service.

[FR Doc. 05–1706 Filed 1–28–05; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–New (Employment Questionnaire)]

Proposed Information Collection Activity: Proposed Collection; Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed new collection, and allow 60 days for public comment in response to the notice. This notice solicits comments for information needed to determine continued entitlement to benefits based on unemployment.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before April 1, 2005.

ADDRESSES: Submit written comments on the collection of information to Nancy J. Kessinger, Veterans Benefits Administration (20M35), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail *irmnkess@vba.va.gov*. Please refer to ''OMB Control No. 2900-New (Employment Questionnaire)'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 273–7079 or FAX (202) 275–5947.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Public Law 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed 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, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Employment Questionnaire, VA Forms 21–4140, 21–4140–1.

OMB Control Number: 2900-New (Employment Questionnaire).

Type of Review: New collection.

Abstract: Claimants who are under the age of 60 and receiving individual unemployability, compensation at 100 percent rate are required to complete VA Form 21–4140 and 21–4101–1 certifying that they are still unable to secure or follow a substantially gainful occupation because of a service connected-disability. VA will use the information collected to determine the claimant's continued entitlement to individual unemployability benefits.

Affected Public: Individuals or households.

Estimated Annual Burden: 10,833 hours.

Estimated Average Burden Per Respondent: 5 minutes.

Frequency of Response: Annually.

Estimated Number of Respondents: 130,000.

Dated: January 19, 2005.

By direction of the Secretary.

Loise Russell,

Director, Records Management Service.

[FR Doc. 05–1707 Filed 1–28–05; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–New (Direct Deposit Enrollment/Change)]

Proposed Information Collection Activity: Proposed Collection; Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each existing collection in use without an OMB control number, and allow 60 days for public comment in response to the notice. This notice solicits comments for information needed to authorize VA to start or change direct deposit of Government Life Insurance payments.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before April 1, 2005.

ADDRESSES: Submit written comments on the collection of information to Nancy J. Kessinger, Veterans Benefits Administration (20M35), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail: *irmnkess@vba.va.gov*. Please refer to ''OMB Control No. 2900-New (Direct Deposit Enrollment/Change)'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 273–7079 or FAX (202) 275–5947.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Public Law 104–13; 44 U.S.C., 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed 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, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Direct Deposit Enrollment/Change, VA Form 29–0309.

OMB Control Number: 2900-New.

Type of Review: Existing collection in use without an OMB control number.

Abstract: VA Form 29–0309 is completed by claimants authorizing VA to start or change direct deposit at their financial institution for the purpose of depositing directly into their account any or all Government Life Insurance payments that the claimant is entitled to receive from insurance policies he or she possess.

Affected Public: Individuals or households.

Estimated Annual Burden: 20 hours.

Estimated Average Burden Per Respondent: 20 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 10,000.

Dated: January 19, 2005.

By direction of the Secretary.

Loise Russell,

Director, Records Management Service.

[FR Doc. 05–1708 Filed 1–28–05; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0270]

Proposed Information Collection Activity: Proposed Collection; Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments for information needed to establish veteran-borrowers repayment agreement on delinquent guaranteed or insured VA home loans.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before April 1, 2005.

ADDRESSES: Submit written comments on the collection of information to Nancy J. Kessinger, Veterans Benefits Administration (20M35), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail: *irmnkess@vba.va.gov.* Please refer to ''OMB Control No. 2900–0270'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 273–7079 or FAX (202) 275–5947.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Public Law 104–13; 44 U.S.C. 3501—3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed 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, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Financial Counseling Statement, VA Form 26–8844.

OMB Control Number: 2900–0270.

Type of Review: Extension of a currently approved collection.

Abstract: VA personnel and veteran-borrower use VA Form 26–8844 during financial counseling service to record the borrower's net income, total expenditure, net worth, and to suggest areas where expenses can be reduced or income increased. VA performs financial counseling in some cases to provide veteran-borrowers the maximum assistance possible to retain their home during periods of temporary financial difficulty. VA uses the information collected to help borrowers who are seriously delinquent on guaranteed or insured VA home loans to budget and establish a repayment schedule for the loan.

Affected Public: Individuals or households.

Estimated Annual Burden: 3,750 hours.

Estimated Average Burden Per Respondent: 45 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 5,000.

Dated: January 19, 2005.

By direction of the Secretary.

Loise Russell,

Director, Records Management Service.

[FR Doc. 05–1709 Filed 1–28–05; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0463]

Proposed Information Collection Activity: Proposed Collection; Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments for information needed to waive disability benefits.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before April 1, 2005.

ADDRESSES: Submit written comments on the collection of information to Nancy J. Kessinger, Veterans Benefits Administration (20M35), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail: *irmnkess@vba.va.gov.* Please refer to ''OMB Control No. 2900–0463'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 273–7079 or FAX (202) 275–5947.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Public Law 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is

being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed 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, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Notice of Waiver of VA Compensation or Pension to Receive Military Pay and Allowances, VA Form 21–8951 and VA Form 21–8951–2.

OMB Control Number: 2900–0463.

Type of Review: Extension of a currently approved collection.

Abstract: VA Form 21–8951 and VA Form 21–8951–2 is completed by claimants to waive VA disability benefits in order to receive active or inactive duty training pay. Active and inactive duty training pay cannot be paid concurrently with VA disability compensation or pension benefits. Claimants who elect to keep training pay must waive VA benefits for the number of days equal to the number of days in which they received training pay.

Affected Public: Individuals or households.

Estimated Annual Burden: 3,500 hours.

Estimated Average Burden Per Respondent: 10 minutes.

Frequency of Response: Annually.

Estimated Number of Respondents: 21,000.

Dated: January 19, 2005.

By direction of the Secretary.

Loise Russell,

Director, Records Management Service.

[FR Doc. 05–1710 Filed 1–28–05; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0503]

Proposed Information Collection Activity: Proposed Collection; Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments for information needed by insurance personnel to determine continued entitlement to Veterans Mortgage Life Insurance.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before April 1, 2005.

ADDRESSES: Submit written comments on the collection of information to Nancy J. Kessinger, Veterans Benefits Administration (20M35), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail: *irmnkess@vba.va.gov.* Please refer to ''OMB Control No. 2900–0503'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 273–7079 or FAX (202) 275–5947.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Public Law 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed 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, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Veterans Mortgage Life Insurance—Change of Address Statement, VA Form 29–0563.

OMB Control Number: 2900–0503.

Type of Review: Extension of a currently approved collection.

Abstract: VA Form 29–0563 is used to inquire about a veteran's continued ownership of property issued under Veterans Mortgage Life Insurance when an address change for a veteran is received. Veterans Mortgage Life Insurance is terminated when the veteran no longer owns property. VA uses the information collected to determine whether continued coverage for Veterans Mortgage Life Insurance is required.

Affected Public: Individuals or households.

Estimated Annual Burden: 20 hours.

Estimated Average Burden Per Respondent: 5 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 240.

Dated: January 19, 2005.

By direction of the Secretary.

Loise Russell,

Director, Records Management Service.

[FR Doc. 05–1711 Filed 1–28–05; 8:45 am]

BILLING CODE 8320–01–P

Federal Register

Monday
January 31, 2005

Part II

Reader Aids

Cumulative List of Public Laws
108th Congress, Second Session

CUMULATIVE LIST OF PUBLIC LAWS

This is the cumulative list of public laws for the 108th Congress, Second Session. Other cumulative lists (1993–2004) are available online at *http://www.archives.gov/federal_register/public_laws/public_laws.html*.Comments may be addressed to the Director, Office of the Federal Register, Washington, DC 20408 or send e-mail to *info@nara.fedreg.gov*.

The text of laws may be ordered in individual pamphlet form (referred to as ''slip laws'') from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202–512–2470). The text will also be made available on the Internet from GPO Access at *http://www.gpoacess.gov/plaws/index.html*. Some laws may not yet be available online or for purchase.

Public Law	Title	Approved	118 Stat.
108–199	Consolidated Appropriations Act, 2004	Jan. 23, 2004	3
108–200	Congo Basin Forest Partnership Act of 2004	Feb. 13, 2004	458
108–201	NASA Flexibility Act of 2004	Feb. 24, 2004	461
108–202	Surface Transportation Extension Act of 2004	Feb. 29, 2004	478
108–203	Social Security Protection Act of 2004	Mar. 2, 2004	493
108–204	Native American Technical Corrections Act of 2004	Mar. 2, 2004	542
108–205	To provide for an additional temporary extension of programs under the Small Business Act and the Small Business Investment Act of 1958 through April 2, 2004, and for other purposes.	Mar. 15, 2004	553
108–206	To provide for the conveyance of a small parcel of Bureau of Land Management land in Douglas County, Oregon, to the county to improve management of and recreational access to the Oregon Dunes National Recreation Area, and for other purposes.	Mar. 15, 2004	554
108–207	To extend the final report date and termination date of the National Commission on Terrorist Attacks Upon the United States, to provide additional funding for the Commission, and for other purposes.	Mar. 16, 2004	556
108–208	Galisteo Basin Archaeological Sites Protection Act	Mar. 19, 2004	558
108–209	Fort Bayard National Historic Landmark Act	Mar. 19, 2004	562
108–210	Welfare Reform Extension Act of 2004	Mar. 31, 2004	564
108–211	To reauthorize certain school lunch and child nutrition programs through June 30, 2004	Mar. 31, 2004	566
108–212	Unborn Victims of Violence Act of 2004	Apr. 1, 2004	568
108–213	Energy Efficient Housing Technical Correction Act	Apr. 1, 2004	571
108–214	Medical Devices Technical Corrections Act	Apr. 1, 2004	572
108–215	To authorize the President of the United States to agree to certain amendments to the Agreement between the Government of the United States of America and the Government of the United Mexican States concerning the establishment of a Border Environment Cooperation Commission and a North American Development Bank, and for other purposes.	Apr. 5, 2004	579
108–216	Organ Donation and Recovery Improvement Act	Apr. 5, 2004	584
108–217	To provide for an additional temporary extension of programs under the Small Business Act and the Small Business Investment Act of 1958 through June 4, 2004, and for other purposes.	Apr. 5, 2004	591
108–218	Pension Funding Equity Act of 2004	Apr. 10, 2004	596
108–219	To provide for the conveyance to the Utrok Atoll local government of a decommissioned National Oceanic and Atmospheric Administration ship, and for other purposes.	Apr. 13, 2004	615
108–220	To require the Secretary of Defense to reimburse members of the United States Armed Forces for certain transportation expenses incurred by the members in connection with leave under the Central Command Rest and Recuperation Leave Program before the program was expanded to include domestic travel.	Apr. 22, 2004	618
108–221	To direct the Administrator of General Services to convey to Fresno County, California the existing Federal courthouse in that county.	Apr. 30, 2004	619
108–222	Cowlitz Indian Tribe Distribution of Judgment Funds Act	Apr. 30, 2004	621
108–223	To designate the Orville Wright Federal Building and the Wilbur Wright Federal Building in Washington, District of Columbia.	Apr. 30, 2004	626
108–224	Surface Transportation Extension Act of 2004, Part II	Apr. 30, 2004	627
108–225	To designate the United States courthouse located at 400 North Miami Avenue in Miami, Florida, as the ''Wilkie D. Ferguson, Jr. United States Courthouse''.	May 7, 2004	641
108–226	To designate the Federal building located at 250 West Cherry Street in Carbondale, Illinois the ''Senator Paul Simon Federal Building''.	May 7, 2004	642
108–227	To designate a Federal building in Harrisburg, Pennsylvania, as the ''Ronald Reagan Federal Building''.	May 7, 2004	643
108–228	To amend the Communications Satellite Act of 1962 to extend the deadline for the INTELSAT initial public offering.	May 18, 2004	644
108–229	To provide for expansion of Sleeping Bear Dunes National Lakeshore	May 28, 2004	645
108–230	To require the conveyance of certain National Forest System lands in Mendocino National Forest, California, to provide for the use of the proceeds from such conveyance for National Forest purposes, and for other purposes.	May 28, 2004	646
108–231	To authorize the Secretary of the Interior to revise a repayment contract with the Tom Green County Water and Control and Improvement District No. 1, San Angelo project, Texas, and for other purposes.	May 28, 2004	648
108–232	Premier Certified Lenders Program Improvement Act of 2004	May 28, 2004	649
108–233	Irvine Basin Surface and Groundwater Improvement Act of 2004	May 28, 2004	654
108–234	To provide for the establishment of separate campaign medals to be awarded to members of the uniformed services who participate in Operation Enduring Freedom and to members of the uniformed services who participate in Operation Iraqi Freedom.	May 28, 2004	655
108–235	To address the participation of Taiwan in the World Health Organization	June 14, 2004	656
108–236	Recognizing the 60th anniversary of the Allied landing at Normandy during World War II	June 15, 2004	659
108–237	To encourage the development and promulgation of voluntary consensus standards by providing relief under the antitrust laws to standards development organizations with respect to conduct engaged in for the purpose of developing voluntary consensus standards, and for other purposes.	June 22, 2004	661
108–238	National Great Black Americans Commemoration Act of 2004	June 22, 2004	670

Public Law	Title	Approved	118 Stat.
108–239	To designate the facility of the United States Postal Service located at 3751 West 6th Street in Los Angeles, California, as the ''Dosan Ahn Chang Ho Post Office''.	June 25, 2004	673
108–240	To redesignate the facility of the United States Postal Service located at 121 Kinderkamack Road in River Edge, New Jersey, as the ''New Bridge Landing Post Office''.	June 25, 2004	674
108–241	To designate the facility of the United States Postal Service located at 115 West Pine Street in Hattiesburg, Mississippi, as the ''Major Henry A. Commiskey, Sr. Post Office Building''.	June 25, 2004	675
108–242	To designate the facility of the United States Postal Service located at 255 North Main Street in Jonesboro, Georgia, as the ''S. Truett Cathy Post Office Building''.	June 25, 2004	676
108–243	To designate the facility of the United States Postal Service located at 304 West Michigan Street in Stuttgart, Arkansas, as the ''Lloyd L. Burke Post Office''.	June 25, 2004	677
108–244	To designate the facility of the United States Postal Service located at 2055 Siesta Drive in Sarasota, Florida, as the ''Brigadier General (AUS-Ret.) John H. McLain Post Office''.	June 25, 2004	678
108–245	To designate the facility of the United States Postal Service located at 14 Chestnut Street in Liberty, New York, as the ''Ben R. Gerow Post Office Building''.	June 25, 2004	679
108–246	To designate the facility of the United States Postal Service located at 15500 Pearl Road in Strongsville, Ohio, as the ''Walter F. Ehrnfelt, Jr. Post Office Building''.	June 25, 2004	680
108–247	To designate the facility of the United States Postal Service located at 525 Main Street in Tarboro, North Carolina, as the ''George Henry White Post Office Building''.	June 25, 2004	681
108–248	To designate the facility of the United States Postal Service located at 210 Main Street in Malden, Illinois, as the ''Army Staff Sgt. Lincoln Hollinsaid Malden Post Office''.	June 25, 2004	682
108–249	To designate the facility of the United States Postal Service located at 185 State Street in Manhattan, Illinois, as the ''Army Pvt. Shawn Pahnke Manhattan Post Office''.	June 25, 2004	683
108–250	To designate the facility of the United States Postal Service located at 201 South Chicago Avenue in Saint Anne, Illinois, as the ''Marine Capt. Ryan Beaupre Saint Anne Post Office''.	June 25, 2004	684
108–251	To designate the facility of the United States Postal Service located at 2 West Main Street in Batavia, New York, as the ''Barber Conable Post Office Building''.	June 25, 2004	685
108–252	To designate the facility of the United States Postal Service located at 410 Huston Street in Altamont, Kansas, as the ''Myron V. George Post Office''.	June 25, 2004	686
108–253	To designate the facility of the United States Postal Service located at 223 South Main Street in Roxboro, North Carolina, as the ''Oscar Scott Woody Post Office Building''.	June 25, 2004	687
108–254	To designate the facility of the United States Postal Service located at 137 East Young High Pike in Knoxville, Tennessee, as the ''Ben Atchley Post Office Building''.	June 25, 2004	688
108–255	To designate the facility of the United States Postal Service located at 607 Pershing Drive in Laclede, Missouri, as the ''General John J. Pershing Post Office''.	June 25, 2004	689
108–256	To designate the facility of the United States Postal Service located at 695 Marconi Boulevard in Copiague, New York, as the ''Maxine S. Postal United States Post Office''.	June 25, 2004	690
108–257	To redesignate the facility of the United States Postal Service located at 14-24 Abbott Road in Fair Lawn, New Jersey, as the ''Mary Ann Collura Post Office Building''.	June 25, 2004	691
108–258	To redesignate the facility of the United States Postal Service located at 7 Commercial Boulevard in Middletown, Rhode Island, as the ''Rhode Island Veterans Post Office Building''.	June 25, 2004	692
108–259	To designate the facility of the United States Postal Service located at 475 Kell Farm Drive in Cape Girardeau, Missouri, as the ''Richard G. Wilson Processing and Distribution Facility''.	June 25, 2004	693
108–260	To designate the facility of the United States Postal Service located at 122 West Elwood Avenue in Raeford, North Carolina, as the ''Bobby Marshall Gentry Post Office Building''.	June 25, 2004	694
108–261	To designate the facility of the United States Postal Service located at 410 South Jackson Road in Edinburg, Texas, as the ''Dr. Miguel A. Nevarez Post Office Building''.	June 25, 2004	695
108–262	TANF and Related Programs Continuation Act of 2004	June 30, 2004	696
108–263	Surface Transportation Extension Act of 2004, Part III	June 30, 2004	698
108–264	Bunning-Bereuter-Blumenauer Flood Insurance Reform Act of 2004	June 30, 2004	712
108–265	Child Nutrition and WIC Reauthorization Act of 2004	June 30, 2004	729
108–266	Marine Turtle Conservation Act of 2004	July 2, 2004	791
108–267	To amend the Indian Self-Determination and Education Assistance Act to redesignate the American Indian Education Foundation as the National Fund for Excellence in American Indian Education.	July 2, 2004	797
108–268	To provide for the transfer of the Nebraska Avenue Naval Complex in the District of Columbia to facilitate the establishment of the headquarters for the Department of Homeland Security, to provide for the acquisition by the Department of the Navy of suitable replacement facilities, and for other purposes.	July 2, 2004	799
108–269	To amend the Bend Pine Nursery Land Conveyance Act to direct the Secretary of Agriculture to sell the Bend Pine Nursery Administrative Site in the State of Oregon.	July 2, 2004	803
108–270	Western Shoshone Claims Distribution Act	July 7, 2004	805
108–271	GAO Human Capital Reform Act of 2004	July 7, 2004	811
108–272	Approving the renewal of import restrictions contained in the Burmese Freedom and Democracy Act of 2003.	July 7, 2004	818
108–273	To designate the United States courthouse and post office building located at 93 Atocha Street in Ponce, Puerto Rico, as the ''Luis A. Ferre United States Courthouse and Post Office Building''.	July 7, 2004	819
108–274	AGOA Acceleration Act of 2004	July 13, 2004	820
108–275	Identity Theft Penalty Enhancement Act	July 15, 2004	831
108–276	Project BioShield Act of 2004	July 21, 2004	835
108–277	Law Enforcement Officers Safety Act of 2004	July 22, 2004	865
108–278	Tribal Forest Protection Act of 2004	July 22, 2004	868
108–279	To resolve boundary conflicts in Barry and Stone Counties in the State of Missouri	July 22, 2004	872
108–280	Surface Transportation Extension Act of 2004, Part IV	July 30, 2004	876
108–281	To amend the E-Government Act of 2002 with respect to rulemaking authority of the Judicial Conference.	Aug. 2, 2004	889
108–282	To amend the Federal Food, Drug, and Cosmetic Act with regard to new animal drugs, and for other purposes.	Aug. 2, 2004	891
108–283	Northern Uganda Crisis Response Act	Aug. 2, 2004	912
108–284	Providing for the appointment of Eli Broad as a citizen regent of the Board of Regents of the Smithsonian Institution.	Aug. 2, 2004	916
108–285	Helping Hands for Homeownership Act of 2004	Aug. 2, 2004	917

Public Law	Title	Approved	118 Stat.
108–286	United States-Australia Free Trade Agreement Implementation Act	Aug. 3, 2004	919
108–287	Department of Defense Appropriations Act, 2005	Aug. 5, 2004	951
108–288	To designate the United States courthouse located at 100 North Palafox Street in Pensacola, Florida, as the ''Winston E. Arnow United States Courthouse''.	Aug. 6, 2004	1016
108–289	Jamestown 400th Anniversary Commemorative Coin Act of 2004	Aug. 6, 2004	1017
108–290	John Marshall Commemorative Coin Act	Aug. 6, 2004	1021
108–291	Marine Corps 230th Anniversary Commemorative Coin Act	Aug. 6, 2004	1024
108–292	To designate the facility of the United States Postal Service located at 4737 Mile Stretch Drive in Holiday, Florida, as the ''Sergeant First Class Paul Ray Smith Post Office Building''.	Aug. 6, 2004	1027
108–293	Coast Guard and Maritime Transportation Act of 2004	Aug. 9, 2004	1028
108–294	To redesignate the facilities of the United States Postal Service located at 7715 and 7748 S. Cottage Grove Avenue in Chicago, Illinois, as the ''James E. Worsham Post Office'' and the ''James E. Worsham Carrier Annex Building'', respectively, and for other purposes.	Aug. 9, 2004	1089
108–295	SUTA Dumping Prevention Act of 2004	Aug. 9, 2004	1090
108–296	To designate the facility of the United States Postal Service located at 550 Nebraska Avenue in Kansas City, Kansas, as the ''Newell George Post Office Building''.	Aug. 9, 2004	1094
108–297	Cape Town Treaty Implementation Act of 2004	Aug. 9, 2004	1095
108–298	To designate the facility of the United States Postal Service located at 7450 Natural Bridge Road in St. Louis, Missouri, as the ''Vitilas 'Veto' Reid Post Office Building''.	Aug. 9, 2004	1099
108–299	To modify certain deadlines pertaining to machine-readable, tamper-resistant entry and exit documents.	Aug. 9, 2004	1100
108–300	To designate the facility of the United States Postal Service at 73 South Euclid Avenue in Montauk, New York, as the ''Perry B. Duryea, Jr. Post Office''.	Aug. 9, 2004	1101
108–301	To preserve the ability of the Federal Housing Administration to insure mortgages under sections 238 and 519 of the National Housing Act.	Aug. 9, 2004	1102
108–302	United States-Morocco Free Trade Agreement Implementation Act	Aug. 17, 2004	1103
108–303	Emergency Supplemental Appropriations for Disaster Relief Act, 2004	Sept. 8, 2004	1124
108–304	Sports Agent Responsibility and Trust Act	Sept. 24, 2004	1125
108–305	To provide for the conveyance of the real property located at 1081 West Main Street in Ravenna, Ohio.	Sept. 24, 2004	1130
108–306	To provide an additional temporary extension of programs under the Small Business Act and the Small Business Investment Act of 1958 through September 30, 2004, and for other purposes.	Sept. 24, 2004	1131
108–307	Harpers Ferry National Historical Park Boundary Revision Act of 2004	Sept. 24, 2004	1133
108–308	Welform Reform Extension Act, Part VIII	Sept. 30, 2004	1135
108–309	Making continuing appropriations for the fiscal year 2005, and for other purposes	Sept. 30, 2004	1137
108–310	Surface Transportation Extension Act of 2004, Part V	Sept. 30, 2004	1144
108–311	Working Families Tax Relief Act of 2004	Oct. 4, 2004	1166
108–312	Mount Rainier National Park Boundary Adjustment Act of 2004	Oct. 5, 2004	1194
108–313	Johnstown Flood National Memorial Boundary Adjustment Act of 2004	Oct. 5, 2004	1196
108–314	Martin Luther King, Junior, National Historic Site Land Exchange Act	Oct. 5, 2004	1198
108–315	Carpinteria and Montecito Water Distribution Systems Conveyance Act of 2004	Oct. 5, 2004	1200
108–316	To amend the Reclamation Wastewater and Groundwater Study and Facilities Act to authorize the Secretary of the Interior to participate in the Williamson County, Texas, Water Recycling and Reuse Project, and for other purposes.	Oct. 5, 2004	1202
108–317	Southwest Forest Health and Wildfire Prevention Act of 2004	Oct. 5, 2004	1204
108–318	To amend the Reclamation Project Authorization Act of 1972 to clarify the acreage for which the North Loup division is authorized to provide irrigation water under the Missouri River Basin project.	Oct. 5, 2004	1211
108–319	To extend the term of the Forest Counties Payments Committee	Oct. 5, 2004	1212
108–320	To amend the Stevenson-Wydler Technology Innovation Act of 1980 to permit Malcolm Baldrige National Quality Awards to be made to nonprofit organizations.	Oct. 5, 2004	1213
108–321	Timucuan Ecological and Historic Preserve Boundary Revision Act of 2004	Oct. 5, 2004	1214
108–322	Commemorating the opening of the National Museum of the American Indian	Oct. 5, 2004	1216
108–323	To reauthorize the Tropical Forest Conservation Act of 1998 through fiscal year 2007, and for other purposes.	Oct. 6, 2004	1218
108–324	Military Construction Appropriations and Emergency Hurricane Supplemental Appropriations Act, 2005.	Oct. 13, 2004	1220
108–325	Craig Recreation Land Purchase Act	Oct. 13, 2004	1268
108–326	To clarify the tax treatment of bonds and other obligations issued by the Government of American Samoa.	Oct. 16, 2004	1270
108–327	National Wildlife Refuge Volunteer Act of 2004	Oct. 16, 2004	1271
108–328	To amend the Safe Drinking Water Act to reauthorize the New York City Watershed Protection Program.	Oct. 16, 2004	1273
108–329	To amend the Act of November 2, 1966 (80 Stat. 1112), to allow binding arbitration clauses to be included in all contracts affecting the land within the Salt River Pima-Maricopa Indian Reservation.	Oct. 16, 2004	1274
108–330	Department of Homeland Security Financial Accountability Act	Oct. 16, 2004	1275
108–331	To authorize the Board of Regents of the Smithsonian Institution to carry out construction and related activities in support of the collaborative Very Energetic Radiation Imaging Telescope Array System (VERITAS) project on Kitt Peak near Tucson, Arizona.	Oct. 16, 2004	1281
108–332	Global Anti-Semitism Review Act of 2004	Oct. 16, 2004	1282
108–333	North Korean Human Rights Act of 2004	Oct. 18, 2004	1287
108–334	Department of Homeland Security Appropriations Act, 2005	Oct. 18, 2004	1298
108–335	District of Columbia Appropriations Act, 2005	Oct. 18, 2004	1322
108–336	Southern Ute and Colorado Intergovernmental Agreement Implementation Act of 2004	Oct. 18, 2004	1354
108–337	Alaska Native Allotment Subdivision Act	Oct. 18, 2004	1357
108–338	To direct the Secretary of Agriculture to convey to the New Hope Cemetery Association certain land in the State of Arkansas for use as a cemetery.	Oct. 18, 2004	1359
108–339	To replace certain Coastal Barrier Resources System maps	Oct. 18, 2004	1361
108–340	Manhattan Project National Historical Park Study Act	Oct. 18, 2004	1362
108–341	To transfer Federal lands between the Secretary of Agriculture and the Secretary of the Interior	Oct. 18, 2004	1364

Public Law	Title	Approved	118 Stat.
108–342	El Camino Real de los Tejas National Historic Trail Act	Oct. 18, 2004	1370
108–343	Tapoco Project Licensing Act of 2004	Oct. 18, 2004	1372
108–344	To revise and extend the Boys and Girls Clubs of America	Oct. 18, 2004	1376
108–345	To redesignate the Ridges Basin Reservoir, Colorado, as Lake Nighthorse	Oct. 18, 2004	1378
108–346	Arapaho and Roosevelt National Forests Land Exchange Act of 2004	Oct. 18, 2004	1379
108–347	Belarus Democracy Act of 2004	Oct. 20, 2004	1383
108–348	To authorize the Gateway Arch in St. Louis, Missouri, to be illuminated by pink lights in honor of breast cancer awareness month.	Oct. 20, 2004	1388
108–349	To amend the Congressional Accountability Act of 1995 to permit members of the Board of Directors of the Office of Compliance to serve for 2 terms.	Oct. 21, 2004	1389
108–350	To authorize the Secretary of Agriculture to sell or exchange all or part of certain administrative sites and other land in the Ozark-St. Francis and Ouachita National Forests and to use funds derived from the sale or exchange to acquire, construct, or improve administrative sites.	Oct. 21, 2004	1390
108–351	To amend the Lease Lot Conveyance Act of 2002 to provide that the amounts received by the United States under that Act shall be deposited in the reclamation fund, and for other purposes.	Oct. 21, 2004	1394
108–352	National Park System Laws Technical Amendments Act of 2004	Oct. 21, 2004	1395
108–353	To designate the facility of the United States Postal Service located at 4141 Postmark Drive, Anchorage, Alaska, as the ''Robert J. Opinsky Post Office Building''.	Oct. 21, 2004	1399
108–354	Chimayo Water Supply System and Espanola Filtration Facility Act of 2004	Oct. 21, 2004	1400
108–355	Garrett Lee Smith Memorial Act	Oct. 21, 2004	1404
108–356	To extend certain authority of the Supreme Court Police, modify the venue of prosecutions relating to the Supreme Court building and grounds, and authorize the acceptance of gifts to the United States Supreme Court.	Oct. 21, 2004	1416
108–357	American Jobs Creation Act of 2004	Oct. 22, 2004	1418
108–358	Anabolic Steroid Control Act of 2004	Oct. 22, 2004	1661
108–359	To amend the securities laws to permit church pension plans to be invested in collective trusts.	Oct. 25, 2004	1666
108–360	To reauthorize the National Earthquake Hazards Reduction Program, and for other purposes	Oct. 25, 2004	1668
108–361	Water Supply, Reliability, and Environmental Improvement Act	Oct. 25, 2004	1681
108–362	Pancreatic Islet Cell Transplantation Act of 2004	Oct. 25, 2004	1703
108–363	Veterans' Compensation Cost-of-Living Adjustment Act of 2004	Oct. 25, 2004	1705
108–364	Assistive Technology Act of 2004	Oct. 25, 2004	1707
108–365	Mammography Quality Standards Reauthorization Act of 2004	Oct. 25, 2004	1738
108–366	Higher Education Extension Act of 2004	Oct. 25, 2004	1741
108–367	Fort Donelson National Battlefield Expansion Act of 2004	Oct. 25, 2004	1743
108–368	To authorize the President to award a gold medal on behalf of the Congress to Reverend Doctor Martin Luther King, Jr. (posthumously) and his widow Coretta Scott King in recognition of their contributions to the Nation on behalf of the civil rights movement.	Oct. 25, 2004	1746
108–369	Family Farmer Bankruptcy Relief Act of 2004	Oct. 25, 2004	1749
108–370	Prevention of Child Abduction Partnership Act	Oct. 25, 2004	1750
108–371	To modify and extend certain privatization requirements of the Communications Satellite Act of 1962.	Oct. 25, 2004	1752
108–372	State Justice Institute Reauthorization Act of 2004	Oct. 25, 2004	1754
108–373	Economic Development Administration Reauthorization Act of 2004	Oct. 27, 2004	1756
108–374	American Indian Probate Reform Act of 2004	Oct. 27, 2004	1773
108–375	Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005	Oct. 28, 2004	1811
108–376	To protect the voting rights of members of the Armed Services in elections for the Delegate representing American Samoa in the United States House of Representatives, and for other purposes.	Oct. 30, 2004	2200
108–377	Asthmatic Schoolchildren's Treatment and Health Management Act of 2004	Oct. 30, 2004	2202
108–378	To amend the Organic Act of Guam for the purposes of clarifying the local judicial structure of Guam.	Oct. 30, 2004	2206
108–379	To amend the Agricultural Adjustment Act to remove the requirement that processors be members of an agency administering a marketing order applicable to pears.	Oct. 30, 2004	2209
108–380	To clarify the boundaries of the John H. Chafee Coast Barrier Resources System Cedar Keys Unit P25 on Otherwise Protected Area P25P.	Oct. 30, 2004	2210
108–381	To provide for the conveyance of several small parcels of National Forest System land in the Apalachicola National Forest, Florida, to resolve boundary discrepancies involving the Mt. Trial Primitive Baptist Church of Wakulla County, Florida, and for other purposes.	Oct. 30, 2004	2211
108–382	Provo River Project Transfer Act	Oct. 30, 2004	2212
108–383	National Archives and Records Administration Efficiency Act of 2004	Oct. 30, 2004	2218
108–384	Brown Tree Snake Control and Eradication Act of 2004	Oct. 30, 2004	2221
108–385	John Muir National Historic Site Boundary Adjustment Act	Oct. 30, 2004	2227
108–386	2004 District of Columbia Omnibus Authorization Act	Oct. 30, 2004	2228
108–387	To redesignate Fort Clatsop National Memorial as the Lewis and Clark National Historical Park, to include in the park sites in the State of Washington as well as the State of Oregon, and for other purposes.	Oct. 30, 2004	2234
108–388	To designate the facility of the United States Postal Service located at 555 West 180th Street in New York, New York, as the ''Sergeant Riayan A. Tejeda Post Office''.	Oct. 30, 2004	2238
108–389	Chickasaw National Recreation Area Land Exchange Act of 2004	Oct. 30, 2004	2239
108–390	To amend section 274A of the Immigration and Nationality Act to improve the process for verifying an individual's eligibility for employment..	Oct. 30, 2004	2242
108–391	Expressing the sense of the Congress in recognition of the contributions of the seven Columbia astronauts by supporting establishment of a Columbia Memorial Space Science Learning Center.	Oct. 30, 2004	2243
108–392	To designate the facility of the United States Postal Service located at 2811 Springdale Avenue in Springdale, Arkansas, as the ''Harvey and Bernice Jones Post Office Building''.	Oct. 30, 2004	2245
108–393	Homeownership Opportunities for Native Americans Act of 2004	Oct. 30, 2004	2246
108–394	Wilson's Creek National Battlefield Boundary Adjustment Act of 2004	Oct. 30, 2004	2247

Public Law	Title	Approved	118 Stat.
108–395	To designate the facility of the United States Postal Service located at 1115 South Clinton Avenue in Dunn, North Carolina, as the ''General William Carey Lee Post Office Building''.	Oct. 30, 2004	2249
108–396	Truman Farm Home Expansion Act	Oct. 30, 2004	2250
108–397	To designate the facility of the United States Postal Service located at 10 West Prospect Street in Nanuet, New York, as the ''Anthony I. Lombardi Memorial Post Office Building''.	Oct. 30, 2004	2251
108–398	To designate the facility of the United States Postal Service located at 19504 Linden Boulevard in St. Albans, New York, as the ''Archie Spigner Post OfficeBuilding''.	Oct. 30, 2004	2252
108–399	To amend the Federal Water Pollution Control Act to reauthorize the National Estuary Program.	Oct. 30, 2004	2253
108–400	To amend the Colorado Canyons National Conservation Area and Black Ridge Canyons Wilderness Act of 2000 to rename the Colorado Canyons National Conservation Area as the McInnis Canyons National Conservation Area.	Oct. 30, 2004	2254
108–401	Federal Regulatory Improvement Act of 2004	Oct. 30, 2004	2255
108–402	To designate the facility of the United States Postal Service located at 411 Midway Avenue in Mascotte, Florida, as the ''Specialist Eric Ramirez Post Office''.	Oct. 30, 2004	2257
108–403	To designate the facility of the United States Postal Service located at United States Route 1 in Ridgeway, North Carolina, as the ''Eva Holtzman Post Office''.	Oct. 30, 2004	2258
108–404	To designate the facility of the United States Postal Service located at 1001 Williams Street in Ignacio, Colorado, as the ''Leonard C. Burch Post Office Building''.	Oct. 30, 2004	2259
108–405	Justice for All Act of 2004	Oct. 30, 2004	2260
108–406	Special Olympics Sport and Empowerment Act of 2004	Oct. 30, 2004	2294
108–407	To designate the facility of the United States Postal Service located at 11110 Sunset Hills Road in Reston, Virginia, as the ''Martha Pennino Post Office Building''.	Oct. 30, 2004	2297
108–408	To designate the facility of the United States Postal Service located at 23055 Sherman Way in West Hills, California, as the ''Evan Asa Ashcraft Post Office Building''.	Oct. 30, 2004	2298
108–409	Taxpayer-Teacher Protection Act of 2004	Oct. 30, 2004	2299
108–410	John F. Kennedy Center Reauthorization Act of 2004	Oct. 30, 2004	2303
108–411	Federal Workforce Flexibility Act of 2004	Oct. 30, 2004	2305
108–412	To require the Secretary of Agriculture to establish a program to provide assistance to eligible weed management entities to control or eradicate noxious weeds on public and private land.	Oct. 30, 2004	2320
108–413	Hibben Center Act	Oct. 30, 2004	2325
108–414	Mentally Ill Offender Treatment and Crime Reduction Act of 2004	Oct. 30, 2004	2327
108–415	To amend title 31 of the United States Code to increase the public debt limit	Nov. 19, 2004	2337
108–416	Making further continuing appropriations for the fiscal year 2005, and for other purposes	Nov. 21, 2004	2338
108–417	To authorize an exchange of land at Fort Frederica National Monument, and for other purposes.	Nov. 30, 2004	2339
108–418	To amend the Reclamation Projects Authorization and Adjustment Act of 1992 to increase the Federal share of the costs of the San Gabriel Basin demonstration project.	Nov. 30, 2004	2340
108–419	Copyright Royalty and Distribution Reform Act of 2004	Nov. 30, 2004	2341
108–420	California Missions Preservation Act	Nov. 30, 2004	2372
108–421	Highlands Conservation Act	Nov. 30, 2004	2375
108–422	Veterans Health Programs Improvement Act of 2004	Nov. 30, 2004	2379
108–423	Department of Energy High-End Computing Revitalization Act of 2004	Nov. 30, 2004	2400
108–424	Lincoln County Conservation, Recreation, and Development Act of 2004	Nov. 30, 2004	2403
108–425	To amend the Tijuana River Valley Estuary and Beach Sewage Cleanup Act of 2000 to extend the authorization of appropriations, and for other purposes.	Nov. 30, 2004	2420
108–426	Norman Y. Mineta Research and Special Programs Improvement Act	Nov. 30, 2004	2423
108–427	Research Review Act of 2004	Nov. 30, 2004	2430
108–428	To extend the liability indemnification regime for the commercial space transportation industry.	Nov. 30, 2004	2432
108–429	Miscellaneous Trade and Technical Corrections Act of 2004	Dec. 3, 2004	2434
108–430	Petrified Forest National Park Expansion Act of 2004	Dec. 3, 2004	2606
108–431	To reaffirm the inherent sovereign rights of the Osage Tribe to determine its membership and form of government.	Dec. 3, 2004	2609
108–432	Recognizing the 60th anniversary of the Battle of the Bulge during World War II	Dec. 3, 2004	2611
108–433	Appointing the day for the convening of the first session of the One Hundred Ninth Congress	Dec. 3, 2004	2613
108–434	Making further continuing appropriations for the fiscal year 2005, and for other purposes	Dec. 3, 2004	2614
108–435	Internet Tax Nondiscrimination Act	Dec. 3, 2004	2615
108–436	Idaho Panhandle National Forest Improvement Act of 2004	Dec. 3, 2004	2620
108–437	Three Affiliated Tribes Health Facility Compensation Act	Dec. 3, 2004	2623
108–438	Kate Mullany National Historic Site Act	Dec. 3, 2004	2625
108–439	To authorize additional appropriations for the Reclamation Safety of Dams Act of 1978	Dec. 3, 2004	2627
108–440	To designate the facility of the United States Postal Service located at 3150 Great Northern Avenue in Missoula, Montana, as the ''Mike Mansfield Post Office''.	Dec. 3, 2004	2629
108–441	To improve access to physicians in medically underserved areas	Dec. 3, 2004	2630
108–442	To designate the facility of the United States Postal Service located at 1050 North Hills Boulevard in Reno, Nevada, as the ''Guardians of Freedom Memorial Post Office Building'' and to authorize the installation of a plaque at such site, and for other purposes.	Dec. 3, 2004	2632
108–443	To designate the facility of the United States Postal Service located at 1475 Western Avenue, Suite 45, in Albany, New York, as the ''Lieutenant John F. Finn Post Office''.	Dec. 3, 2004	2634
108–444	To amend the Livestock Mandatory Price Reporting Act of 1999 to modify the termination date for mandatory price reporting.	Dec. 3, 2004	2635
108–445	Department of Veterans Affairs Health Care Personnel Enhancement Act of 2004	Dec. 3, 2004	2636
108–446	Individuals with Disabilities Education Improvement Act of 2004	Dec. 3, 2004	2647
108–447	Consolidated Appropriations Act, 2005	Dec. 8, 2004	2809
108–448	To amend title XIX of the Social Security Act to extend medicare cost-sharing for the medicare part B premium for qualifying individuals through September 2005.	Dec. 8, 2004	3467
108–449	To amend and extend the Irish Peace Process Cultural and Training Program Act of 1998	Dec. 10, 2004	3469
108–450	District of Columbia Mental Health Civil Commitment Modernization Act of 2004	Dec. 10, 2004	3472
108–451	Arizona Water Settlements Act	Dec. 10, 2004	3478
108–452	Alaska Land Transfer Acceleration Act	Dec. 10, 2004	3575
108–453	Cooperative Research and Technology Enhancement (CREATE) Act of 2004	Dec. 10, 2004	3596

Public Law	Title	Approved	118 Stat.
108–454	Veterans Benefits Improvement Act of 2004	Dec. 10, 2004	3598
108–455	To extend the authority of the United States District Court for the Southern District of Iowa to hold court in Rock Island, Illinois.	Dec. 10, 2004	3628
108–456	To reauthorize the Harmful Algal Bloom and Hypoxia Research and Control Act of 1998, and for other purposes.	Dec. 10, 2004	3630
108–457	To amend the District of Columbia College Access Act of 1999 to reauthorize for 2 additional years the public school and private school tuition assistance programs established under the Act.	Dec. 17, 2004	3637
108–458	Intelligence Reform and Terrorism Prevention Act of 2004	Dec. 17, 2004	3638
108–459	To redesignate the facility of the United States Postal Service located at 747 Broadway in Albany, New York, as the ''United States Postal Service Henry Johnson Annex''.	Dec. 21, 2004	3873
108–460	To provide for the conveyance of Federal lands, improvements, equipment, and resource materials at the Oxford Research Station in Granville County, North Carolina, to the State of North Carolina.	Dec. 21, 2004	3874
108–461	To designate the United States courthouse located at 125 Bull Street in Savannah, Georgia, as the ''Tomochichi United States Courthouse''.	Dec. 21, 2004	3875
108–462	To designate the facility of the United States Geological Survey and the United States Bureau of Reclamation located at 230 Collins Road, Boise, Idaho, as the ''F.H. Newell Building''.	Dec. 21, 2004	3876
108–463	To designate the Federal building located at 324 Twenty-Fifth Street in Ogden, Utah, as the ''James V. Hansen Federal Building''.	Dec. 21, 2004	3877
108–464	Benjamin Franklin Commemorative Coin Act	Dec. 21, 2004	3878
108–465	Specialty Crops Competitiveness Act of 2004	Dec. 21, 2004	3882
108–466	To designate the Federal building located at Fifth and Richardson Avenues in Roswell, New Mexico, as the ''Joe Skeen Federal Building''.	Dec. 21, 2004	3888
108–467	To designate the Federal building and United States courthouse located at 615 East Houston Street in San Antonio, Texas, as the ''Hipolito F. Garcia Federal Building and United States Courthouse''.	Dec. 21, 2004	3889
108–468	To redesignate the facility of the United States Postal Service located at 4025 Feather Lakes Way in Kingwood, Texas, as the ''Congressman Jack Fields Post Office''.	Dec. 21, 2004	3890
108–469	Thrift Savings Plan Open Elections Act of 2004	Dec. 21, 2004	3891
108–470	To confirm the authority of the Secretary of Agriculture to collect approved State commodity assessments on behalf of the State from the proceeds of marketing assistance loans.	Dec. 21, 2004	3894
108–471	To designate the facility of the United States Postal Service located at 140 Sacramento Street in Rio Vista, California, as the ''Adam G. Kinser Post Office Building''.	Dec. 21, 2004	3895
108–472	To designate the facility of the United States Postal Service located at 560 Bay Isles Road in Longboat Key, Florida, as the ''Lieutenant General James V. Edmundson Post Office Building''.	Dec. 21, 2004	3896
108–473	To designate the facility of the United States Postal Service located at 25 McHenry Street in Rosine, Kentucky, as the ''Bill Monroe Post Office''.	Dec. 21, 2004	3897
108–474	American History and Civics Education Act of 2004	Dec. 21, 2004	3898
108–475	To designate the facility of the United States Postal Service located at 5505 Stevens Way in San Diego, California, as the ''Earl B. Gilliam/Imperial Avenue Post Office Building''.	Dec. 21, 2004	3900
108–476	To treat certain arrangements maintained by the YMCA Retirement Fund as church plans for the purposes of certain provisions of the Internal Revenue Code of 1986, and for other purposes.	Dec. 21, 2004	3901
108–477	To designate the facility of the United States Postal Service located at 4985 Moorhead Avenue in Boulder, Colorado, as the ''Donald G. Brotzman Post Office Building''.	Dec. 21, 2004	3903
108–478	To designate the facility of the United States Postal Service located at 103 East Kleberg in Kingsville, Texas, as the ''Irma Rangel Post Office Building''.	Dec. 21, 2004	3904
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	3905
108–480	To authorize funds for an educational center for the Castillo de San Marcos National Monument, and for other purposes.	Dec. 23, 2004	3907
108–481	Kilauea Point National Wildlife Refuge Expansion Act of 2004	Dec. 23, 2004	3910
108–482	Intellectual Property Protection and Courts Amendments Act of 2004	Dec. 23, 2004	3912
108–483	To authorize the exchange of certain land in Everglades National Park	Dec. 23, 2004	3919
108–484	Microenterprise Results and Accountability Act of 2004	Dec. 23, 2004	3922
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	3932
108–486	American Bald Eagle Recovery and National Emblem Commemorative Coin Act	Dec. 23, 2004	3934
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	3939
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	3964
108–489	District of Columbia Retirement Protection Improvement Act of 2004	Dec. 23, 2004	3966
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	3972
108–491	To authorize salary adjustments for Justices and judges of the United States for fiscal year 2005.	Dec. 23, 2004	3973
108–492	Commercial Space Launch Amendments Act of 2004	Dec. 23, 2004	3974
108–493	To amend the Internal Revenue Code of 1986 to modify the taxation of arrow components	Dec. 23, 2004	3984

Public Law	Title	Approved	118 Stat.
108–494	To amend the National Telecommunications and Information Administration Organization Act to facilitate the reallocation of spectrum from governmental to commercial users 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 relaible 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	3986
108–495	Video Voyeurism Prevention Act of 2004	Dec. 23, 2004	3999
108–496	Federal Employee Dental and Vision Benefits Enhancement Act of 2004	Dec. 23, 2004	4001
108–497	Comprehensive Peace in Sudan Act of 2004	Dec. 23, 2004	4012
108–498	To limit the transfer of certain Commodity Credit Corporation funds between conservation programs for technical assistance for the programs.	Dec. 23, 2004	4020

Federal Register

Monday,
January 31, 2005

Part III

Department of Agriculture

Agricultural Marketing Service

7 CFR Part 1001

Milk in the Northeast Marketing Area; Decision on Proposed Amendments to Marketing Agreement and to Order; Proposed Rule

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1001

[Docket No. AO–14–A70; DA–02–01]

Milk in the Northeast Marketing Area; Decision on Proposed Amendments to Marketing Agreement and to Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This decision proposes to permanently adopt changes in provisions of the Northeast marketing area contained in a Recommended Decision published in the **Federal Register** on March 25, 2004, with one minor modification. This document is subject to approval by producers by referendum.

FOR FURTHER INFORMATION CONTACT: Gino Tosi, Marketing Specialist, Order Formulation and Enforcement Branch, USDA/AMS/Dairy Programs, STOP 0231—Room 2968, 1400 Independence Avenue, SW., Washington, DC 20250–0231, (202)690–1366, e-mail *gino.tosi@usda.gov.*

SUPPLEMENTARY INFORMATION: This Final Decision proposes to adopt amendments that would establish year-round supply plant performance standards, exclude milk received by supply plants from producers not eligible to be pooled on the Northeast order from supply plant performance standards, remove the ''split-plant'' provision, establish a one-day ''touch base'' standard, establish explicit diversion limits for pool plants, prohibit the ability to pool the same milk on the Federal milk order and a marketwide pool administered by another government entity, and grant authority to the Market Administrator to adjust the touch-base and diversion limit standards as market conditions warrant. Additional amendments that amend reporting and payment date provisions, with one minor modification from what was proposed in the Recommended Decision, are also adopted.

This administrative action is governed by the provisions of Sections 556 and 557 of Title 5 of the United States Code and, therefore, is excluded from the requirements of Executive Order 12866.

The amendments to the rules adopted herein have been reviewed under Executive Order 12988, Civil Justice Reform. They are not intended to have a retroactive effect. If adopted, the proposed amendments would not preempt any state or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may request modification or exemption from such order by filing with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with the law. A handler is afforded the opportunity for a hearing on the petition. After a hearing, the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has its principal place of business, has jurisdiction in equity to review the Secretary's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

Regulatory Flexibility Analysis and Paperwork Reduction Act

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Agricultural Marketing Service has considered the economic impact of this action on small entities and has certified that this final decision will not have a significant economic impact on a substantial number of small entities.

For the purpose of the Regulatory Flexibility Act, a dairy farm is considered a ''small business'' if it has an annual gross revenue of less than $750,000, and a dairy products manufacturer is a ''small business'' if it has fewer than 500 employees. For the purposes of determining which dairy farms are ''small businesses,'' the $750,000 per year criterion was used to establish a production guideline of 500,000 pounds per month. Although this guideline does not factor in additional monies that may be received by dairy producers, it should be an inclusive standard for most ''small'' dairy farmers. For purposes of determining a handler's size, if the plant is part of a larger company operating multiple plants that collectively exceed the 500-employee limit, the plant will be considered a large business even if the local plant has fewer than 500 employees.

In September 2002, the time of the hearing, there were 16,715 producers pooled on and 143 handlers regulated by the Northeast order. Of these, 97 percent of the producers and 71 percent of the handlers would be considered small businesses. The adoption of the amended pooling standards serve to revise and establish criteria that ensure the pooling of producers, producer milk, and plants that have a reasonable association with, and are consistently serving, the fluid milk needs of the Northeast milk marketing area. Criteria for pooling milk are established on the basis of performance standards that are considered adequate to meet the Class I fluid needs of the market and to determine those that are eligible to share in the revenue that arises from the classified pricing of milk. Criteria for pooling are established without regard to the size of any dairy industry organization or entity. The amendments to the reporting and payment date provisions serve to streamline and simplify handler payments to the market administrator. The criteria established in the amended pooling standards and reporting and payment date provisions are applied in an equal fashion to both large and small businesses. Therefore, the Department has determined that the adopted amendments will not have a significant economic impact on a substantial number of small entities.

A review of reporting requirements was completed under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). It was determined that these adopted amendments would have no impact on reporting, recordkeeping, or other compliance requirements because they would remain identical to the current requirements. No new forms are proposed and no additional reporting requirements would be necessary.

This action does not require additional information collection that requires clearance by the Office of Management and Budget (OMB) beyond currently approved information collection. The primary sources of data used to complete the approved forms are routinely used in most business transactions. The forms require only a minimal amount of information which can be supplied without data processing equipment or a trained statistical staff. Thus, the information collection and reporting burden is relatively small. Requiring the same reports for all handlers does not significantly disadvantage any handler that is smaller than the industry average.

Prior documents in this proceeding:

Notice of Hearing: Issued July 26, 2002; published August 1, 2002 (67 FR 49887).

Supplemental Notice of Hearing: Issued August 14, 2002; published August 16, 2002 (67 FR 53522).

Recommended Decision: Issued March 17, 2004; published March 25, 2004 (69 FR 15562)

Preliminary Statement

A public hearing was held on proposed amendments to the marketing agreement and order regulating the handling of milk in the Northeast marketing area. The hearing was held, pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR part 900), at Alexandria, Virginia, on September 10–13, 2002, pursuant to a Notice of Hearing issued July 26, 2002, and published August 1, 2002 (67 FR 49887) and a Supplemental Notice of Hearing issued August 14, 2002, and published August 16, 2002 (67 FR 53522).

Upon the basis of the evidence introduced at the hearing and the record thereof, the Administrator, on March 17, 2004, issued a Recommended Decision containing notice of the opportunity to file written exceptions thereto.

The material issues, findings, conclusions, and rulings of the Recommended Decision, with one minor modification, are hereby approved and adopted and are set forth herein. The material issues on the record of the hearing relate to:

1. Reporting and Payment Dates.
2. Pooling standards of the marketing order:
   a. Performance standards for supply plants.
   b. Unit pooling standards for distributing plants.
   c. Standards for producer milk.
3. Marketwide Service Payments.
4. Conforming changes to the order.

Findings and Conclusions

The following findings and conclusions on the material issues are based on evidence presented at the hearing and the record thereof:

1. Reporting and Payment Dates

Several changes to the reporting and payment date provisions of the Northeast marketing order are adopted, with one minor variation from what was proposed in the Recommended Decision. The adopted changes include: (1) Changing the submission date of monthly handler reports to on or before the 10th day of the month; (2) Announcing the producer price differential (PPD) and statistical uniform price on or before the 14th day of the month, but allowing the market administrator additional days if the 14th falls on a Saturday, Sunday, or national holiday; (3) Requiring payments to the producer settlement fund (PSF) be received no later than two days after the announcement of the PPD; (4) Modifying the date which payments from the PSF are to be disbursed to handlers to the day after the due date required for payment into the PSF; and (5) Requiring final payments to producers be made no later than the day after the required date of payment to handlers from the PSF.

The Recommended Decision would have required partial payments to producers be made no later than the last day of the month. Upon consideration of an exception received regarding modification of the partial payment date, the partial payment to dairy farmers will continue to be due on or before the 26th day of the month. This issue is discussed later in this decision. The following table summarizes the adopted changes:

	Current provision	Adopted changes	Reason for change
PROPOSAL 1			
Submission of monthly handler reports to Market Administrator.	Due on or before the 9th day of the month.	Due on or before the 10th day of the month.	Allows handlers one more day to submit reports to Market Administrator.
Date of PPD and statistical uniform price announcement.	Announce on or before the 13th day of the month.	Announced on or before the 14th day of the month, and up to two additional public business days thereafter if the 14th falls on a weekend or national holiday.	Maintains the time the Market Administrator has to announce the PPD and statistical uniform price and if the 14th falls on a weekend or national holiday allows additional days.
Handler payments to the PSF	Payment must be made no later than the 15th of the month, unless the 15th falls on a weekend or holiday, where the payment can be delayed until the next business day.	Payment must be made no later than two days after the announcement of the PPD and statistical uniform price, unless the due date falls on a weekend or holiday, then the payment can be delayed until the next business day.	A corresponding change made because of extending the date for filing Market Administrator reports and the computation of the PPD and statistical uniform price.
Date when final payments are to be disbursed to producers.	Payment must be received by each producer no later than the day after the 16th day of the following month.	Payment must be received the following month by each producer no later than the day after the required payment date from the PSF unless the day falls on a weekend or holiday, then the payment can be delayed.	A corresponding change that adds flexibility to the relationship between the date of payment to handlers from the PSF and final payment to producers.
PROPOSAL 4			
Date on which payments from the PSF are disbursed to handlers.	Market Administrator must pay each handler the amount owed, if any, from the PSF no later than the 16th after the end of each month.	Market Administrator must pay each handler the amount owed, if any, no later then the day after handler payments to the PSF are received unless the day falls on a weekend or holiday, then the payment can be delayed.	Helps to assure that producers receive full payment in the event of the late payments to the PSF.

Currently, a handler's report on milk receipts and utilization is due to the Market Administrator on or before the 9th day of the month. Submission of this report triggers a sequence of other reporting and payment dates. These include: announcement of the PPD and statistical uniform price on or before the 13th day of the month; handler obligations to the PSF, due no later than the 15th day of the month but subject to a delay to the next business day if the day falls on a weekend or holiday; disbursement of funds from the PSF to handlers, due no later than the 16th day after the end of each month but also delayed subject to a weekend or holiday; partial payments from handlers to producers and cooperative associations, due on or before the 26th day of the month and again delayed due to a weekend or holiday; and final payments to producers and cooperative associations, made no later than the day after payment to handlers from the PSF.

A portion of Proposal 1, submitted by New York State Dairy Foods, Inc. (NYSDF), Proposal 4, submitted by the Northeast Market Administrator, the Association of Dairy Cooperatives in the Northeast (ADCNE) and NYSDF, and Proposal 12, submitted by the Northeast market administrator, are adopted. All three proposals seek to modify various reporting and payment provisions of the order. NYSDF is a trade association representing milk handlers and processors in the Northeast marketing area. ADCNE represents a number of dairy farmer cooperatives whose milk is pooled on the Northeast order. Their members include Agri-Mark, Inc. (Agri-Mark), Dairy Farmers of America, Inc. (DFA), Dairylea Cooperative Inc. (Dairylea), Land O' Lakes, Inc. (LOL), Maryland and Virginia Milk Producers Cooperative, Inc. (MVMP), O–AT–KA Cooperative, Inc. (O–AT–KA), St. Albans Cooperative Creamery, Inc. (St. Albans), and Upstate Farms Cooperative, Inc. (Upstate). Worcester Creameries, Elmhurst Dairy, Mountainside Farms, and Steuben Foods also testified in support of Proposal 1.

Proposal 1 would require monthly handler reports to be received by the Market Administrator on or before the 10th day of the month. This, in turn, triggers a sequence of other reporting deadline and payment date provisions that would be similarly changed. The Recommended Decision included a provision that would require partial payments to dairy farmers be made on or before the last day of the month. This Final Decision, however, will keep the partial payment date as currently provided by the order. The adopted changes include: (1) Announcement of the PPD and statistical uniform price a day later—from the 13th to the 14th day of the month. If the 14th day of the month falls on a Saturday, Sunday, or national holiday, the Market Administrator would have up to two additional public business days to announce the PPD and the statistical uniform price; (2) Handler payments to the PSF be made no later than two days after the announcement of the PPD unless the due date falls on a weekend or holiday, then the payment can be delayed until the next business day; and (3) Final payments to producers be received no later than the day after the required date of payment from the PSF unless the due date falls on a weekend or holiday, then the payment can be delayed until the next business day. Proposal 4 would modify the day which payments from the PSF are to be disbursed to handlers from the 16th of the month to the day after the due date required for payment into the PSF. Proposal 12 seeks to make a technical correction to the order provision relating to payments to producers and cooperatives, which will make the provisions identical to other Federal orders by changing ''pool plant operator'' to ''handler'' throughout the provisions of the order.

A witness appearing on behalf of NYSDF testified in support of Proposal 1, stating that its adoption is necessary to correct unnecessarily burdensome regulations that have resulted from the reporting and payment date provisions adopted as part of Federal order reform. According to the witness, the amendments incorporated in Proposal 1 would essentially restore the reporting and payment dates specified in the former New York-New Jersey milk marketing order. The witness indicated that giving an additional day for submitting handler reports to the Market Administrator would lessen the difficulties milk handlers are currently experiencing in meeting the current reporting deadline. The witness explained that milk suppliers have experienced considerable difficulties in furnishing milk component and billing data in time for meeting the currently established reporting deadline. This situation is compounded, the witness explained, when handlers must account for the co-mingling of tanker loads of milk between cooperative and independent milk producers. Often, the witness stated, reports to the Market Administrator contain erroneous and estimated data because the reporting handler did not receive the correct data in time.

The NYSDF witness also cited testimony from the Northeast Market Administrator that one third of handler reports are often filed late. Moving the reporting date from the 9th to the 10th of the month would give milk suppliers and buyers an additional day to complete their work, thereby greatly reducing the number of late reports to the Market Administrator, the witness concluded.

The second proposed change in reporting dates contained in Proposal 1 would maintain the time the Market Administrator has to announce the PPD and statistical uniform price, and up to two additional public business days thereafter if the 14th falls on a weekend or national holiday. According to the NYSDF witness, this portion of the proposal is consistent with the proposed one-day extension for submission of handler reports to the Market Administrator and would extend to the Market Administrator sufficient time to make the necessary price computations without undue pressure brought about by weekends or holidays. The witness also noted that while this proposal could give the Market Administrator up to two additional public business days for making the price computations, it would not require that the additional time be used. If the Market Administrator finds it feasible, a price announcement could come earlier, the witness stated.

The third change in reporting dates offered by the NYSDF witness would require handler payments to the PSF be made no later than two days after the announcement of the PPD. According to the witness, this portion of the proposal is intended primarily as a conforming change made necessary by the one-day proposed extension in the date for filing Market Administrator reports and the computation of the PPD and statistical uniform price. Currently, handler payments to the PSF must be made no later than the 15th of the month, unless the 15th falls on a weekend or national holiday where the payment can be delayed until the following business day, the witness noted. The witness expressed concern that compliance with the current handler payment deadline was difficult, and the proposed change would better accommodate the flow of money from handlers to the PSF. The witness was of the opinion that this portion of the proposal would provide a more consistent time interval to gather the Market Administrator classifications on milk transfers at pool reporting time, giving handlers a more consistent time frame in which to make necessary money transfers, for example, and

improve concurrent billings for milk that was transferred or diverted.

The NYSDF witness testified that Proposal 1 would also require final payments to dairy farmers be disbursed no later than the day after the required payment date to handlers from the PSF. The primary purpose of this portion of the proposal, the witness explained, is to have the date of final payment to dairy farmers conform with other proposed date changes for the computation of the statistical uniform price and with when payments are made into and out of the PSF. The witness stressed that no change in the requirement for ''day-earlier'' payment to cooperatives was proposed, as currently set forth in the provisions of the order, and the final payment to producers would still be due the day after payments from the PSF are made by the Market Administrator. Accordingly, the witness noted, dates of final payment could move a day or two later, but only if the date of payment from the PSF were extended by the same number of days. This sequence in the relationship of ''date of final payment'' to the ''date of payment from the producer settlement fund'' should be continued, the witness said.

The NYSDF witness testified that the last feature of Proposal 1 modifies the date that partial payments are received by producers to ''on or before the last day of the month'', instead of the current ''26th day of the month''. The witness presented evidence which demonstrated that a longer spread in days between partial and final payment exists now than prior to Federal order reform. The witness testified that making partial payments due ''on or before the last day of the month'' would conform more closely with the dates previously set in the respective pre-reform orders and create better ''spacing'' between required pay dates.

The NYSDF witness was of the opinion that adoption of Proposal 1 also would accommodate ''tolled'' bulk milk purchased by milk distributors for processing and packaging into Class I products at pool distributing plants. The witness described ''tolling'' as a situation where a plant is paid to process raw milk, but the processing plant does not take ownership of the milk or incur a payment obligation to producers. The witness noted that the Northeast order requires that tolled milk be purchased on the basis of the PPD and component prices rather than on the basis of Class I skim value and butterfat prices. Therefore, the Market Administrator must ''credit'' the handler who processes cooperative receipts, together with a Market Administrator assessment on the tolled milk. The tolling processor must then prepare a billing to the distributor of the tolled milk at the difference between the Class I cost of the skim and butterfat and also a cooperative credit from the Market Administrator, including the associated Market Administrator fee, the witness stated. The NYSDF witness noted that doing this requires having detailed component values as well as knowing the final PPD. The billing involved is made after the PPD announcement and the billing by the Market Administrator of the handler's pool obligation, the witness said.

In their post-hearing brief, NYSDF emphasized that Proposal 1 takes the existing payment structure and applies it to the date that the Market Administrator announces the PPD and statistical uniform price. NYSDF asserted that Proposal 1 does not set the payment date to the PSF as the 16th of the month. Rather, they noted, handlers could be making payment earlier than the 16th of the month if the PPD is announced before the 14th day of the month. NYSDF was of the opinion that as a whole, Proposal 1 would allow the Market Administrator to receive more timely and accurate handler reports and permit earlier price announcements and earlier payments to and from the PSF. NYSDF concluded that both dairy farmers and handlers would benefit from more accurate information that would flow naturally from adoption of Proposal 1.

NYSDF's post-hearing brief concluded that adoption of Proposal 1 would still have producers in the Northeast marketing area receiving a partial payment for milk 5 days earlier than was the case prior to Federal order reform.

A witness appearing on behalf of Marcus Dairy (Marcus) testified in support of Proposal 1. Marcus is a distributing plant which receives approximately 60 percent of its milk supply from independent dairy farmers, with the remainder supplied by cooperatives. The witness indicated support for moving the handler reporting date from the 9th to the 10th day of the month, noting that an extra day would help in receiving more accurate information from cooperatives and eliminate the need to estimate data so that reports can be submitted on time. The witness also testified that the proposal should be accompanied by the proposed change to the Market Administrator PPD announcement date from the 13th to the 14th of the month while providing the flexibility for the Market Administrator to make announcements later in the event that the 14th falls on a holiday or weekend. These modifications would also require a similar change in the date when payment to the PSF is due, the witness noted. In light of this, the Marcus witness expressed support for requiring that payments to the PSF be made not more than two days after the PPD announcement and that final payments to dairy farmers be received no later than the day after the required date of payment by the Market Administrator. Marcus also supported moving the date of partial payment from the ''26th of the month'' to ''on or before the 30th of the month.'' The witness was of the opinion that adjusting these payment date provisions would improve the cash flow of dairy farmers.

A witness appearing on behalf of ADCNE testified in opposition to Proposal 1. The witness said that dairy farmers, and those persons who provide services to dairy farmers, are faced with meeting deadlines that are sometimes difficult or inconvenient. The witness expressed the opinion that businesses that rely on information from other businesses do not necessarily have any ability to force those other businesses to change just because they provide needed information. Accordingly, the witness said, ADCNE does not view the current reporting dates as unreasonable or in need of change. Instead, the ADCNE witness suggested that those involved work together to resolve producer payment issues instead of seeking a regulatory change that would result in delay of payments to dairy farmers. Delaying producer payment dates will unnecessarily impose financial costs to dairy farmers in the Northeast, the ADCNE witness concluded.

In their post-hearing brief, NYSDF responded to ADCNE's views by indicating that no amount of overtime worked by employees of NYSDF can create reports when other entities fail to get needed report information to handlers in a timely manner. NYSDF's brief also noted that many of their members are small businesses subject to Regulatory Flexibility Act analysis and relief as necessary and that undertaking expensive overtime in order to fill out reports when they do not have all the necessary information needed from various entities negates the intent of the Regulatory Flexibility Act.

Exceptions to the Recommended Decision received from ADCNE opposed adoption of all portions of Proposal 1. ADCNE was of the opinion that Northeast order milk handlers are fully able to file reports on or before the 9th of the month, and that moving the reporting date from the 9th of the month

to the 10th of the month is unjustified. ADCNE was of the opinion that the proponents of Proposal 1 did not sufficiently demonstrate how the lack of timeliness or accuracy of handler reports has affected price announcements by the Market Administrator, or caused inaccurate or late payments to dairy farmers. ADCNE also described how moving the reporting date could possibly delay payments to dairy farmers and have a negative effect on their cash flow.

ADCNE took particular exception to the proposed change in the date of partial payment from the 26th day of the month to the last day of the month. ADCNE argued that postponing the date of partial payment would provide a financial gain for handlers at the expense of dairy farmers. ADCNE explained how moving the date of partial payment could cause financial hardship by requiring dairy farmers to carry more operating capital debt during the four to seven day period that the partial payment would be delayed. ADCNE noted that a delayed payment could increase the exposure of producers to financial losses in the event of a default by a handler. ADCNE also disputed the assertions that delaying the partial payment date until the last day of the month would create better spacing between payment dates to producers and that moving the partial payment back to a date that was previously applicable in the pre-reform orders was desirable.

An exception to the Recommended Decision was also received by Cooperative Milk Producers Association (CMPA). CMPA did not take exception to a specific proposal but opposed any change in reporting and payment deadlines that could delay payments to dairy farmers.

The Northeast Market Administrator testified in support of Proposal 4, which seeks to move the date on which payments from the PSF are dispersed to handlers from the 16th day after the end of the month to no later than the day after handler payments to the PSF are received. The Market Administrator explained that a problem arises when late payments to the PSF result in insufficient funds to make payments out of the PSF when both payments to and from the PSF fall on the same day. When this happens, order provisions provide for a pro-rata reduction in payments to handlers who can, in turn, reduce payments to dairy farmers, the Market Administrator noted. According to the Market Administrator, Proposal 4 would allow one extra day for payments from the PSF and cause dairy farmers to receive their payments one day later three or four times a year. However, dairy farmers would always be assured of receiving the full amount owed, the Market Administrator added.

A witness representing ADCNE also testified in support of Proposal 4. Under current provisions, the ADCNE witness said, the date for payments to the PSF, the 16th of the month, can sometimes fall on the same day that payments from the PSF are to be made. In their post-hearing brief, ADCNE asserted the adoption of Proposal 4 was necessary for the proper administration of the PSF.

The Northeast Market Administrator also testified in support of Proposal 12. This proposal seeks to make a technical correction to the order provisions relating to payments to producers and cooperative associations and would make the Northeast order's *Payments to producers and to cooperative associations* provision identical to other Federal orders. The Market Administrator explained that the Proposal would simply amend references to ''pool plant operator'' as ''handler.''

Reporting and payment date provisions of the pre-reform New England, New York-New Jersey, and Mid-Atlantic orders served the different needs and marketing conditions of their respective marketing areas. Provisions adopted under Federal order reform established reporting and payment dates that were reflective of the three consolidated orders, while recognizing the need to establish dates that would be conducive to the marketing conditions of the larger consolidated Northeast order. The reporting and payment date requirements adopted for the consolidated Northeast order were intended to reasonably accommodate historical patterns and practices while recognizing that fixed dates also needed to be specified. For example, handler reports to the Market Administrator were due as soon as the 8th of the month, or as late as the 10th of the month. When the three pre-reform orders were consolidated to form the Northeast order, the new handler reporting date was set for the 9th of the month. This was also the case for the date for the Market Administrator's announcement of the PPD and statistical uniform price. In the pre-reform New England and Mid-Atlantic orders, the announcement was on the 13th of the month, while in the pre-reform New York/New Jersey order the announcement was on the 14th of the month. Current provisions in the consolidated Northeast order require the announcement by the 13th of the month.

This decision maintains a change in the deadline for submitting handler reports to the Market Administrator from the 9th of the month to the 10th of the month. The exceptions to the Recommended Decision submitted by ADCNE regarding handler reporting deadlines are not persuasive. Delaying the deadline for handler reports to the Market Administrator from the 9th of the month to the 10th of the month is supported by the hearing record and should reduce the number of late reports and lessen the number of inaccuracies and estimations contained therein.

Changing the handler reporting date deadline by one day will also be accompanied by a change in the date the Market Administrator is to announce the PPD and statistical uniform price. Also adopted is the feature of Proposal 1 which specifies that the Market Administrator can make the PPD and statistical uniform price announcement up to two public business days later if the 14th falls on a weekend or national holiday.

The portion of Proposal 1 that specifies handler payments to the PSF be made no later than two days after the PPD and statistical uniform price announcement is also adopted. This portion of Proposal 1 is a change made necessary by the proposed one-day extension in the date for filing handler reports and the computation and announcement of the PPD and statistical uniform price. The adoption of this portion of Proposal 1 also adds a measure of flexibility to the payment date provisions by making the date of handler payments to the PSF dependent on the date the Market Administrator announces the PPD and statistical uniform price. It also will provide the opportunity for handlers to make payments to the PSF earlier than the 16th of the month if the Market Administrator announcement of the PPD comes before the 14th of the month.

Payments to handlers from the PSF also necessitates a corresponding change as a result of the adopted changes for announcement of the PPD and statistical uniform price and dates for payment to the PSF. Evidence presented at the hearing demonstrated that sometimes payments to and from the PSF can fall on the same day and can lead to reduced payments to dairy farmers because payments are pro-rated. Amending the date that payments are made from the PSF to handlers from ''the day after the 16th day of the month'', to the day after handler payments to the PSF are received will better assure handlers of receiving their

full payment each month from the PSF. Prompt and complete payments to dairy farmers are dependant on timely and full payments from the PSF to milk handlers. However, final payments to dairy farmers should be made no later than the day after the required payment date from the PSF by the Market Administrator.

Exceptions to the Recommended Decision received from ADCNE for not changing the date of partial payment to dairy farmers are persuasive. The proposed change in the partial payment date is a separate issue from the reporting dates issue that affects the timing of the calculation and announcement of the producer price differential and statistical uniform price. The revised reporting dates, as discussed in other parts of this decision, affect the timing of the final payment to producers. ADCNE correctly noted in their exceptions that neither the Agricultural Marketing Agreement Act nor existing Federal law require that the monthly partial and final payments to dairy farmers be made on an evenly spaced basis. ADCNE's comments also clearly reveal the potential monetary affect on producers of moving the partial payment date to the last day of the month. Despite the suggested benefit of more even spacing between payment dates and the explanation that the later date would be more in line with the pre-order reform date, the reasons and supporting arguments for keeping the partial payment date as is are valid and sound. This Final Decision will maintain the partial payment date as currently specified by the order. The partial payment to dairy farmers will continue to be due on or before the 26th of the month. The partial payment is based on the lowest announced class price for the preceding month. Since that price is already known to handlers, there is no need to delay partial payments to dairy farmers because of reporting and payment date changes adopted in the decision.

Additionally, ADCNE took exception to the use of the term ''conforming change'' in the Recommended Decision. Moving the date of handler payment to the PSF, the date of partial payment, and the date of final payment were referred to in the Recommended Decision as ''conforming changes'' resulting from adjusting the date which handler reports are to be submitted to the Market Administrator. The Department would like to clarify that the use of the term ''conforming'' in this case was not intended to reference its traditional use of the term ''conforming change''—a resulting change in order language in one section of the order stemming from a change in order language in another. The term was intended to clarify the changes in reporting and payment dates corresponding to and resulting from moving the due date of handler reports.

2. Pooling Standards

Summaries of testimony regarding the pooling standards of the Northeast order are provided individually. The discussion of all pooling standards and the decision's findings and conclusions regarding pooling standards is presented immediately after testimony summary for ''c''. below.

a. Performance Standards for Supply Plants

Certain amendments to the *Pool plant* provision of the Northeast order are adopted. Specifically, the adopted amendments include: (1) Establishing a supply plant performance standard of 10 percent of total milk receipts for each of the months of January through August and December, and 20 percent of total milk receipts for each of the months of September through November; (2) Removing the ''split plant'' feature; and (3) excluding milk received from producers not eligible to be pooled on the Northeast order from the total volume of milk used to determine the amount of milk that a supply plant needs to deliver to a distributing plant to become pooled. These recommended changes are represented in certain features of Proposals 2, 5, and 8.

Proposal 10, which advocates lowering performance standards, was not included for adoption in the Recommended Decision and is not adopted in this Final Decision. Furthermore, Proposal 9, which would credit route distribution from the plant and transfers in the form of packaged fluid milk products against the supply plant performance standards, was not included for adoption in the Recommended Decision and is not adopted in this Final Decision.

Currently, supply plants in the Northeast order need to ship at least 10 percent of their total milk receipts in the months of August and December and 20 percent of their total milk receipts in each of the months of September through November to pool distributing plants in order to qualify the supply plant and all of its milk receipts for pooling. A supply plant which meets the performance standard in each of the months of August through December is automatically considered a pool plant for each of the months of January through July. Supply plants that do not qualify as a pool plant in each of the months of August through December need to ship at least 10 percent of their total milk receipts to distributing plants during each of the months of January through July in order to qualify the supply plant and all of its milk receipts for pooling in each of those months.

The order also currently provides a ''split-plant'' feature to accommodate a supply plant that has both pool and nonpool facilities. This feature was adopted during Federal order reform to provide for more uniform supply plant provisions within the Federal milk order system. It was not a feature contained in any of the three pre-reform orders consolidated to form the Northeast order.

Proposal 2, submitted by NYSDF, seeks to amend the *Pool plant* provision of the order by: (1) Increasing the supply plant performance standards by 5 percentage points to 15 percent for the months of August and December, and by 5 percentage points to 25 percent for each of the months of September through November; and (2) Removing the split-plant provision. In their post-hearing brief, NYSDF slightly modified the months applicable for the proposed increased standards to specify a performance standard of 15 percent in the month of August and 25 percent for each of the months of September through December.

A witness representing NYSDF testified that after implementation of Federal milk order reform, milk supplies pooled on the Northeast order during the fall months have decreased. During these months, the NYSDF witness said, milk was shipped to areas outside of the order, and it was difficult for Northeast order fluid milk handlers to acquire an adequate supply of milk to meet the needs of their customers. Although there was not as significant a shortage in the first half of 2002 as there was in 2000 and 2001, the witness predicted that the situation would change substantially beginning in late 2002 and during 2003.

The NYSDF witness characterized milk shortages in the fall months for the Northeast marketing area as a long-term problem that requires long-term action. In this regard, the witness stressed, Proposal 2 is designed to increase the amount of milk available to fluid milk handlers during the fall months. The witness said the proposed increase is similar to provisions previously contained in the pre-reform Middle Atlantic and New England milk orders and is identical to the adjustments made to supply plant performance standards by the Market Administrator in 2000 and 2001 for the months of August through November.

The NYSDF witness testified that supply plant performance standards applicable in the pre-reform orders consolidated to form the current Northeast milk order enabled cooperatives to pool the milk of their members separately from the milk of independent producers and small cooperatives who also supplied fluid milk plants. After implementation of Federal order reform, the witness said, the new pooling provisions have allowed cooperatives to pool not only the milk of their members, but also the milk of other smaller cooperatives and independent producers. The current pooling provisions, the witness emphasized, are being used in a way that allows large cooperatives to guarantee themselves a higher volume of milk pooled as Class I. In their post-hearing brief, NYSDF added that this arrangement has resulted in an increased market share of total Class I sales by larger cooperatives while the total volume of milk available to Class I handlers has remained unchanged.

Data presented by the NYSDF witness showed that cooperatives now account for over 80 percent of all milk pooled on the Northeast order. The witness noted that cooperatives have guaranteed non-members an outlet to pool their milk and, on average, pool in excess of 100 million pounds of non-member milk each month. The witness concluded that because cooperatives pool such a large amount of milk, cooperatives should not have difficulty meeting the proposed five percentage point performance standard increase for supply plants.

The NYSDF witness emphasized that their greatest concern regarding supply plant performance standards is the issue of ''guaranteed'' pooling of non-member milk supplies and the lack of diversion limit standards. The witness was of the opinion that this has enabled milk to be pooled on the order without bearing any responsibility for serving the Class I market or being made available as a reserve supply to the market. The witness was of the opinion that inappropriate pooling has resulted in the erosion of blend prices paid to producers who do regularly supply the Class I needs of the market.

The NYSDF witness further testified that the split-plant feature for supply plants should be removed because the feature does not serve the purpose for which it is intended. The witness maintained that the split-plant provision was created to allow a supply plant to have separate facilities to receive and process Grade B milk. Currently, the witness said, no handlers located in the Northeast order are using the split-plant feature. However, if a supply plant chooses to rely on the feature, it would be able to pool a substantial amount of additional milk simply by diverting milk to the non-pool side of the plant during those months when no performance standards or diversion limits are provided by the order, the witness cautioned.

In conclusion, the NYSDF witness said, it is the Class I market that generates additional revenues which accrue to all producers whose milk is pooled on the Northeast marketing area. Accordingly, the witness maintained, entities that seek to have their milk pooled on the order should bear some responsibility in actually supplying the Class I needs of the market. The witness said that Proposal 2 is intended to end what NYSDF characterized as ''abusive'' pool-riding methods and to ensure that entities benefitting from revenue generated by Class I sales have demonstrated service in supplying the Class I market.

A witness appearing on behalf of Marcus also testified in support of Proposal 2. According to the witness, Marcus Dairy experienced milk supply shortages during some months since implementation of the consolidated Northeast milk order. The witness stated that adoption of Proposal 2 would help alleviate supply shortfalls for the Class I market during the fall months when the milk is most needed.

A witness representing the ADCNE testified in opposition to that portion of Proposal 2 that would raise the supply plant performance standards for the months of August through December. However, the witness supported the proposal on the need to remove the split-plant feature. The witness was of the opinion that increasing supply plant performance standards was unwarranted and could cause disorderly marketing conditions in the region because some handlers would be forced to depool a portion of the milk of their producers. The witness stressed that the Market Administrator already has the authority to adjust these standards and that this should continue as the way to make future changes as marketing conditions warrant.

Furthermore, the ADCNE witness emphasized, Proposal 2 does not specify some level of performance by supply plants during the ''free-ride'' months of January through July.[1] According to the witness, Proposal 2 also does not limit the ability of producers located far from the Northeast marketing area to be pooled on the order without maintaining a reasonable association to the market and does not ensure that Class I distributors will receive additional milk when needed.

In their post-hearing brief, ADCNE stressed that no evidence was presented at the hearing that would warrant a permanent change in performance standards. ADCNE reiterated their opinion that the current authority provided to the Market Administrator to make adjustments to the performance standards was the most appropriate method for the orderly marketing of milk in the Northeast.

Proposal 5, submitted by ADCNE, also seeks to amend the *Pool plant* provision of the order. Specifically the proposal would: (1) Require supply plants to deliver at least 10 percent of their total milk receipts to a distributing plant during each of the months of January through August and December; (2) Grant authority to the Market Administrator to impose additional shipping requirements on handlers receiving marketwide service payments; and (3) Eliminate the split-plant provision.

The ADCNE witness testified that current order provisions have unintentionally provided the opportunity for milk to be pooled and priced under the terms of the Northeast order without demonstrating a reasonable level of service in supplying the Class I needs of the market. Pooling such milk could result in a lower blend price for all producers who do regularly supply the fluid needs of the market, the witness specified. The witness stressed that Proposal 5 is not meant to eliminate the ability to pool the milk of producers located far from the Northeast marketing area. Instead, the witness explained, Proposal 5 would assure that all milk pooled on the Northeast order demonstrate a consistent service to supplying distributing plants and consequently bear some of the burden of incurring the additional costs of supplying the Class I needs of the market. According to the witness, there are two aspects of the *Pool plant* provision of the Northeast marketing order that have enabled what the witness described as ''opportunistic pooling'': The split-plant feature and the current level of supply plant performance standards.

The ADCNE witness explained that supply plants qualified as split-plants can engage in opportunistic pooling by receiving milk on the pool side of the plant and then diverting the milk to the nonpool side of the plant. Under current provisions, during the months of August and December a supply plant could divert nine loads of milk to its nonpool side for every one load of milk it

[1] The dairy industry term known as a ''free-ride'' period is often used to describe those time periods when no performance standard is specified.

receives on its pool side, the witness explained. In addition, the witness continued, during the months of September through November, the supply plant could divert eight loads of milk for every two loads it receives at the pool side of the plant. According to the witness, once the plant meets the performance standards in each of the months of August through December, the plant is automatically qualified as a pool plant in the months of January through July and can divert an unlimited amount of milk.

Under current supply plant performance standards, the ADCNE witness said, a pool plant located far from the marketing area could potentially pool all of the milk located near it during the spring months by shipping a small amount of its milk supply to a Northeast order pool plant during the fall months. The lack of a monthly touch-base standard, the witness also asserted, has facilitated the pooling of milk located far from the marketing area by allowing producers to qualify all of their milk for pooling by delivering a minimal amount of milk to a Northeast order pool plant. During January through July when no performance standards for supply plants are stipulated, the witness noted, a plant has the ability to pool all the milk of every producer who had delivered to the plant throughout the year. According to the witness, theoretically 100 percent of the pool plant's milk receipts could be pooled on the Northeast order.

The ADCNE witness presented data estimating the impact of pooling distant milk on the Northeast order blend price. The witness estimated that for the period of January 2001 through July 2002, the blend price was reduced by an average of 16 cents per hundredweight. The witness was of the opinion that if Proposal 5 is adopted, most of the lost blend price value would be restored.

The ADCNE witness testified that the free-ride feature is no longer being used for its intended purpose of allowing producers that had been historically pooled on the Northeast Order to remain pooled. Instead, the witness stated, the free-ride feature has created the ability to pool milk on the order that was never intended to be pooled. The witness maintained that supply plants that currently meet the performance standards in September through November would not be disadvantaged with the new year-round monthly performance standards because the proposed standards for the months of January through July are lower than those specified for the fall months.

Comments filed by ADCNE supported adoption of all changes to the order's pooling standards contained in the Recommended Decision.

A witness testifying on behalf of NYSDF testified in opposition to Proposal 5. While NYSDF agreed that the order's lack of performance standards for all months has created opportunities for distant milk to be pooled on the order, a free-ride feature is important for maintaining orderly marketing conditions. The NYSDF witness said that providing for months without performance standards ensures that the market's reserves have the ability to be pooled on the order during months of abundant supply.

At the hearing, NYSDF offered a modification to Proposal 5, proposing that the performance standard during the months of January through July only apply to supply plants located outside of the States that comprise the Northeast order. The justification for this modification, the witness said, is that during the spring months when additional milk is not usually needed by distributing plants, it prevents the uneconomic movement of milk by supply plants located within the marketing area. The NYSDF modification would make Proposal 5 similar to amendments recently adopted by the Mideast order, the witness noted.

Comments filed on behalf of NYSDF in response to the Recommended Decision supported most of the proposed amendments to the order's pooling standards. NYSDF expressed support for the proposed touch-base standard and monthly diversion limits, and agreed that the proposed changes will better identify the producers that are ready, willing and able to serve the fluid market.

NYSDF took exception to the proposed supply plant shipping standards of 10 percent for the months of January through June. It was the opinion of NYSDF that this shipping standard would cause difficulties for small cooperatives, who currently pay fees to larger cooperatives for pooling, who would then have to pay a fee in every month of the year to have their milk pooled. NYSDF contended that the minimum 10 percent shipping standard should apply only to supply plants that are located outside the states that comprise the Northeast marketing area. It is the opinion of NYSDF that supply plants from ''distant'' areas must demonstrate that their producer milk is really serving the market in a reserve supply capacity.

Proposal 8, submitted by Friendship Dairies (Friendship), a partially regulated handler on the Northeast order, seeks to amend the order's *Pool plant* provision by excluding milk received by supply plants from producers who would not be eligible to be pooled under the Northeast order and pre-qualified cooperative producer milk from the total volume of milk used to determine the amount of milk a supply plant would need to deliver to distributing plants in order to satisfy the supply plant performance standards.

The *Producer* provision of the Northeast order describes those producers who would not be eligible for pooling on the Northeast order. They include: an entity that operates their own farm and plant at their sole enterprise and risk, commonly referred to as a producer handler; a dairy farmer whose milk is received at an exempt plant excluding producer milk diverted to the exempt plant; a dairy farmer designated as a producer under another Federal order; a dairy farmer whose milk is reported as diverted to a plant fully regulated under another Federal order that is assigned to Class I; or a ''dairy farmer for other markets,'' which is a dairy farmer whose milk during certain months of the year is received by a pooling handler and that pooling handler caused the milk from such dairy farmer to be delivered to any plant as other than producer milk or delivered to any other Federal milk order.

A witness appearing for Friendship testified that the current method used in determining if a supply plant has met a performance standard is examining the total amount of milk received at the plant and the amount of those receipts shipped to distributing plants. As a supply plant procures additional milk to offset the milk it transfers or diverts to distributing plants, the additional milk receipts become included in the plant's total milk receipts, the witness said. This increases the quantity of milk that must be transferred or diverted by the supply plant to distributing plants to meet the performance standard for pooling purposes, the witness explained. Basing the supply plant qualification percentage exclusively on the supply plant's producer milk supply, the witness concluded, would reduce the amount of milk that Friendship would have to ship every month to pool distributing plants in order to be pooled under the terms of the order. Friendship testified that they must include milk received from cooperatives that has already been qualified for pooling by the cooperative in the total receipts used to determine the amount of milk they must ship to meet supply plant performance requirements. The Friendship witness noted that adoption of Proposal 8 would

address this by excluding pre-qualified cooperative milk from the volume of receipts upon which a supply plant must make shipments in order to be designated as a pool supply plant.

The Friendship witness also noted that excluding milk received from producers not eligible to be pooled on the Northeast order from the performance standards for supply plants has been adopted in the pooling provisions of other Federal orders. The witness clarified that in these other Federal orders where a similar provision is present, the supply plant performance standard is based on the amount of milk produced by dairy farmers that is pooled through association with the supply plant, regardless of whether or not it was diverted from the plant.

A witness appearing for ADCNE expressed opposition to Proposal 8 noting that it would liberalize supply plant performance standards. According to the witness, the intent of supply plant pooling provisions are to qualify both the plant and the operator of the plant. It is meaningless to qualify a supply plant, the witness noted, in which the operator does not control the milk of a group of dairy farmers. A cheese plant operator would never incur the costs to ship milk from the plant to a distributing plant, the witness offered by example, unless the plant intended to pool a group of dairy farmers and draw from the pool.

ADCNE further noted opposition to Proposal 8 in their post-hearing brief by emphasizing that the operator of a supply plant has an option of whether or not to be pooled. According to ADCNE, the operator of a plant can acquire and maintain their own producer milk supply and can pool the plant by meeting the pooling standards of the order or choose nonpool status and purchase milk supplies from other pool or non-pool handlers.

An exception to the Recommended Decision filed by Bongrain Cheese (Bongrain), a cheese manufacturer in Pennsylvania, supported adoption of all portions of Proposal 8. Bongrain was of the opinion that the second portion of Proposal 8 that would deduct the volume of milk received from cooperatives from the total volume of milk used to determine the amount of milk a supply plant needs to deliver to distributing plants in order to satisfy supply plant performance standards should also be adopted. Bongrain was of the opinion that milk purchased from cooperatives has already been qualified for pooling, and that current standards put undue burden on cheese manufacturers to buy additional milk for the sole purpose of meeting performance standards. Bongrain noted that excluding pre-qualified cooperative milk from the volume of receipts upon which a supply plant must make shipments in order to qualify for pooling would minimize unnecessary movements of milk.

A proposal, published in the hearing notice as Proposal 9, also submitted by Friendship, seeking to amend the *Pool plant* provision was not recommended for adoption in the Recommended Decision and is not adopted in this Final Decision. The proposal would credit route distribution from the plant and transfers in the form of packaged fluid milk products to distributing plants to the total shipments from a supply plant in determining if the supply plant has met the performance standard of the order. Currently, route distribution is not credited against the total milk receipts in determining if a plant has met the supply plant performance standard.

The Friendship witness stated that Proposal 9 is meant to address only Class I products packaged at the Friendship plant and not Class I products purchased from other plants, which they subsequently distribute. To exclude the possibility of a partially regulated distributing plant becoming fully regulated by the adoption of Proposal 9, the Friendship witness modified their proposal at the hearing to only include route distribution and transfers of packaged fluid milk in qualifying supply plants whose milk utilization is at least 50 percent in Class II, Class III, or Class IV products.

The Friendship witness testified that their plant has unique characteristics—they produce non-fat dry milk (a Class IV product) and cultured buttermilk (a Class I product). It is the production of buttermilk, the witness noted, that causes their plant to be designated as a partially-regulated distributing plant under the consolidated Northeast order. The witness testified that their plant could not meet the supply plant performance standards if the amount of milk distributed on routes in the form of packaged fluid milk products counted towards pool qualification.

The Friendship witness maintained that the Northeast order's pooling provisions are unfair because, in their view, buttermilk satisfies an established Class I demand, but is still factored into determining if a supply plant has met the order's performance standards by shipping milk to a distributing plant. The Friendship witness asserted that currently the only way to qualify their plant is to fulfill someone else's need for Class I milk without receiving any credit for its own contribution to the Class I market.

The witness stressed that Proposal 9 is not intended to qualify previously partially-regulated distributing plants which are not currently fully regulated on the Northeast order. The witness saw the potential for a distributing plant who also manufactures products other than Class I to meet the supply plant performance standards under a liberal reading of Proposal 9. To address this unintended occurrence, the witness modified Proposal 9 to apply only to supply plants that process at least 50 percent of their total physical milk receipts into products other than Class I. With this modification, the witness noted, the possibility of distributing plants becoming pooled as supply plants is eliminated.

A witness appearing on behalf of ADCNE testified in opposition to Proposal 9. The witness said that the proposal does not specify that the plant's route distribution be located within the Northeast marketing area and could have the possible unintended consequence of pooling partially regulated distributing plants on the order with route distribution greater than the supply plant performance standard of 10 or 20 percent. Additionally, the ADCNE witness testified that purchases and transfers of Class I products into and out of manufacturing plants could occur, which would only serve to circumvent the intent of the Federal order provisions of requiring a supply plant to actually supply the Class I market as a condition for pooling its milk supply. The ADCNE witness was of the opinion that Proposal 9 combines the characteristics of two different pooling provisions for the benefit of a few supply plants that may have Class I sales and only serves to confuse the pooling provisions of the order.

Additionally, ADCNE noted in their post-hearing brief that such a change could allow nonpool manufacturing plants, currently without their own producer supply, a means of ''gaming'' the system by transferring packaged product into and then back out of the plant for the sole purpose of meeting the supply plant performance standard. Such a change would be de-stabilizing to the market, lead to disorderly marketing conditions, and make procurement efforts by Class I processors more difficult and costly, noted ADCNE.

Proposal 10, also submitted by Friendship, proposed to lower the supply plant performance standards by 5 percentage points to a new standard of 5 percent in each of the months of

August and December and by 10 percentage points to a new level of 10 percent in each of the months of September through November. Proposal 10 was not recommended for adoption in the Recommended Decision and is not adopted in this Final Decision.

According to the Friendship witness, the objective of the Federal milk marketing order program is the equitable sharing of Class I revenue amongst all producers who supply the marketing area. This objective is defeated, the witness said, when performance standards result in the exclusion of some producers from the order's marketwide pool. According to the witness, producers without access to a Class I outlet have to ''buy'' market access from those producers who dominate the market's Class I milk supply or move milk not needed for Class I use over long distances for the sole purpose of meeting a performance standard. This situation, said the witness, only results in the displacement of milk supplying other Class I plants and in unwarranted additional transportation costs to those producers seeking to pool their milk on the order.

The Friendship witness also testified that the current supply plant performance standard of 10 percent in the months of August and December and 20 percent in each of the months of September through November were chosen in an arbitrary manner to create a ''performance hurdle'' that a plant must leap in order to participate as a pool supply plant on the Northeast order. Reducing these performance standards by 5 percentage points to 5 percent for each of the months of August and December and by 10 percentage points to 10 percent in each of the months of September through November would assure sufficient performance in supplying the Class I market without causing unnecessary milk shipments solely to meet the pooling standards of the order, the witness said.

b. Unit Pooling Standards for Distributing Plants

A proposal, published in the supplemental hearing notice as Proposal 14, was recommended for adoption in the Recommended Decision and is included for adoption in this Final Decision. Specifically, Proposal 14 amends the *Pool plant* unit pooling feature by specifying that a plant of the pool plant unit which is not a distributing plant must process at least 60 percent of its total producer milk receipts (including milk received from cooperative handlers) into Class I or Class II products and that the plant be physically located in the Northeast marketing area. Accordingly, the non-distributing plant of the pooling unit would be permitted to process up to 40 percent of its total producer milk receipts into Class III or IV products. Proposal 14 was offered by NYSDF. A witness representing the H.P. Hood Company (H.P. Hood), a fully regulated milk handler who pools milk on the Northeast order, testified on behalf of NYSDF.

The unit pooling provision of the Northeast order currently allows for two or more plants located in the marketing area and operated by the same handler to qualify for pooling as a ''unit'' by meeting the total and in-area route disposition standard as if they were a single distributing plant. To qualify as a pooling unit, at least one plant of the unit must qualify as a pool distributing plant on its own standing, and the other plant(s) of the unit must process only Class I or II milk products. The pooling unit must also meet the total route distribution standard of 25 percent, and 25 percent of its route distribution must be within the marketing area.

The NYSDF witness testified that adoption of Proposal 14 would allow H.P. Hood and other similarly situated unit-pool handlers greater flexibility in how they pool their milk on the Northeast order. According to the witness, present unit pooling standards unduly restrict milk use at the non-distributing plant(s) of the unit to Class I or II products. The witness indicated that adoption of Proposal 14 would also aid cooperatives and other plants in how they pool milk because a pooling unit would be expanded to include milk balancing operations that produce Class III and Class IV milk products to be the non-distributing plant(s) of the pooling unit. The disparity in current provisions, the NYSDF witness stressed, is that the primary plant of a pooling unit can still produce a limited amount of Class III or IV products, while the non-distributing plant(s) in the unit cannot. According to the NYSDF witness, Proposal 14 adds flexibility to current provisions by allowing the non-distributing plant(s) in the unit to process up to 40 percent of total producer receipts into Class III or IV milk products.

Comments submitted by NYSDF supported amending the unit pooling provision of the order. NYSDF noted adoption of the proposal would make the unit pooling provision more equitable between handlers.

No testimony was received in opposition to the adoption of Proposal 14.

c. Standards for Producer Milk

Several amendments to the *Producer milk* provision of the Northeast order, contained in certain features of both Proposals 3 and 6, were included for adoption in the Recommended Decision and are adopted in this Final Decision. Specifically, the following changes to the *Producer milk* provision are adopted: (1) Establishing an explicit standard that one day's milk production of a dairy farmer be received at a pool plant before the milk of the dairy farmer is eligible for diversion to non-pool plants; (2) Clarifying that a producer may touch-base anytime during the month; (3) Eliminating the ability to simultaneously pool the same milk on the Northeast order and on a marketwide equalization pool operated by another government entity; (4) Establishing an explicit diversion limit standard for producer milk of 90 percent in each of the months of January through August and December and of 80 percent in each of the months of September through November (Milk in excess of the diversion limits will not be considered as producer milk, and the pool plant must designate to the Market Administrator which deliveries are to be de-pooled. Furthermore, milk diverted in excess of the diversion limit standards will not result in a loss of producer status under the order.); and (5) Granting authority to the Market Administrator to adjust the touch-base standard and the diversion limit standard as market conditions warrant.

The current *Producer milk* provision of the Northeast order considers milk of a dairy farmer to be producer milk when the dairy farmer has delivered milk to a pool plant. This event is commonly referred to as ''touching-base.'' Once an initial delivery is made, all the milk of a producer is eligible to be diverted to nonpool plants and continues to be priced under the terms of the order. While there are no specific year-round diversion limits for distributing plants, a diversion limit for supply plants is functionally set at 100 percent minus the applicable performance standard specified for supply plants. Therefore, in the months of August and December, a supply plant can divert no more than 90 percent of its total milk receipts to nonpool plants. During each of the months of September through November, a supply plant can currently divert no more than 80 percent of its total milk receipts to nonpool plants. During each of the months of January through July, no diversion limits for supply plants are specified. Additionally, the Northeast order currently does not limit the ability to

simultaneously pool the same milk of a producer on the order and on a marketwide equalization pool operated by another government entity.

Proposal 3, offered by NYSDF, seeks to modify the *Producer milk* provision of the order by: (1) Establishing a two-day touch-base standard in each of the months of August through December; (2) Setting an explicit limit on the amount of producer milk that can be diverted from any type of pool plant to nonpool plants at 60 percent of total receipts in each of the months of August through December, and 75 percent in each of the months of January through July; (3) Clarifying that any milk diverted in excess of the diversion limits will not be considered producer milk; and (4) Providing authority to the Market Administrator to adjust diversion limit standards.

A witness appearing on behalf of NYSDF was of the opinion that current pooling provisions of the Northeast order are inadequate and have resulted in milk being pooled on the order that does not demonstrate regular and consistent performance in supplying the Class I needs of the market. The witness explained that after a pool plant receives the milk of a producer, the plant can then divert unlimited quantities of that producer's milk. The diverted milk need never again be physically received at a pool plant and need not ever be made available for satisfying the market's Class I needs, the witness said, yet such milk would continue to be pooled and receive the blend price of the Northeast order. Consequently, the witness stated, Northeast order producers are receiving an otherwise lower blend price because of the increased quantity of milk being pooled at lower valued uses. The witness characterized pooling milk in this way as ''artificial pooling.''

NYSDF offered a modification to Proposal 3 in their post-hearing brief. The NYSDF modification proposed that diversion limit standards for supply plants should be 100 percent minus the proposed supply plant performance standards. Therefore, NYSDF wrote, the diversion limit in August would be 85 percent, 75 percent in each of the months of September through November, and 90 percent in the month of December.

The NYSDF witness testified that milk in excess of the proposed diversion limit standards should not be pooled because the order would be pooling the excess reserves of another market to the detriment of those pooled producers whose milk regularly and consistently serves the Northeast Class I market. According to the witness, during some months when milk production is plentiful, total pool milk receipts from as many as 800 producers located far from the marketing area have exceeded 100 million pounds. The NYSDF witness was of the opinion that the milk of these producers was not only unneeded to supply the Northeast order fluid needs but a vast majority of the distant milk was never physically received on a regular or consistent basis at a Northeast pool plant.

The NYSDF witness testified that milk diverted in excess of the specified diversion limits should not be considered as producer milk and therefore should not be pooled on the order. The witness also emphasized that the Market Administrator should be given the authority to adjust diversion limits and the touch-base standard as market conditions warrant.

The NYSDF witness was of the opinion that the two-day touch-base standard offered in Proposal 3 is reasonable and would eliminate the ability to artificially pool milk on the order by requiring a producer to deliver at least two days' milk production to a pool plant in each of the pool-qualifying months before the milk of that producer would be eligible for diversion to nonpool plants. The higher touch-base standard in the months of August through December would also more fully assure fluid handlers an adequate supply of milk to meet the needs of their customers when milk supplies are less abundant, the witness added.

A witness appearing on behalf of ADCNE testified in opposition to Proposal 3. The witness said that implementation of a two-day touch-base standard would result in disorderly market conditions because the cost to producers in meeting this pooling standard could increase significantly. The witness presented testimony describing the vast geographic area and other characteristics of the Northeast order that would give rise to increased costs to producers. The witness explained that because most Northeast order producers are not located near a Class I handler, a higher touch-base standard would result in the uneconomic movement of milk and in higher overall transportation costs. The witness also suggested that higher transportation costs could prevent some producers from being able to pool their milk on the order.

The ADCNE witness also expressed opposition to the portion of Proposal 3 that would lower diversion limit standards. The witness did agree that the current lack of specific diversion limits could cause harm in the orderly marketing of milk. In ADCNE's opinion, the proposed diversion limits for the months of August through December are too restrictive and could result in disorderly marketing conditions. Rather, ADCNE was of the opinion that establishing performance standards for supply plants in each of the months of January through July was a more appropriate alternative than making restrictive changes to the order's diversion limit standards.

Proposal 6, offered by ADCNE, also seeks to amend the *Producer milk* definition of the Northeast order. Specifically, the proposal seeks to: (1) Establish year-round diversion limit standards of 80 percent in each of the months of September through November, and 90 percent in each of the months of January through August and December; (2) Clarify that a producer can touch-base anytime during the month to make their milk eligible for diversion to nonpool plants; (3) Clarify that over-diverted milk will not result in a dairy farmer losing producer status on the order; (4) Eliminate the ability to simultaneously pool the same milk on the Northeast order and on a marketwide equalization pool operated by another government entity; and (5) Provide authority to the Market Administrator to adjust diversion limit standards applicable to those handlers who receive marketwide service payments when warranted.

A witness appearing on behalf of ADCNE testified that the pooling provisions of the Northeast order need to be considered on an emergency basis to correct loopholes that could lead to further erosion of blend prices and disorderly market conditions. The witness also testified that the lack of specific year-round diversion limit standards for distributing plants needs to be corrected because the absence of such standards currently allows distributing plants the ability to pool large quantities of milk during the spring months when milk supplies are plentiful through the diversion process. According to the witness, the only functional restrictions on diversions from a distributing plant during those months are economic considerations and the amount of milk that a distributing plant can physically receive. Theoretically, the witness explained, a single distributing plant could pool all of the milk in the Northeast Order because no diversion limit is specified. The witness stressed that if diversion limit standards are not established for every month, an increase in the amount of milk pooled on the order could result in significantly lower blend prices paid to producers.

The ADCNE witness also explained that a producer should not lose producer status under the dairy farmer for other markets provision of the Northeast order in the event that a handler over-diverts the milk of a producer. In this regard, the witness explained that Proposal 6 would allow for pooling the milk of producers in the following month in the event that milk of a dairy farmer is over-diverted in the current month.

The ADCNE witness also testified that while no entities are currently engaging in the practice of simultaneously pooling the same milk on the Northeast order and on a marketwide equalization pool operated by another government entity (commonly referred to as ''double-dipping''), the opportunity for it exists, especially with the Western New York State Milk Marketing Order that shares a common milkshed with the Northeast order marketing area. The ADCNE witness stipulated that eliminating the ability to double-dip would have no effect on milk priced by State-operated programs that provide for marketwide pooling of milk pricing premiums such as the Pennsylvania Milk Marketing Board, the Maine Milk Commission, or the Virginia Milk Commission.

The pooling standards of all milk marketing orders, including the Northeast order, are intended to ensure that an adequate supply of milk is supplied to meet the Class I needs of the market and to provide the criteria for identifying those who are reasonably associated with the market as a condition for receiving the order's blend price. The pooling standards of the Northeast order are represented in the *Pool Plant, Producer,* and the *Producer milk* provisions of the order. Taken as a whole, these provisions are intended to ensure that an adequate supply of milk is supplied to meet the Class I needs of the market. In addition, these provisions provide the criteria for identifying those producers and plants whose milk is reasonably associated with the market by supplying the Class I needs and thereby sharing in the marketwide distribution of proceeds arising primarily from Class I sales. Pooling standards of the Northeast order are based on performance, specifying standards that, if met, qualify a producer, the milk of a producer, or a plant to share in the benefits arising from the classified pricing of milk.

Pooling standards that are performance-based provide the only viable method for determining those eligible to share in the marketwide pool. This is because it is the additional revenue from the Class I use of milk that adds additional income, and it is reasonable to expect that only those producers who consistently bear the costs of supplying the market's fluid needs should be the ones to share in the distribution of pool proceeds. Pool plant standards therefore are needed to identify the milk of those producers who are providing service in meeting the Class I needs of the market. This is important because producers whose milk is pooled receive the market's blend price. If the pooling provisions do not reasonably accomplish these aims, the proceeds that accrue to the marketwide pool from fluid milk sales are not properly shared with the appropriate producers and can result in an unwarranted lowering of returns to those producers who actually incur the costs of supplying the fluid needs of the market.

Similarly, pooling standards for distributing and supply plants should also provide for those features and accommodations that reflect the needs of proprietary handlers and cooperatives in providing the market with fluid milk and dairy products. When a pooling feature can result in pooling milk which would not reasonably demonstrate serving the fluid needs of the market, it is appropriate to re-examine the need for continuing to provide that feature as a necessary component of the pooling standards of the order. The pooling standards of an order serve to ensure an adequate supply of fluid milk for the market and the proper identification of those producers whose milk does serve the fluid needs of the market. A feature which can diminish these aims should be considered unnecessary.

The record provides sufficient evidence to conclude that features of the *Pool plant* provision are not appropriate given the prevailing marketing conditions of the Northeast order. The hearing record reveals that both the lack of supply plant performance standards in every month and the lack of explicit diversion limit standards for all pool plants in every month of the year have allowed producers from areas located far from the marketing area to participate in the distribution of proceeds from the marketwide pooling of milk without demonstration of a reasonable level of consistent and regular service in meeting the Class I needs of the market. Current performance standards have allowed these producers to receive the Northeast order's blend price by simply making a one-time delivery of milk to a pool plant and thereafter divert unlimited quantities of milk to nonpool plants located nearer their farms and far from the marketing area. Such milk pooled by diversion cannot reasonably be considered a reserve supply for the marketing order area because it is never again physically received by pool plants regulated by the Northeast order. Furthermore, such milk pooled by way of diversion is not consistently demonstrating performance to serving the market's Class I needs. The pooling of milk through the diversion process evidenced by the record increases the total amount of milk pooled on the order and lowers the blend prices paid to all producers, especially to those producers who consistently deliver milk to the order's pool plants.

The record provides evidence to conclude that performance standards for supply plants should be specified for every month. The performance standards proposed by the ADCNE are reasonable in light of the prevailing marketing conditions reflected in the Northeast marketing area. The concerns of NYSDF, who represented the interests of the many distributing plants regulated under the terms of the order, make clear that since the Northeast milk marketing area was created and implemented as part of Federal milk order reform in January 2000, the need arose at least twice for the Market Administrator to raise the performance standards for supply plants. This was done so that distributing plant bottlers would be assured of sufficient milk supplies to meet fluid demands.

In this regard, this decision can only conclude that authority provided to the Market Administrator to make the needed adjustments to the performance standards as marketing conditions warrant functions well and as intended. The temporary increase in supply plant performance standards brought forth the milk supply needed to satisfy the needs of distributing plants. Accordingly, this Final Decision sees no compelling reason to adopt the higher supply plant performance standards offered by NYSDF. To the extent that the needs of distributing plants have necessitated the need to increase the availability of supply to meet fluid needs, the order provisions have done so. It is reasonable to conclude, therefore, that the order will continue to react as needed to changing marketing conditions into the future.

Handlers and producers are better served by eliminating the ability of a supply plant to automatically be a pool plant if the supply plant had been a pool plant in some prior period as the order currently provides. The granting of automatic pool plant status to a plant does not provide the certainty needed by distributing plants for the order to assure them an adequate supply of milk

for Class I uses. Together with other pooling standard inadequacies, it provides an avenue through which more milk can be pooled on the Northeast order than can be considered as part of the legitimate milk supply of the pool plant where automatic pool plant status has been granted. The opportunity to pool milk in this way only serves to increase the volume of milk pooled (at lowered valued uses) without that milk either being committed to, or demonstrating, serving the Class I needs of the market as a condition for receiving the order's blend price. Therefore, the supply plant performance standards should be amended to specify performance to the market in every month of the year. The performance standards of 10 percent in each of the months of January through August and December and 20 percent in each of the months of September through November are adopted. Accordingly, exceptions filed by NYSDF regarding the adoption of year round supply plant performance standards previously referenced in this decision offer no persuasive justification in demonstrating how the order's supply plant performance standards could not be changed by the Market Administrator when marketing conditions warrant their increase or decrease.

The pool plant feature contained in the Northeast order for split-plants should be removed. No similar provision was contained in the three pre-reform orders consolidated to form the Northeast order. The split-plant provision was included in the consolidated Northeast order in an effort to provide for the uniformity of provisions throughout the reformed Federal milk order system. The provision was established with the intent to allow handlers the ability to process Grade A milk in the pool side of the plant and process Grade B milk in the nonpool side of the plant.

It is clear from the record that handlers in the Northeast marketing area are not utilizing this feature of the pool plant provision, and no milk is being pooled on the order in this manner. However, if utilized, the feature could be used as a mechanism for pooling milk on the order that would not need to demonstrate a consistent service to the Class I market. This feature could be used as a loophole through which deliveries of milk to the pool side of a split-plant can then be diverted to the nonpool side of the plant. The diverted milk would never then need to serve the market's Class I needs. The split-plant feature could unintentionally provide the opportunity for milk to become pooled on the Northeast order without that milk demonstrating a reasonable level of service in meeting the market's fluid needs but would share in the revenue generated from Class I sales.

The removal of the split-plant feature is broadly supported by the hearing participants. Since the split-plant feature is not currently utilized by any Northeast handler, no producers currently serving the Northeast market would be adversely affected by its removal from the terms of the order.

The hearing record supports the adoption of certain features of Proposal 8 offered by Friendship. In simple terms, the proposal calls for excluding milk received by a supply plant from two sources—milk received from sources not eligible for pooling (for example, milk received from a producer handler or from a dairy farmer for other markets) and from a cooperative association—from the total volume of milk receipts at the supply plant. By excluding such milk receipts from the total actual receipts, the proposal essentially lowers the intended performance standards for supply plants.

As discussed above, the record reveals concern by distributing plants that the pooling standards of the Northeast order need to specify higher performance standards for supply plants and the need for explicit diversion limits and touch-base standards for producer milk. While the higher performance standards called for in the NYSDF proposal are not recommended for adoption, the adoption of certain features of Proposal 8 would essentially reduce the amount of milk that supply plants ship to distributing plants so that the Class I needs of the market can be satisfied. The current performance standards for supply plants are sufficiently liberal, especially in light of the more than 40 percent Class I use of milk in the Northeast marketing area.

The part of Proposal 8 that excludes milk received from producers not eligible for pooling is adopted in this Final Decision since that milk is not eligible to be pooled on the Northeast order. It is reasonable to exclude such receipts for the purposes of determining if the supply plant has met the intended performance standards because milk not eligible for pooling should not be used as a factor for qualification.

The portion of Proposal 8 that is not adopted in this Final Decision specifically excludes supply plant milk receipts from cooperatives as a factor for qualification. Exceptions received from Bongrain Cheese, discussed earlier in this decision, noted support for adoption of this portion of Proposal 8, and are not persuasive. This feature is not adopted because it is viewed as having more to do with a supply plant's ability to draw money from the PSF than it does with demonstrating a reasonable standard of performance in supplying the Class I needs of the market as a condition for participation in the marketwide pool.

As discussed above, the hearing record supports concluding that the Northeast order is not adequately identifying the milk of those producers that are actually supplying the Class I needs of the market on a regular and consistent basis. In this regard, certain changes to the *Producer milk* provision are adopted in this Final Decision.

The current touch-base standard of the Northeast order does not provide detail sufficient to specify the quantity of milk a producer must deliver to pool plants. Currently the order only indicates that if a producer delivers milk to a Northeast order pool plant, the milk of that producer becomes eligible for diversion to nonpool plants. Generally, milk marketing orders that exhibit lower fluid demands require fewer physical deliveries to a pool plant, while markets with higher fluid demands typically specify more frequent deliveries. A touch-base standard that is too high can result in higher transportation costs to producers and cause uneconomic shipments of milk for the sole purpose of meeting a pooling standard. If the standard is too low, fluid handlers may be less assured of an adequate supply of fluid milk to meet the demands of the Class I market.

The hearing record supports concluding that the touch-base standard of the *Producer milk* provision, together with generally inadequate diversion limit standards for all pool plants, contributes to the pooling of milk on the order which does not demonstrate a reasonable level of service in supplying the Class I needs of the market. There are competing proposals and views on how the order should rely on both the touch-base standard and diversion limit standards so that, together with the performance standards, the Class I needs of the market are satisfied and the order has appropriately identified the milk of those producers whose milk actually demonstrates service in meeting the Class I needs of the market.

The ADCNE proposals place much more weight on the need for explicit diversion limit standards in each and every month that are applicable to both supply and distributing plants than on a two-day touch-base standard proposed by NYSDF. The ADCNE and NYSDF both acknowledge the need for explicit diversion limit standards for all pool

plants, although their respective positions of what those standards should be differ only as to what are the most appropriate levels for the Northeast order.

This Final Decision adopts a one-day touch-base standard in the initial pool qualifying month. A touch-base standard that would require more frequent deliveries is not warranted because it would result in higher transportation costs to producers and cause uneconomic shipments of milk for the sole purpose of meeting a pooling standard. A one-day touch-base standard, together with other adopted changes contained in this Final Decision, should adequately contribute in identifying the milk of those producers who regularly supply the market's Class I needs and therefore can be pooled under the terms of the order. The position of the ADCNE that the milk of a producer could touch-base anytime during the initial qualifying month is reasonable and is adopted for the purpose of clarifying when meeting this standard should occur.

Granting authority to the Market Administrator to adjust the touch-base standard is also adopted as a key component of the adopted one-day touch base standard. While this feature of the touch-base standard was not included in those proposals amending the *Producer milk* provision of the Northeast order, the record is specific that this was intended. It is also consistent with the authority already granted to the Market Administrator to adjust the performance standards of the order for supply plants.

Providing for the diversion of milk is a desirable and needed feature of an order because it facilitates the orderly and efficient disposition of milk not needed for fluid use. When producer milk is not needed for Class I use, some provision should be made for milk to be diverted to nonpool plants for use in manufactured products. However, it is essential that limits be established to safeguard against excessive milk supplies becoming associated with the market through the diversion process.

In the context of this proceeding, milk diverted by distributing and supply plants is milk not physically received at the plants. While diverted milk is not physically received, it is nevertheless an integral part of the milk supply of the diverting plant. If such milk is not part of the integral supply of the diverting plant, then that milk should not be associated with the diverting plant and should not be pooled. Associating more milk than is actually part of the legitimate reserve supply of the diverting plant can unnecessarily reduce the blend price paid to dairy farmers who service the market's Class I needs.

Without reasonable diversion limits, the order's ability to provide for effective performance standards and orderly marketing is weakened. Diversion limits that are set too high can open the door for pooling much more milk on the market than can be reasonably associated with the reserve supply for the market. The record reveals that unlimited diversion limits for distributing plants in the Northeast order could have contributed to the pooling of large volumes of milk that have not demonstrated performance to the Class I market. The same is also revealed in the record by the lack of explicit diversion limit standards for supply plants in every month.

This Final Decision adopts diversion limit standards for all pool plants as proposed by ADCNE. Specifically, a diversion limit standard of 90 percent in each of the months of January through August and December and 80 percent in each of the months of September through November is adopted. Milk diverted in excess of the standards will not be considered producer milk and the pool plant must designate to the Market Administrator which deliveries will be depooled. If the pool plant fails to make a designation, the Market Administrator can depool all of that month's diversions to nonpool plants. As also proposed by ADCNE, this decision can find no reason to cause the loss of producer status under the order in the event a producer's milk is caused to be over diverted. Accordingly, the proviso that a producer will not lose producer status under the order in the event that the milk of a producer is over diverted is adopted.

To the extent that these diversion limits may warrant future adjustments, this Final Decision adopts explicit authority to the Market Administrator to adjust the diversion limit standards when needed. In practice, such authority has already been given to the Market Administrator in that current supply plant diversion limits are functionally set at 100 percent minus the applicable performance standard. In past actions undertaken by the Market Administrator to change supply plant performance standards, the applicable diversion limit was also functionally changed as higher performance standards adopted temporarily also changed supply plant diversion limits. Therefore, providing authority to change the order's diversion limit standards in the way presented in this Final Decision merely serves to clarify an authority already granted to the Market Administrator.

Since the 1960s, the Federal milk order program has recognized the harm and disorder that results to both producers and handlers when the same milk of a producer is simultaneously pooled on more than one Federal order, commonly referred to as ''double-dipping.'' In the past, this situation caused disparate prices between producers while handlers were not assured of uniform prices, which gave rise to competitive equity issues.

The need to prevent ''double-dipping'' became critically important as distribution areas expanded and orders merged. The issue of ''double-dipping'' on a marketwide equalization pool operated by another government entity and a Federal order can, for all intents and purposes, have the same undesirable outcomes that Federal orders once experienced and subsequently corrected. While ''double-dipping'' is not presently occurring in the Northeast order, it is clear that the Northeast order should be amended to prevent the ability to pool the same milk on both a Federal order and a marketwide equalization pool operated by another government entity. This action is consistent with other recent Federal order amendatory actions regarding simultaneous pooling on a Federal order and on another government operated program.

The hearing record does not support the adoption of Proposal 9, which seeks to exclude a supply plant's route distribution of packaged fluid milk products from the total volume of milk that it would need to deliver to a distributing plant for the purpose of meeting the order's performance standards. As implied in the name, a supply plant is a supplier of bulk milk to distributing plants. Supply plant performance standards are intended, in part, to ensure that distributing plants are supplied with enough fluid milk to meet their needs. A plant's route sales in the marketing area are used to determine the pool status of fully or partially regulated distributing plants, not of supply plants.

The hearing record supports the adoption of Proposal 14 because it serves to provide milk processors in the Northeast with the more orderly marketing of unit-pooled milk without compromising the order's intent to ensure that the Class I needs of the marketing area are satisfied. Unit pooling serves to provide a degree of regulatory flexibility for handlers by recognizing specialization of plant operations and to minimize the uneconomical and inefficient movement

of milk for the sole purpose of meeting or retaining pool status.

If a plant has combined Class I and II receipts of 60 percent or more, including milk received from cooperative handlers and milk diverted from the plant, and is physically located in the Northeast marketing area, it is reasonable to conclude that the unit's plant does contribute in making milk available on a regular and consistent basis for meeting the fluid needs of the order. Therefore, its adoption is included in this Final Decision provided all other standards and conditions for unit pooling are met. This should provide for greater flexibility in the types of products a pooling unit may produce, such as Class III or Class IV dairy products, in a unit pooled plant. Additionally, providing for the secondary unit-pooled facility to be located within the Northeast marketing area, as well as being primarily involved in producing Class I or Class II milk products, retains safeguards that would prevent the pooling of milk that may be located far from the marketing area which would not demonstrate the standards of performance in servicing the Class I needs of the market.

A proposal published in the hearing notice as Proposal 11, seeking to amend the dairy farmer for other markets feature of the *Producer* provision, was withdrawn at the hearing by the proponent. No further reference to this proposal will be made.

3. Marketwide Service Payments

A proposal, published in the hearing notice as Proposal 7, seeking to establish a 6-cent per hundredweight (cwt) marketwide service payment in the form of a market ''balancing'' credit to handlers was not included for adoption in the Recommended Decision is not adopted in this Final Decision. As proposed, a balancing credit would be provided if the handler pools at least a million pounds of milk per month, provided less than 65 percent of such pooled milk is shipped to distributing plants for Class I use or represents at least three percent of the total volume of milk pooled on the Northeast order.

In the context of this proceeding, ''balancing'' refers to those actions performed by handlers that add or remove milk from their supply to accommodate the fluctuating needs of Class I. The Northeast order does not currently contain a marketwide service payment provision.

Proposal 7 was offered by ADCNE and has received additional support or endorsement in writing from the National Milk Producers Federation (NMPF) and the New York State Farm Bureau Federation.

A form of a marketwide service payment was available to certain cooperative handlers in the pre-reform New York-New Jersey milk marketing order. That order was combined with the Middle Atlantic and New England orders to form the consolidated Northeast order. The service payment of the New York-New Jersey order consisted of two components: a cooperative service payment and a balancing payment. The balancing component was far smaller than the proposed six cents per cwt credit under consideration in this proceeding. The cooperative service payment could total up to three cents per cwt. An additional ''up to'' one cent was provided for balancing. By comparison, the marketwide service payment proposal considered in this proceeding is dedicated entirely to compensating eligible handlers for balancing functions.

The ADCNE's rationale for balancing payments rests on the argument that the Northeast order has a large number of independent milk producers (dairy farmers who are not members of a cooperative) who avoid incurring the costs of operating and maintaining facilities that provide outlets for milk when not needed for fluid use. In this regard, they assert that the independent producers essentially receive a higher blend price for their milk because they avoid the costs of balancing which are largely absorbed by dairy farmer cooperatives that own manufacturing plants. As a matter of equity, ADCNE is of the opinion that the entire market, rather than only cooperatives, should share in bearing the costs that arise from providing these market balancing operations and facilities.

In post hearing briefs, support for Proposal 7 was completely withdrawn by Agrimark, a major participant and member of ADCNE who provided testimony at the hearing in favor of adopting a marketwide service payment for balancing. In addition, LOL, also a member of ADCNE, indicated their change to a neutral and uncommitted position for the adoption of a balancing credit.[2]

Testimony advancing the adoption of Proposal 7 was provided by representatives of three members of ADCNE. The majority of their testimony relied on research conducted by USDA's Rural Cooperative Business Service (RCBS), which examined market balancing activities in the Northeast milk marketing area. The research was performed at the request of ADCNE.

An RCBS witness, who participated in conducting the market balancing research, provided testimony concerning the study's methodology, underlying assumptions, and findings. The witness emphasized that the research performed and testimony given was offered as a service to the industry and interested parties and was not in support of, or opposition to, any proposal under consideration in the proceeding.

The RCBS witness testified that the study provided a framework that can be used to estimate the costs associated with balancing the Class I needs of the Northeast marketing area by examining the costs associated with unused milk manufacturing capacity at butter-powder plants located within the marketing area. According to the witness, unused milk manufacturing capacity results from increases or decreases in the demand for fluid milk by Class I handlers given the available milk supply associated with the marketing area. The witness explained that the study also estimated changes in costs associated with different hypothetical levels of idled butter-powder plant capacity when subjected to seasonal variations in milk supplies that caused fluctuations in the amount of milk manufactured at butter-powder plants. The witness indicated that the plant capacity data originated from cooperatives that operated butter-powder plants in the pre-reform orders consolidated to form the Northeast marketing area.

The RCBS witness explained that the study results are theoretical and do not represent actual or existing conditions in the Northeast marketing area. According to the witness, the balancing study employed a comparative static methodology. For the purposes of the study, the witness explained, the research defined the necessary reserve milk supply requirements of the market as the amount of milk required to meet daily operating fluctuations among distributing plants (operating reserves) and seasonal fluctuations (seasonal reserves). According to the witness, during periods of abundant milk supply in the Northeast marketing area, such reserve milk is used for Class IV manufacturing purposes, specifically for the manufacture of nonfat dry milk (NFDM).

According to the RCBS witness, the study suggests that seasonal variations in the demand for fluid milk cause variations in the supply of milk that

[2] After the deadline for submitting post-hearing briefs and the publication of the Recommended Decision, LOL, in correspondence to the Department, iterated that the Final Decision should be based on the record of the proceeding.

would otherwise be used in manufacturing. As a result, milk available for the manufacturing of NFDM fluctuates inversely with the milk supplies needed to meet fluid milk demand, the witness noted. The witness said that as demand for milk for fluid use increases, supplies of milk for manufacturing tend to decline. According to the witness, changes in Class I (fluid) demand change the amount of unused butter-powder plant capacity and such unused capacity has associated costs.

The RCBS witness explained that the balancing study was conducted using two different scenarios. The witness said the first scenario assumes an operating reserve of milk needed to balance the regions' needs at 10 percent of total fluid demand. The second scenario assumes, according to the witness, an operating reserve of 20 percent. The witness testified that operating costs were compared under these two differing scenarios while other factors were held constant. The witness noted that while the study focuses on estimating costs and changes in estimated costs, the study did not address methods by which to recover or offset costs typically associated with balancing services and operations. The witness indicated that cost recovery methods might include some form of marketwide service payments formalized under the term of a milk marketing order, ''give-up'' charges (a charge by a supplier for making milk available, for example, to a distributing plant), balancing or diversion fees (a charge for accepting milk at a balancing facility when not needed by a Class I bottler), ''over-order'' premiums (a price charged for milk above those minimum prices set under the terms of a milk marketing order), or by pricing formulae included in the classified prices established under a milk marketing order.

A witness from Dairylea, a farmer-owned agricultural marketing and service organization, appeared on behalf of the ADCNE and testified in support of Proposal 7. The witness described the Northeast marketing area as a milk ''megamarket'' characterized by high population and milk production density that requires marketwide service payments for balancing the market's fluid needs. The witness asserted that the Class I needs of the Northeast market are so large and unique among Federal milk orders that without compensation for the costs incurred for balancing, such activities might not otherwise be provided. The witness asserted that there is no other viable market mechanism through which excess milk supplies can be adequately disposed of other than through the butter-powder balancing facilities of the region's six largest cooperative handlers. The witness did note, however, that all manufacturing handlers operating in the Northeast marketing area also perform balancing functions by simply procuring milk from the area's producers.

The Dairylea witness characterized the Northeast as a unique milk-producing region because nearly 25 percent of farmers supplying the market are independent producers and not members of cooperatives. The witness characterized the Northeast's independent producers as largely serving the needs of Class I handlers and as generally not involved in providing balancing facilities and services for the market. Additionally, the witness testified that the marketing area contains nearly 40 percent of all dairy farmer cooperatives in the United States. In comparing outlets for milk, the witness testified that the Northeast marketing area is represented by 32 proprietary handlers and 259 milk plants.

The witness for Dairylea was of the opinion that the unique characteristics and size of the marketing area together with the sheer volume of milk required to supply the fluid needs of the marketing area make it imperative that marketwide service payments be provided to compensate the largest cooperative handlers for the costs that they incur for balancing the market. According to the witness, without cooperatives performing this service, some milk production in the marketing area would not clear the market. The witness did note that some milk produced within the boundaries of the Northeast marketing area is not pooled on the order because it is delivered south to other marketing areas where it receives a higher blend price. The witness similarly acknowledged that milk produced west of the marketing area is delivered to the Northeast marketing area butter-powder plants because being pooled on the Northeast order often commands a higher blend price.

The Dairylea witness also acknowledged that other plants located within the Northeast marketing area (some 184 nonpool plants, many of which are proprietary) also perform significant balancing functions. The witness was of the opinion that no single nonpool plant could individually provide significant market balancing services, however, taken as a whole, these plants do provide and perform balancing functions.

The Dairylea witness testified that the members of ADCNE had advanced a conceptually similar marketwide service payment proposal for balancing during the Federal milk order reform effort. The witness testified that Federal order reform provided public debate and analysis on the need for a marketwide service payment for balancing. The witness explained that USDA rejected the marketwide service payment proposal in the Federal milk order reform Recommended Decision of 1998 and the Final Decision of 1999 because the proposed balancing credit level sought had not been adequately explained.

A witness from Agrimark, also appearing on behalf of ADCNE, testified that the Food Security Act of 1985 (commonly referred to as the 1985 Farm Bill) provided authority for Federal milk marketing orders to allow handlers to collect for services rendered that are of benefit to all the market's participants. The witness asserted that the disposal of surplus milk (milk not needed for fluid use) and the procurement of supplemental milk supplies for fluid handlers are specifically identified in the provisions of the 1985 Farm Bill as being of marketwide benefit. The witness also asserted that payments for reimbursing handlers who provide services of marketwide benefit may be made from the total sums payable by all handlers for milk—the costs of which are paid from the total value of milk pooled before the computation of the blend price.

In the opinion of the Agrimark witness, such payments would be made on a uniform basis by all pool participants and thereby all would equitably share in the cost associated with balancing. According to the witness, because independent producers do not operate balancing facilities or perform balancing functions, they have avoided the burden of incurring balancing costs while receiving the benefit of the blend price.

Testimony of the Agrimark witness reinforced the opinion of the Dairylea witness that cooperatives perform the bulk of market balancing functions in the Northeast marketing area throughout the year. As an example, the witness cited data originating from the Market Administrator's office illustrating that during 2001, cooperative-supplied milk satisfied market shortfalls during those months when milk production was at its lowest in the region. In addition, the witness noted that cooperatives accommodated surplus milk diversions from the Class I market when milk production in the area was higher. The witness stressed that the volume of

deliveries to Class I bottlers by cooperatives varied inversely with the delivery volumes by independent milk producers.

According to the Agrimark witness, during November 2001, receipts by Class I handlers from cooperative suppliers were more than double the level of receipts from independent producers. In contrast, the witness testified that receipts by Class I handlers from cooperative suppliers reached their low point during July 2001, a period of the year when overall milk production in the Northeast was highest. According to the witness, milk deliveries by cooperatives during November to the Class I market were 29 percent above those for July. This data clearly shows, the witness asserted, that milk supplied by cooperatives provided a larger share of market balancing than did independent producer milk.

Relying on data supplied by the Market Administrator, the Agrimark witness testified there are approximately 4,000 independent producers who pool their milk on the Northeast order. The witness indicated that these producers account for approximately 6 billion pounds of milk per year pooled on the order. Of this milk volume, the witness asserted, some 80 percent is supplied for fluid uses in a market whose total Class I use is only 45 percent of the total volume of milk pooled. The witness testified that while independent producer milk is not refused by distributing plants from their producers during slack demand months of the year, cooperative-producer milk is sometimes diverted from Class I use by distributing plants for use in manufacturing. According to the witness, this further demonstrates that it is cooperatives who own manufacturing plants that provide the majority of balancing services for the market.

The witness was of the opinion that cooperative producers are receiving a lower price because cooperatives have absorbed the costs associated with market balancing, and as such, balancing costs are not equitably shared among all the market's producers. In addition, the witness expressed the opinion that milk supplied by cooperatives is more likely to be the milk that is diverted away from Class I use than is milk supplied by independent producers. Diversions tend to be made, according to the witness, to cooperatives that operate butter-powder plants. The witness testified that all costs and risks of operating such balancing plants accrue only to the cooperatives while such costs and risks are essentially avoided by independent producers.

The Agrimark witness testified that excess manufacturing plant capacity occurring during high fluid demand months causes losses for large cooperative handlers that operate balancing plants. According to the witness, Agrimark may be reaching a point where it can no longer operate their balancing plants because of excessive operating costs arising from idled plant processing capacity. High operating costs occur, according to the witness, because there is insufficient milk volume for the plants to operate profitably at certain times of the year.

The Agrimark witness testified that revenue from the manufacture and distribution of Class IV products and sales of Class I and II products essentially subsidize the balancing operations and activities of cooperatives. In the opinion of the witness, these subsidies are required because the balancing costs they incur are not recoverable from the marketplace. The witness also provided information relating to one of their specific plants for comparison with the RCBS study in order to validate the RCBS study cost estimates. For example, the witness indicated that a butter-powder plant, owned and operated by Agrimark, was built in 1919 and has been refurbished on a number of occasions. The witness indicated that while their plant costs and the cost estimates in the RCBS study differ on a number of factors, the RCBS study nevertheless can be relied upon in its totality as an accurate reflection of Agrimark's own plant costs.

A witness from LOL, also appearing on behalf of ADCNE, testified that marketwide service payments are needed for the Northeast milk order to keep balancing plants operating, thus benefitting all market participants. According to the LOL witness, only cooperatives incur the brunt of balancing costs and bear the burden of receiving lower blend prices than would be the case if balancing costs were more equitably shared by all producers who pool milk on the Northeast order. Members of cooperatives are therefore at a disadvantage in the marketplace as compared to independent producers who do not pay for balancing through cooperative membership dues or reduced revenues, the witness concluded.

The LOL witness testified that ADCNE cooperatives provided balancing services for as much as 21.8 million pounds of milk per day during peak milk production months during 2001. The witness testified that this evidence was based on a survey that LOL conducted using data received from ADCNE member butter-powder plants for the months of May and November of that year. In addition, the witness noted, as did the Agrimark witness, data presented by the Market Administrator indicated that 80 percent of independent producer milk is delivered directly to distributing plants for Class I use even though milk supplied by cooperatives represented the bulk of reserve milk pooled on the Northeast order.

Relying on Market Administrator data and the methodology for estimating balancing costs from the RCBS study, the witness asserted that to properly balance the Northeast marketing area, the cooperatives operating butter-powder plants must operate with a 20 percent operating reserve of milk during all seasons. According to the witness, during months of high fluid milk demand, draws on milk supplies from butter-powder plants for delivery to the Class I market resulted in unused butter-powder capacity of as much as 11.5 million pounds in a single month. Accordingly, the witness asserted, the cooperative's butter-powder plants should receive compensation for the cost of maintaining this available but unused processing capacity. According to the witness, the existence of such capacity benefits all producers and handlers participating in the Northeast marketing area and provides a needed alternative outlet for milk.

The LOL witness noted that the balancing cost estimation developed in the RCBS study suggests that four modern, efficient, optimally located, three-million pounds per day butter-powder plants would efficiently balance the Northeast market even though there are seven actual plants located in the marketing area. Nevertheless, the witness was of the opinion that the RCBS study of four theoretical manufacturing plants is an appropriate proxy for all butter-powder plants currently operating in the Northeast region. The witness asserted that LOL's own data and analysis validates the RCBS study's methodology. According to the witness, because the theory so accurately reflects actual marketing conditions, the operators of the seven butter-powder plants have a sound basis to justify a marketwide service payment for unrecovered costs incurred by balancing the market.

Testimony offered in opposition to the marketwide service payment proposal and the need in general for a balancing credit was advanced by representatives of NYSDF, representatives from the International Dairy Foods Association (IDFA), several proprietary handlers including

Friendship Dairy, Queensboro Farms, Marcus Dairy, and Worcester Creameries, Dean Foods, H.P. Hood, and two independent dairy farmers. Representatives for the proprietary handlers testified and all maintained that if a balancing credit feature were adopted, they would not be eligible to receive the proposed marketwide service payments even though they too incur costs for performing market balancing functions. These witnesses also testified that if Proposal 7 were adopted, they would be placed at a competitive disadvantage in procuring milk when compared to large cooperative handlers because they would need to pay a higher effective price for milk. In this regard, the witnesses indicated that as small businesses they would be treated unfairly. Each of the proprietary handlers pointedly observed that the benefit of marketwide service payments would accrue only to the large-scale butter-powder processors located in the Northeast marketing area.

A witness for Queensboro Farms testified that as an operator of a supply plant, the company provides balancing services for the market that are similar to those performed by large-scale NFDM plants and accordingly should receive compensation for providing balancing services if a balancing credit for the order is adopted. However, the witness emphasized and asserted that the proposal unfairly excludes proprietary handlers on the basis of the milk volume eligibility criteria. The witness said that as a matter of fairness and competitive equity, no handler should receive a balancing credit if it is made available only to the largest handlers.

Witnesses appearing on behalf of Marcus Dairy and Worcester Creameries provided testimony supporting the Queensboro Farms witness. The witness for Marcus Dairy noted that the company's cost of sourcing milk would be higher, thus the prices paid to farmers by them would be lower than prices paid by the largest cooperative handlers who would be eligible to receive a marketwide service payment. However, because Marcus Dairy is a small business entity, it would not be eligible for receiving a payment. Similarly, witnesses for Worcester Creameries and Friendship Dairy, both proprietary handlers and small businesses, provided supporting testimony concluding that adoption of a balancing credit, limited to criteria that only a large cooperative could meet, would needlessly harm them by increasing their milk procurement costs.

A witness testifying on behalf of NYSDF noted that every handler in the Northeast marketing area performs some market balancing functions and therefore should be eligible to receive a credit if the decision is to adopt a balancing credit feature for the Northeast milk order. The witness asserted that if the largest handlers received marketwide service payments, then smaller handlers would face relatively higher costs and would therefore be placed at a competitive disadvantage in the price they pay for a supply of milk.

A consultant witness for NYSDF testified that adoption of Proposal 7 would serve to unduly enhance the power of larger cooperatives at the expense of smaller cooperatives. The witness asserted that smaller cooperatives pooling milk on the Northeast order whose monthly milk receipts are not sufficient to meet the proposed criteria for receiving a balancing credit might be forced to affiliate with a larger cooperative eligible to receive marketwide balancing credits. The witness speculated that although smaller cooperatives might receive partial benefit from the credits through affiliation, they also might be absorbed into a larger cooperative's milk marketing operations as the price for receiving this benefit. This witness was also of the opinion that the members of ADCNE have failed to reveal or consider that handlers are charged over-order premiums, give-up fees, or other variously named charges that are essentially already compensating for balancing costs.

A witness appearing on behalf of Dean Foods testified that surplus milk from the Northeast marketing area could at times be shipped to the fluid milk deficit markets of the Southeast and Florida marketing areas. According to the witness, satisfying the demand for fluid milk of the southern marketing areas could serve the same balancing function for the Northeast market's producers seeking compensation to recover costs arising from operating butter-powder plants.

Two independent dairy farmers, one from western New York State and another from Pennsylvania, testified that dairy farmers already pay for balancing as part of the expenses deducted from their milk checks by handlers. The dairy farmers testified that while no specific fee is explicitly itemized as a market balancing charge, they viewed the deduction as a cost they pay for balancing. They testified that they and other producers have been informed by their cooperative handlers, who market their milk, that the cost of balancing is a component of the handling charges that are deducted from their milk checks.

A witness representing IDFA testified in opposition to Proposal 7. The witness noted that the costs of balancing the Northeast milk market are already recovered through revenues received in over-order premiums charged for milk diverted from Class IV to Class I use. In addition, the witness pointed out that the Class IV product pricing formula make allowance factors include balancing costs in determining the Class IV milk price. In this regard, the IDFA witness viewed Proposal 7 as requiring handlers to essentially pay anew for a function already accounted for in market prices.

In addition, the IDFA witness expressed the opinion that consideration of a marketwide service payment proposal to compensate certain handlers for market balancing services should be heard on a national basis instead of on a limited basis for only the Northeast milk order. The IDFA witness stated that adopting Proposal 7 would have multi-regional impacts and perhaps national impacts.

The IDFA witness noted that USDA had previously rejected proposals for marketwide service payments for balancing advanced by ADCNE cooperatives for the Northeast order as part of Federal milk order reform. According to the IDFA witness, USDA rejected these proposals, in part because the make allowances for Class IV products already included a factor for balancing cost recovery and that the resulting Class IV prices would be at market-clearing levels. The witness concluded that this negates the need for additional compensation for costs already compensated.

Exceptions to the Recommended Decision from ADCNE argued that the Department did not accept the fundamental reasoning behind the marketwide service payment proposal—that Class I balancing should be paid for by all market participants. ADCNE took specific exception to five separate issues raised by the Recommended Decision.

ADCNE first suggested that the Recommended Decision emphasized non-record evidence more so than record testimony. Specifically, it was the opinion of ADCNE that the Recommended Decision put more weight on Agrimark and LOL's change of position after the close of the hearing than it did on record testimony and evidence received at the hearing.

ADCNE also argued that balancing costs of ADCNE cooperatives were sufficiently documented at the hearing. ADCNE was of the opinion that the Dairylea, Agrimark and LOL witnesses

appearing on their behalf sufficiently proved that the costs of operating balancing plants in the Northeast were far greater than the lowest cost figures contained in the RCBS study, but were ignored since the Recommended Decision failed to acknowledge the study as a lowest cost Class I balancing model. ADCNE emphasized that their member cooperatives lose money by providing balancing services to the Northeast market, and the equity positions of cooperative members is put at risk in doing so. ADCNE inferred that since the costs of owning and operating butter powder manufacturing facilities reduce the proceeds to ADCNE cooperative members, the milk of ADCNE cooperatives and cooperative members should receive preferential treatment over milk shipped to proprietary plants.

ADCNE took exception to the consideration of plant revenues and profitability in the Recommended Decision. ADCNE was of the opinion that profitability should not be used to determine the need for a marketwide service payment.

ADCNE also argued that the make allowance factor in the formula used to compute the price for milk used in Class IV is not a substitute for a marketwide service payment, and that the Class III/IV Interim Decision was not specific as to the intended definition of ''balancing''.

The Agricultural Marketing Agreement Act of 1937 (AMAA), as amended, provides authority for milk marketing orders to contain provisions for marketwide service payments. In this context, a marketwide service payment is a charge to all producers of milk, irrespective of the use classification of such milk, that is deducted before computing the order's statistical uniform price. The AMAA specifically identifies the types of services that may be of marketwide benefit. They include, but are not limited to: (1) Providing facilities to furnish additional supplies of milk needed by handlers and to handle and dispose of milk supplies in excess of quantities needed by handlers; (2) handling on specific days quantities of milk that exceed quantities needed by handlers; and (3) transporting milk from one location to another for the purpose of fulfilling requirements for milk of a higher use classification or for providing a market outlet for milk of any use classification.

A current example of Federal milk marketing orders that provides for marketwide service payments is the transportation funds for qualified handlers in the Southeast and Appalachian milk marketing orders. In these marketing orders, handlers pay an assessment on producer milk assigned to Class I each month into separate transportation credit balancing funds maintained and operated by the Market Administrator for each order. These funds, originally established in four pre-reform milk orders, were carried into these two consolidated milk marketing orders as a result of the need to import milk into the southeastern regions of the country from other areas during certain times of the year. The provisions provide payments from the funds to handlers who import supplemental milk for fluid use during the generally low milk production months of July through December. The provisions restrict the payments to milk received from other plants or farms located outside of the marketing areas.

Another example of a marketwide service payment provision includes the transportation credits and assembly credits employed in the Upper Midwest milk marketing order. Unlike the marketwide service payments of the Appalachian and Southeast orders, the Upper Midwest order's marketwide service payment provides credits to handlers for their total class use value before the blend price is calculated. Because the credits reduce the total dollar value of the pool, it results in a lower blend price to all producers.

In the pre-reform New York-New Jersey milk marketing order, a payment was available to certain cooperative handlers in the form of a cooperative service payment and a balancing payment. These provisions predate the AMAA's amendment by the 1985 Farm Bill. Under the pre-reform New York-New Jersey order, qualified cooperatives could receive up to three cents per cwt on the amount of milk pooled on the order in the form of a cooperative service payment. Plus, there was a component for a balancing payment that could have been up to one cent per cwt provided a cooperative association operated a manufacturing facility. By comparison, the marketwide service payment proposal considered in this proceeding is dedicated entirely to compensating eligible handlers for balancing functions and the rate of compensation at six cents per cwt is much higher.

In testimony offered by proponents and opponents, as well as in the data supplied for the record by the Market Administrator, it is evident that the Northeast order has certain unique characteristics and marketing conditions. The Northeast marketing area is the single largest marketing area for Class I milk. Approximately 75 percent of the milk pooled on the order is from members of cooperatives with the remainder supplied by independent producers. In this regard, the Northeast marketing area has the largest base of independent producers that pool milk on the order relative to the other 9 Federal milk marketing orders. The marketing area's independent producers tend to be the predominant suppliers of the Class I needs of the marketing area as revealed by evidence showing that some 80 percent of independent milk supplies are pooled by a Class I handler in comparison to cooperative milk supplies. Cooperative milk supplies for the Northeast marketing area supply the vast majority of the marketing area's milk used in Class III and Class IV dairy products.

The Northeast's market structure also is unique given the large use of milk for Class II products such as ice cream, sour cream, yogurt, and cottage cheese. The marketing area can also be characterized as unique by the relatively large number of proprietary handlers, many of whom are manufacturing entities. These handlers provide dairy farmers with alternative outlets for their milk. None of the handlers individually provide balancing services on the scale offered at the plants owned and operated by the large cooperative members of the ADCNE. However, taken as a whole, these plants do provide real and important balancing services that are similar to those provided by the member cooperatives of ADCNE.

As noted in the Recommended Decision, the basis of the argument advanced by the proponents of Proposal 7 is that without marketwide service payments, balancing functions are unprofitable and cost recovery is not otherwise supported by market forces. The underpinning of identifying costs relies on the theoretical results of a RCBS study that examined the costs of balancing incurred by cooperatives that operate butter-powder plants in the Northeast by placing a value on unused plant processing capacity. The optimal cost structure for balancing the Northeast marketing area is presented by the proponents as an accurate reflection of the existing structure of the regional milk market. However, actual costs, together with the profitability or lack of profitability of these butter-powder plants, are never adequately addressed. Profitability is important to the issue as it can speak directly to whether or not a marketwide service payment can be justified. This is important because it is the position of the proponents that balancing activities might not otherwise be provided to the marketplace and because there are no

other viable market mechanisms through which excess milk supplies can be adequately disposed of other than through the butter-powder balancing facilities of the region's six largest cooperative handlers.

Typically, a review of the profitability would include a presentation and discussion of actual costs and revenues. In this proceeding, neither actual costs nor actual revenues generated from the sale of Class IV products or other methods used to generate revenue are addressed. The record does not contain information regarding revenues for Class IV products generated by the butter-powder operations or related joint-product production processes from some plants that produce NFDM.

Regarding costs, the proponents preferred to rely on a theoretical cost estimating framework rather than on actual costs incurred in performing balancing services. Without actual revenues and costs available for review, it is impossible to credibly assess whether balancing costs are inequitably shared. Similarly, without historical cost and revenue data series, it is not possible to reasonably consider how the profitability of these operations has changed over time under prevailing and/or changing marketing conditions. It is therefore not possible on the basis of the record to determine if there is a credible need to compensate cooperatives for balancing the market through the use of marketwide service payments.

The record does not support adoption of a marketwide service payment provision for balancing services for the Northeast milk marketing order. As noted in the Recommended Decision, arguments contained in the record in support of Proposal 7 have focused on the need to share the costs that are not recoverable from the marketplace for balancing the Class I needs of the Northeast marketing area more equitably with all producers who pool their milk on the order. Costs have been explained primarily by attempting to place a value on unused butter-powder manufacturing plant capacity where unused plant capacity is caused by seasonal fluctuations in the relative demands for fluid milk given available milk supplies. Proponents have relied primarily on a theoretical framework developed in an RCBS study, and to a much more limited extent, actual plant replacement cost data to estimate the costs they incur for balancing the market. A balancing cost estimate is derived in the RCBS study from an analysis of competing milk uses that cause butter-powder plants to be operated at less than full capacity which, in turn, is caused by seasonal fluctuations in the demand for Class I milk.

ADCNE commented that the Recommended Decision overlooked the RCBS study as a lowest-cost model. This argument is not persuasive. The RCBS study provided an excellent model of market balancing activities in the Northeast on the basis of unused plant capacity. As previously mentioned, the RCBS study is theoretical and does not represent actual or existing costs and conditions in the Northeast marketing area. Therefore, the RCBS study could not be relied upon as the underpinning of the ADCNE's proposal alone, or as a basis to explain how the requested rate of six cents per cwt is derived. It is clear that the RCBS study focused on manufacturing facilities that produce butter and powder, which cost far less to produce than cheese. Denial of the marketwide service payment proposal is explained in the Recommended Decision and in this Final Decision.

For all intents and purposes, butter-powder plants operated in the Northeast milk marketing area are owned and operated by members of ADCNE and provide balancing services. The ADCNE member proponents argue that a significant share of independent producers (dairy farmers who are not members of cooperatives), do not bear the cost burdens that cooperative members (producers) bear by operating and maintaining butter-powder plants. ADCNE insists that these butter-powder plants provide a market outlet for cooperatives and independent milk when not needed for the fluid market and that such outlets provide a service that is of marketwide benefit. Proponents for adoption of Proposal 7 maintain that the blend price received by independent producers is higher than it would otherwise be if independent producers had the burden of maintaining and providing services that balance the market.

The central discussion of the proposal to establish a marketwide service payment by proponents is long on articulating costs associated with balancing. However, the discussion of the role and adequacy of revenues generated from providing balancing related activities or revenue generated in the marketplace from the sale of Class IV products is nearly absent. For example, proponent testimony is nearly silent concerning the roles of over-order premiums, give-up charges, make allowances already a part of the pricing formulae of the order, and other charges that generate revenue to offset costs incurred and characterized as associated with providing balancing functions. Nevertheless, it is clear from the testimony that producers and proprietary handlers pay charges and fees for either a supplemental supply of milk or for the removal of milk when not needed for fluid use. Producers and proprietary handlers have had it explained, in varying ways, that such charges and fees are due to costs associated with balancing—that is—supplying additional milk to meet fluid demand or the removal of milk for surplus disposal when not needed by distributing plants.

In their exceptions to the Recommended Decision, ADCNE again suggested that their members are operating at a loss from the operation and maintenance of their balancing plants. This argument is not persuasive. As already noted, no record evidence adequately demonstrates that ADCNE cooperatives are operating at a loss as a result of owning and operating balancing facilities. A balancing facility does not necessarily need to experience losses to warrant a marketwide service payment. However, some measure of the revenues and costs associated with the procurement, production and sale of all milk associated with the plant, at the minimum, is necessary if for no other reason to explain or justify the proposed rate of six cents per cwt.

Opponents, including proprietary handlers and independent dairy farmers, also argue that balancing costs have already been recouped by the large cooperatives in various ways. The record reveals that proprietary handlers pay give-up charges and over order premiums to cooperative suppliers to obtain milk for Class I use when needed. Costs also are recouped by the imposition of variously-named charges and fees incurred by Class I handlers diverting some of their independent milk supply to a butter-powder plant when not needed for fluid use and in fees deducted from independent producer milk checks that have been explained in various ways to be fees charged for balancing.

Opponents correctly note that the costs of balancing have already been considered and are accounted for in the Class IV product-price formula make allowance used in all Federal milk marketing orders for establishing the Class IV milk price. ADCNE, however, commented that the make allowance in the Class IV product price formula does not adequately cover balancing costs. The Class III/IV pricing formulae adopted in the Class III/IV Interim Decision (65 FR 768832, published December 7, 2002) included a factor to offset the cost of balancing performed by butter-powder manufacturing plants. Official notice is hereby taken of the

Class III/IV Final Decision (67 FR 67906, published November 7, 2002). The Class III/IV Final Decision that adopted product price formulas for all Federal milk marketing orders, including the Northeast order, gave specific recognition to costs associated with balancing in the make allowance factor in setting the Class III and Class IV milk price. ADCNE's exception is not persuasive. As already stated, the Class III/IV pricing formulae include a factor to offset the cost of balancing performed by butter-powder manufacturing plants. The Class III/IV pricing formulae, together with factors discussed herein all speak to the issue of the inadequacy of cost and revenue evidence that would tend to explain a requested marketwide service payment rate of six cents per cwt.

Proprietary handlers also stress their opposition to adoption of Proposal 7 on the basis that they would be excluded from receiving a balancing credit, not because they do not provide balancing services but because of their size. These plants provide balancing services through the production of Class II and III products. ADCNE's proposal would provide a balancing payment to plants that pool over a million pounds per month, thus eliminating all but the large ADCNE member butter-powder plants from receiving any money. The exclusion of small businesses creates inequity among handlers in the price they pay for their milk supply. Small handlers should not need to pay higher prices for milk relative to large cooperative handlers who would be eligible to receive a balancing credit. Independent of the other reasons discussed for not adopting a marketwide service payment for balancing, neither the Recommended Decision nor this Final Decision can find record evidence that adequately addresses why business size should have a bearing on the exclusion of small handlers who clearly perform balancing functions or are charged for balancing services but would not be eligible for a balancing credit.

None of the witnesses appearing on behalf of ADCNE would provide information for the record concerning fees charged to distributing plants and other commercial customers from whom cooperative handlers receive payments to compensate for, or to offset, balancing costs. But the record is clear, however, that such fees are charged in various ways and forms. Because balancing costs are recoverable and, in fact, are recovered in various ways, the record cannot support the notion that whatever cost burden is being borne by any financially interested business entity is so inequitable that it necessitates having the Federal government establish a provision to supervise the transfer of funds from one set of business entities to another.

Conversely, the record contains evidence that investments by the large cooperatives in balancing facilities have taken place. For example, testimony by the LOL witness for ADCNE reveals that balancing services and plant expansion for balancing operations took place repeatedly at their Carlisle, PA, facility over the period of 1984–2000, a time span during which no marketwide service payment was provided under the terms of then Middle Atlantic milk marketing order. Testimony by the Agrimark witness appearing on behalf of the ADCNE similarly reveals repeated investment in their butter-powder plant at Springfield, MA, at a time when no marketwide service payment was provided under the terms of the New England milk marketing order.

In post hearing briefs and comments, support for Proposal 7 was completely withdrawn by Agrimark, one of the cooperatives comprising ADCNE. In addition, LOL, another cooperative member of the ADCNE, changed their position from support to a neutral position. After the deadline for submission of post-hearing briefs and publication of the Recommended Decision, LOL submitted a letter changing their support from a neutral position to asking that the Final Decision be based on the record of the proceeding.

ADCNE commented that the Recommended Decision relied more on non-record positions than on evidence received at the hearing. This claim is unfounded. The Recommended Decision indicated that two major hearing participants appearing on behalf of the ADCNE, who are also representatives of three ADCNE member cooperatives, had changed their individual positions on the marketwide service payment proposal. The Recommended Decision made note of the change in position by Agrimark and LOL as factual information as does this Final Decision. With regard to LOL's plea that the Department rely on the record of this proceeding, it is the record of this proceeding alone that provides the basis for not adopting the marketwide service payment provision.

As noted in the Recommended Decision, the record contains no persuasive argument or compelling evidence to find that there are cost inequities between cooperative dairy farmers and independent dairy farmers that would warrant adoption of a provision providing payments from one group of producers to another. The applicable Class III and Class IV pricing formulae and other free market transactions charged by the large cooperatives with balancing facilities sufficiently offset balancing costs and are adequate to sustain existing balancing facilities and operations. Additionally, the Northeast order Class I price is sufficiently high to ensure that a sufficient supply of milk for fluid use, together with the Class IV price as established under the order, will provide for the orderly disposal of milk when not needed for fluid use. The Northeast order already provides for cost equity in the minimum pricing mechanisms and the marketplace is providing the ability for transactions outside the terms of the order that currently do not exhibit the need for additional regulation.

The record also does not support adoption of Proposal 7 on the basis of strictly theoretical costs. Offsetting costs by providing a balancing payment must be based on evidence of actual costs incurred for two reasons. First, an estimate of actual costs serves to provide and define a reasonable basis from which to determine a total value of the service being provided and corresponding rate at which reimbursement should be made. Secondly, it is real dollars that will be transferred from one group of producers to another. Accordingly, it is reasonable to suppose that those who will have their blend price reduced have an adequate and supportable explanation why, in the interest of producer and handler equity, their revenue should be reduced. In this regard, the record does not provide any indication, other than proponent assertions, that the revenues generated are insufficient to offset inequitably borne costs. Because actual costs are not provided, a finding cannot be made to determine whether or not the proposed balancing credit rate of six cents per cwt is reasonable.

There is no evidence to suggest that milk of producers pooled on the Northeast order will be unable to find markets without the establishment of a balancing credit. The record is clear in demonstrating that balancing functions and services are performed by large cooperatives and they are able to recover costs from those they serviced without government intervention. The record does not reveal or contain evidence demonstrating disorderly marketing conditions occurring because balancing facilities and services are not sufficiently recovering their costs.

This decision concludes that the qualification criteria of Proposal 7 for receipt of a balancing credit would

unduly disadvantage handlers who perform a balancing function for the market, but for no reason other than their size renders them ineligible to recover balancing costs by receipt of a credit. These handlers would suffer adverse business consequences from the higher effective prices they would need to pay to procure a supply of milk. The record does not reveal any justification that explains why other handlers should be denied a credit for performing a similar service. Accordingly, this decision concludes that the eligibility criteria of Proposal 7 would have an adverse impact on these businesses in the Northeast marketing area.

Rulings on Proposed Findings and Conclusions

Briefs and proposed findings and conclusions were filed on behalf of certain interested parties. These briefs, proposed findings and conclusions, and the evidence in the record were considered in making the findings and conclusions set forth above. To the extent that the suggested findings and conclusions filed by interested parties are inconsistent with the findings and conclusions set forth herein, the requests to make such findings or reach such conclusions are denied for the reasons previously stated in this decision.

General Findings

The findings and determinations hereinafter set forth supplement those that were made when the Northeast order was first issued and when it was amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

(a) The tentative marketing agreement and the order, as hereby proposed to be amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(b) The parity prices of milk as determined pursuant to section 2 of the Act are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the marketing area, and the minimum prices specified in the tentative marketing agreement and the order, as hereby proposed to be amended, are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest; and

(c) The tentative marketing agreement and the order, as hereby proposed to be amended, will regulate the handling of milk in the same manner as, and will be applicable only to persons in the respective classes of industrial and commercial activity specified in, the marketing agreement upon which a hearing has been held.

Rulings on Exceptions

In arriving at the findings and conclusions, and the regulatory provisions of this decision, each of the exceptions received was carefully and fully considered in conjunction with the record evidence. To the extent that the findings and conclusions and the regulatory provisions of this decision are at variance with any of the exceptions, such exceptions are hereby overruled for the reasons previously stated in this decision.

Marketing Agreement and Order

Annexed hereto and made a part hereof are two documents, a Marketing Agreement regulating the handling of milk, and an Order amending the order regulating the handling of milk in the Northeast marketing area, which has been decided upon as the detailed and appropriate means of effectuating the foregoing conclusions.

It is hereby ordered that this entire decision and the two documents annexed hereto be published in the **Federal Register**.

Referendum Order To Determine Producer Approval; Determination of Representative Period; and Designation of Referendum Agent

It is hereby directed that a referendum be conducted and completed on or before the 30th day from the date this decision is published in the **Federal Register**, in accordance with the procedure for the conduct of referenda [7 CFR 900.300–311], to determine whether the issuance of the order as amended and hereby proposed to be amended, regulating the handling of milk in the Northeast marketing area is approved or favored by producers, as defined under the terms of the order, as amended and as hereby proposed to be amended, who during such representative period were engaged in the production of milk for sale within the aforesaid marketing area.

The representative period for the conduct of such referendum is hereby determined to be July 2004.

The agent of the Secretary to conduct such referendum is hereby designated to be Erik Rasmussen, the Northeast Market Administrator.

List of Subjects in 7 CFR Part 1001

Milk marketing orders.

Dated: January 14, 2005.

A. J. Yates,

Administrator, Agricultural Marketing Service.

Order Amending the Order Regulating the Handling of Milk in the Northeast Marketing Area

(This order shall not become effective unless and until the requirements of § 900.14 of the rules of practice and procedure governing proceedings to formulate marketing agreements and marketing orders have been met.)

Findings and Determinations

The findings and determinations hereinafter set forth supplement those that were made when the order was first issued and when it was amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

(a) Findings. A public hearing was held upon certain proposed amendments to the tentative marketing agreement and to the order regulating the handling of milk in the Northeast marketing area. The hearing was held pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), and the applicable rules of practice and procedure (7 CFR Part 900).

Upon the basis of the evidence introduced at such hearing and the record thereof, it is found that:

(1) The said order as hereby amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(2) The parity prices of milk, as determined pursuant to Section 2 of the Act, are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the aforesaid marketing area. The minimum prices specified in the order as hereby amended are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest; and

(3) The said order as hereby amended regulates the handling of milk in the same manner as, and is applicable only to persons in the respective classes of industrial or commercial activity specified in, a marketing agreement upon which a hearing has been held.

Order Relative to Handling

It is therefore ordered, that on and after the effective date hereof, the handling of milk in the Northeast marketing area shall be in conformity to and in compliance with the terms and

conditions of the order, as amended, and as hereby amended, as follows:

The provisions of the order amending the order contained in the Recommended Decision issued by the Administrator, Agricultural Marketing Service, on March 17, 2004, and published in the **Federal Register** on March 25, 2004 (69 FR 15562), are adopted with one minor change and shall be the terms and provisions of this order. The revised order follows.

Authority: 7 U.S.C. 601–674.

PART 1001—MILK IN THE NORTHEAST MARKETING AREA

1. The authority citation for 7 CFR part 1001 continues to read as follows:

Authority: 7 U.S.C. 601–674.

2. Section 1001.7 is amended by:

a. Revising paragraphs (c)(1) and (c)(2);

b. Removing paragraph (c)(3);

c. Redesignating paragraphs (c)(4) and (c)(5) as (c)(3) and (c)(4);

d. Revising paragraphs (e)(1) and (e)(2); and

e. Removing paragraph (h)(7).

The revisions read as follows:

§ 1001.7 Pool plant.

* * * * *

(c) * * *

(1) In each of the months of January through August and December, such shipments and transfers to distributing plants must not equal less than 10 percent of the total quantity of milk (except the milk of a producer described in § 1001.12(b)) that is received at the plant or diverted from it pursuant to § 1001.13 during the month.

(2) In each of the months of September through November, such shipments and transfers to distributing plants must equal not less than 20 percent of the total quantity of milk (except the milk of a producer described in § 1001.12(b)) that is received at the plant or diverted from it pursuant to § 1001.13 during the month.

* * * * *

(e) * * *

(1) At least one of the plants in the unit qualifies as a pool distributing plant pursuant to paragraph (a) of this section;

(2) Other plants in the unit must process at least 60 percent of monthly receipts of producer milk, including cooperative 9(c) milk, only as Class I or Class II products and must be located in the Northeast marketing area, as defined in § 1001.2, in a pricing zone providing the same or a lower Class I price than the price applicable at the distributing plant(s) included in the unit; and

* * * * *

3. Section 1001.13 is amended by:

a. Revising paragraph (d)(1);

b. Redesignating paragraph (d)(2) as paragraph (d)(3); and

c. Adding paragraphs (d)(2), (d)(4), (d)(5) and (e).

The revision and additions read as follows:

§ 1001.13 Producer milk.

* * * * *

(d) * * *

(1) Milk of a dairy farmer shall not be eligible for diversion unless one day's milk production of such dairy farmer was physically received as producer milk and the dairy farmer has continuously retained producer status since that time. If a dairy farmer loses producer status under the order in this part (except as a result of a temporary loss of Grade A approval), the dairy farmer's milk shall not be eligible for diversion unless milk of the dairy farmer has been physically received as producer milk at a pool plant during the month;

(2) Of the total quantity of producer milk received during the month (including diversion but excluding the quantity of producer milk received from a handler described in § 1000.9(c) or which is diverted to another pool plant), the handler diverted to nonpool plants not more than 80 percent during each of the months of September through November and 90 percent during each of the months of January through August and December. In the event that a handler causes the milk of a producer to be over diverted, a dairy farmer will not lose producer status;

(3) * * *

(4) Any milk diverted in excess of the limits set forth in paragraph (d)(2) of this section shall not be producer milk. The diverting handler shall designate the dairy farmer deliveries that shall not be producer milk. If the handler fails to designate the dairy farmer deliveries which are ineligible, producer milk status shall be forfeited with respect to all milk diverted to nonpool plants by such handler; and

(5) The delivery day requirement and the diversion percentages in paragraphs (d)(1) and (d)(2) of this section may be increased of decreased by the Market Administrator if the Market Administrator finds that such revision is necessary to assure orderly marketing and efficient handling of milk in the marketing area. Before making such a finding, the Market Administrator shall investigate the need for the revision either on the Market Administrator's own initiative or at the request of interested persons if the request is made in writing at least 15 days prior to the month for which the requested revision is desired to be effective. If the investigation shows that a revision might be appropriate, the Market Administrator shall issue a notice stating that the revision is being considered and inviting written data, views, and arguments. Any decision to revise an applicable percentage or delivery day requirement must be issued in writing at least one day before the effective date.

(e) Producer milk shall not include milk of a producer that is subject to inclusion and participation in a marketwide equalization pool under a milk classification and pricing program imposed under the authority of another government entity.

4. Section 1001.30 is amended by revising the introductory text to read as follows:

§ 1001.30 Reports of receipts and utilization.

Each handler shall report monthly so that the Market Administrator's office receives the report on or before the 10th day after the end of the month, in the detail and on prescribed forms, as follows:

* * * * *

5. Section 1001.62 is amended by:

a. Revising introductory text; and

b. Adding paragraph (h).

The revision and addition reads as follows:

§ 1001.62 Announcement of producer prices.

On of before the 14th day after the end of the month, the Market Administrator shall announce the following prices and information:

* * * * *

(h) If the 14th falls on a Saturday, Sunday, or national holiday, the Market Administrator may have up to two additional business days to announce the producer price differential and the statistical uniform price.

6. Section 1001.71 is amended by revising the introductory text to read as follows:

§ 1001.71 Payments to the producer-settlement fund.

Each handler shall make payment to the producer-settlement fund in a manner that provides receipt of the funds by the Market Administrator no later than two days after the announcement of the producer price differential and the statistical uniform price pursuant to § 1001.62 (except as provided for in § 1000.90). Payment shall be the amount, if any, by which the amount specified in paragraph (a) of this section exceeds the amount

specified in paragraph (b) of this section:

* * * * *

7. Section 1001.72 is revised to read as follows:

§ 1001.72 Payments from the producer-settlement fund.

No later than the day after the due date required for payment to the Market Administrator pursuant to § 1001.71 (except as provided in § 1001.90), the Market Administrator shall pay to each handler the amount, if any, by which the amount computed pursuant to § 1001.71(b) exceeds the amount computed pursuant to § 1001.71(a). If, at such time, the balance in the producer-settlement fund is insufficient to make all payments pursuant to this section, the Market Administrator shall reduce uniformly such payments and shall complete the payments as soon as the funds are available.

8. Section 1001.73 is amended by revising paragraphs (a)(2) and (e) introductory text to read as follows:

§ 1001.73 Payments to producers and to cooperative associations.

* * * * *

(a) * * *

(2) *Final payment.* For milk received during the month, payment shall be made during the following month so it is received by each producer no later than the day after the required date of payment by the Market Administrator, pursuant to § 1001.72, in an amount computed as follows:

* * * * *

(e) In making payments to producers pursuant to this section, each handler shall furnish each producer (except for a producer whose milk was received from a cooperative association handler described in § 1000.9(a) or 9(c)), a supporting statement in such form that it may be retained by the recipient which shall show:

* * * * *

Marketing Agreement Regulating the Handling of Milk in the Northeast Marketing Area

The parties hereto, in order to effectuate the declared policy of the Act, and in accordance with the rules of practice and procedure effective thereunder (7 CFR part 900), desire to enter into this marketing agreement and do hereby agree that the provisions referred to in paragraph I hereof as augmented by the provisions specified in paragraph II hereof, shall be and are the provisions of this marketing agreement as if set out in full herein.

I. The findings and determinations, order relative to handling, and the provisions of §§ 1001.1 to 1001.86 all inclusive, of the order regulating the handling of milk in the Northeast marketing area (7 CFR 1001 which is annexed hereto); and

II. The following provisions: Record of milk handled and authorization to correct typographical errors.

(a) Record of milk handled. The undersigned certifies that he/she handled during the month of July, 2004, ____ hundredweight of milk covered by this marketing agreement.

(b) Authorization to correct typographical errors. The undersigned hereby authorizes the Deputy Administrator, or Acting Deputy Administrator, Dairy Programs, Agricultural Marketing Service, to correct any typographical errors which may have been made in this marketing agreement.

Effective date. This marketing agreement shall become effective upon the execution of a counterpart hereof by the Department in accordance with Section 900.14(a) of the aforesaid rules of practice and procedure.

In witness whereof, the contracting handlers, acting under the provisions of the Act, for the purposes and subject to the limitations herein contained and not otherwise, have hereunto set their respective hands and seals.

Signature
By (Name) _____
(Title) _____
(Address) _____
(Seal)
Attest

[FR Doc. 05–1410 Filed 1–28–05; 8:45 am]

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Federal Register

Monday,
January 31, 2005

Part IV

Environmental Protection Agency

Animal Feeding Operations Consent Agreement and Final Order; Notice

ENVIRONMENTAL PROTECTION AGENCY

[OAR–2004–0237; FRL–7864–4]

Animal Feeding Operations Consent Agreement and Final Order

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of consent agreement and final order, and request for public comment.

SUMMARY: The EPA is offering animal feeding operations (AFOs) an opportunity to sign a voluntary consent agreement and final order (henceforth referred to as the ''Air Compliance Agreement'' or the ''Agreement''). A copy of the Air Compliance Agreement is attached as an Appendix to this notice. The sign-up period for eligible AFOs to sign the Agreement will run for 90 days from the date of this notice.

AFOs that choose to sign the Air Compliance Agreement will share responsibility for funding an extensive, nationwide emissions monitoring study. The monitoring study will lead to the development of methodologies for estimating emissions from AFOs and will help AFOs to determine and comply with their regulatory responsibilities under the Clean Air Act (CAA); the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA); and the Emergency Planning and Community Right-To-Know Act (EPCRA). Once applicable emission estimating methodologies have been published by EPA, the Agreement will also require each participating AFO to certify that it is in compliance with all relevant requirements of the CAA, CERCLA and EPCRA.

EPA is requesting comment on the Air Compliance Agreement, with particular emphasis on implementation of the Agreement. All comments should be submitted within 30 days of the date of this notice.

DATES: Comments must be received on or before March 2, 2005.

ADDRESSES: Submit your comments, identified by Docket ID No. OAR–2004–0237, by one of the following methods:

- 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: Air Docket, Environmental Protection Agency, Mailcode: 6102T, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Please include a total of two copies.
- Hand Delivery: Environmental Protection Agency, 1301 Constitution Avenue, NW., Room B102, Washington, DC 20460. 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–2004–0237. The 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 Web sites 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.

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 information, such as copyrighted materials, 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 form at Docket ID No. OAR–2004–0237, 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 Air Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: For information on the Air Compliance Agreement, contact Mr. Bruce Fergusson, Special Litigation and Projects Division, Office of Enforcement and Compliance Assurance, U.S. EPA, Ariel Rios Building, Washington, DC 20460, telephone number (202) 564–1261, fax number (202) 564–0010, and electronic mail: *fergusson.bruce@epa.gov.*

For information on the monitoring study, contact Ms. Sharon Nizich, Organic Chemicals Group, Emission Standards Division, Office of Air Quality Planning and Standards, U.S. EPA, Research Triangle Park, NC 27711, telephone number (919) 541–2825, fax number (919) 541–3470, and electronic mail: *nizich.sharon@epa.gov.*

SUPPLEMENTARY INFORMATION:

Overview of the Air Compliance Agreement: By offering AFOs this opportunity to sign an Air Compliance Agreement, the Agency will help participating AFOs pool their resources to lower the cost of measuring emissions and ensure that they comply with all applicable environmental regulations in the shortest amount of time. While EPA has the authority on a case-by-case basis to require AFOs to monitor their emissions and to come into compliance with applicable Federal laws, that process has proven to be difficult and time consuming, partly due to the uncertainty regarding emissions from AFOs, which was reiterated in a recent report by the National Academy of Sciences (NAS).[1] Moreover, even when EPA has reached a successful resolution of an enforcement case, only the facilities that are the subject of the enforcement action were directly affected. Consequently, EPA believes that the Air Compliance Agreement will be the quickest and most effective way to address the current uncertainty regarding emissions from AFOs and to bring all participating AFOs into compliance with all applicable regulatory requirements.

The Air Compliance Agreement will not affect in any way EPA's ability to respond to an imminent and substantial endangerment to public health, welfare or the environment. Nor will participation in the Agreement provide protection for criminal violations of

[1] NAS, ''Air Emissions From Animal Feeding Operations: Current Knowledge, Future Needs,'' National Research Council, 2003.

environmental laws. Finally, the Air Compliance Agreement is not intended to affect compliance by AFOs with any requirements of the Clean Water Act (CWA) and the implementing regulations applicable to concentrated animal feeding operations.

AFOs that choose not to sign an Air Compliance Agreement will be subject to potential enforcement action by the Federal Government for any CAA, CERCLA, or EPCRA violations, as would any AFO that signs the Agreement but later drops out by not complying with the terms of the Agreement.

EPA recognizes that AFOs can have a negative impact on nearby residents, particularly with respect to objectionable odors and other nuisance problems that can affect their quality of life. EPA also recognizes that concerns have been raised recently regarding the possible health impacts from AFO emissions. It is important to note, however, that under existing Federal laws, EPA has an important but limited role in dealing with many of the potential impacts from AFOs. To the extent that certain pollutants from AFOs are regulated under the CAA and are emitted in quantities that exceed regulatory thresholds, EPA can and will require AFOs to comply with all applicable CAA requirements, including limiting those emissions where appropriate. However, many of the negative impacts resulting from AFOs, such as odor, are not currently regulated under Federal laws, but are addressed by State and local laws. EPA supports local and State efforts in those areas and relies on them to enforce their State and local laws for odor and nuisance problems, health code violations, and zoning challenges posed by AFOs. The Air Compliance Agreement will explicitly require participants to comply with final State nuisance orders. In addition, the Agreement will not affect the ability of States or citizens to enforce compliance with nonfederally enforceable State laws, existing or future, that are applicable to AFOs.

Sources may also emit fugitive emissions, but this notice does not address fugitive emissions. Guidance on fugitive emissions will be issued along with other appropriate guidance/and or regulations after the conclusion of the monitoring study.

Relevant Air Pollutants and Applicable Laws: AFOs emit several air pollutants, including ammonia (NH_3), hydrogen sulfide (H_2S), particulate matter (PM), and volatile organic compounds (VOC). NH_3 and H_2S are hazardous substances under CERCLA and EPCRA, and the release of these gases may need to be reported under CERCLA and EPCRA if released in sufficient quantities. H_2S, PM, and VOC are all regulated under the CAA and subject to various requirements under that statute and the implementing Federal and State rules and regulations. Emissions of these pollutants come from many different areas at AFOs, including animal housing structures (*e.g.,* barns, covered feed lots) and manure storage areas (*e.g.,* lagoons, covered manure piles). An important issue that arises under the CAA is whether emissions from different areas at AFOs should be treated as fugitive or nonfugitive. The Agency plans to issue regulations and/or guidance on this issue after the conclusion of the monitoring study.

Applicability: The Air Compliance Agreement is being offered to AFOs in the egg, broiler chicken, turkey, dairy and swine industries that meet the definition of an AFO under the CWA. The Agreement will address emissions coming from buildings or structures that house agricultural livestock, and from lagoons or similar structures that are used for storage and/or treatment of agricultural livestock waste at participating AFOs. The Air Compliance Agreement will not address AFOs that only have open-air feedlots, such as cattle feedlots. Nor will it address emissions from sources other than animal housing structures or agricultural livestock waste storage and treatment units.

Major Terms of the Air Compliance Agreement: The Air Compliance Agreement establishes specific obligations that will apply to all participating AFOs and includes limited, conditional covenants not to sue and liability releases from EPA. AFOs that choose to participate will agree to pay a civil penalty which is based on the size of the AFO. The penalty ranges from $200 to $1,000 per AFO, depending upon the number of animals at the AFO. The threshold ranges depend upon the species of animal. The total penalty is capped and ranges from $10,000 for a participant having 10 or fewer farms to $100,000 for a participant having over 200 farms. Participation in the Air Compliance Agreement and payment of a penalty will not be an admission of liability by an AFO.

In addition, participating AFOs, except for certain contract growers, will be responsible for the payment of approximately $2,500 per farm into a fund to conduct a nationwide emission monitoring study and for making their facilities available for emissions testing under the nationwide monitoring study. In general, the monitoring study, which is described more fully below and in Attachment B to the Air Compliance Agreement (included as an appendix to this notice), will undertake over a 2-year period, emissions monitoring at a representative sample of animal housing structures and manure storage and treatment units across the country. At the end of the monitoring study, EPA will use the data from the monitoring study and any other relevant, available data to develop emissions estimating methodologies. These emissions estimating methodologies will then be used by the AFO industry to estimate their annual emissions.

EPA's publication of the emissions estimating methodologies will trigger the obligation of participating AFOs to determine their emissions and to comply with all applicable CAA requirements, including applying for all required permits, and to make any requisite hazardous release notices under CERCLA and EPCRA. EPA expects to apply these emission estimating methodologies to all AFOs, whether or not they participate in the Air Compliance Agreement.

Please note that the Air Compliance Agreement does not define the scope of the term ''source'' as it relates to animal agriculture and farm activities. The Agency plans to provide guidance on this issue at the conclusion of the monitoring study.

Any AFO that fails to comply with the requirements as described will not receive the limited conditional release and covenant not to sue described later in this notice. Any conditional release and covenant not to sue offered as part of the Air Compliance Agreement will be revoked, and the AFO will remain liable for all past and ongoing violations.

AFOs that choose to participate in the Air Compliance Agreement and meet all its conditions will receive from EPA a limited release and covenant not to sue from liability for certain past and on-going CAA, CERCLA and EPCRA violations. The release and covenant not to sue will cover an AFO's liability for failing to comply with certain provisions of CERCLA, EPCRA, and the CAA up to the time the AFO reports its releases under CERCLA or EPCRA and applies for and receives the requisite CAA permits.

Participating AFOs will also be obligated to comply with all final actions and final orders issued by the State or local authority that address a nuisance arising from air emissions at the AFO. Failure to comply with the final action or order to correct the nuisance will void the conditional release and covenant not to sue offered in the Air Compliance Agreement.

Some very large AFOs will be required to immediately report estimated releases of NH_3, solely for purposes of the Air Compliance Agreement and not for purposes of reporting under CERCLA or EPCRA.

Finally, AFOs that install waste-to-energy systems that convert animal manure into electricity will get an extra 180 days to apply for CAA permits and to make the requisite hazardous release notifications under CERCLA and EPCRA.

Terms Applicable to Contract Growers and Integrators: Many AFOs, particularly in the swine, broiler chicken, and turkey industry, raise livestock for separate corporations that usually own the animals, provide feed and medical services, and that process and market the meat products. In those cases, the AFO that grows the animals is referred to as a ''contract grower,'' and the separate corporation that processes and markets the meat products is referred to as an ''integrator.''

The Air Compliance Agreement includes provisions that will allow both integrators and contract growers to participate. Among other things, a contract grower will not be responsible for the payment of monies into the monitoring fund if an integrator has already agreed to be responsible for the payment of such monies. The contract grower/integrator provisions in the Agreement will also apply to AFOs that produce milk under contract with a cooperative or that supply heifers to dairy herds owned by a separate entity.

Emissions Monitoring Study: The purpose of the monitoring study is to: collect data and aggregate it with appropriate existing emissions data; analyze the monitoring results; and create tools (*e.g.,* tables and/or emission models) that AFOs could use to determine whether they emit pollutants at levels that require them to apply for permits under the CAA or submit notifications under CERCLA or EPCRA. The monitoring study is designed to generate scientifically credible data to provide for the characterization of emissions from all major types of AFOs in all geographic areas where they are located. To provide a framework for the monitoring study and to generate a comprehensive field sampling plan from representative farms in the United States, a protocol (Attachment B to the Air Compliance Agreement, included as part of the Appendix to this notice) was developed through the collaborative efforts of industry experts, university scientists, government scientists, and other stakeholders knowledgeable in the field. Although the protocol development was facilitated by the U.S. EPA and the U.S. Department of Agriculture (USDA), it represents the opinions of the scientists, government experts, and stakeholders involved. In addition, there was extensive internal review and input by representatives from U.S. EPA's Office of Enforcement and Compliance Assurance, Office of Air and Radiation, and Office of Research and Development.

As recommended in the NAS 2003 report, ''Air Emissions From Animal Feeding Operations,'' and paraphrased here, EPA and USDA should for the short term, initiate and conduct a coordinated research program designed to produce a scientifically sound basis for measuring and estimating air emissions from AFOs. Specific recommendations being addressed with the protocol that were discussed in the NAS 2002 Interim Report [2] are related to direct measurements at sample farms by utilizing information on the relationships between air emissions and animal types, nutrient outputs, and manure handling practices; conducting studies to evaluate the extent to which ambient atmospheric concentrations of the various pollutants of interest are consistent with estimated emissions; and using scientifically sound and practical protocols for measuring pollutant concentration emission rates. EPA's longer-term strategy involves additional recommendations from the NAS which entail developing a process-based model that considers the entire animal production process. The data collected in the monitoring study will lay the groundwork for developing these more process-related emission estimates. However, as with any large and complex effort, this work must be conducted over a period of years.

Under the Air Compliance Agreement, the participating AFOs will set up an umbrella nonprofit entity (referred to here as the nonprofit organization or NPO) to handle the funds contributed by the individual participating facilities. The NPO will then subcontract to a Science Advisor and independent monitoring contractor (the ''IMC'') to run the nationwide monitoring study. The IMC will submit a proposed plan for review and approval by EPA that is consistent with the monitoring protocol outlined in Attachment B to the Air Compliance Agreement. The proposed plan would also include a list of recommended candidate facilities to be monitored.

EPA will review and approve or disapprove the proposed plan within 30 days of receiving it from the IMC. If the proposed plan is disapproved, EPA will specifically state why the plan is being disapproved and what changes need to be made. The IMC will then have 30 days to modify the proposed plan to address the changes required by EPA and to submit the modified plan to EPA for review and approval. Once the plan is approved, all participating AFOs, through the NPO, will be obligated to fully fund the nationwide emission monitoring study and to establish a binding contract with the IMC to carry out the approved plan.

Monitoring will be conducted pursuant to EPA protocols and be done by a fleet of mobile labs purchased by the NPO and overseen by the IMC hired to run the study. Emissions at the facilities will be monitored at both buildings and waste lagoons and will include H_2S, VOC, PM and NH_3. Monitoring will occur at facilities across the country to get a representative sample of the facility types in major geographic regions. EPA expects that the monitoring will begin in 2005 and continue for 2 years. Two years of monitoring is the minimum time needed because emissions from AFOs can vary greatly over the course of a year and may vary significantly from year to year. The data generated during the monitoring study will be made fully available to the general public.

Technical experts on emissions monitoring at EPA and from a number of universities believe that monitoring the farms described in the attached protocol will provide sufficient data to get a valid sample that is representative of the vast majority of the participating AFOs. Significantly increasing the number of farms to be monitored would be prohibitively expensive and would not add substantially to the value of the data collected.

Throughout the course of the monitoring study, EPA will review and analyze the data as they are generated. EPA will use the data generated from the monitoring and all other available, relevant data to develop methodologies for estimating annual emissions from swine, dairy, egg laying, broiler chicken, and turkey AFOs. Within 18 months after the conclusion of the nationwide emissions monitoring study, EPA expects that it will publish on its Web site, on a rolling basis as work is completed, the methodologies for estimating emissions for the vast majority of AFOs in the eligible animal groups.

[2] NAS, ''The Scientific Basis For Estimating Air Emissions From Animal Feeding Operations.'' Interim Report, National Research Council, 2002.

Relationship Between the Air Compliance Agreement and Other Actions the Agency May Take To Address AFO Air Emissions

In September 2001, EPA's Office of Air and Radiation (OAR) and the USDA jointly commissioned the NAS to prepare a report recommending approaches for characterizing emission profiles and identifying emission mitigation techniques, including:

- Review industry characterization and use of model farms;
- Evaluate emission factors, measurement methods, and modeling approaches;
- Recommend fate and transport methodologies;
- Identify mitigation technologies and management practices; and
- Identify critical research needs.

The NAS concluded its report in 2003 with a number of key findings, some of which are quoted here from the report:

> * * * EPA and USDA should use process-based mathematical models with mass balance constraints for nitrogen-containing compounds, methane, and hydrogen sulfide to identify, estimate, and guide management changes that decrease emissions for regulatory and management programs.
>
> * * * measurement protocols, control strategies and management techniques must be emission and scale specific * * *
>
> * * * There is a general paucity of credible scientific information on the effects of mitigation technologies on concentrations, rates, and fates of air emissions from AFOs. However, the implementation of technically and economically feasible management practices (*e.g.,* manure incorporation into soil) designed to decrease emissions should not be delayed.
>
> * * * scientifically sound and practical protocols for measuring air concentrations, emission rates, and fates are needed for the various elements (nitrogen, carbon, sulfur), compounds (*e.g.,* ammonia [NH_3], CH_4, H_2S) and particulate matter.

The EPA is planning to proceed in a manner that is consistent with the recommendations of the NAS. EPA's plan is focused on the achievement of real environmental benefits to protect public health and the environment while supporting a sustainable agricultural sector. EPA plans to continue to work with USDA and others to:

- Collect data and information related to operations at AFOs;
- Determine emissions from individual AFOs; and
- Identify appropriate regulatory and nonregulatory (*e.g.,* best management practices, environmental management systems, etc.) responses for each farm.

The Air Compliance Agreement with individual AFOs is an integral component of the data collection and emissions determinations of this effort. As discussed earlier in this notice, as part of the Air Compliance Agreement, AFOs will fund a 2-year nationwide emissions monitoring study to gather emissions data and mass balance information from AFOs. It is anticipated that emissions monitoring will be conducted at farms that represent the major animal sectors, types of operations, and different geographic locations.

The information gathered during the emissions monitoring study will be used to more adequately characterize emissions from individual farms. Individual farm emissions estimates will be used, along with other relevant information, to determine appropriate regulatory and nonregulatory responses to address the emissions. As recommended in the NAS report, EPA will then move forward to develop a process-based model which entails considering the entire animal feeding process. Similar to other large and complex efforts, the work must be conducted in stages over a period of years. The monitoring study, and the resulting emission estimating methodology, is a critical first step in this multiyear effort.

Conclusion: EPA believes that the Air Compliance Agreement will be the quickest and most effective way to address the current uncertainties regarding air emissions from AFOs and to bring the entire AFO industry into compliance with the CAA, section 103 of CERCLA, and section 304 of EPCRA. The Air Compliance Agreement's terms, conditions, and protections will be available only to those facilities that are eligible, that elect to participate, and that comply with the terms of the agreement. As appropriate, nonparticipants, and those who sign up but later drop out due to noncompliance with the Air Compliance Agreement, will be subject to enforcement actions in which significant penalties and injunctive relief could be sought for violations of the CAA, section 103 of CERCLA, and section 304 of EPCRA.

This notice describes an Air Compliance Agreement that EPA is offering certain types of AFOs and requests public comment on that Agreement. No new rights or obligations on behalf of EPA or any other party are created beyond what is contained in a fully executed and approved Agreement.

This notice provides a general description of the Air Compliance Agreement. Interested parties are encouraged to carefully read the Air Compliance Agreement and its Attachments (included as an Appendix to this notice) to fully understand what is being offered to AFOs. To the extent that provisions of the Air Compliance Agreement and its Attachments are inconsistent with this notice, the provisions of the Agreement will prevail.

Participation in the Air Compliance Agreement is voluntary. The Agreement is not intended to affect in any way EPA's ability to respond to an imminent and substantial endangerment to public health, welfare or the environment. Participation in the Agreement will not provide protection for criminal violations of environmental laws. In addition, the Agreement is not intended to affect the ability of States or citizens to enforce compliance with nonfederally enforceable State laws applicable to AFOs.

EPA recognizes that State and local agencies are undertaking efforts to improve emissions estimation methodologies for AFOs. EPA supports continued action to improve emissions information for all source categories and will use the best information available as we implement our programs. EPA also supports State and local efforts to demonstrate improved emissions reduction strategies and recognizes the value of State or local control requirements tailored to the needs of specific geographic areas. For these reasons, nothing in the Air Compliance Agreement will be used to delay or otherwise interfere with the implementation and enforcement of existing State statutes that eliminate exemptions to CAA requirements for agricultural sources of air pollution.

Request for Public Comment: As stated above, EPA is requesting comment on the Air Compliance Agreement, with particular emphasis on implementation of the Agreement. All comments should be submitted within 30 days of the date of this notice.

Earlier drafts of the Air Compliance Agreement have been circulated publicly. EPA requested and received comments on those drafts from, among others, representatives of state governments, environmental groups, local citizens' groups, and the AFO industry. Those comments were considered, and, where appropriate, changes were made to the draft agreement. In addition, the emission monitoring protocol for the nationwide emission monitoring program (Attachment B to the Agreement, included in the Appendix to this notice) was developed by a group of 30 leaders in the area of AFO air emissions, including scientists from EPA, the AFO industry, environmental groups, and several colleges and universities.

Sign Up Procedures: To participate in the Air Compliance Agreement, eligible AFOs should sign the Air Compliance Agreement and fill out Attachment A to the Agreement (the Farm and Emission Unit Information Sheets). A copy of the Agreement and all attachments can be downloaded from EPA's Web site at: *http://www.epa.gov.* The signed Agreement should be returned to EPA during the 90-day sign-up period that commences on the date of this notice. EPA will not sign the Agreement and forward it to EPA's Environmental Appeals Board for approval until after the conclusion of the public comment period.

Owners and operators of AFOs who want to sign Air Compliance Agreements with EPA will need to provide all of the following information on the Farm and Emission Unit Information Sheets for each AFO they would like to be covered by the Compliance Agreement:

- The name and address of the Respondent signing the Air Compliance Agreement;
- The name of each facility to be covered by the Agreement;
- The name of the owner and operator of each facility, including whether it is a contract grower facility;
- The location of all the covered facilities;
- The animal type and number of animals at each facility;
- The type of animal housing structure and number of structures at each facility;
- The type of manure handling system and the number of manure storage areas (*e.g.,* manure piles or lagoons) at each facility;
- The capacity and surface area, if applicable, of all manure storage areas at each facility; and,
- A description of any emission control technology or nontraditional manure treatment systems at each facility.

Signed Air Compliance Agreements, including all properly filled out attachments, should be sent to: Special Litigation and Projects Division (2248A), Attn: Air Compliance Agreements, Office of Regulatory Enforcement, Office of Enforcement and Compliance Assurance, U.S. EPA, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

At the end of the sign-up period, EPA will determine whether a sufficient number of AFOs of each species have elected to participate. The determination will be based on whether the number of participants is sufficient to fully fund the monitoring study and whether the number of participants for each type of operation is sufficient to provide a representative sample to monitor. If the total number of participants is insufficient, EPA will not sign any Air Compliance Agreements and will not proceed with the monitoring study. If, however, the total number of participants is sufficient but there are an insufficient number of AFOs with a particular species or type of operation, EPA may decline to sign Air Compliance Agreements with those particular operations and decide not to proceed with the monitoring of that type of operation. No later than 30 days after the end of the sign-up period, EPA will decide whether to proceed with all, part, or none of the monitoring study and will sign the Air Compliance Agreements and forward them to EPA's Environmental Appeals Board (EAB) for final approval.

Additional Sources of General Information: To find out more about compliance with the CAA or section 103 of CERCLA, or EPCRA 304, please access the EPA Web site at

http://www.epa.gov/air/oaq_caa.html/

or

http://www.epa.gov/superfund/action/law/cercla.htm.

Dated: January 21, 2005.

Thomas V. Skinner,

Assistant Administrator for Enforcement.

Jeffrey R. Holmstead,

Assistant Administrator for Air and Radiation.

Appendix 1—Air Compliance Agreement With Attachments A and B; Attachment A—Farm Information Sheet; Attachment B—National Air Emissions Monitoring Study Protocol

Appendix 1

In the Matter of [Participating Company]; Consent Agreement and Final Order; CAA–HQ–2005–XX; CERCLA–HQ–2005–XX; EPCRA–HQ–2005–XX

I. Preliminary Statement

1. The United States Environmental Protection Agency (EPA) and [Participating Company] (Respondent) voluntarily enter into this Consent Agreement and Final Order (Agreement) to address emissions of air pollutants and hazardous substances from certain animal feeding operation(s) that may be subject to requirements of the Clean Air Act, the hazardous substance release notification provisions of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and the emergency notification provisions of the Emergency Planning and Community Right-to-Know Act (EPCRA).

2. The purpose of this Agreement is to ensure that [Participating Company] complies with applicable requirements of the Clean Air Act and applicable release notification provisions of CERCLA and EPCRA. To that end, this Agreement requires [Participating Company], among other things, to be responsible for the payment of funds towards a two-year national air emissions monitoring study that will lead to the development of Emissions-Estimating Methodologies that will help animal feeding operations determine and comply with their regulatory responsibilities under the Clean Air Act, CERCLA and EPCRA.

3. This Agreement is issued pursuant to section 113 of the Clean Air Act, 42 U.S.C. 7413 (federal enforcement of the Clean Air Act); sections 103 and 109 of CERCLA, 42 U.S.C. 9603 and 9609 (federal enforcement of notification provisions); section 325 of EPCRA, 42 U.S.C. 11045 (federal enforcement of EPCRA notification provisions); and 40 CFR 22.13(b) and 22.18(b)(2) and (3) (procedural requirements for the quick resolution and settlement of matters before the filing of an administrative complaint). Respondent's participation in this Agreement is not an admission of liability. At this time, Respondent neither admits nor denies that any of its Farms is subject to CERCLA or EPCRA reporting or Clean Air Act permitting requirements, or is in violation of any provision of CERCLA, EPCRA or the Clean Air Act. The execution of this Agreement by Respondent is not an admission that any of its agricultural operations has been operated negligently or improperly, or that any such operation is or was in violation of any federal, state or local law or regulation.

4. As described more specifically in paragraphs 26 and 35 below, this Agreement resolves Respondent's civil liability for certain potential violations of the Clean Air Act, CERCLA and/or EPCRA at [Participating Company's] Farm(s) listed in Attachment A. The release and covenant not to sue found in paragraph 26 resolves only violations identified and quantified by applying the Emissions-Estimating Methodologies developed using data from the national air emissions monitoring study described herein.

5. This Agreement is one of numerous identical agreements between EPA and animal feeding operations across the nation. Through these agreements, EPA and participating animal feeding operations aim to assist in the development of improved Emissions-Estimating Methodologies for air emissions from animal feeding operations and to ensure that all animal feeding operations are in compliance with applicable Clean Air Act, CERCLA and EPCRA requirements. Notwithstanding any other provision, this Agreement shall not delay or interfere with the implementation or enforcement of State statutes that eliminate exemptions to Clean Air Act requirements for agricultural sources of air pollution.

6. EPA may decline to enter into this Agreement with animal feeding operations (and their successors and assigns) that have been notified by EPA or a State that they currently may be subject to a Federal or State Clean Air Act, CERCLA section 103 or EPCRA section 304(a) enforcement action.

II. Definitions

7. Unless otherwise defined herein, terms used in this Agreement shall have the same meaning given to those terms in the Clean

Air Act, 42 U.S.C. 7401 *et seq.*; the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9601 *et seq.*; the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. 11001 *et seq.,* and the implementing regulations promulgated thereunder. For purposes of this Agreement only, the following terms shall have the following meanings.

8. The term ''Agricultural Waste'' or ''Agricultural Livestock Waste'' means Livestock manure, wastewater, litter including bedding material for the disposition of manure, and egg washing or milking center waste treatment and storage. ''Agricultural Livestock'' or ''Livestock'' include dairy cattle, swine and/or poultry among others.

9. The term ''Contract Grower'' means the owner or operator of a Farm that raises Livestock or produces milk or eggs under a contract with Respondent.

10. The term ''Emissions-Estimating Methodologies'' means those procedures that will be developed by EPA, based on data from the national air emissions monitoring study and any other relevant data and information, to estimate daily and total annual emissions from individual Emission Units and/or Sources. These methodologies will be published on EPA's Web site (*http://www.epa.gov*).

11. The term ''Emission Unit'' means any part of a Farm that emits or may emit Volatile Organic Compounds (VOCs), Hydrogen Sulfide (H_2S), Ammonia (NH_3), or Particulate Matter (TSP, PM10 and PM2.5) and is either: (a) A building, enclosure, or structure that permanently or temporarily houses Agricultural Livestock; or (b) a lagoon or installation that is used for storage and/or treatment of Agricultural Waste.

12. The term ''Environmental Appeals Board'' or ''EAB'' means the permanent body with continuing functions designated by the Administrator of EPA under 40 CFR 1.25(e) whose responsibilities include approving administrative settlements commenced at EPA Headquarters.

13. The term ''Facility'' shall mean ''CERCLA Facility and/or EPCRA Facility.'' The term ''CERCLA Facility'' shall have the meaning given that term under section 101(9) of CERCLA, 42 U.S.C. 9601(9). The term ''EPCRA Facility'' shall have the meaning given that term under section 329(4) of EPCRA, 42 U.S.C. 11049(4).

14. The term ''Farm'' shall mean the production area(s) of an animal feeding operation, adjacent and under common ownership, where animals are confined, including animal lots, houses or barns; and Agricultural Waste handling and storage facilities. ''Farm'' does not include land application sites for Agricultural Waste. This definition is limited exclusively to this Agreement and establishes no precedent for the interpretation of any statute, regulation or guidance.

15. The term ''Nuisance'' is defined according to State and local common law, statutes, regulations, ordinances or usage.

16. The term ''Permitting Authority'' means the local, State or Federal government entity with jurisdiction to require compliance with the permitting requirements of the Clean Air Act.

17. The term ''Independent Monitoring Contractor'' means a person or entity that is not affiliated with Respondent or any other animal feeding operation, that has sufficient experience and expertise to fully implement the national air emissions monitoring study described herein, that meets the qualifications set forth in Attachment B to this Agreement, and that is approved by EPA.

18. The term ''Qualifying Release'' means a release that triggers a reporting requirement under section 103 of CERCLA or section 304 of EPCRA.

19. The term ''Respondent'' means [Participating Company].

20. The term ''Source'' shall have the meaning given to the term ''stationary source'' in the implementing regulations of the Clean Air Act at 40 CFR 52.21(b)(5) through (6), as interpreted by applicable guidance issued by EPA.

21. The term ''State or Local Authority'' means a state or local government entity with jurisdiction over Respondent's Farm(s).

III. Consent Agreement

22. EPA and Respondent have agreed to resolve this matter by executing this Agreement, as further set forth herein.

23. Respondent asserts that it either owns, operates or otherwise controls, or contracts with Contract Growers who own, operate or otherwise control, the Farm(s) listed in Attachment A to this Agreement. Respondent agrees that this Agreement applies only to the Farm(s) that are listed in Attachment A and contain one or more Emission Unit(s) as defined in paragraph 11 and described in Attachment A.

24. For the purpose of this proceeding, Respondent does not contest the jurisdiction of the Environmental Appeals Board.

25. As specified more fully below, Respondent consents to pay a civil penalty, to be responsible for the payment of funds to the national air emissions monitoring study, and to facilitate implementation of the monitoring study, including making certain Farms available for monitoring.

26. In consideration of Respondent's obligations under this Agreement and subject to the limitations and conditions set forth in paragraphs 27–30, 33, 34, 36, 37 and 43, EPA releases and covenants not to sue Respondent, with respect to the listed Emission Units located at the Farm(s) in Attachment A, for:

(A) Civil violations of the permitting requirements contained in Title I, Parts C and D, and Title V of the Clean Air Act, and any other federally enforceable State implementation plan (SIP) requirements for major or minor sources based on quantities, rates, or concentrations of air emissions of pollutants that will be monitored under this Agreement, namely Volatile Organic Compounds (VOCs), Hydrogen Sulfide (H_2S), Particulate Matter (TSP, PM10 and PM2.5), and Ammonia (NH_3); and

(B) civil violations of CERCLA section 103 or EPCRA section 304 from air emissions of Hydrogen Sulfide (H_2S) or Ammonia (NH_3) that are not singular unexpected or accidental releases such as those caused by an explosion, fire or other abnormal occurrence.

27. (a) The releases and covenants not to sue described in paragraphs 26 and 35 extend only to violations of the requirements identified in those paragraphs and apply only to emissions from Agricultural Waste at Emission Units (as defined in paragraph 11). They do not extend to any other requirements including but not limited to: (i) Any possible requirements that relate to emissions generated by other equipment or activities co-located at the Farm, including waste-to-energy systems; (ii) activities at open cattle feedlots for beef production; (iii) Clean Air Act permitting requirements triggered by an expansion of a Farm beyond its design capacity as of the date this Agreement is executed; or (iv) requirements that are not triggered by the quantity, concentration or rate of emission of Volatile Organic Compounds (VOCs), Hydrogen Sulfide (H_2S), Particulate Matter (TSP, PM10 and PM2.5) or Ammonia (NH_3), including work practice requirements and equipment specifications.

(b) The release and covenants not to sue in paragraphs 26 and 35 shall apply to the liability of a Contract Grower with respect to a Farm if and only if the Contract Grower executes an Agreement with EPA covering that Farm.

28. The release and covenant not to sue described in paragraph 26 covers Respondent's liability for violations with respect to an Emission Unit located at a Farm listed in Attachment A if and only if Respondent complies with all applicable requirements of this Agreement and, with respect to that Emission Unit:

(A) Within 120 days after receiving an executed copy of this Agreement, for any Farm that confines more than 10 times the ''large Concentrated Animal Feeding Operation'' threshold of an animal species,[3] the animal feeding operation provides to the National Response Center (NRC) and to the relevant local and state emergency response authorities written notice describing its location and stating substantially as follows:

This operation raises [species] and may generate routine air emissions of Ammonia in excess of the reportable quantity of 100 pounds per 24 hours. A rough estimate of those emissions is [__] pounds per 24 hours, but this estimate could be substantially above or below the actual emission rate, which is being determined through an ongoing monitoring study in cooperation with the U.S. Environmental Protection Agency. When that emission rate has been determined by this study, we will notify you of any reportable releases pursuant to CERCLA section 103 or EPCRA section 304. In the interim, further information can be obtained by contacting [insert contact information for a person in charge of the operation].

[3] This definition is being used in this Agreement solely for the purpose of determining the penalty assessed, and for certain limited reporting purposes. ''Large Concentrated Animal Feeding Operation'' is defined as: (a) 2,500 swine weighing more than 55 pounds; (b) 10,000 swine weighing less than 55 pounds; (c) 82,000 laying hens; (d) 125,000 broilers; (e) 55,000 turkeys; or (f) 700 mature dairy cows or 1000 dairy heifers.

Respondent shall provide to EPA, at the address in paragraph 64, a copy of any written notice given pursuant to this subparagraph. This interim notice shall be provided to satisfy the terms of this Agreement only and is not intended to establish a precedent or standard for reporting under CERCLA or EPCRA.

(B) Where application of the Emissions-Estimating Methodologies establishes that no Clean Air Act requirements or that no CERCLA or EPCRA notifications are required for a Source or Facility, Respondent shall so certify to EPA in writing within 60 days after EPA publishes Emissions-Estimating Methodologies applicable to the Emission Units at the Source or Facility. Any such certification shall identify each Source or Facility covered by the certification and the Emissions-Estimating Methodology used to calculate its emissions. If EPA notifies Respondent that this certification is not correct because application of the Emissions-Estimating Methodologies indicates that the Source or Facility is subject to such requirements, Respondent shall have 90 days from notification by EPA to comply with the provisions in paragraph 28(C) or submit, in writing, clear and convincing proof to EPA that Respondent's certification is correct.

(C) Respondent complies with all of the applicable requirements set forth below:

(i) Within 120 days after EPA has published Emissions-Estimating Methodologies applicable to the Emission Units at Respondent's Source, Respondent submits all Clean Air Act permit applications required by the Permitting Authority for the Source, based on application of those Emissions-Estimating Methodologies.

(a) For a Source whose emissions exceed the major source threshold in Title I, Part C or D, based on the area's attainment status (*e.g.,* in an attainment area, more than 250 tons per year of a regulated pollutant), this requirement includes:

(1) Applying for and ultimately obtaining a permit that contains a federally enforceable limitation or condition that limits the potential to emit of the Source to less than the applicable major source threshold for the area where the Source is located; or,

(2) Installing best available control technology (BACT) in an attainment area, or technology meeting the lowest achievable emission rate (LAER) if the Source is located in a nonattainment area, as determined by and in accordance with the schedule provided by the Permitting Authority for the Source, and obtaining a federally enforceable permit that incorporates an appropriate BACT or LAER limit. For the purposes of this Agreement, compliance with the requirements found in 40 CFR 52.21(k) through (p) is not a condition of the release and covenant not to sue described in paragraph 26. Nothing in this paragraph is intended to limit a state or local government's authority to impose applicable permitting requirements. Emission reductions that result from installing BACT or LAER may not be used in netting calculations to offset emissions from a future modification to the Source.

(b) The annual emissions from a particular Source shall be determined based on Respondent's current operating methods and on the maximum number of animals housed at the Source at any time over the 24 months prior to EPA's publication of the applicable Emissions-Estimating Methodologies.

(c) Respondent promptly and fully responds to any notices of deficiency (or other equivalent notification that the permit application is incomplete or incorrect) issued by the Permitting Authority with respect to the permit application(s).

(d) As described in paragraph 34, below, Farms installing waste-to-energy systems will have an additional 180 days to submit the above-referenced permit applications.

(ii) Within 120 days after EPA has published Emissions-Estimating Methodologies applicable to Emission Units at Respondent's Facility, Respondent reports all Qualifying Releases of Hydrogen Sulfide (H_2S) and Ammonia (NH_3) in accordance with section 103 of CERCLA and section 304 of EPCRA.

(iii) Respondent timely installs all emission control equipment and implements all practices required by this Agreement or contained in the Clean Air Act permits issued in response to the applications submitted in accordance with subparagraph (i) of this paragraph.

(iv) Respondent provides EPA with written certification that it has timely installed all emission control equipment and implemented all practices required by this Agreement or contained in the Clean Air Act permits issued in response to the applications submitted in accordance with subparagraph (i) of this paragraph, within 30 days of meeting those requirements or within 30 days of acknowledgment of compliance by the Permitting Authority if such acknowledgment is required.

(D) Respondent's failure to comply with any of the above requirements in this paragraph at any particular Source shall affect the release and covenant not to sue for the noncompliant Source only and shall not affect the release and covenant not to sue for Respondent's complying Sources. In addition, Respondent's failure to comply with any of the above requirements in this paragraph at any particular Facility shall affect the release and covenant not to sue for the noncompliant Facility only and shall not affect the release and covenant not to sue for Respondent's complying Facilities.

29. For any Farm listed in Attachment A that is owned and operated by a Contract Grower, Respondent is not responsible for complying with paragraphs 28, 30 and 60. However, the release and covenant not to sue described in paragraph 26 covers Respondent's liability for violations with respect to the Emission Units located at such Farm if, and only if, the Contract Grower complies with all the requirements of paragraph 28. The Contract Grower's liability for violations with respect to the Emission Units located at that Farm is not covered by any of the releases and covenants not to sue set forth in this Agreement. However, the Contract Grower may enter its own agreement with EPA (thus becoming a respondent in its own agreement) and obtain similar conditional releases and covenants not to sue with respect to the emission units at its farm.

30. In addition, the release and covenant not to sue described in paragraph 26 covers violations with respect to the Emission Units located at a Farm listed in Attachment A if, and only if, Respondent complies with the following requirements, with respect to that Farm:

(A) During the period in which potential violations at the Farm are covered by the release and covenant not to sue as described in paragraph 26, Respondent complies with all final actions and final orders issued by the State or Local Authority that address a Nuisance arising from air emissions at the Farm and that are:

(i) Issued after Respondent has been given notice and opportunity to be heard (including any available judicial review) as required by applicable state or local law; and,

(ii) Issued during the time period in which potential violations at the Farm are covered by the release and covenant not to sue as described in paragraph 26.

(B) Within 60 days of coming into compliance with the final action or order of the State or Local Authority, Respondent provides EPA with written certification that Respondent has complied with the final action or final order and within the time schedule approved by the State or Local Authority.

31. Respondent agrees that the statute of limitations for all claims covered by the release and covenant not to sue in paragraph 26 will be tolled from the date this Agreement is approved by the EAB and until the earlier of: (a) 120 days after Respondent files the required certifications in accordance with paragraph 28(B) or paragraph 28(C)(iv), or (b) December 31, 2011. This time period can be extended by written agreement of both parties.

32. EPA will publish Emissions-Estimating Methodologies within 18 months of the conclusion of the monitoring period and will publish such Methodologies on a rolling basis as soon as they are developed. If EPA's Science Advisory Board determines that EPA is unable to publish Emissions-Estimating Methodologies applicable to a particular type of Emission Unit in Attachment A within 18 months of the conclusion of the monitoring period because of inadequate data, EPA will attempt to resolve such data problems as soon as possible. EPA's inability to publish an Emissions-Estimating Methodology for a particular type of Emission Unit in Attachment A within 18 months shall have no effect on any other deadline or provision of this Agreement for any other type of Emission Unit listed in Attachment A.

33. As a condition of its participation in this Agreement, Respondent agrees to accept, regardless of any collateral proceeding, the study protocols employed in and the emissions data developed by, the national air emissions monitoring study conducted under the plan described in paragraphs 53 through 63 below. If Respondent challenges the protocols employed or the data developed, the release and covenant not to sue described in paragraph 26 of this Agreement will become null and void and will have no effect on Respondent's past or future liability.

34. Respondent may choose to install and operate one or more systems that process

Agricultural Livestock Waste to produce electricity (a waste-to-energy system). If Respondent selects this option, it will have, with respect to a Farm at which such a system will be installed, an additional 180 days to comply with the requirements of paragraph 28 provided the following requirements are met, with respect to that Farm:

(A) Within 120 days after EPA has published Emissions-Estimating Methodologies applicable to the Emission Units at Respondent's Source, Respondent provides EPA with a written certification that it intends to install a waste-to-energy system, identifies each Farm at which such a system is or will be installed, and describes the type of waste-to-energy system installed and the percentage by volume of Agricultural Waste processed by the system at each Farm.

(B) The waste-to-energy system processes at least 50 percent of the Agricultural Waste by volume produced at the Farm.

(C) Respondent makes each Farm at which a waste-to-energy system is installed available for inspection by EPA.

(D) Respondent agrees to operate the waste-to-energy system for 24 months from the first date of operation or the date EPA publishes Emissions-Estimating Methodologies for the Emission Units at Respondent's Source, whichever is later. If during that 24-month period Respondent has to shut down the waste-to-energy system, the benefits of this paragraph will still be applicable if Respondent has made all reasonable efforts to maintain and operate the system.

(E) Respondent obtains, within applicable time limits, all required federal and state permits needed to construct and operate the waste-to-energy system at the Farm.

35. Subject to paragraphs 27, 37 and 43, if during the pendency of the nationwide monitoring study, Respondent promptly reports and corrects a civil violation of a federally approved SIP or an approved Federal implementation plan (FIP) resulting from emissions of Volatile Organic Compounds (VOCs), Hydrogen Sulfide (H_2S), Ammonia (NH_3), or Particulate Matter (TSP, PM10, and PM2.5) from a Farm listed in Attachment A that causes or contributes to a violation of any provision of the federally approved SIP that requires compliance with an ambient air quality standard at the Farm's property line, EPA releases and covenants not to sue Respondent for the reported and corrected violation if, and only if, the conditions set forth below are met:

(A) Unless Respondent first learned of the violation through a notice from EPA, Respondent provides notice of the violation to EPA and the applicable Permitting Authority within 21 days of Respondent's discovery of the violation or the final order of the EAB approving this Agreement, whichever is later;

(B) Respondent corrects the violation, including making any necessary adjustments to its operations at the Farm to prevent the violation from happening again, within 60 days after notice is given by Respondent or EPA as described in subparagraph (A) above. If the violation cannot reasonably be corrected within 60 days, Respondent must, before the end of the 60-day time period, submit a plan that is ultimately approved by EPA and the applicable Permitting Authority to correct the violation and must comply with the approved plan in accordance with the specified schedule. Within 30 days of correcting the violation, Respondent shall submit a written certification to EPA indicating that it has corrected the violation in accordance with the approved plan; and,

(C) The violation is not a repeated violation that Respondent previously reported to EPA pursuant to this paragraph. Respondent may rectify the loss of the above release and covenant not to sue for the first instance of a repeat violation; however, if it pays a stipulated penalty of $500 a day for each day that the Farm exceeds the ambient air quality standard, and it meets the requirements of subparagraphs (A) and (B), except that the time to correct the violation shall be 30 days instead of 60 days.

36. All certifications that Respondent must submit to comply with this Agreement shall include the following statement:

I certify under penalty of law that the information contained in this submittal to EPA is accurate, true, and complete. I understand that there are significant civil and criminal penalties for making false or misleading statements to the United States government.

The above statement shall be signed by a responsible official for the Respondent (*i.e.,* the owner if Respondent is a sole proprietorship, the managing partner if Respondent is a partnership, or a responsible corporate official if Respondent is an incorporated entity).

37. The releases and covenants not to sue described in paragraphs 26 and 35 do not cover Respondent's liability for any violation with respect to an Emission Unit located at a Farm if Respondent fails to comply with any of the applicable requirements of this Agreement with respect to that Emission Unit, including the limitations and conditions in paragraphs 26–29 and 33–34 above. The releases and covenants not to sue described in paragraphs 26 and 35 cover only violations with respect to the Emission Units located at the Farm that occur before the earlier of: (a) The date Respondent submits the last required certification covering those Emission Units; or (b) 2 years after Respondent submits any permit applications pursuant to paragraph 28(C)(i). This time period can be extended by a period not to exceed 6 months upon written agreement of both parties provided the Respondent's action or inaction is not the cause of any delay in obtaining a permit.

38. EPA will notify Respondent if EPA has determined that it cannot develop Emissions-Estimating Methodologies for any Emission Units listed in Attachment A.

(A) This notice shall identify (individually or by category) Emission Units, Sources and/or Facilities for which Emissions-Estimating Methodologies cannot be developed.

(B) For the Emission Units identified in such a notice:

(i) No certification under paragraph 28 shall be required for those Emission Units and any other related Emission Units that comprise the Source or Facility; and,

(ii) The releases and covenants not to sue described in paragraphs 26 and 35 shall cover potential violations that occur on or before 120 days after the date the notice is mailed, but shall not cover potential violations that occur more than 120 days after that date.

(C) Notice required under this paragraph will be deemed proper if sent via U.S. mail postage prepaid to the address listed in Attachment A.

39. The execution of this Agreement is not an admission of liability by Respondent, and Respondent neither admits nor denies that it has violated any provisions of the Clean Air Act, CERCLA or EPCRA.

40. Respondent waives its right to request an adjudicatory hearing on this Agreement, and its right, created by Clean Air Act section 113(a)(4), to confer with the Administrator before this Agreement takes effect. Respondent further waives its right to seek judicial review of the penalty assessed in paragraph 48.

41. Respondent and EPA represent that they are duly authorized to execute this Agreement, and that the persons signing this Agreement on their behalf are duly authorized to bind Respondent and EPA, respectively, to the terms of this Agreement.

42. Respondent agrees not to claim or attempt to claim a federal income tax deduction or credit covering all or any part of the civil penalty paid to the United States Treasurer. Any payments made in connection with the national air emissions monitoring study do not constitute a fine or penalty and are not paid in settlement of any actual or potential liability for a fine or penalty.

43. This Agreement is without prejudice to all rights of EPA against Respondent with respect to any claims not expressly covered by the releases and covenants not to sue contained in paragraphs 26 and 35. This Agreement does not limit in any way EPA's authority to restrain Respondent or otherwise act in any situations that may present an imminent and substantial endangerment to public health, welfare or the environment. In addition, the releases and covenants not to sue in paragraphs 26 and 35 do not cover any criminal liability.

44. With respect to any claims not expressly released herein, in any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, penalties, recovery of response costs or other relief relating to a Farm listed in Attachment A, Respondent shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant proceeding.

45. Respondent recognizes that EPA may not execute this Agreement if EPA determines that there will be inadequate funding for the national air emissions monitoring study or if EPA determines that there is inadequate representation of eligible animal groups and types of Farms, Facilities or Emission Units.

46. Respondent and EPA stipulate to the issuance of the proposed Final Order below.

[Participating Company], Respondent

By: _____
(Print Name): _____
Title: _____
Dated: _____

U.S. Environmental Protection Agency, Complainant

By: _____
Title: _____
Dated: _____

IV. Final Order

It is hereby ordered and adjudged as follows:

Compliance

47. Respondent shall comply with all terms of this Agreement.

Penalty

48. Respondent is hereby assessed a penalty based on the number and size of the Farms listed in Attachment A as follows:

(A) If Respondent has only one Farm and that Farm is below the ''large Concentrated Animal Feeding Operation'' threshold for that animal species,[4] Respondent is assessed a penalty of $200.

(B) All other Respondents are assessed a penalty of $500 per Farm, unless the Farm contains more than 10 times the total number of animals that defines the ''large Concentrated Animal Feeding Operation'' threshold. For those Farms, Respondent is assessed a penalty of $1,000 per Farm.

(C) The total penalty paid by Respondent shall not exceed:

$10,000 if Attachment A lists 1–10 Farms

$30,000 if Attachment A lists 11–50 Farms

$60,000 if Attachment A lists 51–100 Farms

$80,000 if Attachment A lists 101–150 Farms

$90,000 if Attachment A lists 151–200 Farms

$100,000 if Attachment A lists more than 200 Farms.

49. Respondent shall pay the assessed penalty no later than 30 calendar days from the date an executed copy of this Agreement is received by Respondent (hereinafter referred to as the ''Agreement Date'').

50. All penalty assessment monies under this Agreement shall be paid by certified check or money order, payable to the United States Treasurer, and mailed to: U.S. Environmental Protection Agency (Washington, DC Hearing Clerk), P.O. Box 360277, Pittsburgh, Pennsylvania 15251–6277. A transmittal letter, indicating Respondent's name, complete address, and this case docket number must accompany the payment. Respondent shall file a copy of the check and of the transmittal letter by mailing it to: Headquarters Hearing Clerk, US EPA, 1921 Jefferson Davis Hwy, Crystal Mall #2, Room 104, Arlington, VA 22202.

51. Failure to pay the penalty assessed under this Agreement may subject Respondent to a civil action pursuant to section 113(d)(5) of the Clean Air Act, 42 U.S.C. 7413(d)(5), to collect any unpaid portion of the monies owed, together with interest, handling charges, enforcement expenses, including attorney fees and nonpayment penalties. In any such collection action, the validity, amount or appropriateness of this Order or the penalty assessed hereunder is not subject to review.

52. Pursuant to 42 U.S.C. 7413(d)(5) and 31 U.S.C. 3717, Respondent shall pay the following amounts:

(A) *Interest.* Any unpaid portion of the assessed penalty shall bear interest at the rate established pursuant to 26 U.S.C. 6621(a)(2) from the date an executed copy of this Agreement is received by Respondent; provided, however, that no interest shall be payable on any portion of the assessed penalty that is paid within 30 days of the Agreement Date.

(B) *Attorney Fees, Collection Cost, Nonpayment Penalty.* Should Respondent fail to pay on a timely basis the amount of the assessed penalty, Respondent shall be required to pay, in addition to such penalty and interest, the United States' enforcement expenses, including but not limited to attorney fees and costs incurred by the United States for collection proceedings, and a quarterly nonpayment penalty for each quarter during which such failure to pay persists. Such nonpayment penalty shall be 10 percent of the aggregate amount of Respondent's outstanding penalties and nonpayment penalties accrued from the beginning of such quarter.

(C) *Payment.* Interest, attorney fees, collection costs, and nonpayment penalties related to Respondent's failure to timely pay the assessed penalty shall be made in accordance with subparagraphs (A) and (B) of this paragraph.

Monitoring Fund

53. Respondent has a shared responsibility for funding and implementing the national air emissions monitoring study described in paragraphs 53 through 63.

(A) Respondent individually shall be responsible for paying the lesser of: (a) $2,500 for each Farm listed in Attachment A to this Agreement; or (b) Respondent's pro rata share of the amount needed to fully fund the monitoring study (''Full Funding Level''), including any unfunded balance of the monitoring study, consistent with the provisions of paragraph 62. Respondent's pro rata share shall be based on the number of Farms listed in Attachment A divided by the total number of discrete Farms of the same species that share responsibility for funding the national monitoring study. The Full Funding Level is the amount of money actually needed to fully and adequately fund the monitoring study described in this Agreement. The Full Funding Level shall be initially estimated within 60 days of the Agreement date and shall be included as part of the proposed plan to conduct the monitoring described in paragraph 55. The estimated Full Funding Level shall be used to determine the pro rata share of the monitoring fund payment for which Respondent is initially responsible. Any shortfalls that occur because the estimated Full Funding Level was less than the actual Full Funding Level shall be handled in accordance with this paragraph and paragraph 62.

(B) Respondent shall have no obligation to contribute money to the national monitoring study on behalf of a Farm listed in Attachment A if: (a) That Farm has been listed as a contract farm in another agreement that is identical to this agreement except for the respondent involved, and (b) the respondent to the other Agreement has agreed to be responsible for the payment of monies into the monitoring study for that Farm.

54. Respondent shall have met its shared responsibility for funding and implementing the national air emissions monitoring study, including any individual payments by Respondent under paragraph 53 or 62 if, and only if: (a) A nonprofit entity is established for the purposes set forth below; (b) the monitoring fund obligations to the nonprofit entity are fully satisfied; (c) the nonprofit entity enters into a contract with an Independent Monitoring Contractor (the ''IMC'') that obligates the IMC to fulfill the requirements set forth in paragraphs 55 through 59 and 62 of this Agreement; and, (d) Respondent grants access to Farms listed in Attachment A in accordance with paragraphs 60 and 61. The purposes of the nonprofit entity shall include: collecting and holding Respondent's contributions to the national air emissions monitoring study, purchasing and holding title to research equipment, contracting with an IMC to conduct the monitoring study, and other responsibilities.

55. The contract identified in paragraph 54 shall require the IMC to submit to EPA, within 60 days of the Agreement date, a detailed plan to conduct the nationwide monitoring study set forth in Attachment B. The proposed plan shall:

(A) Identify the IMC and its qualifications, including the qualifications of any subcontracted science advisors, for implementing the national air emissions monitoring study;

(B) Be consistent with, expand the explanation of, and include all of the elements of the monitoring study outline set forth in Attachment B to this Agreement, including the requirements that: (1) All monitoring be completed within 2 years of EPA's approval of the monitoring study; (2) a comprehensive quality assurance program be implemented as part of the study; and (3) the emissions to be monitored will be Particulate Matter (TSP, PM10, and PM2.5), Hydrogen Sulfide (H_2S), Ammonia (NH_3), and Volatile Organic Compounds (VOCs);

(C) Identify the Farms to be monitored and the justification for including those Farms based on the specifications for the monitoring set forth in Attachment B; and,

(D) Require the IMC to submit detailed quarterly reports to EPA and to the entity described in paragraph 54. Those reports shall discuss the IMC's progress in implementing the approved monitoring plan, including what it did during the previous 3 months and what it intends to do during the next three months. The IMC shall submit quarterly reports starting with the end of the first calendar quarter (*i.e.,* March 31, June 30, September 30 or December 31) after the proposed monitoring plan is approved by EPA, unless the plan is approved by EPA with less than 30 days left in the current

[4] Ibid.

calendar quarter. If that occurs, the IMC shall submit the first quarterly report at the end of the next calendar quarter. The quarterly reports shall continue through the end of the calendar quarter during which the national monitoring study is completed.

56. EPA will review and approve or disapprove the proposed plan within 30 days of receiving it from the IMC. If the proposed plan is disapproved, EPA will specifically state why it is being disapproved and what changes need to be made. The IMC shall then have 30 days from the date EPA disapproves the proposed plan to modify it and to submit the modified plan to EPA for review and approval. If the IMC does not submit a plan that is ultimately approved by EPA, the releases and covenants not to sue set forth in paragraphs 26 and 35 of this Agreement shall be null and void.

57. Once the plan is approved, the contract between the nonprofit entity identified in paragraph 54 and the IMC shall require the IMC to fully implement the approved plan in accordance with the approved schedule. Failure of the IMC to implement the approved plan in accordance with the approved schedule, unless specifically excused by EPA in writing, shall nullify the releases and covenants not to sue set forth in paragraphs 26 and 35 of the Agreement. The estimated Full Funding Level monies shall be transferred to the nonprofit entity described in paragraph 54 within 60 days of EPA's approval of the monitoring plan.

58. The contract identified in paragraph 54 shall require the IMC to schedule periodic meetings (either by phone or in person) with EPA, and additional meetings upon request by EPA or the IMC, to discuss progress in implementing the approved plan. The IMC shall be required to promptly inform EPA of any problems in implementing the approved plan that have occurred or are anticipated to occur or of any adjustments that may be needed. No changes may be made to the approved plan without the written consent of EPA.

59. All emissions data generated and all analyses of the data made by the IMC during the nationwide monitoring study shall be provided to EPA as soon as possible in a form and through means acceptable to EPA. The parties agree that all emissions data will be fully available to the public, and that Respondent waives any right to claim any privilege with respect to such data.

60. Respondent agrees to make the Farms listed in Attachment A available for emissions monitoring under the national air emissions monitoring study if the Farm is chosen as a monitoring site under the approved plan. As stated in paragraph 29, if the Farm is owned by a Contract Grower, this requirement does not apply. However, a Contract Grower who enters into its own agreement with EPA (thus becoming a respondent in its own agreement) is subject to this requirement.

61. Respondent also agrees to give EPA or its representative access to those Farms for the purpose of verifying their suitability for monitoring or to observe monitoring conducted under the approved nationwide monitoring plan. EPA agrees that prior to entering a Farm, it will comply with proper biosecurity measures as are normal and customary. Nothing in this Agreement is intended in any way to limit EPA's inspection, monitoring, and information collection authorities under the Clean Air Act, CERCLA or EPCRA.

62. If, prior to completion of the national air emissions monitoring study, it appears that there will be insufficient funds to complete the study, the IMC shall notify EPA of this problem within 30 days of making this determination. The notice shall contain a detailed explanation of why there are insufficient funds, account for all money spent, and identify how much more money is needed to complete the monitoring study. If Respondent is not required under paragraph 53 to contribute or secure the contribution of additional money to the national monitoring study that will be sufficient to complete the monitoring study, the IMC or the nonprofit entity described in paragraph 54 shall make all reasonable efforts to find additional funding to complete the monitoring study. The IMC or the nonprofit entity described in paragraph 54 shall advise EPA of the efforts to locate additional funding and shall not commit to the use of additional funding sources without the prior approval of EPA. If, despite the best efforts of Respondent or its representative, the IMC, or the nonprofit entity described in paragraph 54, the national monitoring study cannot be completed due to lack of funding, then the releases and covenants not to sue set forth in paragraphs 26 and 35 of this Agreement will no longer be in effect. For Farms with animal types for which sufficient funds were provided to fully and adequately fund their portion of the national monitoring study, EPA shall make reasonable efforts to avoid terminating the releases and covenants not to sue set forth in paragraphs 26 and 35.

63. If, after completion of the national monitoring study, there is unspent money in the national monitoring fund, the IMC shall notify EPA within 90 days of completion of the monitoring study. The notice shall contain a detailed explanation of why there are unspent funds, including an accounting of all money spent to implement the national monitoring study and how much is left unspent. The notice shall also include a proposed plan for distribution of the leftover money.

64. All certifications required by this Agreement shall be submitted to: Special Litigation and Projects Division (2248A), Attn: AFO/CAFO certifications, Office of Regulatory Enforcement, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

65. Except for a Farm for which Respondent, or the Contract Grower, is able to certify under paragraph 27(B), this document constitutes an ''enforcement response'' as that term is used in the Clean Air Act Penalty Policy and an ''enforcement action'' as that term is used in the EPCRA/CERCLA Penalty Policy.

66. Each party shall bear its own costs, fees, and disbursements in this action, except where explicitly stated as otherwise in this Agreement.

67. The provisions of this Agreement shall be binding on Respondent, its officers, directors, employees, agents, successors and assigns.

68. This Agreement is not binding and without legal effect unless and until approved by the Environmental Appeals Board.

It is so ordered.

Dated this_____ day of _____, 2005.

_____

Environmental Appeals Judge
Environmental Appeals Board
U.S. Environmental Protection Agency

Attachment A to the Consent Agreement

This Attachment identifies and describes the Farms and Emission Units covered by this Agreement. This Agreement has no effect on any Farm or Emission Unit not specifically listed on this Attachment. The terms used in this Attachment shall have the meaning given to those terms in the Agreement.

The attached Farm Information Sheets and Emission Unit Information Sheets provide information about each Farm and Emission Unit(s) to be covered by this Agreement. A separate form for each Farm and each Emission Unit covered by the Agreement is attached below and as such is an integral part of this Attachment. By identifying a Farm for coverage under the Agreement, Respondent is asserting that the Farm meets the definition of a Farm in the Agreement and contains at least one Emission Unit as defined in the Agreement. Also by identifying an Emission Unit at a Farm for coverage under the Agreement, Respondent is asserting that the Emission Unit meets the definition of an Emission Unit in the Agreement. Unless Respondent identifies a Contract Grower for a Farm, Respondent is also asserting it owns, operates or otherwise controls the Farm.

I certify under penalty of law that the information contained in this submittal to EPA is accurate, true, and complete. I understand that there are significant civil and criminal penalties for making false or misleading statements to the United States Government.

[Signature] _____

[Name] [Title] [Date]
[Participating Company]
[Participating Company's Address]

Farm Information Sheet (Example) (Fill Out One Sheet for Each Farm)

Name of Farm: _____

Is the Farm owned and operated by a Contract Grower or is otherwise a contract farm?

_____yes _____no

Name of Contract Grower (if applicable): ____

Location: _____

(street address, city, county, state)

Animal Type (check all that apply):

_____Poultry (layers)
_____Poultry (broilers)
_____Poultry (turkeys)
_____Dairy Cattle (heifers or milking cattle)
_____Swine (nursery, sow or finisher)
_____Other (please identify)

For all Farms that Respondent owns and/or operates, provide a Farm sketch/diagram that numbers or otherwise identifies all Emission Units listed on this Farm Information Sheet.

Emission Unit Information Sheet (Example) (Fill Out One Sheet for Each Emission Unit)

Name of Farm where Emission Unit is located: _____
Unit name and/or number: _____
Date placed in service: _____
Design capacity (No. of animals or No. of gallons): _____

If the Emission Unit is a manure storage and treatment system in use at the Farm, check all that apply:

_____pull plug/flush/in-ground manure storage basin (if lagoon, specify type)
_____deep pit/in-ground manure storage basin (if lagoon specify type)
_____shallow pit/open manure storage
_____shallow pit/closed manure storage
_____deep pit/open manure storage
_____deep pit/closed manure storage
_____manure belt/closed manure storage
_____manure belt/open manure storage
_____flush/open manure storage
_____flush/closed manure storage
_____scrape/open manure storage
_____scrape/closed manure storage
_____other (briefly describe)

If the Emission Unit is a building, enclosure, or structure that permanently or temporarily houses Agricultural Livestock, check all that apply with respect to the ventilation type:

_____natural
_____mechanical
_____other (please describe)

Emission Control Technology (please list type and briefly describe if applicable):

Attachment B—National Air Emissions Monitoring Study Protocol; Overview & Summary

Executive Summary

This document provides an overview and summary of a monitoring study protocol for collecting air emissions data from the egg, broiler chicken, turkey, dairy and swine industries. This protocol was developed through a collaborative effort of industry experts, university scientists, government scientists, and other stakeholders knowledgeable in the field. Although the effort was facilitated by the U.S. Environmental Protection Agency (EPA) and the U.S. Department of Agriculture (USDA), this product represents the opinions of the scientists, government experts, and stakeholders involved. In addition, there was extensive internal review and input by representatives from U.S. EPA's Office of Enforcement and Compliance Assurance, Office of Air and Radiation, and Office of Research and Development.

This protocol is designed to provide a framework for development of a comprehensive field sampling plan for collecting quality-assured air emission data from representative livestock and poultry farms in the U.S. As recommended in the National Academy of Sciences (NAS) 2003 report,[5] and paraphrased here, * * * EPA and USDA should for the short term, initiate and conduct a coordinated research program designed to produce a scientifically sound basis for measuring and estimating air emissions from AFOs. Specific recommendations being addressed with this protocol are related to direct measurements at sample farms; utilizing information on the relationships between air emissions and animal types, nutrient outputs, manure handling practices, animal numbers, climate, and other factors, conducting these studies to evaluate the extent to which ambient atmospheric concentrations of the various pollutants of interest are consistent with estimated farm emissions; and using scientifically sound and practical protocols for measuring pollutant emission rates. The research program will involve additional recommendations from the NAS, which entails developing a process-based model that considers the entire animal production process. The data collected in the monitoring study will lay the groundwork for developing these more process-related emission estimates. However, as with any large and complex effort, this work must be conducted over a period of years.

In the development of this protocol, several alternate techniques were considered. The Science Advisor, in designing the monitoring study, may choose to use an alternate technique that is deemed most appropriate for a particular study unit. (A listing of alternate techniques can be found later in this protocol.) Thus, this protocol does not exclude use or consideration of any measurement methods or technologies that have been demonstrated to be scientifically sound and/or widely accepted for application to collecting air emissions data from the relevant farm sectors. However, the use of alternate techniques is dependent upon EPA approval of a comprehensive study design and budget.

The benchmark data collected and subsequent analyses and interpretation will allow EPA and livestock and poultry producers to reasonably determine which farms are subject to the regulatory provisions of the Clean Air Act and reporting requirements of CERCLA and EPCRA. Following sound scientific principles and using accepted instrumentation and methods, the monitoring study will collect new data from a number of farms across the country and will also evaluate existing emissions data from other selected studies that may meet EPA quality assurance criteria. Together, they will form a database to which additional studies of air emissions and the effectiveness control technologies can be compared.

EPA will review and approve (as described in the Consent Agreement) a comprehensive study design and plan, including a Quality Assurance Project Plan (QAPP), and a budget for all aspects of the monitoring study. The QAPP will outline appropriate procedures to ensure acceptable accuracy, precision, representativeness, and comparability of the data; and will specify the use of properly maintained and reliable instrumentation, sampling schedules, ready supply of spare parts, approved analytical methodologies and standard operation procedures, description of routine quality control (QC) checks, external validation of data, well-trained analysts, field blanks, electrical backups, audits, documentation and format of data submission, and other procedural requirements. Chain of custody documentation will be used for samples of particulate matter. Wetted materials for gas sampling will be Teflon®, stainless steel or glass. All sampling flow rates will be calibrated.

Monitoring Study Responsibilities

Several groups of management and technical staff will be responsible for success of the study. Their responsibilities are discussed here and graphically illustrated in the following flow chart.

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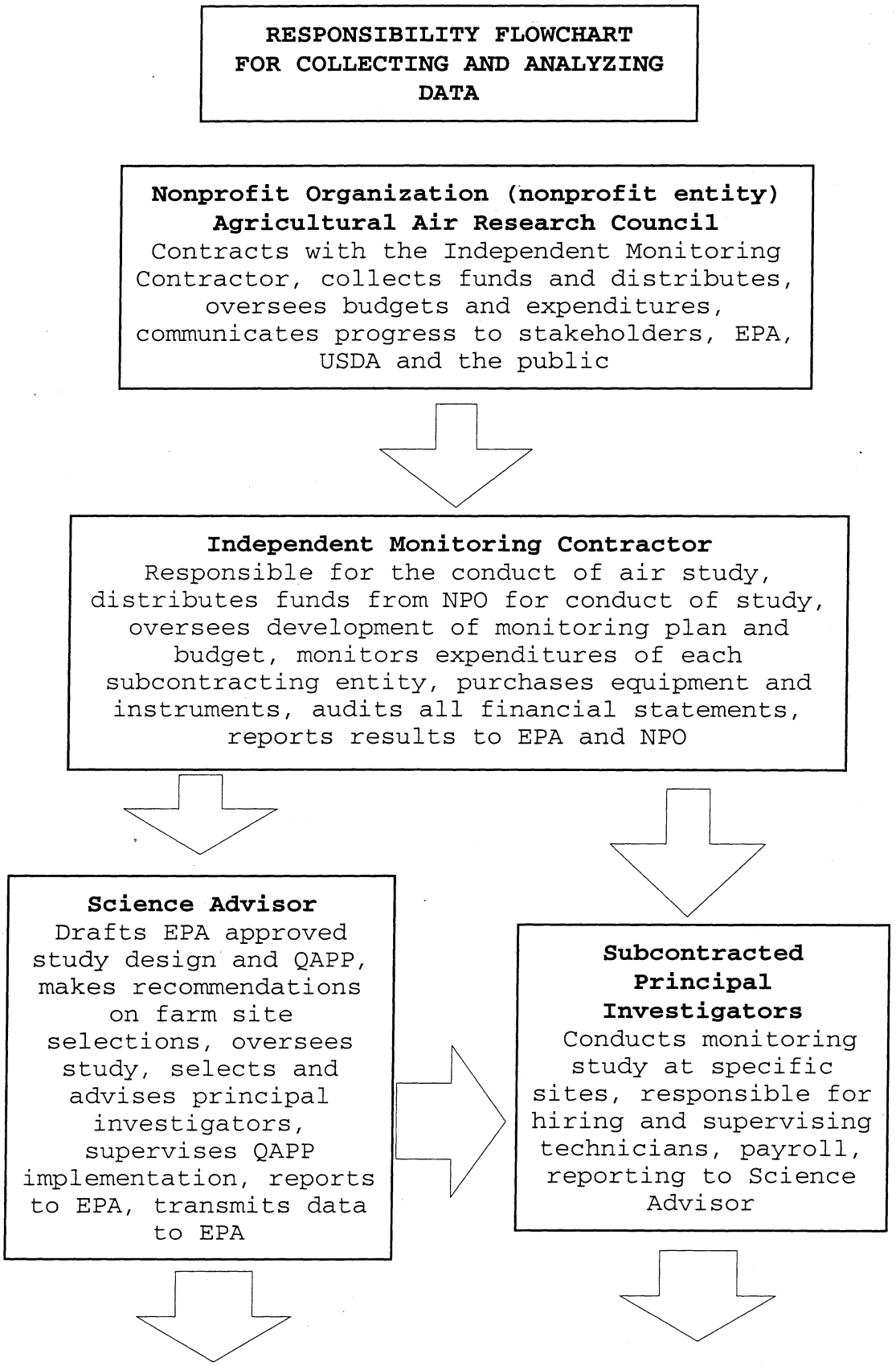
[5] NAS, ''Air Emissions From Animal Feeding Operations: Current Knowledge, Future Needs,'' National Research Council, 2003.



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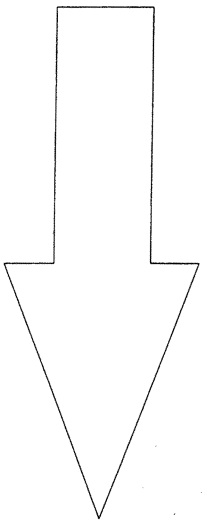
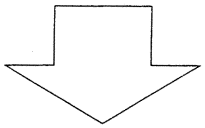
The Nonprofit Organization (NPO)

Industry has established a nonprofit entity (Agricultural Air Research Council, or AARC, and referred to as the nonprofit organization or NPO in the Consent Agreement) to handle the funds contributed by individual participating organizations. The NPO will operate like a company with voting members who elect a board of directors. The board of directors will meet regularly, receive reports on the progress of the study, approve the budget, and review audits of expenditures.





Scientists, Technicians, Lab Staff
Collects data and transmits to Science Advisor and staff for processing and transmitting/reporting to EPA

U.S. Environmental Protection Agency
Monitors progress, interprets data, and develops emissions estimating methodology and guidance for producer compliance once monitoring study is complete

The NPO will be responsible for:

- Selecting the Science Advisor and Independent Monitoring Contractor (IMC);
- Holding and disbursing to the Independent Monitoring Contractor the funds necessary to complete the study according to its approved schedule, protocol and budget; and
- Communicating progress of the study to livestock and poultry producers, the media and other interested parties.

Selection of the IMC and Science Advisor

The NPO will choose an IMC and a Science Advisor based on qualifications, experience and familiarity with all components of the subject matter. The IMC and the Science Advisor must be well staffed with accountants and contract managers who are well versed in fiduciary management. EPA will review the NPO's selection. If EPA believes the qualification criteria have not been met, the NPO will have to select an alternate candidate.

Role of Science Advisor

To be technically qualified, the Science Advisor must have an extensive background in animal agriculture, including expertise in air emissions from animal feeding operations, data processing, and engineering processes. The Science Advisor will be responsible for drafting the comprehensive study design and QAPP and will submit these to EPA for approval. He/She will also coordinate with the IMC to oversee the work of the subcontracted Principal Investigators on the study. The Science Advisor will be employed by the IMC.

Roles of the Independent Monitoring Contractor (IMC)

Technical & Administrative Oversight

The IMC will be contractually responsible for the conduct of the study, and will:

- Be a separate organization from the industry that funds the study;
- Oversee the performance of the Science Advisor;
- Work closely with the Science Advisor in purchasing and assembling equipment and developing contracts for principal investigators; and
- Directly administer all subcontracts, supervise budgets and monitor expenditures, report progress and audit all financial statements.

Reporting on Study Progress

The IMC will:

- Report to EPA and the NPO on financial status of the study;
- Report to EPA and the NPO on the study progress; and
- Create a Web site specifically for the monitoring study and regularly post updates so that the public can follow the study's progress.

Role of the Principal Investigators

Principal investigators will carry out the monitoring at each site. They will report to the Science Advisor and, in turn, to the IMC.

Site Selection

The NPO will be comprised of representatives from the various animal husbandry industries who are knowledgeable of actual farming operations as related to the farm sites proposed for monitoring. They will compile a list of candidate farms from those operations participating in the Consent Agreement and submit the list to the Science

Advisor. The Science Advisor will then facilitate a process to select farms for monitoring based on a set of pertinent factors (*e.g.,* differing regional and climatic conditions, number of animals, different manure handling practices, and types of ventilation (natural vs. forced air)). In addition, logistical issues will be considered to reduce problems associated with egress and convenience; such as, is there a principal investigator located within 3 hours of the site, are there housing accommodations available within 1 hour of the site, is there internet access at the farm, and is 220 V power available? After comprehensive site plans are approved by EPA, the Science Advisor will supervise the set up of equipment at those farms selected, advise the cooperating farmers of their responsibilities, verify utilities, arrange for high speed computer data transmission service, initiate the study and implement the quality assurance project plan. As the study progresses, some investigators may want to alter their approved plans due to interim findings (such as, collecting redundant data or discovering a need to change equipment location). Any changes must be sent to the Science Advisor, with EPA notification and concurrence, for approval or disapproval.

Monitoring Plans by Species

On the following pages, the swine, egg layer, meat bird (broiler and turkey) and dairy air emissions study components are summarized. These were developed over several months by a peer review team of scientists, industry and other stakeholders. While the study scope varies from species to species in line with their data needs, available funding, and industry characteristics, the technologies and measurement methodologies selected by the team are consistent across species.

1. Air Emission Monitoring Plan for Swine

Introduction: Swine production phases include sows (breeding, gestation, and farrowing), nursery pigs, and finishing pigs. The buildings are either naturally ventilated or mechanically ventilated but many buildings have a combination of the two ventilation types. Manure treatment and/or storage generally consists of either basins (earthen, clay or synthetic lined earthen, concrete, glass lined steel) that store manure collected from the barn, or clay/synthetic lined earthen anaerobic treatment lagoons that treat and store manure. Manure collection systems with external manure storage/treatment are generally scrape, flush or pull-plug.

Overall, the U.S. hog inventory is located in three general regions. The five top Midwest swine states, IA, MN, IL, MO, and IN represent about 54 percent of the total inventory in the U.S. In the Southeast, NC, AR, VA, KY, and MS represent about 19 percent, and in the West, OK, NE, KS, SD, and TX represent about 15 percent.

Farm Selection for New Measurements: Swine production farm types are identified by region, production phase, ventilation type, and manure storage/treatment in Table 1. Farms selected will be characterized by criteria such as facility age, size, design and management, local topography and meteorology, swine diet and genetics. The farm should be reasonably isolated from other potential air pollution sources. Producers/farm managers must be willing to attend a training session, make changes as needed to accommodate the project, and maintain and share certain production records to facilitate data analysis and interpretation. Farms to be monitored will be further characterized using farm management data and samples collected for analysis of water, feed and manure. Farms will provide vital management information regarding ventilation controls/management and scheduling of barn activities such as manure management, animal load out, animal treatment, or feeding. At a minimum, water, feed and manure samples will be collected and analyzed for total nitrogen and total sulfur content.

TABLE 1.—FARM SITES IDENTIFIED AND PROPOSED FOR MONITORING

[G = gestation, F = farrowing, FI = finishing, MV = mechanically ventilated]

Production phase	Ventilation type	Number of units	Location of measurements	
			Barns or rooms	Storage/lagoon treatment
SOUTHEAST:				
Sow	MV	4	G & F.	
		Single or double		Lagoon.
Finisher	MV	4	FI.	
		Single or double		Lagoon.
MIDWEST:				
Sow	MV	4	G & F.	
		2		Deep pit.
Finisher	MV	4	FI.	
		1		Basin.
WEST:				
Sow	MV	4	G & F.	
		Single or double		Lagoon.

Methods: The mass balance technique will be used for measuring emissions from mechanically ventilated barns. Micrometeorological techniques will be used for manure storage/treatment systems located outside the barn. Table 2 summarizes the methods and emissions that will be measured from barns and manure storage/treatment systems. A maximum of five farms will be selected for barn measurements and six farms for manure storage/treatment system measurements. If possible, at least one farm will have measurements conducted at both the barns and the manure storage/treatment system.

TABLE 2.—SUMMARY OF EMISSIONS MEASUREMENTS AND METHODOLOGIES

Source units	Methodology	Targeted emissions	Number of farms	Number of units to monitor
Barn	Mass balance	NH_3, PM10, PM2.5 VOC, H_2S, TSP, CO_2.	[1] 5	20
Manure storage/treatment system	Micromet and Water 9	VOC, H_2S, NH_3	[1] 6	6

[1] See Table 1.

Barn Measurements: An on-farm instrumentation shelter (OFIS) will house the equipment for measuring pollutant concentrations at representative air inlets and outlets (primarily by air extraction for gases), barn airflows, operational processes and environmental variables. Sampling will be conducted for 24 months with data logged every 60 seconds. Data will be retrieved with network-connected PCs, formatted, validated, and delivered to EPA for subsequent calculations of emission factors. A multipoint air sampling system in the shelter will draw air sequentially from representative locations (including outdoor air) at the barns and deliver selected streams to a manifold from which on-line gas monitors draw their subsamples. Concentration of constituents of interest will be measured using the following methods:

- Ammonia will be measured using chemiluminescence or photoacoustic ingrared.
- Hydrogen sulfide will be measured with pulsed fluorescence.
- Carbon dioxide will be measured using photoacoustic infrared or equivalent.
- TSP will be measured using an isokinetic multipoint gravimetric method.
- PM2.5 will be measured gravimetrically with a federal reference method for PM2.5 at least for 1 month per site. It will be shared among sites.
- PM10 will be measured in real time using the tapered element oscillating microbalance (TEOM) at representative exhaust locations in the barn and ambient air.
- An initial characterization study of barn volatile organic compounds (VOC) will be conducted on 1 day during the first month at the first site (site 1). While total nonmethane hydrocarbons (NMHC) are continuously monitored using a dual-channel FID analyzer (Method 25A) along with building airflow rate, VOC will be sampled with replication at two barns using Silcosteel canisters, and all-glass impingers (EPA Method 26A). Each sample will be evaluated using concurrent gas chromatography-mass spectrometry (GC–MS) and GC/FID for TO 15 and other FID-responding compounds. VOC mass will be calculated as the sum of individual analytes. The 20 analytes making the greatest contribution to total mass will be identified during the initial characterization study. A sampling method that captures a significant fraction of the VOC mass will be chosen for the remainder of the study.
- The Method 26A sampling train is suitable for collecting samples for analysis of formaldehyde and acetaldehyde using NCASI 94.02, requiring only the addition of spectrophotometry for the detection of formaldehyde. These compounds will be measured during the initial characterization study and, if not found, will not be analyzed during subsequent measurements.
- Total VOC mass may be estimated (scaled) by multiplying the total carbon as determined by Method 25A by the molecular weight/carbon weight ratio derived from GC–MS or GC–FID speciation. This should account for the VOC that are not identified by GC methods due either to sampling bias or the analytical procedures used, although some error is anticipated due to the imprecise response of the Method 25A FID to oxygenated compounds. Acceptance of a scaling factor will depend on whether the Method 25A analyzer response is reasonable based on the manufacturer's stated response factors, bench-scale verification, or judgmental estimation of the mass of unaccounted for VOC.
- By the middle of the second month, the Science Advisor will report results of the initial VOC characterization to EPA with recommendations on the appropriateness and validity of the selected methodologies.
- Quarterly VOC samples using the selected VOC sampling method will occur at all sites, along with continuous Method 25A monitoring at site 1 throughout the study.
- Method 25A measurements will be corrected from an ''as carbon'' basis to a total VOC mass basis by multiplying them by the mean molecular weight per carbon atom established by GC–MS evaluations during applicable intervals of time.

Mechanically ventilated barn airflows will be estimated by continuously measuring fan operational status and building static pressure to calculate fan airflow from field-tested fan performance curves and by directly measuring selected fan airflows using anemometers. Specific processes that directly or indirectly influence barn emissions will be measured including pig activity, manure management/handling, feeding, and lighting. Environmental parameters including heating and cooling operation, floor and manure temperatures, inside and outside air temperatures and humidity, wind speed and direction, and solar radiation will be continuously monitored. Feed and water consumption, manure production and removal, swine mortalities, and animal production will also be monitored. As noted above, samples of feed, water, and manure will be collected and analyzed for total nitrogen and total sulfur. These data will enable the development and validation of process-based emission models in the future.

Table 1 identifies those types of farms where barn measurements will be taken to provide the needed data to complete the objectives of the monitoring study. A total of five farms will be selected as measurement sites. Two farms in the Southeast representing the sow and finishing phases of production with lagoon manure treatment will be selected. Two farms in the Midwest representing a finishing farm using an in-ground manure storage basin and a sow farm with a deep pit gestation barn will be selected. Finally, one farm in the West representing a sow farm with lagoon treatment will be selected. On each of the farms, four barns will have measurements taken simultaneously. Where applicable, the sow farms will have two farrowing rooms and two gestation barn emissions measured and on finishing farms, up to four barns will have emission measurements.

Lagoons: Micrometeorological techniques will be used to estimate emissions of NH_3, H_2S, and a limited number of VOC from lagoons. Fundamentally, this approach will use optical remote sensing (ORS) downwind and upwind of the lagoon coupled with 3-dimensional (3D) wind velocity measurements at heights of 2 and 12 meters (m). The concentrations of NH_3 and the various hydrocarbons will be made using open path Fourier transform infrared spectroscopy (FTIR). Measurements of H_2S (and NH_3) will be made using collocated open path UV differential optical absorption spectroscopy (UV–DOAS) systems. A team of two persons with two scanning FTIR systems, two single-path UV–DOAS systems, and two 3D sonics with supplementary meteorological instruments will move sequentially from farm to farm.

Each of two ORS systems will be oriented parallel to the storage side and approximately 10m from the lagoon edge. Each monostatic FTIR system will scan five retroreflectors; three mounted at 1m height equally dividing the length of the open path along the lagoon side and two mounted on a tower at heights of 6 and 12m located at the corners down the adjacent sides of the lagoon, resulting in scan lines down each of the four sides of the lagoon. Two bistatic single-path UV–DOAS systems will be located at a nominal 2m height within 2m laterally of the FTIR scan lines on the two sides of the lagoon oriented most closely with prevailing winds.

Emissions will be determined from the difference in upwind and downwind concentration measurements using two different methods—a Eulerian Gaussian approach and a Lagrangian Stochastic approach. The Lagrangian approach is based on an inverse dispersion analysis using a backward Lagrangian stochastic method (bLS). This approach will be used to estimate NH_3 emissions from concentration measurements made using the FTIR and UV–DOAS systems and the H_2S emissions from concentration measurements made using the UV–DOAS systems. The emission rate for NH_3 will be the ensemble average of the estimated emissions for each of the five FTIR scans with a corresponding error of the emission estimate. The Eulerian approach is based on a computed tomography (CT) method using Eulerian Gaussian statistics and a fitted wind profile from the two 3D sonics. Measurements of air and lagoon temperatures, wind speed and direction, humidity, atmospheric pressure, and solar radiation will also be conducted.

The bLS and CT emission estimates will be quality assured using tests of instrument response, wind direction and wind speed, stability, turbulence intensity, differences between the lagoon and the surrounding surface temperatures, differences in the mean and turbulent wind components with height, and the temporal variability in emissions. Emission estimates using the CT method will be qualified by the measured fraction of the estimated plume. To estimate VOC emissions from lagoons, samples of the lagoon liquid will be collected and analyzed for VOC, and the EPA model WATER9 will be used to estimate emissions based on measured VOC concentrations, pH, and other factors.

Quality Assurance/Quality Control (QA/QC): QA/QC processes will be established before data collection commences. The QA/QC procedures will be based on EPA guidelines and will include the use of properly maintained and reliable instrumentation, ready supply of spare parts,

approved analytical methodologies and standard operating procedures, external validation of data, well-trained analysts, field blanks, electrical backups, audits, and documentation. Calibration and maintenance logs will be maintained for each instrument.

2. Air Emission Monitoring Plan for Laying Hens

Introduction: Most U.S. layer housing types and manure management schemes fall under one of four categories: (1) High-rise houses with manure stored in the lower level and removed every 1 to 2 years, (2) belt houses with quasi-continuous manure transfer to an external storage/treatment facility, (3) shallow-pit houses with regular manure removal by scraping and temporary storage in uncovered piles, and (4) liquid-manure houses with manure flushed daily into a lagoon. The locations for four sites with specific housing types were recommended for the monitoring study with consideration of these four housing categories along with the potential impact of climatic differences and the geographical density of egg production (Table 3). Final site selections will also depend on site-specific factors including representativeness of facility age, size, design and management, and flock diet and genetics. The facility should be reasonably isolated from other air pollution sources and have potential for testing mitigation strategies. Producers/farm managers must be willing to attend a training session, make changes as needed to accommodate the project, and maintain and share certain production records to facilitate data analysis and interpretation.

TABLE 3.—RECOMMENDED TYPES AND LOCATIONS OF LAYING HEN HOUSES TO BE MONITORED IN THE MONITORING STUDY

Region/location	House 1—type	House 2—type
Midwest	High-rise with inside manure storage (2)	Manure belt (2) with manure storage.
West	Shallow pit with open manure storage	Manure belt with open manure storage.
South	High-rise with inside manure storage	High-rise with inside manure storage.
East	High-rise with inside manure storage	Flushing with anaerobic treatment lagoon

Methods: An on-farm instrument shelter (OFIS) will house the equipment for monitoring pollutant concentrations at representative air inlets and outlets (primarily by air extraction for gases), barn and manure shed airflows, and operational processes and environmental variables. Sampling will be conducted for 24 months with data logged every 60 seconds. Data will be retrieved with network-connected PCs, formatted, validated, and delivered to EPA for subsequent calculations of emission factors. A multipoint air sampling system in the OFIS will draw air sequentially from representative locations (including outdoor air) at the hen houses and manure sheds and deliver selected streams to a manifold from which gas analyzers draw their samples.

Selected pollutants will be evaluated as follows:

- Ammonia will be measured using chemiluminescence or photoacoustic infrared.
- Hydrogen sulfide will be measured with pulsed fluorescence.
- Carbon dioxide will be measured using photoacoustic infrared or equivalent.
- TSP will be measured using an isokinetic multipoint gravimetric method.
- PM2.5 will be measured gravimetrically with a federal reference method for PM2.5 at least for 1 month per site. It will be shared among sites.
- PM10 will be measured in real time using the tapered element oscillating microbalance (TEOM) at representative exhaust locations in the barn, ambient air, and at manure storage exhaust (if manure is disturbed).
- An initial characterization study of barn VOC will be conducted on 1 day during the first month at the first site (site 1). While total nonmethane hydrocarbons (NMHC) are continuously monitored using a dual-channel FID analyzer (Method 25A) along with building airflow rate, VOC will be sampled with replication at two barns using Silcosteel canisters, and all-glass impingers (EPA Method 26A). Each sample will be evaluated using concurrent gas chromatography—mass spectrometry (GC–MS) and GC/FID for TO 15 and other FID-responding compounds. VOC mass will be calculated as the sum of individual analytes. The 20 analytes making the greatest contribution to total mass will be identified during the initial characterization study. A sampling method that captures a significant fraction of the VOC mass will be chosen for the remainder of the study.
- The Method 26A sampling train is suitable for collecting samples for analysis of formaldehyde and acetaldehyde using NCASI 94.02, requiring only the addition of spectrophotometry for the detection of formaldehyde. These compounds will be measured during the initial characterization study and, if not found, will not be analyzed during subsequent measurements.
- Total VOC mass may be estimated (scaled) by multiplying the total carbon as determined by Method 25A by the molecular weight/carbon weight ratio derived from GC–MS or GC–FID speciation. This should account for the VOC that are not identified by GC methods due either to sampling bias or the analytical procedures used, although some error is anticipated due to the imprecise response of the Method 25A FID to oxygenated compounds. Acceptance of a scaling factor will depend on whether the Method 25A analyzer response is reasonable based on the manufacturer's stated response factors, bench-scale verification, or judgmental estimation of unaccounted for VOC mass.
- By the middle of the second month, the Science Advisor will report results of the initial VOC characterization to EPA with recommendations on the appropriateness and validity of the selected methodologies.
- Quarterly VOC samples using the selected VOC sampling method will occur at all sites, along with continuous Method 25A monitoring at site 1 throughout the study.
- Method 25A measurements will be corrected from an ''as carbon'' basis to a total VOC mass basis by multiplying them by the mean molecular weight per carbon atom established by GC–MS evaluations during applicable intervals of time.

Mechanically ventilated barn airflows will be estimated by continuously measuring fan operational status and building static pressure to calculate fan airflow from field-tested fan performance curves and by directly measuring selected fan airflows using anemometers. Specific processes that directly or indirectly influence air emissions will be measured including hen activity, feeding, and lighting. Measured environmental parameters include cooling system status, manure temperatures, inside and outside air temperatures and humidities, wind speed and direction, and solar radiation. Feed and water consumption, egg production, manure production and removal, and bird mortalities will also be monitored with producer assistance. Samples of feed, eggs, water, and manure will be collected and analyzed for total nitrogen and total sulfur. These data will enable the development and validation of process-based emission models in the future.

Quality assurance/quality control (QA/QC): QA/QC processes will be established before data collection commences. The QA/QC procedures will be based on EPA guidelines and will include the use of properly maintained and reliable instrumentation, ready supply of spare parts, approved analytical methodologies and standard operating procedures, external validation of data, well-trained analysts, field blanks, electrical backups, audits, and documentation. Instrument calibration and maintenance logs will be maintained.

3. Air Emission Monitoring Plan for Meat Birds (Broiler Chickens and Turkeys)

Introduction: Meat birds include broilers and turkeys and are raised in confinement barns on dirt or concrete floors covered with litter. Broiler barns are typically mechanically ventilated and turkey barns are typically naturally ventilated. The locations for three sites with specific housing types were recommended for the monitoring study with consideration of the potential impact of climatic differences and the geographical density of poultry meat production (Table 4). The final site selections will depend on site-

specific emission generating factors including representativeness of facility age, size, design and management; and flock diet and genetics. The facility should be reasonably isolated from other air pollution sources and have potential for testing mitigation strategies. Producers/farm managers must be willing to attend a training session, make changes as needed to accommodate the project, and maintain and share certain production records to facilitate data analysis and interpretation.

TABLE 4.—RECOMMENDED TYPES AND LOCATIONS OF MEAT BIRD HOUSES TO BE MONITORED

Region	Type	Ventilation type	Manure handling
Midwest	Turkey	Mechanical	Litter on floor.
West Coast	Broiler	Mechanical	Litter on floor.
Southeast	Broiler	Mechanical	Litter on floor.

Methods: An on-farm instrument shelter (OFIS) will house the equipment for monitoring pollutant concentrations at representative air inlets and outlets (primarily by air extraction for gases), barn airflows, and operational processes and environmental variables. Sampling will be conducted for 24 months with data logged every 60 seconds. Data will be retrieved with network-connected PCs, formatted, validated, and delivered to EPA for subsequent calculations of emission factors. A multipoint air sampling system in the OFIS will draw air sequentially from representative locations (including outdoor air) at the barns and deliver selected streams to a manifold from which gas analyzers draw their subsamples. The pollutants targeted for measurement will be evaluated as follows:

- Ammonia will be measured using chemiluminescence or photoacoustic infrared.
- Hydrogen sulfide will be measured with pulsed fluorescence.
- Carbon dioxide will be measured using photoacoustic infrared or equivalent.
- TSP will be measured using an isokinetic multipoint gravimetric method.
- PM2.5 will be measured gravimetrically with a federal reference method for PM2.5 at least for 1 month per site. It will be shared among sites.
- PM10 will be measured in real time using the tapered element oscillating microbalance (TEOM) at representative exhaust locations in the barn, and ambient air.
- An initial characterization study of barn VOC will be conducted on 1 day during the first month at the first site (site 1). While total nonmethane hydrocarbons (NMHC) are continuously monitored using a dual-channel FID analyzer (Method 25A) along with building airflow rate, VOC will be sampled with replication at two barns using Silcosteel canisters, and all-glass impingers (EPA Method 26A). Each sample will be evaluated using concurrent gas chromatography—mass spectrometry (GC–MS) and GC/FID for TO 15 and other FID-responding compounds. VOC mass will be calculated as the sum of individual analytes. The 20 analytes making the greatest contribution to total mass will be identified during the initial characterization study. A sampling method that captures a significant fraction of the VOC mass will be chosen for the remainder of the study.
- The Method 26A sampling train is suitable for collecting samples for analysis of formaldehyde and acetaldehyde using NCASI 94.02, requiring only the addition of spectrophotometry for the detection of formaldehyde. These compounds will be measured during the initial characterization study and, if not found, will not be analyzed during subsequent measurements.
- Total VOC mass may be estimated (scaled) by multiplying the total carbon as determined by Method 25A by the molecular weight/carbon weight ratio derived from GC–MS or GC–FID speciation. This should account for the VOC that are not identified by GC methods due either to sampling bias or the analytical procedures used, although some error is anticipated due to the imprecise response of the Method 25A FID to oxygenated compounds. Acceptance of a scaling factor will depend on whether the Method 25A analyzer response is reasonable based on the manufacturer's stated response factors, bench-scale verification, or judgmental estimation of the mass of unaccounted for VOC.
- By the middle of the second month, the Science Advisor will report results of the initial VOC characterization to EPA with recommendations on the appropriateness and validity of the selected methodologies.
- Quarterly VOC samples using the selected VOC sampling method will occur at all sites, along with continuous Method 25A monitoring at site 1 throughout the study.
- Method 25A measurements will be corrected from an ''as carbon'' basis to a total VOC mass basis by multiplying them by the mean molecular weight per carbon atom established by GC–MS evaluations during applicable intervals of time.

Mechanically ventilated barn airflows will be estimated by continuously measuring fan operational status and building static pressure to calculate fan airflow from field-tested fan performance curves and by directly measuring selected fan airflows using anemometers. Specific processes that directly or indirectly influence barn emissions will be measured including bird activity, manure handling, feeding, and lighting. Measured environmental parameters include heating and cooling operation, floor and manure temperatures, inside and outside air temperatures and humidity, wind speed and direction, and solar radiation. Feed and water consumption, manure production and removal, bird mortalities and bird production will also be monitored with producer assistance. Samples of feed, water, and manure will be collected and analyzed for total nitrogen and total sulfur. These data will enable the development and validation of process-based emission models in the future.

Quality Assurance/Quality Control (QA/QC): QA/QC processes will be established before data collection commences. The QA/QC procedures will be based on EPA guidelines and will include the use of properly maintained and reliable instrumentation, ready supply of spare parts, approved analytical methodologies and standard operating procedures, external validation of data, well-trained analysts, field blanks, electrical backups, audits, and documentation. Instrument calibration and maintenance logs will be maintained.

Open Manure Piles: Micrometeorological techniques will be used to estimate emissions of NH_3, H_2S, and a limited number of VOC from open manure piles. Fundamentally, this approach will use optical remote sensing (ORS) downwind and upwind of the source coupled with 3-dimensional (3D) wind velocity measurements at heights of 2 and 12m. The concentrations of NH_3 and the various hydrocarbons will be made using open path Fourier transform infrared spectroscopy (FTIR). Measurements of H_2S (and NH_3) will be made using collocated open path UV differential optical absorption spectroscopy (UV–DOAS) systems. A team of two persons with two scanning FTIR systems, two single-path UV–DOAS systems, and two 3D sonics with supplementary meteorological instruments will move sequentially from farm to farm.

Each of two ORS systems will be oriented parallel to the storage side and approximately 10m from the storage edge. Each monostatic FTIR system will scan five retroreflectors; three mounted at 1m height equally dividing the length of the open path along the storage side and two mounted on a tower at heights of 6 and 12m located at the corners down the adjacent sides of the source, resulting in scan lines down each of the four sides of the storage. Two bistatic single-path UV–DOAS systems will be located at a nominal 2m height within 2m laterally of the FTIR scan lines on the two sides of the manure storage area oriented most closely with prevailing winds.

Emissions will be determined from the difference in upwind and downwind concentration measurements using two different methods—an Eulerian Gaussian approach and a Lagrangian Stochastic approach. The Lagrangian approach is based on an inverse dispersion analysis using a backward Lagrangian stochastic method (bLS). This approach will be used to estimate NH_3 emissions from concentration measurements made using the FTIR and UV–DOAS systems and the H_2S emissions from concentration measurements made using the UV–DOAS systems. The emission rate for NH_3 will be the ensemble average of the

estimated emissions for each of the five FTIR scans with a corresponding error of the emissions estimate. The Eulerian approach is based on a computed tomography (CT) method using Eulerian Gaussian statistics and a fitted wind profile from the two-3D sonics. Measurements of air and storage temperatures, wind speed and direction, humidity, atmospheric pressure, and solar radiation will also be conducted.

The bLS and CT emission estimates will be quality assured using tests of instrument response, wind direction and wind speed, stability, turbulence intensity, differences between the storage and the surrounding surface temperatures, differences in the mean and turbulent wind components with height, and the temporal variability in emissions. Emission estimates using the CT method will be qualified by the measured fraction of the estimated plume.

4. Air Emissions Monitoring Plan for Dairy

Introduction: Dairy operations are naturally ventilated buildings with different manure handling systems. Measurement of the emissions from these operations is to be conducted with a series of measurement systems that provide a concentration measurement along a path that would be representative of the emission plume from the building. In order to estimate the emissions rate, it is necessary to couple the concentration with a measurement of the wind flow through the building or facility.

Manure storage sites could be either liquid (lagoons or slurry store) or piles of solid materials. These sites represent a different source area for emissions than buildings and will have to be considered separately in the measurement scheme.

The protocols that are developed for these studies are based on the following assumptions.

- The buildings are naturally ventilated and require a measurement method that captures the entire plume leaving the building. Mechanically ventilated facilities are beginning to enter the industry.
- Manure storage is separate from the building and will have to be measured as a distinct entity as part of the farm emission factor.
- The primary emissions sources are the housing and feeding areas and manure storage.
- There is a large diversity among dairy operations across the U.S., and although there are similar characteristics in general structure, the difference in building design, management, and climate require measurements of facilities that represent these factors.
- Measurements will be conducted at facilities which represent a diversity of systems in three general areas: California and Southern U.S., Northeast U.S., and Upper Midwest.

Milk production facilities include cattle (dry cows, lactating cows, and replacement heifers) and calves. The partially open barns range from those with windows and flaps to fully open free stalls. The buildings are most typically naturally ventilated except for some mechanically ventilated free stall and tie stall houses. The naturally ventilated barns range from partially open barns with windows and flaps to fully open free stalls. External manure storages generally consist of either earthen basins that store undiluted manure collected from the barn, or anaerobic treatment lagoons that treat manure that is diluted by a factor of about 5:1. Manure collection systems generally are either scrape or flush. Four dairy sites that consider climate and types of ventilation, manure collection, and manure storage have been identified by the dairy industry for collecting the comprehensive air emission data required by the monitoring study (Table 5). Final site selections will also depend on site-specific factors including representativeness of facility age, size, design and management; and cow diet and genetics. The facility should be isolated from other potential air pollution sources and have potential for testing mitigation strategies. Producers should be willing to make changes and keep extra records to facilitate a quality study.

TABLE 5.—RECOMMENDED TYPES AND LOCATIONS OF DAIRY FACILITIES TO BE MONITORED IN THIS STUDY

Region	Site type	Ventilation **	Manure collection	Manure storage
Midwest	Free stall	Natural	Flush or scrape	Lagoon.
Northeast	Free stall	Natural	Scrape	Basin.
West	Open* free stall	Natural	Flush	Lagoon.
South	Open free stall	Natural	Scrape	Basin.

* Cattle are free to walk outside in open free stall barns.
** If warranted by current or future use, mechanically ventilated barns may be monitored.

Methods

Naturally Ventilated Buildings: To achieve the most representative measurements of the emissions of the gases, it is recommended that a FTIR system be used to quantify the concentration of NH_3, CO_2, and, at levels above 50 parts per billion (ppb), H_2S in various paths through the atmosphere. A variation of the horizontal gradient method utilizing multiple paths through the airflow from the building, called radial plume mapping, measures the concentrations. The FTIR method is selected because of the extreme turbulence adjacent to the building and the lack of a defined plume in this area of the facility. A scanning system rotates among the paths to provide a serial measurement of the paths utilizing horizontally and vertically located retro-reflectors. A computer calculates the concentration gradients in real time. FTIR measurements are coupled to two sonic anemometers positioned at two locations along the length of the building to provide the wind flow measurements needed to estimate the flux from the measured concentrations.

Particulate load would be sampled using a series of particle samplers located with a sampling height of 5m adjacent to one of the sonic anemometer towers. These units would be designed to collect 2.5μm, 10μm and TSP values.

VOC would be sampled at the same position as the particulate samples for the building emissions. VOC emissions from the manure storage would be sampled with a system located both upwind and downwind of the manure storage system. These units would be positioned at heights of 2 and 12m.

Mechanically Ventilated Buildings: Mechanically ventilated buildings have begun to be used in the dairy industry. If warranted by current or future use, a mechanically ventilated facility will be included in this project. An on-site instrument shelter (OSIS) will house the equipment for monitoring pollutant concentrations at representative air inlets and outlets (primarily by air extraction), barn airflows, and operational processes and environmental variables. Sampling will be conducted for 24 months with data logged every 60 seconds. Data will be retrieved with network-connected PCs, formatted, validated, and delivered to EPA as hourly averages for subsequent calculations of emission factors. A multipoint air sampling system in the OSIS will draw air sequentially from representative locations (including ambient) at the barns and deliver selected streams to a manifold from which on-line gas monitors draw their subsamples. The pollutants targeted for measurement will be evaluated as follows:

- Ammonia will be measured using chemiluminescence or photoacoustic infrared.
- Hydrogen sulfide will be measured with pulsed fluorescence.
- Carbon dioxide will be measured using photoacoustic infrared or equivalent.
- TSP will be measured using an isokinetic multipoint gravimetric method.
- PM2.5 will be measured gravimetrically with a federal reference method for PM2.5 at least for 1 month per site. It will be shared among sites.
- PM10 concentrations will be measured in real time using the tapered element oscillating microbalance (TEOM) at representative exhaust locations in the barn and ambient air.
- An initial characterization study of barn VOC will be conducted on 1 day during the first month at the first site (site 1). While total nonmethane hydrocarbons (NMHC) are

continuously monitored using a dual-channel FID analyzer (Method 25A) along with building airflow rate, VOC will be sampled with replication at two barns using Silcosteel canisters, and all-glass impingers (EPA Method 26A). Each sample will be evaluated using concurrent gas chromatography—mass spectrometry (GC–MS) and GC/FID for TO 15 and other FID-responding compounds. VOC mass will be calculated as the sum of individual analytes. The 20 analytes making the greatest contribution to total mass will be identified during the initial characterization study. A sampling method that captures a significant fraction of the VOC mass will be chosen for the remainder of the study.

• The Method 26A sampling train is suitable for collecting samples for analysis of formaldehyde and acetaldehyde using NCASI 94.02, requiring only the addition of spectrophotometry for the detection of formaldehyde. These compounds will be measured during the initial characterization study and, if not found, will not be analyzed during subsequent measurements.

• Total VOC mass may be estimated (scaled) by multiplying the total carbon as determined by Method 25A by the molecular weight/carbon weight ratio derived from GC–MS or GC–FID speciation. This should account for the VOC that are not identified by GC methods due either to sampling bias or the analytical procedures used, although some error is anticipated due to the imprecise response of Method 25A FID to oxygenated compounds. Acceptance of a scaling factor will depend on whether the Method 25A analyzer response is reasonable based on the manufacturer's stated response factors, bench-scale verification, or judgmental estimation of the mass of unaccounted for VOC.

• By the middle of the second month, the Science Advisor will report results of the initial VOC characterization to EPA with recommendations on the appropriateness and validity of the selected methodologies.

• Quarterly VOC samples using the selected VOC sampling method will occur at all sites, along with continuous Method 25A monitoring at site 1 throughout the study.

• Method 25A measurements will be corrected from an ''as carbon'' basis to a total VOC mass basis by multiplying them by the mean molecular weight per carbon atom established by GC–MS evaluations during applicable intervals of time.

Manure Storage Systems: Micrometeorological techniques will be used to estimate emissions of NH_3, H_2S, and a limited number of VOC from manure storage systems and storages. Fundamentally, this approach will use optical remote sensing (ORS) downwind and upwind of the storage coupled with 3-dimensional (3D) wind velocity measurements at heights of 2 and 12m. The concentrations of NH_3 and the various hydrocarbons will be made using open path Fourier transform infrared spectroscopy (FTIR). Measurements of H_2S (and NH_3) will be made using collocated open path UV differential optical absorption spectroscopy (UV–DOAS) systems. A team of two persons with two scanning FTIR systems, two single-path UV–DOAS systems, and two 3D sonics with supplementary meteorological instruments will move sequentially from farm to farm.

Each of two ORS systems will be oriented parallel to the storage side and approximately 10m from the storage edge. Each monostatic FTIR system will scan five retroreflectors; three mounted at 1m height equally dividing the length of the open path along the storage side and two mounted on a tower at heights of 6 and 12m located at the corners down the adjacent sides of the storage, resulting in scan lines down each of the four sides of the storage. Two bistatic single-path UV–DOAS systems will be located at a nominal 2m height within 2m laterally of the FTIR scan lines on the two sides of the storage oriented most closely with prevailing winds.

Emissions will be determined from the difference in upwind and downwind concentration measurements using two different methods—an Eulerian Gaussian approach and a Lagrangian Stochastic approach. The Lagrangian approach is based on an inverse dispersion analysis using a backward Lagrangian stochastic method (bLS). This approach will be used to estimate NH_3 emissions from concentration measurements made using the FTIR and UV–DOAS systems and the H_2S emissions from concentration measurements made using the UV–DOAS systems. The emission rate for NH_3 will be the ensemble average of the estimated emissions for each of the five FTIR scans with a corresponding error of the emission estimate. The Eulerian approach is based on a computed tomography (CT) method using Eulerian Gaussian statistics and a fitted wind profile from the two 3D sonics. Measurements of air and storage temperatures, wind speed and direction, humidity, atmospheric pressure, and solar radiation will also be conducted.

The bLS and CT emission estimates will be quality assured using tests of instrument response, wind direction and wind speed, stability, turbulence intensity, differences between the storage and the surrounding surface temperatures, differences in the mean and turbulent wind components with height, and the temporal variability in emissions. Emission estimates using the CT method will be qualified by the measured fraction of the estimated plume.

To estimate VOC emissions from lagoons, samples of the lagoon liquid will be collected and analyzed for VOC, and the EPA model WATER9 will be used to estimate emissions based on measured VOC concentrations, pH, and other factors.

Alternate Techniques

1. For the circuit rider system, an instrumental system such as the DustTrak by TSI could be used for continuous particle data for PM2.5 and PM10. These systems provide optical light scattering measurements of the concentration in mg/m3 and cost about $5,000 per point including an environmental shelter.

2. A radial plume mapping approach could be applied to the manure storage systems using a TDL system that has been approved by EPA for use in the aluminum industry in a single path mode. One upwind and three downwind paths provide the same type of data as the FTIR except for a single compound. The single laser is scanned via fiberoptic cables to the individual paths with a complete scan taking 40 seconds. It provides a fast, direct measurement of the flux of ammonia from these manure systems. A single 4-channel system costs $68,000.

3. It is recommended that one short-term (2-week) measurement of each facility be made with a LIDAR system to measure and quantify the plume dynamics of particles, water vapor, and ammonia surrounding the facility. This is recommended because the short-term measurements will be made at different times throughout the year and will be placed at a series of heights based on experience. These associated data of the plume structure will provide evidence of representativeness of the micrometeorological measurements for the emission rates.

4. It is recommended that each building site be instrumented with temperature and associated sensors to provide a continuous measurement record of the microclimate within and adjacent to the building. These systems can be linked with sensors to measure and record animal activity and floor temperature. A similar system would be located to measure the microclimate of the manure storage system and would include air temperature, wind speed, wind direction, surface temperature, and relative humidity of the manure storage system. The continuous record from these manure storage units and buildings would provide a reference for the short-term measurements made with the FTIR systems.

5. A Dynamic Flux Chamber Technique could be used for performing emission measurements from lagoons and/or a manure pile. Ammonia flux is measured over a surface (lagoon and/or soil) using a dynamic flux chamber system interfaced to an environmentally controlled mobile laboratory. This flux chamber system is interfaced to an environmentally controlled mobile laboratory in which two ammonia chemiluminescence analyzers, gas dilution/ titration calibration system, and data logger with lap-top computer are located. The flux calculation of ammonia using the flow-through chamber system is given by the mass balance for ammonia in the chamber.

Typical Factors Used in Determining Farm Selection

Farm Characteristics

1. Did the producer sign up to the Consent Agreement and pay EPA?

2. Does the producer's farm fit the description of any of the farms listed?

3. Is there a principal investigator within 3 hours of the site?

4. Are there housing accommodations available within 1 hour of the site?

5. Does your site have mechanical or natural ventilation for barns? Do the fans blow out directly over the lagoon/ manure storage area?

6. Is the producer/farm manager cooperative to attend a training session and provide needed production information?

7. Is there internet access at the farm? Is 220 V power available?

8. What is the general topography on the farm? Describe the surrounding terrain

(rolling hills, flat, low lying, river bottom, etc.) specifically for areas near the barns and the manure storage/treatment system.

9. Is the farm free from large disturbances such as trees and other buildings?

10. What is the distance from a public road? Is it gravel?

11. Are there other potential air pollutant sources nearby? Explain type (other farms, industrial site, grain elevator/feedmill), distance and direction.

12. Are there other animal species housed on the site, or planned for housing on site?

13. How many barns are located on the site? How many animals in each barn? Please characterize the barns: Barn number/identifier, production phase, rate your barn cleanliness (1–5; 1 being the cleanest), age of barns, and air exchange rate.

14. How far are the land application fields from the lagoons and barns?

15. How often is manure removed from the manure treatment/storage system and land applied?

16. How often is manure removed from the buildings and sent to the outdoor treatment/storage system?

17. Describe (in general terms) the rations fed to the animals.

18. Are the animals hand-fed or is feed delivered through an automatic delivery system?

19. Is fat (vegetable or animal) added to the rations?

20. Are feed rations pelleted or ground?

INFLUENCES ON EMISSIONS

Influences	Producer provided	Collected by study
Climate		X
Air temperature		X
Manure temperature		X
Barn temperature		X
Wind speed		X
Solar radiation		X
Rainfall		X
Relative humidity		X
Wind direction		X
Feed conversion/efficiency		X
Feed analysis (N & P & S)	X	X
Phases		X
Feeding to recommendations	X	
Manure production volume	X	X
Management cycle	X	
Storage duration	X	
Stocking density (actual)		X
Lagoon design	X	X
Swine genetics	X	
Animal inventory	X	
Feed usage	X	
Water usage	X	
Closeouts	X	
Feed analysis	X	X
Water analysis		X
Manure analysis	X	X
Animal/barn activity	X	X

[FR Doc. 05–1536 Filed 1–28–05; 8:45 am]

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Federal Register

Monday,
January 31, 2005

Part V

Department of Transportation

Federal Aviation Administration

14 CFR Part 91

Carrying Candidates in Elections; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 91

[Docket No. FAA–2005–20168; Amendment No. 91–287]

RIN 2120–AI12

Carrying Candidates in Elections

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This final rule allows an aircraft operator, other than one operating an aircraft as an air carrier or commercial operator, to receive payment for carrying a candidate seeking office in a State or local election during a campaign. Current regulations allow aircraft operators to receive payment for carrying candidates seeking office in Federal elections during a campaign without the aircraft operator having to meet the safety standards applicable to air carriers and other commercial operators. This rule meets a Congressional mandate that the FAA amend its rules to allow aircraft operators who transport State and local candidates for compensation, to do so without having to comply with FAA safety rules applicable to air carriers and other commercial operators.

DATES: This final rule is effective March 2, 2005.

FOR FURTHER INFORMATION CONTACT: John Chescavage, Office of Rulemaking, ARM–102 Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone (202) 867–9783; facsimile (202) 867–5075, e-mail *john.chescavage@faa.gov.*

SUPPLEMENTARY INFORMATION:

Availability of Rulemaking Documents

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. Make sure to identify the amendment number or docket number of this rulemaking.

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or you may visit *http://dms.dot.gov.*

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 SBRFA on the Internet at our site, *http://www.faa.gov/avr/arm/sbrefa.htm*. For more information on SBREFA, e-mail us *9-AWA-SBREFA@faa.gov.*

Background and Statutory Authority for This Revision

As part of the 1996 FAA reauthorization legislation, Congress required that the FAA Administrator revise Section 91.321 (14 CFR 91.321) of the Federal Aviation Regulations relating to the carriage of candidates in Federal elections, to make the same or similar rules applicable to the carriage of candidates for election to public office in state and local government elections. See Section 1214 ''Carriage of Candidates in State and Local Elections'', Public Law 104–264.

Presently, Section 91.321 allows aircraft operators, who are not air carriers or commercial operators conducting flights under 14 CFR part 121, 125 or 135, to carry—for compensation—candidates in Federal elections without having to comply with FAA safety rules applicable to air carriers if the rules of the Federal Election Commission (FEC) require the candidate to make the payment. In view of the Congressional mandate, the FAA has revised its regulations to allow aircraft operators who transport candidates for public office in state and local elections for compensation, to do so without complying with FAA safety rules applicable to air carriers and other commercial operators. Neither the existing rules applicable to the transportation of candidates in Federal elections nor the new rules applicable to the transportation of candidates for public office in state and local elections relieve the pilots from the airman certification requirements of possessing, at a minimum, a commercial pilot certificate when the pilot is paid for the transportation service. The present rules and the revised rules merely relieve the aircraft operator from the requirements to possess an air carrier/commercial operator certificate.

Certain conditions must be met for these operators to qualify to operate under the general operating rules of 14 CFR and to not be required to comply with rules that apply to air carriers and other commercial operators. Those conditions are:

- The operator's primary business is not as an air carrier or commercial operator;
- The carriage is conducted under the rules of part 91; and
- Payment by the candidate to the aircraft operator is required by law or regulation.

For candidates in Federal elections, the amount paid must not exceed the amount required by regulations of the Federal Election Commission (11 CFR *et seq.*). For candidates for public office in state or local elections, the amount paid must not exceed the amount required to be paid under state or local law. The aircraft operator, conducting the flight under part 91, will be permitted to accept payment in accordance with state or local law for the transportation of agents or people working on behalf of the state or local candidate. Aircraft operators are already allowed to accept payment from agents of, and people representing, Federal candidates when the rules of the FEC require such payments to be made.

We have rewritten the entire section because the current language makes specific references to the Federal Election Commission (FEC) and, thus, only applies to Federal elections. The FEC does not have any authority over candidates for election to state and local government offices. Rather than adding new information to the existing language, we have rewritten the whole section to make it easier to understand.

Good Cause for Not Requesting Comment

Under the Administrative Procedures Act (APA) (5 U.S.C. 553(b)), an agency is not required to follow the normal notice and comment procedures if it finds, for good cause, that they are impracticable, unnecessary, or contrary to the public interest. Since the 1996 reauthorization mandated the changes

to the Code of Federal Regulations and directed the FAA to make specific changes, we have determined that good cause exists to waive prior notice and comment.

Paperwork Reduction Act

There are no current or 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 has determined that there are no ICAO Standards and Recommended Practices that correspond to these regulations.

Economic Assessment, Regulatory Flexibility Determination, Trade Impact Assessment, and Unfunded Mandates Assessment

Proposed changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 directs each Federal agency to propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (19 U.S.C. 2531–2533) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. In developing U.S. standards, the Trade Act also requires agencies to consider international standards and, where appropriate, use them as the basis of U.S. standards. Fourth, the Unfunded Mandates Reform Act of 1995 (Public Law 104–4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more annually (adjusted for inflation).

The FAA has determined this rule (1) is not a ''significant regulatory action'' as defined in section 3(f) of Executive Order 12866 and is not ''significant'' as defined in DOT's Regulatory Policies and Procedures; (2) will not have a significant economic impact on a substantial number of small entities; (3) will not reduce barriers to international trade; and (4) does not impose an unfunded mandate on state, local, or tribal governments, or on the private sector.

This rule will impose no cost on the industry. This final rule allows certain aircraft operators, who qualify and who conduct operations solely under 14 CFR part 91, to receive payment, in accordance with state or local law, to transport candidates in State and local elections.

Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (RFA) 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'' as they are defined in the Act. If we find that the action will have a significant impact, we must do a ''regulatory flexibility analysis.''

This final rule imposes no cost on any aircraft operator, but allows aircraft operators, who qualify and conduct flights under part 91 of the Federal Aviation Regulations, to receive payment for transporting candidates in State and local elections. As such, the RFA does not apply to this action, and 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 establishing any standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. 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) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of the Act requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of $100 million or more (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a ''significant regulatory action.'' The FAA currently uses an inflation-adjusted value of $120.7 million in lieu of $100 million.

This final rule does not contain such a mandate. The requirements of Title II of the Act, therefore, do not apply.

Executive Order 13132, Federalism

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

Environmental Analysis

FAA Order 1050.1E identifies FAA actions that are categorically excluded from preparation of an environmental assessment or environmental impact statement under the National Environmental Policy Act in the absence of extraordinary circumstances. The FAA has determined this rulemaking action qualifies for the categorical exclusion identified in paragraph 312(d) and involves no extraordinary circumstances.

Regulations That Significantly Affect Energy Supply, Distribution, or Use

The FAA has analyzed this final rule under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use (May 18, 2001). We have determined that it is not a ''significant energy action'' under the executive order because it is not a ''significant regulatory action'' under Executive Order 12866, and it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

List of Subjects in 14 CFR Part 91

Agriculture, Air traffic control, Aircraft, Airmen, Airports, Aviation safety, Freight, Noise control, Political candidates, Reporting and recordkeeping requirements.

The Amendment

■ In consideration of the foregoing, the Federal Aviation Administration amends part 91, chapter I of title 14, Code of Federal Regulations as follows:

PART 91—GENERAL OPERATING AND FLIGHT RULES

■ 1. The authority citation for part 91 continues to read as follows:

Authority: 49 U.S.C. 106(g), 1155, 40103, 40113, 40120, 44101, 44111, 44701, 44709, 44711, 44712, 44715, 44716, 44717, 44722, 46306, 46315, 46316, 46504, 46506–46507, 47122, 47508, 47528–47531, articles 12 and 29 of the Convention on International Civil Aviation (61 stat. 1180).

■ 2. Revise § 91.321 to read as follows:

§ 91.321 Carriage of candidates in elections.

(a) As an aircraft operator, you may receive payment for carrying a candidate, agent of a candidate, or person traveling on behalf of a candidate, running for Federal, State, or local election, without having to comply with the rules in parts 121, 125 or 135 of this chapter, under the following conditions:

(1) Your primary business is not as an air carrier or commercial operator;

(2) You carry the candidate, agent, or person traveling on behalf of a candidate, under the rules of part 91; and

(3) By Federal, state or local law, you are required to receive payment for carrying the candidate, agent, or person traveling on behalf of a candidate. For federal elections, the payment may not exceed the amount required by the Federal Election Commission. For a state or local election, the payment may not exceed the amount required under the applicable state or local law.

(b) For the purposes of this section, for Federal elections, the terms *candidate* and *election* have the same meaning as set forth in the regulations of the Federal Election Commission. For State or local elections, the terms *candidate* and *election* have the same meaning as provided by the applicable State or local law and those terms relate to candidates for election to public office in State and local government elections.

Issued in Washington, DC, on January 21, 2005.

Marion C. Blakey,

Administrator.

[FR Doc. 05–1661 Filed 1–28–05; 8:45 am]

BILLING CODE 4910–13–P

Federal Register

Monday,
January 31, 2005

Part VI

The President

Proclamation 7865—60th Anniversary of the Liberation of the Auschwitz Concentration Camp, 2005

Federal Register
Vol. 70, No. 19
Monday, January 31, 2005

Presidential Documents

Title 3—

The President

Proclamation 7865 of January 25, 2005

60th Anniversary of the Liberation of the Auschwitz Concentration Camp, 2005

By the President of the United States of America

A Proclamation

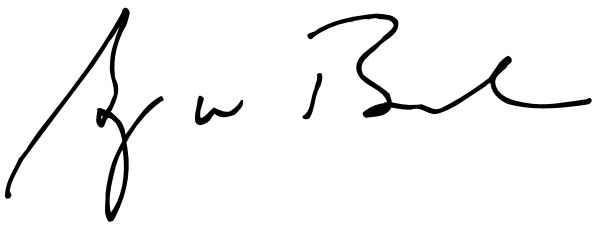
At the Auschwitz concentration camp, evil found willing servants and innocent victims. For almost 5 years, Auschwitz was a factory for murder where more than a million lives were taken. It is a sobering reminder of the power of evil and the need for people to oppose evil wherever it exists. It is a reminder that when we find anti-Semitism, we must come together to fight it.

In places like Auschwitz, evidence of the horror of the Holocaust has been preserved to help the world remember the past. We must never forget the cruelty of the guilty and the courage of the victims at Auschwitz and other Nazi concentration camps.

During the Holocaust, evil was systematic in its implementation and deliberate in its destruction. The 60th anniversary of the liberation of Auschwitz is an opportunity to pass on the stories and lessons of the Holocaust to future generations. The history of the Holocaust demonstrates that evil is real, but hope endures.

NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, by virtue of the authority vested in me by the Constitution and laws of the United States, do hereby proclaim January 27, 2005, as the 60th anniversary of the Liberation of the Auschwitz Concentration Camp. I call upon all Americans to observe this occasion with appropriate ceremonies and programs to honor the victims of Auschwitz and the Holocaust. May God bless their memory and their families, and may we always remember.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-fifth day of January, in the year of our Lord two thousand five, and of the Independence of the United States of America the two hundred and twenty-ninth.



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Federal Register

Monday,
January 31, 2005

Part VII

Federal Trade Commission

16 CFR Parts 801, 802 and 803

Premerger Notification; Reporting and Waiting Period Requirements; Final Rule Revised Jurisdictional Thresholds for Section 7A of the Clayton Act; Notice

FEDERAL TRADE COMMISSION

16 CFR Parts 801, 802 and 803

Premerger Notification; Reporting and Waiting Period Requirements

AGENCY: Federal Trade Commission.

ACTION: Final rule.

SUMMARY: The Commission is amending the premerger notification rules (''the rules'') to reflect adjustment and publication of reporting thresholds as required by the 2000 amendments [1] to Section 7A of the Clayton Act, 15 U.S.C. 18a, as added by the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Public Law 94–935, 90 Stat. 1390 (''the Act.''). The Act requires all persons contemplating certain mergers or acquisitions, which meet or exceed the jurisdictional thresholds in the Act, to file notification with the Federal Trade Commission (''the Commission'') and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice (''the Assistant Attorney General'') and to wait a designated period of time before consummating such transactions. The reporting and waiting period requirements are intended to enable these enforcement agencies to determine whether a proposed merger or acquisition may violate the antitrust laws if consummated and, when appropriate, to seek a preliminary injunction in Federal court to prevent consummation.

DATES: These final rules are effective March 2, 2005.

FOR FURTHER INFORMATION CONTACT: Marian R. Bruno, Assistant Director, Karen E. Berg, Attorney, Malcolm L. Catt, Attorney, B. Michael Verne, Compliance Specialist, or Nancy M. Ovuka, Compliance Specialist, Premerger Notification Office, Bureau of Competition, Room 303, Federal Trade Commission, Washington, DC 20580. Telephone: (202) 326–3100.

SUPPLEMENTARY INFORMATION:

Statement of Basis and Purpose

The 2000 amendments to section 7A require the Commission to revise the Act's jurisdictional and filing fee thresholds annually, based on the change in gross national product, in accordance with section 8(a)(5) for each fiscal year beginning after September 30, 2004. The Commission, with the concurrence of the Assistant Attorney General, is adopting these final rules to reflect the revised thresholds in the examples contained in the rules and to provide a method for future adjustments as required by the 2000 amendments. These final rules will also adjust references to the notification and filing fee thresholds and other limitations in the rules and the Antitrust Improvements Act Notification and Report Form and its Instructions to remain consistent with the revised jurisdictional and filing fee thresholds.

The Commission notes that the effective date of the new thresholds does not affect or void the waiting period expressly required under section 7A(b)(1) of the Act, which provides that the waiting period shall begin with the date the Commission and the Antitrust Division of the Department of Justice (collectively ''the Agencies'') receive the filing, and shall not end until thirty days after that date, absent early termination under section 7A(b)(2). Accordingly, the 30-day statutory waiting period shall continue to apply to all proposed transactions filed with the Agencies for review, even in cases where the Agencies receive a filing before the effective date of the new thresholds but the waiting period for that filing does not expire until after that date.

Implementing the Threshold Changes in Examples to the Rules

Rather than attempt to revise the examples annually, a parenthetical ''(as adjusted)'' has been added where necessary throughout the rules to notify the filer where such a change in statutory threshold value occurs. The term ''as adjusted'' is then defined in new subsection 801.1(m) and refers to a table of the adjusted values published in the **Federal Register** notice titled ''Revised Jurisdictional Thresholds for Section 7A of the Clayton Act.'' The notice will also contain a table showing adjusted values for the rules. This **Federal Register** notice will be published in January of each year and the values contained therein will be effective as of the effective date published in the **Federal Register** notice and will remain effective until superceded in the next calendar year. The notice will also be available at *http://www.ftc.gov.* For ease of application, such adjusted values will be rounded up to the next highest $100,000.

In addition to the revisions to the examples throughout the rules as a result of the mandatory adjustments to the thresholds in the Act, the Commission will adjust the notification thresholds and certain limitations contained in the exemptions as discussed below. The notification thresholds and other limitations will be implemented in the same way as in the changes to the examples as discussed above (*i.e.* by adding the parenthetical ''(as adjusted)'' following the relevant threshold or limitation).

Non-Mandatory Revisions

Section 801.1(h) Definition of Notification Threshold

The HSR statute provides that an acquisition is reportable if, as a result of the acquisition, the acquirer will hold voting securities of the acquired person valued in excess of $50 million. Under the statute, once an acquirer holds voting securities valued at more than $50 million, any additional purchase of even one voting share is reportable. As the antitrust agencies recognized in the original rulemaking proceeding in 1978,[2] this provision would result in far more filings than are needed for effective antitrust review. At the same time, as the acquirer's holding in the company continue to increase in size through subsequent transactions, the agencies must have some opportunities to review the later transactions. That is, there must be some points (thresholds) where these additional acquisitions become reportable.

Section 801.1(h) defines the term ''notification threshold'' and sets forth five reporting thresholds. Failing to adjust these thresholds to correspond to adjusted thresholds for filing fees would create two different sets of thresholds, one for fees and another for notification requirements, creating confusion and difficult administrative problems. Therefore, the notification thresholds will be adjusted annually to correspond to the adjusted filing fee thresholds. Although adjustment of the $1 billion limitation associated with the 25 percent threshold is not mandated on this basis, this limitation will also be adjusted annually, by the same percentage as the other notification thresholds, in order to avoid its eventually coming too close to the $500 million notification threshold as it is adjusted. The Commission believes that such changes are consistent with Congressional intent and with encouraging efficient antitrust review.

Section 801.40 Formation of Joint Venture or Other Corporations

Section 801.40 provides a special size-of-person test in the formation of new corporations. The values used to determine whether the transaction satisfies this test are the same as the jurisdictional size-of-person thresholds

[1] 15 U.S.C. 18a(a). *See* Pub. L. 106–553, 114 Stat. 2762.

[2] 43 FR 33487 (July 31, 1978).

and will therefore be adjusted to remain identical to them.

Section 802.4 Acquisitions of Voting Securities of Issuers Holding Certain Assets the Direct Acquisition of Which Is Exempt

Section 802.4 exempts the acquisition of voting securities of issuers that hold certain assets the direct acquisition of which is exempt under the act or the rules, and do not hold other non-exempt assets with an aggregate fair market value of more than $50 million. The rationale for this rule is that the applicability of an exemption should not depend on the form the acquisition takes, since the antitrust analysis would be the same whether voting securities or assets are being acquired. The statute does not mandate adjustment to this $50 million limitation. However, since this threshold functions in the same manner as the size-of-transaction test in an asset acquisition, this limitation is adjusted to remain consistent with mandated adjustments to the $50 million jurisdictional threshold.

Section 802.21 Acquisitions of Voting Securities Not Meeting or Exceeding Greater Notification Threshold (as Adjusted)

The annual adjustment of notification thresholds can make it difficult for filing parties to determine which notification thresholds are applicable for purposes of this exemption. For example, where a notification threshold increases after a party files but before a year has passed, a question may arise as to whether the notification threshold in place at the time it filed or the adjusted notification threshold would apply. Section 802.21 is amended to provide an acquiring person with a one year period to reach the notification threshold in place at the time that they filed, even though the notification threshold may have subsequently been adjusted during that year. Note, however, that an acquiring person may then acquire up to the next greater *adjusted* notification threshold (as opposed to the next notification threshold in place at the time of filing) during the five years following expiration of the waiting period. This is illustrated in two new examples to section 802.21.

Sections 802.50 and 802.51 Acquisitions of Foreign Assets or Voting Securities of a Foreign Issuer

The adjustment statute does not require adjustment of the limitations contained in sections 802.50 and 802.51 regarding acquisitions of foreign assets and voting securities. The Commission nonetheless is amending the rules to make such adjustments, inasmuch as the Commission has previously amended these limitations to correspond to changes to thresholds in the Act. For example, in 2002,[3] the Commission amended the limitations in these sections by adopting the $50 million size-of-transaction threshold established in the 2000 amendments to the act.[4] In doing so, the Commission noted that the principle underlying sections 802.50 and 802.51 was that the acquisitions of foreign assets or voting securities should not be subject to the reporting requirements unless the assets or voting securities being acquired have sufficient impact on U.S. commerce. The Commission noted that the $50 million threshold amount established in the 2000 legislation provided an appropriate measure of such an impact. The Commission also referenced the 1978 SBP which explained that the $110 million limitation contained in the sections was adopted to approximate the size-of-person criteria of the act. Therefore, the $50 million limitations in these exemptions will be adjusted annually to remain in sync with the adjusted size-of-transaction threshold. Similarly, the $110 million limitation on combined U.S. sales or assets of the acquiring and acquired person will be adjusted in sync with the annual adjustments to the size-of-person test amounts.

Appendix: Premerger Notification and Report Form

Item 2(c) of the Form and Instructions requires the acquiring person to indicate the notification threshold that it will meet or exceed in an acquisition of voting securities. This item will be amended to add ''(as adjusted)'' to the appropriate notification thresholds on the Form and in the Instructions.

Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601–612, requires that the agency conduct an initial and final regulatory analysis of the anticipated economic impact of the proposed amendments on small businesses, except where the Commission certifies that the regulatory action will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605.

Because of the size of the transactions necessary to invoke a Hart-Scott-Rodino filing, the premerger notification rules rarely, if ever, affect small businesses. Indeed, the 2000 amendments to the Act were intended to reduce the burden of the premerger notification program by exempting all transactions valued at $50 million or less. Further, none of the proposed rule amendments expands the coverage of the premerger notification rules in a way that would affect small business. Accordingly, the Commission certifies that these proposed rules will not have a significant economic impact on a substantial number of small entities. This document serves as the required notice of this certification to the Small Business Administration.

Paperwork Reduction Act

Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3518, requires agencies to submit requirements for ''collections of information'' to the Office of Management and Budget (''OMB'') and obtain clearance prior to instituting them. Such collections of information include reporting, recordkeeping, or disclosure requirements contained in regulations. The HSR premerger notification rules and Form contain information collection requirements, as defined by the Paperwork Reduction Act, that have been reviewed and approved by the Office of Management and Budget under OMB Control No. 3084–0005 through May 31, 2007. As noted earlier, these final rules implement amendments to Section 7A of the Clayton Act that require annual adjustments to the jurisdictional thresholds.

There were 1,104 transactions requiring notification in FY 2003. FTC staff estimates that 45 of these transactions would not have required notification had the thresholds been adjusted by the average percentage change in the gross national product over the fifteen years that the thresholds in Section 8 have been annually adjusted. Generally, each transaction involves two filings (because each party to the transaction is required to file). The existing OMB clearance is premised on the staff's estimate that each of these filings requires 39 hours to complete. Accordingly, staff estimates that the final rule changes will result in a reduction in the hours burden of 3,510 hours per year (45 transactions × 2) × 39 hours. This estimate is based on fiscal year 2003 filings,[5] and constitutes approximately a 4% reduction from the previous burden estimate of 87,530 hours. Thus, the total burden hours under the HSR rules as revised will be 84,020 hours. Similarly, staff estimates the total labor costs under the final rules to be $35,708,000 (rounded to the nearest thousand), a decrease of

[3] 67 FR 11898 (March 18, 2002)

[4] See Pub. L. 106–553, 114 Stat. 2762.

[5] FY 2003 is the latest fiscal year for which statistics have been published in the Annual Report to Congress.

$1,492,000 from the previous estimate of $37,200,000.[6]

On January 11, 2005, the Office of Management and Budget approved the new burden estimates resulting from these final rule changes.

Administrative Procedure Act

These final amendments are technical and non-substantive, to the extent they make conforming rule changes that merely incorporate by reference the adjusted filing thresholds to be published elsewhere in the **Federal Register**, or merely clarify the application of the existing rules under the adjusted thresholds, without amending the existing rules in any other way. Accordingly, the Commission has determined that these amendments are not subject to the public notice and comment procedures of the Administrative Procedure Act. See 5 U.S.C. 553(b)(A).

List of Subjects in 16 CFR Parts 801, 802 and 803

Antitrust.

■ For the reasons stated in the preamble, the Federal Trade Commission amends 16 CFR parts 801, 802 and 803 as set forth below:

PART 801—COVERAGE RULES

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

Authority: 15 U.S.C. 18a(d).

■ 2. Amend § 801.1 by revising paragraph (h) and adding paragraph (n) to read as follows:

§ 801.1 Definitions.

* * * * *

(h) *Notification threshold.* The term ''notification threshold'' means:

(1) An aggregate total amount of voting securities of the acquired person valued at greater than $50 million (as adjusted) but less than $100 million (as adjusted);

(2) An aggregate total amount of voting securities of the acquired person valued at $100 million (as adjusted) or greater but less than $500 million (as adjusted);

(3) An aggregate total amount of voting securities of the acquired person valued at $500 million (as adjusted) or greater;

(4) Twenty-five percent of the outstanding voting securities of an issuer if valued at greater than $1 billion (as adjusted); or

(5) Fifty percent of the outstanding voting securities of an issuer if valued at greater than $50 million (as adjusted).

* * * * *

(n) *(as adjusted).* The parenthetical ''(as adjusted)'' refers to the adjusted values published in the **Federal Register** notice titled ''Revised Jurisdictional Threshold for Section 7A of the Clayton Act.'' This **Federal Register** notice will be published in January of each year and the values contained therein will be effective as of the effective date published in the **Federal Register** notice and will remain effective until superseded in the next calendar year. The notice will also be available at *http://www.ftc.gov.* Such adjusted values will be calculated in accordance with Section 7A(a)(2)(A) and will be rounded up to the next highest $100,000.

■ 3. Amend § 801.2(d) by revising Examples 2 and 3; by removing Example 4; and by redesignating Example 5 as Example 4 to read as follows.

§ 801.2 Acquiring and acquired persons.

* * * * *

(d) * * *

Examples:

* * * * *

2. In the above example, suppose the consideration for Y consists of $8 million worth of the voting securities of A. With regard to the transfer of this consideration, ''B'' is an acquiring person because it will hold voting securities it did not previously hold, and ''A'' is an acquired person because its voting securities will be held by B. Since these voting securities are worth less than $50 million (as adjusted), the acquisition of these securities is not reportable. ''A'' will therefore report as an acquiring person only and ''B'' as an acquired person only.

3. In the above example, suppose that, as consideration for Y, A transfers to B a manufacturing plant valued in excess of $50 million (as adjusted). ''B'' is thus an acquiring person and ''A'' an acquired person in a reportable acquisition of assets. ''A'' and ''B'' will each report as both an acquiring and an acquired person in this transaction because each occupies each role in a reportable acquisition.

* * * * *

■ 4. Amend § 801.4(b) by revising Examples 1 and 5 to read as follows:

§ 801.4 Secondary acquisitions.

* * * * *

(b) * * *

Examples:

1. Assume that acquiring person ''A'' proposes to acquire all the voting securities of corporation B. This section provides that the acquisition of voting securities of issuers held but not controlled by B or by any entity which B controls are secondary acquisitions by ''A.'' Thus, if B holds more than $50 million (as adjusted) of the voting securities of corporation X (but does not control X), and ''A'' and ''X'' satisfy Sections 7A (a)(1) and (a)(2), ''A'' must file notification separately with respect to its secondary acquisition of voting securities of X. ''X'' must file notification within fifteen days (or in the case of a cash tender offer, 10 days) after ''A'' files, pursuant to § 801.30.

* * * * *

5. In previous Example 4, suppose the consideration paid by A for the acquisition of B is in excess of $50 million (as adjusted) worth of the voting securities of A. By virtue of § 801.2(d)(2), ''A'' and ''B'' are each both acquiring and acquired persons. A will still be deemed to have acquired control of B, and therefore the resulting acquisition of the voting securities of X is a secondary acquisition. Although ''B'' is now also an acquiring person, unless B gains control of A in the transaction, B still makes no secondary acquisitions of stock held by A. If the consideration paid by A is the voting securities of one of A's subsidiaries and B thereby gains control of that subsidiary, B will make secondary acquisitions of any minority holdings of that subsidiary.

* * * * *

■ 5. Amend § 801.11(e) by revising Examples 1, 3 and 4 to read as follows:

§ 801.11 Annual net sales and total assets.

* * * * *

(e) * * *

Examples: * * *

1. A will borrow $105 million in cash and will purchase assets from B for $100 million. In order to establish whether A's acquisition of B's assets is reportable, A's total assets are determined by subtracting the $100 million that it will use to acquire B's assets from the $105 million that A will have at the time of the acquisition. Therefore, A has total assets of less than $10 million (as adjusted) and does not meet any size-of-person test of Section 7A(a)(2).

* * * * *

3. Assume that company A will make a $150 million acquisition and that it must pay a loan origination fee of $5 million. A borrows $161 million. A does not meet the size-of-person test in Section 7A(a)(2) because its total assets are less than $10 million (as adjusted). $150 million is excluded because it will be consideration for the acquisition and $5 million is excluded because it is an expense incidental to the acquisition. Therefore, A is only a $6 million person. Note that if A were making an acquisition valued at over $200 million (as adjusted), the acquisition would be reportable without regard to the sizes of the persons involved.

4. Assume that ''A'' borrows $195 million to acquire $100 million of assets from ''B'' and $60 million of voting securities of ''C.'' The balance of the loan will be used for working capital. To determine its size for purposes of its acquisition from ''B,'' ''A'' subtracts the $100 million that it will use for that acquisition. Therefore, A has total assets of $95 million for purposes of its acquisition from ''B.'' To determine its size with respect

[6] The reduction of approximately $1,492,000 in labor costs is based on an estimated average of $425 per hour for executives' and attorneys' wages (3,510 hours × $425/hour = $1,491,750).

to its acquisition from ''C,'' ''A'' subtracts the $60 million that will be paid for ''C's'' voting securities. Thus, for purposes of its acquisition from ''C'', ''A'' has total assets of $135 million. In the first acquisition ''A'' meets the $10 million (as adjusted) size-of-person test and in the second acquisition ''A'' meets the $100 million (as adjusted) size-of-person test of Section 7A(a)(2).

■ 6. Amend § 801.13(a) by revising Examples 1 and 4 to read as follows:

§ 801.13 Voting securities or assets to be held as a result of acquisition.

* * * * *

(a) * * *

Examples:

1. Assume that acquiring person ''A'' holds in excess of $50 million (as adjusted) of the voting securities of X, and is to acquire another $1 million of the same voting securities. Since under paragraph (a) of this section all voting securities ''A'' will hold after the acquisition are held ''as a result of'' the acquisition, ''A'' will hold in excess of $50 million (as adjusted) of the voting securities of X as a result of the acquisition. ''A'' must therefore observe the requirements of the act before making the acquisition, unless the present acquisition is exempt under Section 7A(c), § 802.21 or any other rule.

* * * * *

4. On January 1, company A acquired in excess of $50 million (as adjusted) of voting securities of company B. ''A'' and ''B'' filed notification and observed the waiting period for that acquisition. Company A plans to acquire $1 million of assets from company B on May 1 of the same year. Under § 801.13(a)(3), ''A'' and ''B'' do not aggregate the value of the earlier acquired voting securities to determine whether the acquisition is subject to the act. Therefore, the value of the acquisition is $1 million and it is not reportable.

* * * * *

■ 7. Amend § 801.14(b) by revising Examples 1 and 2 to read as follows:

§ 801.14 Aggregate total amount of voting securities and assets.

* * * * *

(b) * * *

Examples:

1. Acquiring person ''A'' previously acquired less than $50 million (as adjusted) of the voting securities (not convertible voting securities) of corporation X. ''A'' now intends to acquire additional assets of X. Under paragraph (a) of this section, ''A'' looks to § 801.13(a) and determines that the voting securities are to be held ''as a result of'' the acquisition. Section 801.13(a) also provides that ''A'' must determine the present value of the previously acquired securities. Under paragraph (b) of this section, ''A'' looks to § 801.13(b)(1) and determines that the assets to be acquired will be held ''as a result of'' the acquisition, and are valued under § 801.10(b). Therefore, if the voting securities have a present value which when combined with the value of the assets would exceed $50 million (as adjusted), the asset acquisition is subject to the requirements of the act since, as a result of it, ''A'' would hold an aggregate total amount of the voting securities and assets of ''X'' in excess of $50 million (as adjusted) .

2. In the previous example, assume that the assets acquisition occurred first, and that the acquisition of the voting securities is to occur within 180 days of the first acquisition. ''A'' now looks to § 801.13(b)(2) and determines that because the second acquisition is of voting securities and not assets, the asset and voting securities acquisitions are not treated as one transaction. Therefore, the second acquisition would not be subject to the requirements of the act since the value of the securities to be acquired does not exceed the $50 million (as adjusted) size-of-transaction test.

■ 8. Amend § 801.15(c) by revising Examples 1, 4, 6 and 7 to read as follows:

§ 801.15 Aggregation of voting securities and assets the acquisition of which was exempt.

* * * * *

(c) * * *

Examples:

1. Assume that acquiring person ''A'' is simultaneously to acquire in excess of $50 million (as adjusted) of the convertible voting securities of X and less than $50 million (as adjusted) of the voting common stock of X. Although the acquisition of the convertible voting securities is exempt under § 802.31, since the overall value of the securities to be acquired is greater than $50 million (as adjusted), ''A'' must determine whether it is obliged to file notification and observe a waiting period before acquiring the securities. Because § 802.31 is one of the exemptions listed in paragraph (a)(2) of this section, ''A'' would not hold the convertible voting securities as a result of the acquisition. Therefore, since as a result of the acquisition ''A'' would hold only the common stock, the size-of-transaction tests of Section 7A(a)(2) would not be satisfied, and ''A'' need not observe the requirements of the act before acquiring the common stock. (Note, however, that the value of the convertible voting securities would be reflected in ''A's'' next regularly prepared balance sheet, for purposes of § 801.11).

* * * * *

4. Assume that acquiring person ''B,'' a United States person, acquired from corporation ''X'' two manufacturing plants located abroad, and assume that the acquisition price was in excess of $50 million (as adjusted). In the most recent year, sales into the United States attributable to the plants were less than $50 million (as adjusted), and thus the acquisition was exempt under § 802.50(a)(2). Within 180 days of that acquisition, ''B'' seeks to acquire a third plant from ''X,'' to which United States sales were attributable in the most recent year. Since under § 801.13(b)(2), as a result of the acquisition, ''B'' would hold all three plants of ''X,''if the $50 million (as adjusted) limitation in § 802.50(a)(2) would be exceeded, under paragraph (b) of this section, ''B'' would hold the previously acquired assets for purposes of the second acquisition. Therefore, as a result of the second acquisition, ''B'' would hold assets of ''X'' exceeding $50 million (as adjusted) in value, would not qualify for the exemption in § 802.50(a)(2), and must observe the requirements of the act and file notification for the acquisition of all three plants before acquiring the third plant

* * * * *

6. ''X'' acquired 55 percent of the voting securities of M, an entity controlled by ''Z,'' six months ago and now proposes to acquire 50 percent of the voting stock of N, another entity controlled by ''Z.'' M's assets consist of $150 million worth of producing coal reserves plus less than $50 million (as adjusted) worth of non-exempt assets and N's assets consist of a producing coal mine worth $100 million together with non-exempt assets with a fair market value of less than $50 million (as adjusted). ''X's'' acquisition of the voting securities of M was exempt under § 802.4(a) because M held exempt assets pursuant to § 802.3(b) and less than $50 million (as adjusted) of non-exempt assets. Because ''X'' acquired control of M in the earlier transaction, M is now within the person of ''X,'' and the assets of M need not be aggregated with those of N to determine if the subsequent acquisition of N will exceed the limitation for coal reserves or for non-exempt assets. Since the assets of N alone do not exceed these limitations, ''X's'' acquisition of N also is not reportable.

7. In previous Example 6, assume that ''X'' acquired 30 percent of the voting securities of M and proposes to acquire 40 percent of the voting securities of N, another entity controlled by ''Z.'' Assume also that M's assets at the time of ''X's'' acquisition of M's voting securities consisted of $90 million worth of producing coal reserves and non-exempt assets with a fair market value of less than $50 million (as adjusted), and that N's assets currently consist of $60 million worth of producing coal reserves and non-exempt assets with a fair market value which when aggregated with M's non-exempt assets would exceed $50 million (as adjusted). Since ''X'' acquired a minority interest in M and intends to acquire a minority interest in N, and since M and N are controlled by ''Z,'' the assets of M and N must be aggregated, pursuant to Secs. 801.15(b) and 801.13, to determine whether the acquisition of N's voting securities is exempt. ''X'' is required to determine the current fair market value of M's assets. If the fair market value of M's coal reserves is unchanged, the aggregated exempt assets do not exceed the limitation for coal reserves. However, if the present fair market value of N's non-exempt assets also is unchanged, the present fair market value of the non-exempt assets of M and N when aggregated is greater than $50 million. Thus the acquisition of the voting securities of N is not exempt. If ''X'' proposed to acquire 50 percent or more of the voting securities of both M and N in the same acquisition, the assets of M and N must be aggregated to determine if the acquisition of the voting securities of both issuers is exempt. Since the fair market value of the aggregated non-exempt assets exceeds $50 million (as

adjusted), the acquisition would not be exempt.

* * * * *

§ 801.20 [Amended]

■ 9. Amend § 801.20(c) by removing Examples 1 and 2.

■ 10. Amend § 801.30(b) by revising Example 2 to read as follows:

§ 801.30 Tender offers and acquisitions of voting securities from third parties.

* * * * *

(b) * * *

Examples:

* * * * *

2. Acquiring person ''A'' proposes to acquire in excess of $50 million (as adjusted) of the voting securities of corporation X on a securities exchange. The waiting period begins when ''A'' files notification. ''X'' must file notification within 15 calendar days thereafter. The seller of the X shares is not subject to any obligations under the act.

* * * * *

■ 11. Amend § 801.31 by revising the Example to read as follows:

§ 801.31 Acquisitions of voting securities by offerees in tender offers.

* * * * *

Example: Assume that ''A,'' which has annual net sales exceeding $100 million (as adjusted), makes a tender offer for voting securities of corporation X. The consideration for the tender offer is to be voting securities of A. ''S,'' a shareholder of X with total assets exceeding $10 million (as adjusted), wishes to tender its holdings of X and in exchange would receive shares of A valued in excess of $50 million (as adjusted). Under this section, ''S's'' acquisition of the shares of A would be an acquisition separately subject to the requirements of the act. Before ''S'' may acquire the voting securities of A, ''S'' must first file notification and observe a waiting period—which is separate from any waiting period that may apply with respect to ''A'' and ''X.'' Since § 801.30 applies, the waiting period applicable to ''A'' and ''S'' begins upon filing by ''S,'' and ''A'' must file with respect to ''S's'' acquisition within 15 days pursuant to § 801.30(b). Should the waiting period with respect to ''A'' and ''X'' expire or be terminated prior to the waiting period with respect to ''S'' and ''A,'' ''S'' may wish to tender its X-shares and place the A-shares into a nonvoting escrow until the expiration or termination of the latter waiting period.

■ 12. Amend § 801.32 by revising the Example to read as follows:

§ 801.32 Conversion and acquisition.

* * * * *

Example: Assume that acquiring person ''A'' wishes to convert convertible voting securities of issuer X, and is to receive common stock of X valued in excess of $50 million (as adjusted). If ''A'' and ''X'' satisfy the criteria of Section 7A(a)(1) and Section 7A(a)(2)(B)(ii), then ''A'' and ''X'' must file notification and observe the waiting period before ''A'' completes the acquisition of the X common stock, unless exempted by Section 7A(c) or the regulations in this part. Since § 801.30 applies, the waiting period begins upon notification by ''A,'' and ''X'' must file notification within 15 days.

■ 13. Amend § 801.40 by revising paragraphs (c)(1) and (2) and Examples 1 and 2 to read as follows:

§ 801.40 Formation of joint venture or other corporations.

* * * * *

(c) * * *

(1)(i) The acquiring person has annual net sales or total assets of $100 million (as adjusted) or more;

(ii) The joint venture or other corporation will have total assets of $10 million (as adjusted) or more; and

(iii) At least one other acquiring person has annual net sales or total assets of $10 million (as adjusted) or more; or

(2)(i) The acquiring person has annual net sales or total assets of $10 million (as adjusted) or more;

(ii) The joint venture or other corporation will have total assets of $100 million (as adjusted) or more; and

(iii) At least one other acquiring person has annual net sales or total assets of $10 million (as adjusted) or more.

* * * * *

Examples:

1. Persons ''A,'' ''B,'' and ''C'' agree to create new corporation ''N,'' a joint venture. ''A,'' ''B,'' and ''C'' will each hold one third of the shares of ''N.'' ''A'' has more than $100 million (as adjusted) in annual net sales. ''B'' has more than $10 million (as adjusted) in total assets but less than $100 million (as adjusted) in annual net sales and total assets. Both ''C's'' total assets and its annual net sales are less than $10 million (as adjusted). ''A,'' ''B,'' and ''C'' are each engaged in commerce. ''A,'' ''B,'' and ''C'' have agreed to make an aggregate initial contribution to the new entity of $18 million in assets and each to make additional contributions of $21 million in each of the next three years. Under paragraph (d) of this section, the assets of the new corporation are $207 million. Under paragraph (c) of this section, ''A'' and ''B'' must file notification. Note that ''A'' and ''B'' also meet the criterion of Section 7A(a)(2)(B)(i) since they will be acquiring one third of the voting securities of the new entity for in excess of $50 million (as adjusted). N need not file notification; see § 802.41.

2. In the preceding example ''A'' has over $10 million (as adjusted) but less than $100 million (as adjusted) in sales and assets, ''B'' and ''C'' have less than $10 million (as adjusted) in sales and assets. ''N'' has total assets of $500 million. Assume that ''A'' will acquire 50 percent of the voting securities of ''N'' and ''B'' and ''C'' will each acquire 25 percent. Since ''A'' will acquire in excess of $200 million (as adjusted) in voting securities of ''N'', the size-of-person test in § 801.40(c) is inapplicable and ''A'' is required to file notification.

■ 14. Amend 801.90 by revising Examples 1 and 2 to read as follows:

§ 801.90 Transactions or devices for avoidance.

* * * * *

Examples:

1. Suppose corporations A and B wish to form a joint venture. A and B contemplate a total investment of over $100 million (as adjusted) in the joint venture; persons ''A'' and ''B'' each have total assets in excess of $100 million (as adjusted). Instead of filing notification pursuant to § 801.40, A creates a new subsidiary, A1, which issues half of its authorized shares to A. Assume that A1 has total assets of $3000. ''A'' then sells 50 percent of its A1 stock to ''B'' for $1500. Thereafter, ''A'' and ''B'' each contribute in excess of $50 million (as adjusted) to A1 in exchange for the remaining authorized A1 stock (one-fourth each to ''A'' and ''B''). A's creation of A1 was exempt under Sec. 802.30; its $1500 sale of A1 stock to ''B'' did not meet the size-of-transaction filing threshold in Section 7A(a)(2)(B); and the second acquisition of stock in A1 by ''A'' and ''B'' was exempt under § 802.30 and Sections 7A(c)(3) and (10). Since this scheme appears to be for the purpose of avoiding the requirements of the act, the sequence of transactions will be disregarded. The transactions will be viewed as the formation of a joint venture corporation by ''A'' and ''B'' having over $10 million (as adjusted) in assets. Such a transaction would be covered by § 801.40 and ''A'' and ''B'' must file notification and observe the waiting period.

2. Suppose ''A'' wholly owns and operates a chain of twenty retail hardware stores, each of which is separately incorporated and has assets of less than $10 million. The aggregate fair market value of the assets of the twenty store corporations is in excess of $50 million (as adjusted). ''A'' proposes to sell the stores to ''B'' for in excess of $50 million (as adjusted). For various reasons it is decided that ''B'' will buy the stock of each of the store corporations from ''A.'' Instead of filing notification and observing the waiting period as contemplated by the act, ''A'' and ''B'' enter into a series of five stock purchase-sale agreements for $12 million each. Under the terms of each contract, the stock of four stores will pass from ''A'' to ''B''. The five agreements are to be consummated on five successive days. Because after each of these transactions the store corporations are no longer part of the acquired person (§ 801.13(a) does not apply because control has passed, see § 801.2), and because $12 million is below the size-of-transaction filing threshold of Section 7A(a)(2)(B), none of the contemplated acquisitions would be subject to the requirements of the act. However, if the stock of all of the store corporations were to be purchased in one transaction, no exemption would be applicable, and the act's requirements would have to be met. Because it appears that the purpose of making five separate contracts is to avoid the

requirements of the act, this section would ignore the form of the separate transactions and consider the substance to be one transaction requiring compliance with the act.

PART 802—EXEMPTION RULES

■ 15. The authority citation for part 802 continues to read as follows:

Authority: 15 U.S.C. 18a(d).

■ 16. Amend § 802.1 by revising Examples 1 through 7, 9 and 10, to read as follows:

§ 802.1 Acquisitions of goods and realty in the ordinary course of business.

* * * * *

Examples:

1. Greengrocer Inc. intends to sell to ''A'' all of the assets of one of the 12 grocery stores that it owns and operates throughout the metropolitan area of City X. Each of Greengrocer's stores constitutes an operating unit, *i.e.*, a business undertaking in a particular location. Thus ''A's'' acquisition is not exempt as an acquisition in the ordinary course of business. However, the acquisition will not be subject to the notification requirements if the acquisition price or fair market value of the store's assets does not exceed $50 million (as adjusted).

2. ''A,'' a manufacturer of airplane engines, agrees to pay in excess of $50 million (as adjusted) to ''B,'' a manufacturer of airplane parts, for certain new engine components to be used in the manufacture of airplane engines. The acquisition is exempt under § 802.1(b) as new goods as well as under § 802.1(c)(3) as current supplies.

3. ''A,'' a power generation company, proposes to purchase from ''B,'' a coal company, in excess of $50 million (as adjusted) of coal under a long-term contract for use in its facilities to supply electric power to a regional public utility and steam to several industrial sites. This transaction is exempt under § 802.1(c)(2) as an acquisition of current supplies. However, if ''A'' proposed to purchase coal reserves rather than enter into a contract to acquire output of a coal mine, the acquisition would not be exempt as an acquisition of goods in the ordinary course of business. The acquisition may still be exempt pursuant to § 802.3(b) as an acquisition of reserves of coal if the requirements of that section are met.

4. ''A,'' a national producer of canned fruit, preserves, jams and jellies, agrees to purchase from ''B'' for in excess of $50 million (as adjusted) a total of 20,000 acres of orchards and vineyards in several locations throughout the U.S. ''A'' plans to harvest the fruit from the acreage for use in its canning operations. The acquisition is not exempt under § 802.1 because orchards and vineyards are real property, not ''goods.'' If, on the other hand, ''A'' had contracted to acquire from ''B'' the fruit and grapes harvested from the orchards and vineyards, the acquisition would qualify for the exemption as an acquisition of current supplies under § 802.1(c)(3). Although the transfer of orchards and vineyards is not exempt under § 802.1, the acquisition would be exempt under § 802.2(g) as an acquisition of agricultural property.

5. ''A,'' a railcar leasing company, will purchase in excess of $50 million (as adjusted) of new railcars from a railcar manufacturer in order to expand its existing fleet of cars available for lease. The transaction is exempt under § 802.1(b) as an acquisition of new goods and § 802.1(c), as an acquisition of current supplies. If ''A'' subsequently sells the railcars to ''C,'' a commercial railroad company, that acquisition would be exempt under § 802.1(d)(2), provided that ''A'' acquired and held the railcars solely for resale or leasing to an entity not within itself.

6. ''A,'' a major oil company, proposes to sell two of its used oil tankers for in excess of $50 million (as adjusted) to ''B,'' a dealer who purchases oil tankers from the major U.S. oil companies. ''B's'' acquisition of the used oil tankers is exempt under § 802.1(d)(1) provided that ''B'' is actually acquiring beneficial ownership of the used tankers and is not acting as an agent of the seller or purchaser.

7. ''A,'' a cruise ship operator, plans to sell for in excess of $50 million (as adjusted) one of its cruise ships to ''B,'' another cruise ship operator. ''A'' has, in good faith, executed a contract to acquire a new cruise ship with substantially the same capacity from a manufacturer. The contract specifies that ''A'' will receive the new cruise ship within one month after the scheduled date of the sale of its used cruise ship to ''B.'' Since ''B'' is acquiring a used durable good that ''A'' has contracted to replace within six months of the sale, the acquisition is exempt under § 802.1(d)(3).

* * * * *

9. Three months ago ''A,'' a manufacturing company, acquired several new machines that will replace equipment on one of its production lines. ''A's'' capacity to produce the same products increased modestly when the integration of the new equipment was completed. ''B,'' a manufacturing company that produces products similar to those produced by ''A,'' has entered into a contract to acquire for in excess of $50 million (as adjusted) the machinery that ''A'' replaced. Delivery of the equipment by ''A'' to ''B'' is scheduled to occur within thirty days. Since ''A'' purchased new machinery to replace the productive capacity of the used equipment, which it sold within six months of the purchase of the new equipment, the acquisition by ''B'' is exempt under § 802.1(d)(3).

10. ''A'' will sell to ''B'' for in excess of $50 million (as adjusted) all of the equipment ''A'' uses exclusively to perform its billing requirements. ''B'' will use the equipment to provide ''A's'' billing needs pursuant to a contract which ''A'' and ''B'' executed 30 days ago in conjunction with the equipment purchase agreement. Although the assets ''B'' will acquire make up essentially all of the assets of one of ''A's'' management and administrative support services divisions, the acquisition qualifies for the exemption under § 802.1(d)(4) because a company's internal management and administrative support services, however organized, are not an operating unit as defined by § 802.1(a). Management and administrative support services are not a ''business undertaking'' as that term is used in § 802.1(a). Rather, they provide support and benefit to the company's operating units and support the company's business operations. However, if the assets being sold also derived revenues from providing billing services for third parties, then the transfer of these assets would not be exempt under § 802.1(d)(4), since the equipment is not being used solely to provide management and administrative support services to ''A''.

* * * * *

■ 17. Amend § 802.2 by revising examples 2 through 7, 9, 10, and 12 to read as follows:

§ 802.2 Certain acquisitions of real property assets.

* * * * *

Examples:

* * * * *

2. ''B,'' a subsidiary of ''A,'' a financial institution, acquired a newly constructed power plant, which it leased to ''X'' pursuant to a lease financing arrangement. ''A's'' acquisition of the plant through B was exempt under § 802.63(a) as a bona fide credit transaction entered into in the ordinary course of ''A's'' business. ''X'' operated the plant as sole lessee for the next eight years and now proposes to exercise an option to buy the plant for in excess of $50 million (as adjusted). ''X's'' acquisition of the plant is exempt pursuant to § 802.2(b). The plant is being acquired from B, the lessor, which held title to the plant for financing purposes, and the purchaser, ''X,'' has had sole and continuous possession and use of the plant since its construction.

3. ''A'' proposes to acquire a tract of wilderness land from ''B'' for consideration in excess of $50 million (as adjusted). Copper deposits valued in excess of $50 million (as adjusted) and timber reserves valued in excess of $50 million (as adjusted) are situated on the land and will be conveyed as part of this transaction. During the last three fiscal years preceding the sale, the property generated $50,000 from the sale of a small amount of timber cut from the reserves two years ago. ''A's'' acquisition of the wilderness land from ''B'' is exempt as an acquisition of unproductive real property because the property did not generate revenues exceeding $5 million during the thirty-six months preceding the acquisition. The copper deposits and timber reserves are by definition unproductive real property and, thus, are not separately subject to the notification requirements.

4. ''A'' proposes to purchase from ''B'' for in excess of $200 million (as adjusted) an old steel mill that is not currently operating to add to ''A's'' existing steel production capacity. The mill has not generated revenues during the 36 months preceding the acquisition but contains equipment valued in excess of $50 million (as adjusted) that ''A'' plans to refurbish for use in its operations. ''A's'' acquisition of the mill and the land on which it is located is exempt as unproductive

real property. However, the transfer of the equipment and any assets other than the unproductive property is not exempt and is separately subject to the notification requirements of the act.

5. ''A'' proposes to purchase two downtown lots, Parcels 1 and 2, from ''B'' for in excess of $50 million (as adjusted). Parcel 1, located in the southwest section, contains no structures or improvements. A hotel is located in the northeast section on Parcel 2, and it has generated $9 million in revenues during the past three years. The purchase of Parcel 1 is exempt if it qualifies as unproductive real property, *i.e.*, it has not generated annual revenues in excess of $5 million in the three fiscal years prior to the acquisition. Parcel 2 is not unproductive real property, but its acquisition is exempt under § 802.2(e) as the acquisition of a hotel.

6. ''A'' plans to purchase from ''B,'' a manufacturer, a newly-constructed building that ''B'' had intended to equip for use in its manufacturing operations. ''B'' was unable to secure financing to purchase the necessary equipment and ''A'', also a manufacturer, will be required to invest in excess of $50 million (as adjusted) in order to equip the building for use in its production operations. This building is not a new facility under § 802.2 (a), because it was not constructed or held by ''B'' for sale or resale. However, the acquisition of the building qualifies for exemption as unproductive real property pursuant to § 802.2(c)(1). The building is not yet a manufacturing facility since it does not contain equipment and requires significant capital investment before it can be used as a manufacturing facility.

7. ''A'' proposes to purchase from ''B,'' for in excess of $50 million (as adjusted), a 100 acre parcel of land that includes a currently operating factory occupying 10 acres. The other 90 adjoining acres are vacant and unimproved and are used by ''B'' for storage of supplies and equipment. The factory and the unimproved acreage have an aggregate fair market value of in excess of $50 million (as adjusted). The transaction is not exempt under § 802.2(c) because the vacant property is adjacent to property occupied by the operating factory. Moreover, if the 90 acres were not adjacent to the 10 acres occupied by the factory, the transaction would not be exempt because the 90 acres are being used in conjunction with the factory being acquired and thus are not unproductive property.

* * * * *

9. ''A'' intends to acquire three shopping centers from ''B'' for a total of in excess of $200 million (as adjusted). The anchor stores in two of the shopping centers are department stores, the businesses of which ''A'' is buying from ''B'' as part of the overall transaction. The acquisition of the shopping centers is an acquisition of retail rental space that is exempt under § 802.2(h). However, ''A's'' acquisition of the department store businesses, including the portion of the shopping centers that the two department stores being purchased occupy, are separately subject to the notification requirements. If the value of these assets exceeds $50 million (as adjusted), ''A'' must comply with the requirements of the act for this part of the transaction.

10. ''A'' wishes to purchase from ''B'' a parcel of land for in excess of $50 million (as adjusted). The parcel contains a race track and a golf course. The golf course qualifies as recreational land pursuant to § 802.2(f), but the race track is not included in the exemption. Therefore, if the value of the race track is more than $50 million (as adjusted), ''A'' will have to file notification for the purchase of the race track.

* * * * *

12. ''A'' proposes to purchase the prescription drug wholesale distribution business of ''B'' for in excess of $50 million (as adjusted). The business includes six regional warehouses used for ''B's'' national wholesale drug distribution business. Since ''A'' is acquiring the warehouses in connection with the acquisition of ''B's'' prescription drug wholesale distribution business, the acquisition of the warehouses is not exempt.

■ 18. Amend § 802.3 by revising Examples 2 and 3 to read as follows:

§ 802.3 Acquisitions of carbon-based mineral reserves.

* * * * *

Examples:

* * * * *

2. ''A,'' an oil company, proposes to acquire for $180 million oil reserves currently in production along with field pipelines and treating and metering facilities which serve such reserves exclusively. The acquisition of the reserves and the associated assets are exempt. ''A'' will also acquire from ''B'' for in excess of $50 million (as adjusted) a natural gas processing plant and its associated gathering pipeline system. This acquisition is not exempt since § 802.3(c) excludes these assets from the exemption in § 802.3 for transfers of associated exploration or production assets.

3. ''A,'' an oil company, proposes to acquire a coal mine currently in operation and associated production assets for $90 million from ''B,'' an oil company. ''A'' will also purchase from ''B'' producing oil reserves valued at $100 million and an oil refinery valued at $13 million. The acquisition of the coal mine and the oil reserves is exempt pursuant to § 802.3. Although § 802.3(c) excludes the refinery from the exemption in § 802.3 for transfers of associated exploration and production assets, ''A's'' acquisition of the refinery is not subject to the notification requirements of the act because its value does not exceed $50 million (as adjusted).

* * * * *

■ 19. Amend § 802.4 by revising paragraph (a) and Examples 1 and 2 to read as follows:

§ 802.4 Acquisitions of voting securities of issuers holding certain assets the direct acquisition of which is exempt.

(a) An acquisition of voting securities of an issuer whose assets together with those of all entities it controls consist or will consist of assets whose purchase would be exempt from the requirements of the act pursuant to Section 7A(c)(2) of the act, § 802.2, § 802.3 or § 802.5 of this part is exempt from the reporting requirements if the acquired issuer and all entities it controls do not hold other non-exempt assets with an aggregate fair market value of more than $50 million (as adjusted).

* * * * *

(c) * * *

Examples:

1. ''A,'' a real estate investment company, proposes to purchase 100 percent of the voting securities of C, a wholly-owned subsidiary of ''B,'' a construction company. C's assets are a newly constructed, never occupied hotel, including fixtures, furnishings and insurance policies. The acquisition of the hotel would be exempt under § 802.2(a) as a new facility and under § 802.2(d). Therefore, the acquisition of the voting securities of C is exempt pursuant to § 802.4(a) since C holds assets whose direct purchase would be exempt under § 802.2 and does not hold non-exempt assets exceeding $50 million (as adjusted) in value.

2. ''A'' proposes to acquire 60 percent of the voting securities of C from ''B.'' C's assets consist of a portfolio of mortgages valued at $55 million and a small manufacturing plant valued at $26 million. The manufacturing plant is an operating unit for purposes of § 802.1(a). Since the acquisition of the mortgages would be exempt pursuant to Section 7A(c)(2) of the act and since the value of the non-exempt manufacturing plant is less than $50 million (as adjusted), this acquisition is exempt under § 802.4(a).

* * * * *

■ 20. Amend § 802.5 by revising Example 2 to read as follows:

§ 802.5 Acquisitions of investment rental property assets.

* * * * *

Examples:

* * * * *

2. ''X'' intends to buy from ''Y'' a development commonly referred to as an industrial park. The industrial park contains a warehouse/distribution center, a retail tire and automobile parts store, an office building, and a small factory. The industrial park also contains several parcels of vacant land. If ''X'' intends to acquire this industrial park as investment rental property, the acquisition will be exempt pursuant to § 802.5. If, however, ''X'' intends to use the factory for its own manufacturing operations, this exemption would be unavailable. The exemptions in § 802.2 for warehouses, rental retail space, office buildings, and undeveloped land may still apply and, if the value of the factory is $50 million (as adjusted) or less, the entire transaction may be exempted by that section.

■ 21. Amend § 802.9 by revising Example 1 to read as follows:

§ 802.9 Acquisition solely for the purpose of investment.

* * * * *

Examples:

1. Suppose that acquiring person ''A'' acquires 6 percent of the voting securities of issuer X, valued in excess of $50 million (as adjusted). If the acquisition is solely for the purpose of investment, it is exempt under Section 7A(c)(9).

* * * * *

■ 22. Amend § 802.21 by revising the heading, paragraph (a)(3), and Examples 1 through 4 following paragraph (a); by adding new Examples 5 and 6 to paragraph (a) to read as follows; and by removing paragraph (c).

§ 802.21 Acquisitions of voting securities not meeting or exceeding greater notification threshold (as adjusted).

(a) * * *

(3) The acquisition will not increase the holdings of the acquiring person to meet or exceed a notification threshold (as adjusted) greater than the greatest notification threshold met or exceeded in the earlier acquisition.

Examples:

1. In 2004, Corporation A acquired $53 million of the voting securities of corporation B and both ''A'' and ''B'' filed notification as required, indicating the $50 million threshold. Within five years of the expiration of the original waiting period, ''A'' acquires additional voting securities of B but not in an amount sufficient to meet or exceed $100 million (as adjusted) or 50 percent of the voting securities of B. No additional notification is required.

2. In 2004, Corporation A acquired $53 million of the voting securities of corporation B and both ''A'' and ''B'' filed notification as required, indicating the $50 million threshold. Suppose that in year three following the expiration of the waiting period, the $50 million notification threshold has been adjusted to $56 million pursuant to Section 7A(a)(2)(a) of the Act. ''A'' now intends to acquire an additional $5 million of the voting securities of B. ''A'' is not required to file another notification even though it now holds voting securities in excess of the $56 million notification threshold (which is greater than the $50 million notification threshold indicated in its filing), because it has not met or exceeded a notification threshold (as adjusted) greater than the notification threshold exceeded in the earlier acquisition (*i.e.* $100 million (as adjusted) or 50% notification thresholds).

3. Same facts as in Example 2 above except now the five year period has expired. Suppose that, the $50 million notification threshold has been adjusted to $57 million pursuant to Section 7A(a)(2)(a) of the Act. ''A'' now holds $58 million of voting securities of B. Because § 802.21(a)(2) is no longer satisfied, the acquisition of any additional voting securities of B will require a new filing because ''A'' will hold voting securities valued in excess of the $57 million notification threshold. If, however, the $50 million notification threshold had been adjusted to $60 million at the end of the five-year period, A could acquire up to that threshold without a new filing.

4. This section also allows a person to recross any of the threshold notification levels that were in effect at the time of filing notification any number of times within five years of the expiration of the waiting period following notification. Thus, if in Example 1, ''A'' had disposed of some voting securities so that it held less than $50 million of the voting securities of B, and thereafter had increased its holdings to more than $50 million but less than $100 million or 50 percent of B, notification would not be required if the increase occurred within 5 years of the expiration of the original waiting period.

5. A files notification at the $50 million notification threshold and acquires $51 million of the voting securities of B in the year following expiration of the waiting period. The next greater notification threshold at the time of filing was $100 million. In year three, the $100 million notification threshold has been adjusted to $106 million. A can now acquire up to, but not meet or exceed, voting securities of B valued at $106 million. As the original $100 million threshold is adjusted upward in years four and five, A can acquire up to those new thresholds as the adjustments are effected.

6. A files notification at the $50 million threshold in January of year one. In February of year one, the $50 million threshold is adjusted to $52 million. A only needs to acquire in excess of $50 million of voting securities of B, not in excess of $52 million, to have exceeded the threshold which was filed for in the year following expiration of the waiting period (*see* § 803.7). It may then acquire up to the next greater notification threshold (as adjusted) during the five years following expiration of the waiting period.

■ 23. Amend § 802.35 by revising Examples 1 and 2 to read as follows:

§ 802.35 Acquisitions by employee trusts.

* * * * *

Examples:

1. Company A establishes a trust for its employees that meets the qualifications of section 401 of the Internal Revenue Code. Company A has the power to designate the trustee of the trust. That trust then acquires 30% of the voting securities of Company A for in excess of $50 million (as adjusted). Later, the trust acquires 20% of the stock of Company B, a wholly-owned subsidiary of Company A, for in excess of $50 million (as adjusted). Neither acquisition is reportable.

2. Assume that in the example above, ''A'' has total assets of $100 million (as adjusted). ''C'' also has total assets of $100 million (as adjusted) and is not controlled by Company A. The trust controlled by Company A plans to acquire 40 percent of the voting securities of Company C for in excess of $50 million (as adjusted). Since Company C is not included within ''A,'' ''A'' must observe the requirements of the act before the trust makes the acquisition of Company C's shares.

■ 24. Amend § 802.41 by revising Examples 1 and 2 to read as follows:

§ 802.41 Joint venture or other corporations at time of formation.

* * * * *

Examples:

1. Corporations A and B, each having sales of in excess of $100 million (as adjusted), each propose to contribute in excess of $50 million (as adjusted) in cash in exchange for 50 percent of the voting securities of a new corporation, N. Under this section, the new corporation need not file notification, although both ''A'' and ''B'' must do so and observe the waiting period prior to receiving any voting securities of N.

2. In addition to the facts in Example 1 of this section, A and B have agreed that upon creation N will purchase 100 percent of the voting securities of corporation C for in excess of $50 million (as adjusted). Because N's purchase of C is not a transaction in connection with N's formation, and because in any event C is not a contributor to the formation of N, ''A,'' ''B'' and ''C'' must file with respect to the proposed acquisition of C and must observe the waiting period.

■ 25. Amend § 802.50 by revising paragraphs (a), (b)(2) and (b)(3) and Examples 2 through 4 to read as follows:

§ 802.50 Acquisitions of foreign assets.

(a) The acquisition of assets located outside the United States shall be exempt from the requirements of the act unless the foreign assets the acquiring person would hold as a result of the acquisition generated sales in or into the U.S. exceeding $50 million (as adjusted) during the acquired person's most recent fiscal year.

(b) * * *

(2) The aggregate sales of the acquiring and acquired persons in or into the United States are less than $110 million (as adjusted) in their respective most recent fiscal years;

(3) The aggregate total assets of the acquiring and acquired persons located in the United States (other than investment assets, voting or nonvoting securities of another person, and assets included pursuant to § 801.40(d)(2) of this chapter) are less than $110 million (as adjusted) ; and

* * * * *

Examples:

* * * * *

2. Sixty days after the transaction in example 1, ''A'' proposes to sell to ''B'' a second manufacturing plant located abroad; sales in or into the United States attributable to this plant, when combined with the sales into the United States of the first plant, totaled in excess of $50 million (as adjusted) in the most recent fiscal year. Since ''B'' would be acquiring the second plant within 180 days of the first plant, both plants would be considered assets of ''A'' held by ''B'' as a result of the second acquisition (*see* § 801.13(b)(2) of this chapter). Since the total sales in or into the United States exceed $50 million (as adjusted), the acquisition of the second plant would not be exempt under this paragraph (a) of this section.

3. Assume that ''A'' and ''B'' are foreign persons with aggregate sales in or into the

United States of in excess of $110 million (as adjusted). If ''A'' acquires only foreign assets of ''B,'' and if those assets generated $50 million (as adjusted) or less in sales in or into the United States, the transaction is exempt.

4. Assume that ''A'' and ''B'' are foreign persons with aggregate sales in or into the United States and assets located in the United Sates of less than $110 million (as adjusted). If ''A'' acquires only foreign assets of ''B,'' and those assets generated in excess of $50 million (as adjusted) in sales in or into the United States during the most recent fiscal year, the transaction is exempt from reporting if the assets are valued at $200 million (as adjusted) or less, but is reportable if valued at greater than $200 million (as adjusted).

■ 26. Amend § 802.51 by revising paragraphs (a), (b), (c)(2) and (c)(3) and Examples 1 through 3 to read as follows:

§ 802.51 Acquisitions of voting securities of a foreign issuer.

(a) *By U.S. persons.* (1) The acquisition of voting securities of a foreign issuer by a U.S. person shall be exempt from the requirements of the act unless the issuer (including all entities controlled by the issuer) either: holds assets located in the United States (other than investment assets, voting or nonvoting securities of another person, and assets included pursuant to § 801.40(d)(2) of this chapter) having an aggregate total value of over $50 million (as adjusted); or made aggregate sales in or into the United States of over $50 million (as adjusted) in its most recent fiscal year.

(2) If interests in multiple foreign issuers are being acquired from the same acquired person, the assets located in the United States and sales in or into the United States of all the issuers must be aggregated to determine whether either $50 million (as adjusted) limitation is exceeded.

(b) *By foreign persons.* (1) The acquisition of voting securities of a foreign issuer by a foreign person shall be exempt from the requirements of the act unless the acquisition will confer control of the issuer and the issuer (including all entities controlled by the issuer) either: holds assets located in the United States (other than investment assets, voting or nonvoting securities of another person, and assets included pursuant to § 801.40(d)(2) of this chapter) having an aggregate total value of over $50 million (as adjusted); or made aggregate sales in or into the United States of over $50 million (as adjusted) in its most recent fiscal year.

(2) If controlling interests in multiple foreign issuers are being acquired from the same acquired person, the assets located in the United States and sales in or into the United States of all the issuers must be aggregated to determine whether either $50 million (as adjusted) limitation is exceeded.

(c) * * *

(2) The aggregate sales of the acquiring and acquired persons in or into the United States are less than $110 million (as adjusted) in their respective most recent fiscal years;

(3) The aggregate total assets of the acquiring and acquired persons located in the United States (other than investment assets, voting or nonvoting securities of another person, and assets included pursuant to § 801.40(d)(2) of this chapter) are less than $110 million (as adjusted); and

* * * * *

Examples:

1. ''A,'' a U.S. person, is to acquire the voting securities of C, a foreign issuer. C has no assets in the United States, but made aggregate sales into the United States of in excess of 50 million (as adjusted) in the most recent fiscal year. The transaction is not exempt under this section.

2. Assume that ''A'' and ''B'' are foreign persons with aggregate sales in or into the United States in excess of $110 million (as adjusted), and that ''A'' is acquiring 100% of the voting securities of ''B.'' Included within ''B'' is U.S. issuer C, whose total U.S. assets are valued in excess of $50 million (as adjusted). Since ''A'' will be acquiring control of an issuer, C, with total U.S. assets of more than $50 million (as adjusted), and the parties' aggregate sales in or into the U.S. in the relevant time period exceed $110 million (as adjusted), the acquisition is not exempt under this section.

3. ''A,'' a foreign person, intends to acquire 100 percent of the voting securities of two wholly owned subsidiaries of ''B'' for a total of in excess of $50 million (as adjusted). BSUB1 is a foreign issuer with less than $50 million (as adjusted) in sales into the U.S. in its most recent fiscal year and with assets of less than $50 million (as adjusted) located in the U.S. Less than $50 million (as adjusted) of the acquisition price has been allocated to BSUB1. BSUB2 is a U.S. issuer with more than $50 million (as adjusted) in U.S. sales and more than $50 million (as adjusted) in assets located in the U.S. Less than $50 million (as adjusted) of the acquisition price is allocated to BSUB2. Since BSUB1 does not exceed the $50 million (as adjusted) limitation for U.S. sales or assets in § 802.51(b), its voting securities are not held as a result of the acquisition (*see* § 801.15(b) of this chapter). Since the acquisition price for BSUB2 alone would not result in ''A'' holding in excess of $50 million (as adjusted) of voting securities of the acquired person, the transaction is non-reportable in its entirety. Note that the U.S. sales and assets of BSUB1 are not aggregated with those of BSUB2 for purposes of determining whether the limitations in paragraph (b) of this section are exceeded. If BSUB2 were also a foreign issuer, such aggregation would be required under paragraph (b)(2) of this section, and the transaction in its entirety would be reportable.

■ 27. Amend § 802.52 by revising its Example to read as follows:

§ 802.52 Acquisitions by or from foreign governmental corporations.

* * * * *

Example: The government of foreign country X has decided to sell assets of its wholly owned corporation, B, all of which are located in foreign country X. The buyer is ''A,'' a U.S. person. Regardless of the aggregate sales in or into the United States attributable to the assets of B, the transaction is exempt under this section. (If such aggregate sales were $50 million (as adjusted) or less, the transaction would also be exempt under § 802.50).

■ 28. Amend § 802.64 by revising Example 1 to read as follows:

§ 802.64 Acquisitions of voting securities by certain institutional investors.

* * * * *

(c) * * *

Examples:

1. Assume that A and its subsidiary, B, are both institutional investors as defined in paragraph (a) of this section, that X is not, and that the conditions set forth in paragraphs (b)(2), (3) and (4) of this section are satisfied. Either A or B may acquire voting securities of X worth in excess of $50 million (as adjusted) as long as the aggregate amount held by person ''A'' as a result of the acquisition does not exceed 15 percent of X's outstanding voting securities. If the aggregate holdings would exceed 15 percent, ''A'' may acquire no more than $50 million (as adjusted) worth of voting securities without being subject to the requirements of the act.

* * * * *

PART 803—TRANSMITTAL RULES

■ 29. The authority citation for part 803 continues to read as follows:

Authority: 15 U.S.C. 18a(d).

■ 30. Amend § 803.5(a)(2) by revising Examples 2 and 3 to read as follows:

§ 803.5 Affidavits required.

(a) * * *

(2) * * *

Examples:

* * * * *

2. ''A'' holds 100,000 shares of the voting securities of Company B. ''A'' has a good faith intention to acquire an additional 900,000 shares of Company B's voting securities. ''A'' states in its notice to B, inter alia, that as a result of the acquisition it will hold 1,000,000 shares. If 1,000,000 shares of Company B represent 20 percent of Company B's outstanding voting securities, the statement will be deemed by the enforcement agencies a notification for the $100 million threshold (as adjusted).

3. Company A intends to acquire voting securities of Company B. ''A'' does not know exactly how many shares it will acquire, but it knows it will definitely acquire in excess of $50 million (as adjusted) worth and may

acquire 50 percent of Company B's shares. ''A'''s notice to the acquired person would meet the requirements of Sec. 803.5(a)(1)(iii) if it states, inter alia, either: ''Company A has a present good faith intention to acquire in excess of $50 million (as adjusted) of the outstanding voting securities of Company B, and depending on market conditions, may acquire more of the voting securities of Company B and thus designates the 50 percent threshold,'' or ''Company A has a present good faith intention to acquire in excess of $50 million (as adjusted) of the outstanding voting securities of Company B, and depending on market conditions may acquire 50 percent or more of the voting securities of Company B.'' The Commission would deem either of these statements as intending to give notice for the 50 percent threshold.

* * * * *

■ 31. Amend § 803.7 by revising its example to read as follows:

§ 803.7 Expiration of notification.

* * * * *

Example: ''A'' files notification that in excess of $100 million (as adjusted) of the voting securities of corporation B are to be acquired. One year after the expiration of the waiting period, ''A'' has acquired less than $100 million (as adjusted) of B's voting securities. Although § 802.21 will permit ''A'' to purchase any amount of B's voting securities short of $100 million (as adjusted) within 5 years from the expiration of the waiting period, A's holdings may not meet or exceed the $100 million (as adjusted) notification threshold without ''A'' and ''B'' again filing notification and observing a waiting period.

■ 32. Amend § 803.9(a) by revising Examples 1 through 6 to read as follows:

§ 803.9 Filing fee.

(a) * * *

Examples:

1. ''A'' wishes to acquire voting securities issued by B, where the greater of the acquisition price and the market price is in excess of $50 million (as adjusted) but less than $100 million (as adjusted) pursuant to § 801.10. When ''A'' files notification for the transaction, it must indicate the $50 million (as adjusted) threshold and pay a filing fee of $45,000 because the aggregate total amount of the acquisition is less than $100 million (as adjusted), but greater than $50 million (as adjusted).

2. ''A'' acquires less than $50 million (as adjusted) of assets from ''B.'' The parties meet the size of person criteria of Section 7A(a)(2)(B), but the transaction is not reportable because it does not exceed the $50 million (as adjusted) size of transaction threshold of that provision. Two months later ''A'' acquires additional assets from ''B'' valued at between $50 million (as adjusted) and $100 million (as adjusted). Pursuant to the aggregation requirements of § 801.13(b)(2)(ii), the aggregate total amount of ''B's'' assets that ''A'' will hold as a result of the second acquisition is in excess of $100 million (as adjusted). Accordingly, when ''A'' files notification for the second transaction, ''A'' must indicate the $100 million (as adjusted) threshold and pay a filing fee of $125,000 because the aggregate total amount of the acquisition is less than $500 million (as adjusted), but not less than $100 million (as adjusted).

3. ''A'' acquires in excess of $50 million (as adjusted) of voting securities issued by B after submitting its notification and $45,000 filing fee and indicates the $50 million (as adjusted) threshold. Two years later, ''A'' files to acquire additional voting securities issued by B valued at $50 million (as adjusted) because it will exceed the next higher reporting threshold (*see* §§ 801.1(h)). Assuming the second transaction is reportable and the value of its initial holdings is unchanged (*see* §§ 801.13(a)(2) and 801.10(c)), the provisions of § 801.13(a)(1) require that ''A'' report that the value of the second transaction is in excess of $100 million (as adjusted) because ''A'' must aggregate previously acquired securities in calculating the value of B's voting securities that it will hold as a result of the second acquisition. ''A'' should pay a filing fee of $125,000.

4. ''A'' signs a contract with a stated purchase price in excess of $100 million (as adjusted), subject to adjustments, to acquire all of the assets of ''B.'' If the amount of adjustments can be reasonably estimated, the acquisition price—as adjusted to reflect that estimate—is determined. If the amount of adjustments cannot be reasonably estimated, the acquisition price is undetermined. In either case the board or its delegee must also determine in good faith the fair market value. (§ 801.10(b) states that the value of an asset acquisition is to be the fair market value or the acquisition price, if determined and greater than fair market value.) ''A'' files notification and submits a $45,000 filing fee. ''A'''s decision to pay that fee may be justified on either of two bases, and ''A'' should submit an attachment to the Notification and Report Form explaining the valuation. First, ''A'' may have concluded that the acquisition price can be reasonably estimated to be less than $100 million (as adjusted), because of anticipated adjustments—*e.g.*, based on due diligence by ''A's'' accounting firm indicating that one third of the inventory is not saleable. If fair market value is also determined in good faith to be less than $100 million (as adjusted), the $45,000 fee is appropriate. Alternatively, ''A'' may conclude that because the adjustments cannot reasonably be estimated, acquisition price is undetermined. If so, ''A'' would base the valuation on the good faith determination of fair market value. The acquiring party's execution of the Certification also attests to the good faith valuation of the value of the transaction.

5. ''A'' contracts to acquire all of the assets of ''B'' for in excess of $500 million (as adjusted). The assets include hotels, office buildings, and rental retail property, all of which are exempted by § 802.2. Section 802.2 directs that these assets are exempt from the requirements of the act and that reporting requirements for the transaction should be determined by analyzing the remainder of the acquisition as if it were a separate transaction. Furthermore, § 801.15(a)(2) states that those exempt assets are never held as a result of the acquisition. Accordingly, the aggregate amount of the transaction is in excess of $100 million (as adjusted), but less than $500 million (as adjusted). ''A'' will be liable for a filing fee of $125,000, rather than $280,000, because the value of the transaction is not less than $100 million (as adjusted) but less than $500 million (as adjusted). Note, however, that ''A'' must include an attachment in its Notification and Report Form setting out both the in excess of $500 million (as adjusted) total purchase price and the basis for its determination that the aggregate total amount of the acquisition under the rules is between $100 million (as adjusted) and $500 million (as adjusted) rather than in excess of $500 million (as adjusted), in accordance with the Instructions to the Form.

6. ''A'' acquires coal reserves from ''B'' valued at $150 million. No notification or filing fee is required because the acquisition is exempted by § 802.3(b). Three months later, A proposes to acquire additional coal reserves from ''B'' valued at $500 million (as adjusted). This transaction is subject to the notification requirements of the act because the value of the acquisition exceeds the $200 million limitation on the exemption in § 802.3(b). As a result of § 801.13(b)(2)(ii), the prior $150 million acquisition must be added because the additional $500 million (as adjusted) of coal reserves were acquired from the same person within 180 days of the initial acquisition. Because aggregating the two acquisitions exceeds the $200 million exemption limitation, § 801.15(b) directs that ''A'' will also hold the previously exempt $150 million acquisition; thus, the aggregate amount held as a result of the $500 million (as adjusted) acquisition exceeds $500 million (as adjusted). Accordingly, ''A'' must file notification to acquire the coal reserves valued in excess of $500 million (as adjusted) and pay a filing fee of $280,000.

* * * * *

■ 33. Revise the Appendix to part 803 to read as follows:

BILLING CODE 6750–01–P

Appendix to Part 803

ANTITRUST IMPROVEMENTS ACT NOTIFICATION AND REPORT FORM for Certain Mergers and Acquisitions

INSTRUCTIONS

GENERAL

The Answer Sheets (pp. 1-15) constitute the Notification and Report Form ("the Form") required to be submitted pursuant to § 803.1(a) of the premerger notification rules ("the rules"). Filing persons need not, however, record their responses on the Form.

These instructions specify the information which must be provided in response to the Items on the Answer Sheets. Only the completed Answer Sheets, together with all documentary attachments, are to be filed with the Federal Trade Commission and the Department of Justice.

Persons providing responses on attachment pages rather than on answer sheets must submit a complete set of attachment pages with each copy of the Form.

The term "documentary attachments" refers to materials supplied in responses to Item 3(d), Item 4 and to submissions pursuant to §§ 803.1(b) and 803.11 of the rules.

Information-The central office for information and assistance concerning the rules, 16 CFR Parts 801-803, and the Form is Room 303, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580, phone (202) 326-3100.

Definitions-The definitions and other provisions governing this Form are set forth in the rules, 16 CFR Parts 801-803. The governing statute, the rules, and the Statement of Basis and Purpose for the rules are set forth at 43 FR 33450 (July 31, 1978), 44 FR 66781 (November 22, 1979) 48 FR 34427 (July 29, 1983) and Pub. L. No. 106-533, 114 Stat. 2762.

Affidavit-Attach the affidavit required by § 803.5 to page 1 of the Form. Affidavits are not required if the person filing notification is an acquired person in a transaction covered by § 801.30. (See § 803.5(a)).

Responses-*Each answer* should identify the Item to which it is addressed. Use the reverse side of the corresponding answer sheet or attach separate additional sheets as necessary in answering each Item. Each additional sheet should identify at the top of the page the Item to which it is addressed. Voluntary submissions pursuant to § 803.1(b) should also be identified.

Enter the name of the person filing notification appearing in Item 1(a) on page 1 of the Form and the date on which the Form is completed at the top of each page of the Form, at the top of any sheets attached to complete the response to any Item, and at the top of the first or cover page of each documentary attachment.

If unable to answer any Item fully, give such information as is available and provide a statement of reasons for non-compliance as required by § 803.3. If exact answers to any Item cannot be given, enter best estimates and indicate the sources or bases of such estimates. Estimated data should be followed by the notation, "est." All information should be rounded to the nearest thousand dollars.

Year-All references to "year" refer to calendar year. If the data are not available on a calendar year basis, supply the requested data for the fiscal year reporting period which most nearly corresponds to the calendar year specified. References to "most recent year" mean the most recent calendar or fiscal year for which the requested information is available.

North American Industry Classification System (NAICS) Data-This Notification and Report Form requests information regarding dollar revenues and lines of commerce at three levels with respect to operations conducted within the United States. (See § 803.2(c)(1).) All persons must submit certain data at the 6-digit NAICS national industry code level. To the extent that dollar revenues are derived from *manufacturing operations* (NAICS Sectors 31-33), data must also be submitted at the *7-digit NAICS product class and 10-digit NAICS product code levels.* The term "dollar revenues" is defined in § 803.2(d).

References-In reporting information by 6-digit NAICS industry code refer to the *North American Industry Classification System - United States, 1997* (*1997 NAICS Manual*) published by the Executive Office of the President, Office of Management and Budget. In reporting information by 7-digit NAICS product class and 10-digit NAICS product code refer to the *1997 Numerical List of Manufactured and Mineral Products* (EC97M31R-NL) published by the Bureau of the Census. Information regarding NAICS also is available at www.census.gov.

Privacy Act Statement-Section 18a(a) of Title 15 of the U.S. Code authorizes the collection of this information. The primary use of this information is to determine whether the merger or acquisition reported in the Notification and Report Form may violate the antitrust laws.

Furnishing the information on the Form is voluntary. Consummation of an acquisition required to be reported by the statute cited above without having provided this information may, however, render a person liable to civil penalties up to $11,000 per day.

Items 5, 7, 8-Supply information only with respect to operations conducted within the United States, including its commonwealths, territories, possessions and the District of Columbia. (See §§ 801.1(k); 803.2(c)(1).)

Information need not be supplied regarding assets or voting securities currently being acquired, when the acquisition is exempt under the statute or rules. (See § 803.2(c)(2).)

The acquired person should limit its response in the case of an acquisition of assets, to the assets being sold, and in the case of an acquisition of voting securities, to the issuer(s) whose voting securities are being acquired and all entities controlled by such issuer. Separate responses may be required where a person is both acquiring and acquired. (See § 803.2(b) and (c).)

Filing-Complete and return two copies (with one notarized original affidavit and certification and one set of documentary attachments) of this Notification and Report Form to the Premerger Notification Office, Bureau of Competition, Room 303, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. Three copies (with one set of documentary attachments) should be sent to: Director of Operations, Antitrust Division, Department of Justice, Patrick Henry Bldg., 601 D Street, N.W., Room #10013, Washington, D.C. 20530. (For FEDEX airbills to the Department of Justice, do not use the 20530 zip code; use zip code 20004.)

ITEM BY ITEM

Affidavit-Attach the affidavit required by § 803.5 to page 1 of the Answer Sheets. Acquiring persons in transactions covered by § 801.30 are required to also submit a copy of the notice served on the acquired person pursuant to § 803.5(a)(1). (See § 803.5(a)(3).)

Fee Information-The fee for filing the Notification and Report Form is based on the aggregate total amount of assets and voting securities to be held as a result of the acquisition:

Value of assets or voting securities to be held	Fee Amount
greater than $50 million but less than $100 million (as adjusted)	$45,000
$100 million or greater but less than $500 million (as adjusted)	$125,000
$500 million or greater (as adjusted)	$280,000

Amount Paid-Indicate the amount of the filing fee paid. This amount should be net of any banking or financial institution charges. Where an explanatory attachment is required, include in your explanation any adjustments to the acquisition price that serve to lower the fee from that which would otherwise be due. If there is no acquisition price or if the acquisition price may fall within a range that straddles two filing fee thresholds, state the transaction value on which the fee is based and explain the valuation method used. Include in your explanation a description of any exempt assets, the value assigned to each, and the valuation method used.

A Valuation Worksheet available from the Premerger Notification Office will be helpful in determining the value of a transaction for filing and fee purposes. This Worksheet need not be submitted with the Notification and Report Form, but it or something similar should be utilized and retained by the acquiring person in the event
Commission staff has questions about the valuation of the transaction.

Payer Identification- Provide the 9-digit Taxpayer Identification Number (TIN) of the acquiring person and, if different from the filing person, the TIN of the payer(s) of the filing fee. A payer or filing person who is a natural person having no TIN must provide the name and social security number (SSN) of the payer. If the payer or filing person is a foreign person, only the name of the payer and the name of the filing person need be supplied if different.

Method of Payment-Check the box indicating the method of fee payment. If paying by electronic wire transfer (EWT), provide the name of the financial institution from which the EWT is being sent and the confirmation number.

To insure filing fees paid by EWT are attributed to the appropriate payer filing notification, the payer must provide the following information to the financial institution initiating the EWT:

The Department of Treasury's ABA Number: 021030004; and
The Federal Trade Commission's ALC Number: 29000001.

If the name used to transmit the EWT differs from the filer's name, provide the alternative name. If the confirmation number is unavailable at the time notification is filed, provide this information by letter within one business day of filing.

Corrective Filing-Put an X in the appropriate box to indicate whether the notification is a corrective filing being made for an acquisition that has already taken place in violation of the statute. Attach a detailed, written explanation signed by a company official explaining (1) how the violation occurred, (2) when and how the violation was discovered and (3) what steps will be taken to ensure compliance in the future.

Transactions Subject to Foreign Antitrust Notification-If to the knowledge or belief of the filing person at the time of filing this notification, a foreign antitrust or competition authority has been or will be notified of the proposed transaction, list the name of each such authority and the date or anticipated date of each such notification. Response to this item is voluntary.

Cash Tender Offer-Put an X in the appropriate box to indicate whether the acquisition is a cash tender offer.

Bankruptcy-Put an X in the appropriate box to indicate whether the acquired person's filing is being made by a trustee in bankruptcy or a debtor-in-possession for a transaction that is subject to section 363(b) of the Bankruptcy Code (11USC § 363).

Early Termination-Put an X in the yes box to request early termination of the waiting period. Notification of each grant of early termination will be published in the Federal Register as required by § 7A(b)(2) of the Clayton Act and on the FTC web site www.ftc.gov.

ITEM 1

Item 1(a)-Give the name and headquarters address of the person filing notification. The name of the person is the name of the ultimate parent entity included within that person.

Item 1(b)-Indicate whether the person filing notification is an acquiring person, an acquired person, or both an acquiring and acquired person. (See § 801.2.)

Item 1(c)-Put an X in the appropriate box to indicate whether the person in Item 1(a) is a corporation, partnership or other (specify).

Item 1(d)-Put an X in the appropriate box to indicate whether data furnished is by calendar year or fiscal year. If fiscal year, specify period.

Item 1(e)-Put an X in the appropriate box to indicate if this Form is being filed on behalf of the ultimate parent entity by another entity within the same person authorized by it to file notification on its behalf pursuant to § 803.2(a), or if this Form is being filed pursuant to § 803.4 on behalf of a foreign person. Then provide the name and mailing address of the entity filing notification on behalf of the reporting person named in Item 1(a) of the Form.

Item 1(f)-If an entity within the person filing notification other than the ultimate parent entity listed in Item 1(a) is the entity which is making the acquisition, or if the assets or voting securities of an entity other than the ultimate parent entity listed in Item 1(a) are being acquired, provide the name and mailing address of that entity and the percentage of its voting securities held by the person named in Item 1(a) above. (If control is effected by means other than the direct holding of the entity's voting securities, describe the intermediaries or the contract through which control is effected (see § 801.1(b)).

Item 1(g)-Print or type the name and title, firm name, address, telephone number, fax number and e-mail address of the individual to contact regarding this Notification and Report Form. (See § 803.20(b)(2)(ii).)

Item 1(h)-Foreign filing persons print or type the name and title, firm name, address, telephone number, fax number and e-mail address of an individual located in the United States designated for the limited purpose of receiving notice of the issuance of a request for additional information or documentary material. (See § 803.20(b)(2)(iii).)

ITEM 2

Item 2(a)-Give the names of all ultimate parent entities of acquiring and acquired person which are parties to the acquisition whether or not they are required to file notification.

Item 2(b)-Put an X in all the boxes that apply to this acquisition.

Item 2(c)-*Acquiring persons* put an X in the box to indicate the highest threshold for which notification is being filed (see § 801.1(h)): $50 million (as adjusted), $100 million (as adjusted), $500 million (as adjusted), 25% (if value of voting securities to be held is greater than $1 billion (as adjusted)), or 50%. The notification threshold selected should be based on voting securities only that will be held as a result of the acquisition.

Item 2(d)-*Assets and voting securities held as a result of the acquisition* (to be completed by both acquiring and acquired persons). State:

Item 2(d)(i)-the value of voting securities;

Item 2(d)(ii)-the percentage of voting securities;

Item 2(d)(iii)-the value of assets:

Item 2(d)(iv)-the aggregate total amount of voting securities and assets of the acquired person to be held by each acquiring person, as a result of the acquisition (see §§ 801.12, 801.13, and 801.14).

Item 2(e)-Acquiring persons must provide the name(s) of the person(s) who performed any fair market valuation used to determine the aggregate total value of the transaction reported in Item 2(d)(iv).

ITEM 3

Item 3(a)-*Description of acquisition*. Briefly describe the transaction. Include a list of the name and mailing address of each acquiring and acquired person, whether or not required to file notification. Indicate for each party whether assets or voting securities (or both) are to be acquired. Also indicate what consideration will be received by each party. In describing the acquisition, include the expected dates of any major events required to consummate the transaction (e.g., stockholders' meetings, filing of requests for approval, other public filings, terminations of tender offers) and the scheduled consummation date of the transaction.

If the voting securities are to be acquired from a holder other than the issuer (or an entity within the same person as the issuer) separately identify (if known) such holder and the issuer of the voting securities. Acquiring persons involved in tender offers should describe the terms of the offer.

Item 3(b)(i)-*Assets to be acquired*. This Item is to be completed only to the extent that the transaction is an acquisition of assets. Describe all general classes of assets (other than cash and securities) to be acquired by each party to the transaction, giving dollar values thereof.

Give the total value of the assets to be acquired in this transaction.

Examples of general classes of assets other than cash and securities are land, merchandising inventory, manufacturing plants (specify location and products produced), and retail stores. For each general class of assets, indicate the page or paragraph number of the contract or other document submitted with this Form in which the assets are more particularly described.

Item 3(b)(ii)-*Assets held by acquiring person*. (To be completed by acquiring persons). If assets of the acquired person (see § 801.13) are presently held by the person filing notification, furnish a description of each general class of such assets in the manner required by Item 3(b)(i), and the dollar value or estimated dollar value at the time they were acquired.

Item 3(c)-*Voting securities to be acquired*. Furnish the following information separately for each issuer whose voting securities will be acquired in the acquisition: (If, as a result of the acquisition, the acquiring person will hold 100 percent of the voting securities of the acquired issuer or if the acquisition is a merger or consolidation (see § 801.2(d)), the parties may so state and provide the total dollar value of the transaction instead of responding to Items 3(c)(i)-3(c)(vi).

Item 3(c)(i)-List each class of voting securities (including convertible voting securities) which will be outstanding after the acquisition has been completed. If there is more than one class of voting securities, include a description of the voting rights of each class. Also list each class of non-voting securities which will be acquired in the acquisition;

Item 3(c)(ii)-Total number of shares of each class of securities listed which will be outstanding after the acquisition has been completed;

Item 3(c)(iii)-Total number of shares of each class of securities listed which will be acquired in this acquisition. If there is more than one acquiring person for any class of securities, show data separately for each acquiring person;

Item 3(c)(iv)-Identity of each person acquiring any securities of any class listed. If there is more than one acquiring person for any class of securities, show data separately for each acquiring person;

Item 3(c)(v)-Dollar value of securities of each class listed to be acquired in this transaction (see § 801.10). If there is more than one acquiring person of any class of securities, show data separately for each acquiring person (If the exact dollar value cannot be determined at the time of filing, provide an estimated value and indicate the basis on which the estimate was made);

Item 3(c)(vi)-Total number of each class of securities listed which will be held by acquiring person(s) after the acquisition has been accomplished. If there is more than one acquiring person for any class of securities, show data separately for each acquiring person;

Item 3(d)-Furnish copies of final or most recent versions of all documents which constitute the agreement among the acquiring person(s) and the person(s) whose voting securities or assets are to be acquired. (Do not attach these documents to the Answer Sheets.)

ITEM 4

Furnish one copy of each of the following documents. For each entity included within the person filing notification which has prepared its own such documents different from those prepared by the person filing notification, furnish, in addition, one copy of each document from each such other entity. Furnish copies of:

Item 4(a)-all of the following documents which have been filed with the United States Securities and Exchange Commission (or are to be filed contemporaneously in connection with this acquisition); the most recent proxy statement and Form 10-K, each dated not more than three years prior to the date of this Notification and Report Form; all Forms 10-Q and 8-K filed since the end of the period reflected by the Form 10-K being supplied; any registration statement filed in connection with the transaction for which notification is being filed; if the acquisition is a tender offer, Schedule TO. Alternatively, if the person filing notification does not have copies of responsive documents readily available, identification of such documents and citation to date and place of filing will constitute compliance;

NOTE: In response to Item 4(a), the person filing notification may incorporate by reference documents submitted with an earlier filing as explained in the staff formal interpretations dated April 10, 1979, and April 7, 1981, and in § 803.2(e).

Item 4(b)-the most recent annual reports and most recent annual audit reports (of person filing notification and of each unconsolidated United States issuer included within such person) and, if different, the most recently regularly prepared balance sheet of the person filing notification and of each unconsolidated United States issuer included within such person;

Item 4(c)-all studies, surveys, analyses and reports which were prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets, and indicate (if not contained in the document itself) the date of preparation, and the name and title of each individual who prepared each such document.

Persons filing notification may provide an optional index of documents called for by Item 4 of the Answer Sheets.

NOTE: If the person filing notification withholds any documents called for by Item 4(c) based on a claim of privilege, the person must provide a statement of reasons for such noncompliance as specified in the staff formal interpretation dated September 13, 1979, and § 803.3(d).

ITEMS 5 through 8

NOTE: For Items 5 through 8, the acquired person should limit its response in the case of an acquisition of assets, to the assets to be sold, and in the case of an acquisition of voting securities, to the issuer(s) whose voting securities are being acquired and all entities controlled by such issuer. A person filing as both acquiring and acquired may be required to provide a separate response to these items in each capacity so that it can properly limit its response as an acquired person. (See § 803.2(b) and (c).)

Items 5(a)-5(c): These items request information regarding dollar revenues and lines of commerce at three NAICS levels with respect to operations conducted within the United States. (See § 803.2(c)(1).) All persons must submit certain data at the 6-digit NAICS industry code level. To the extent that dollar revenues are derived from manufacturing operations (NAICS Sectors 31-33), data must also be submitted at the 7-digit product class level and 10-digit product code level (NAICS-based codes). Where certain published NAICS industry codes contain only 5 digits, the filing person should add a zero (0) after the fifth (5th) digit.

NOTE: See "References" listed in the General Instructions to the Form. Refer to the *1997 NAICS Manual* for the 6-digit industry codes and the *1997 Numerical List of Manufactured and Mineral Products (1997 Numerical List)* for the 7-digit product classes and 10-digit product codes. Report revenues for the 7-digit NAICS product classes and 10-digit NAICS product codes using the codes in the columns labeled "Product code" in the *1997 Numerical List.*

Nondepository credit intermediation (NAICS Industry Group Code 5222); securities, commodity contracts, and other financial investments (NAICS Subsector 523); funds, trusts, and other financial vehicles (NAICS Subsector 525); real estate (NAICS Subsector 531); lessors of nonfinancial intangible assets, except copyright works (NAICS Subsector 533); and management of companies and enterprises (NAICS Subsector 551) should identify or explain the revenues reported (e.g. dollar sales receipts).

Persons filing notification should include the total dollar revenues for all entities included within the person filing notification at the time this Notification and Report Form is prepared (even if such entities have become included within the person since 1997). For example, if the person filing notification acquired an entity in 1998, it must include that entity's 1997 revenues in items 5(a) and 5(b)(i). It must also include that entity's most recent year's revenues in Item 5(b)(iii) and/or Item 5(c).

Item 5(a)-*Dollar revenues by industry.* Provide aggregate 6-digit NAICS industry data for 1997.

Item 5(b)(i)-*Dollar revenues by manufactured product.* Provide the following information on the aggregate operations for the person filing notification for 1997 for each 10-digit NAICS product of the person in NAICS Sectors 31-33 (manufacturing industries).

NOTE: Where the *1997 Numerical List* denotes footnote 1 at the end of a specific Subsector, refer to Appendices A, and then B for detail collected in a specified Current Industrial Report. You must provide 10-digit NAICS product codes and descriptions listed in Appendix B.

Item 5(b)(ii)-*Products added or deleted.* Within NAICS Sectors 31-33 (manufacturing industries), identify each product of the person filing notification added or deleted subsequent to 1997, indicate the year of addition or deletion, and state total dollar revenues in the most recent year for each product that has been added. Products may be identified either by 10-digit NAICS product code or in the manner ordinarily used by the person filing notification.

Do not include products added since 1997 by reason of mergers or acquisitions of entities occurring since 1997. Dollar revenues derived from such products should be included in response to Item 5(b)(i). However, if an entity acquired since 1997 by the person filing notification (and now included within the person) itself has added any products since 1997, these products and the dollar revenues derived therefrom should be listed here. Products deleted by reason of dispositions of assets constituting less than substantially all of the assets of an entity since 1997 should also be listed here.

Item 5(b)(iii)-*Dollar revenues by manufactured product class.* Provide the following information concerning the aggregate operations of the person filing notification for the most recent year for each 7-digit NAICS product class within NAICS Sectors 31-33 (manufacturing industries) in which the person engaged. If such data have not been compiled for the most recent year, estimates of dollar revenues by 7-digit NAICS product class may be provided if a statement describing the method of estimation is furnished.

Item 5(c)-*Dollar revenues by non-manufacturing industry.* Provide the following information concerning the aggregate operations of the person filing notification for the most recent year for each 6-digit NAICS industry code in NAICS Sectors other than 31-33 (manufacturing industries) in which the person engaged. If such data have not been compiled for the most recent year, estimates of dollar revenues by 6-digit NAICS industry code may be provided if a statement describing the method of estimation is furnished. Industries for which the dollar revenues totaled less than one million dollars in the most recent year may be omitted.

NOTE: *This million dollar minimum is applicable only to Item 5(c).*

JOINT VENTURE OR OTHER CORPORATIONS

Item 5(d)-Supply the following information only if the acquisition is the formation of a joint venture or other corporation. (See § 801.40.)

Item 5(d)(i)-List the name and mailing address of the joint venture or other corporation.

Item 5(d)(ii)(A)-List contributions that each person forming the joint venture or other corporation has agreed to make, specifying when each contribution is to be made and the value of the contribution as agreed by the contributors.

Item 5(d)(ii)(B)-Describe any contracts or agreements whereby the joint venture or other corporation will obtain assets or capital from sources other than the persons forming it.

Item 5(d)(ii)(C)-Specify whether and in what amount the persons forming the joint venture or other corporation have agreed to guarantee its credit or obligations.

Item 5(d)(ii)(D)-Describe fully the consideration which each person forming the joint venture or other corporation will receive in exchange for its contribution(s).

Item 5(d)(iii)-Describe generally the business in which the joint venture or other corporation will engage, including location of headquarters and principal plants, warehouses, retail establishments or other places of business, its principal types of products or activities, and the geographic areas in which it will do business.

Item 5(d)(iv)-Identify each 6-digit NAICS industry code in which the joint venture or other corporation will derive dollar revenues. If the joint venture or other corporation will be engaged in manufacturing also specify each 7-digit NAICS product class in which it will derive dollar revenues.

ITEM 6

This item need not be completed by a person filing notification only as an acquired person if only assets are to be acquired. Persons filing notification may respond to Items 6(a), 6(b), or 6(c) by referencing a "document attachment" furnished with this Form if the information so referenced is a complete response and is up-to-date and accurate. Indicate for each Item the specific page(s) of the document that are responsive to that Item.

Item 6(a)-*Entities within the person filing notification.* List the name and headquarters mailing address of each entity included within the person filing notification. Entities with total assets of less than $10 million may be omitted.

Item 6(b)-*Shareholders of person filing notification.* For each entity (including the ultimate parent entity) included within the person filing notification the voting securities of which are held (see § 801.1(c)) by one or more other persons, list the issuer and class of voting securities, the name and headquarters mailing address of each other person which holds five percent or more of the outstanding voting securities of the class and the number and percentage held by that person. Holders need not be listed for entities with total assets of less than $10 million.

Item 6(c)-Holdings of person filing notification. If the person filing notification holds voting securities of any issuer not included within the person filing notification, list the issuer and class, the number and percentage held, and (optionally) the entity within the person filing notification which holds the securities. Holdings of less than five percent of the outstanding voting securities of any issuers, and holding of issuers with total assets of less than $10 million may be omitted.

ITEM 7

If, to the knowledge or belief of the person filing notification, the person filing notification derived dollar revenues in the most recent year from operations in industries within any 6-digit NAICS industry code in which any other person that is a party to the acquisition also derived dollar revenues in the most recent year (or in which a joint venture or other corporation will derive dollar revenues), then for each such 6-digit NAICS industry code:

Item 7(a)-supply the 6-digit NAICS industry code and description for the industry;

Item 7(b)-list the name of each person which is a party to the acquisition which also derived dollar revenues in the 6-digit industry;

Item 7(c)-*Geographic market information*:

Item 7(c)(i)-for each 6-digit NAICS industry code within NAICS Sectors 31-33 (manufacturing industries) listed in Item 7(a) above, list the states or, if desired, portions thereof in which, to the knowledge or belief of the person filing notification, the products in that 6-digit NAICS code produced by the person filing notification are sold without a significant change in their form, whether they are sold by the person filing notification or by others to whom such products have been sold or resold;

Item 7(c)(ii)- for each 6-digit NAICS industry code within NAICS Sectors or Subsectors 11 (agriculture, forestry, fishing and hunting); 21 (mining); 22 (utilities); 23 (construction); 48-49 (transportation and warehousing); 511(publishing industries); 513 (broadcasting and telecommunications); and 71 (arts, entertainment and recreation) listed in item 7(a) above, list the states or, if desired, portions thereof in which the person filing notification conducts such operations;

Item 7(c)(iii)-for each 6-digit NAICS industry code within NAICS Sector 42 (wholesale trade) listed in Item 7(a) above, list the states or, if desired, portions thereof in which the customers of the person filing notification are located;

Item 7(c)(iv)-for each 6-digit NAICS industry code within NAICS Sectors or Subsectors 44-45 (retail trade); 512 (motion picture and sound recording industries); 521 (monetary authorities-central bank); 522 (credit intermediation and related activities); 532 (rental and leasing services); 62 (health care and social assistance); 72 (accommodations and food services); 811 (repair and maintenance); and 812 (personal and laundry services) listed in Item 7(a) above, provide the address, **arranged by state, county and city or town,** of each establishment from which dollar revenues were derived in the most recent year by the person filing notification;

Item 7(c)(v)- for each 6-digit NAICS industry code within NAICS Subsectors 514 (information services and data processing services); 523 (securities, commodity contracts and other financial investments and related activities); 525 (funds, trusts and other financial vehicles); 531 (real estate); 533 (lessors of nonfinancial intangible assets, except copyright works); 54 (professional, scientific and technical services); 55 (management of companies and enterprises); 56 (administrative and support and waste management and remediation services); 61 (educational services); 813 (religious, grantmaking, civic, professional, and similar organizations); and NAICS Industry Group 5242 (insurance agencies and brokerages, third party administration of insurance and pension funds, claims adjusting, and other insurance related activities) listed in Item 7(a) above, list the states or, if desired, portions thereof in which establishments were located from which the person filing notification derived revenues in the most recent year; and

Item 7(c)(vi)-for each 6-digit NAICS industry code within NAICS Industry Group 5241 (insurance carriers) listed in Item 7(a) above, list the state(s) in which the person filing notification is licensed to write insurance.

NOTE: Except in the case of those NAICS major industries in the Sectors and Subsectors mentioned in Item 7(c)(iv) above, the person filing notification may respond with the word "national" if business is conducted in all 50 states.

ITEM 8

Item 8-*Previous acquisitions* (to be completed by acquiring persons). Determine each 6-digit NAICS industry code listed in Item 7(a) above, in which the person filing notification derived dollar revenues of $1 million or more in the most recent year and in which either the acquired issuer derived revenues of $1 million or more in the recent year (or, in which, in the case of the formation of a joint venture or other corporation, the joint venture or other corporation reasonably can be expected to derive revenues of $1 million or more), or revenues of $1 million or more in the most recent year were attributable to the acquired assets. For each such 6-digit NAICS industry code, list all acquisitions made by the person filing notification in the five years prior to the date of filing of entities deriving dollar revenues in that 6-digit NAICS industry code. List only acquisitions of 50 percent or more of the voting securities of an issuer which had annual net sales or total assets greater than $10 million in the year prior to the acquisition, and any acquisitions of assets valued at or above the statutory size-of-transaction test at the time of their acquisition.

For each such acquisition, supply:

(a) the name of the entity acquired;

(b) the headquarters address of the entity prior to the acquisition;

(c) whether securities or assets were acquired;

(d) the consummation date of the acquisition; and

(e) the 6-digit (NAICS code) industries by (number and description) identified above in which the acquired entity derived dollar revenues.

CERTIFICATION- (See § 803.6.)

TRANSACTION NUMBER ASSIGNED ☐☐☐☐☐☐☐☐

16 C.F.R. Part 803 - Appendix
NOTIFICATION AND REPORT FORM FOR CERTAIN MERGERS AND ACQUISITIONS

Approved by OMB
3084-0005
Expires 05/31/2007

THE INFORMATION REQUIRED TO BE SUPPLIED ON THESE ANSWER SHEETS IS SPECIFIED IN THE INSTRUCTIONS

↓ Attach the Affidavit required by § 803.5 to this page.

FEE INFORMATION

AMOUNT PAID $_____

In cases where your filing fee would be higher if based on acquisition price or where the acquisition price is undetermined to the extent that it may straddle a filing fee threshold, attach an explanation of how you determined the appropriate fee *(acquiring persons only).*

Attachment Number _____

TAXPAYER IDENTIFICATION NUMBER _____
or SOCIAL SECURITY NUMBER of payer _____
(acquiring person (and payer if different from acquiring person))

CHECK ATTACHED ☐ MONEY ORDER ATTACHED ☐

WIRE TRANSFER ☐ CONFIRMATION NO._____

FROM: NAME OF INSTITUTION _____

NAME OF PAYER (if different from PERSON FILING) _____

IS THIS A CORRECTIVE FILING? ☐ YES ☐ NO

IS THIS ACQUISITION SUBJECT TO FOREIGN FILING REQUIREMENTS? ☐ YES ☐ NO
If YES, list jurisdictions: *(voluntary)* _____

IS THIS ACQUISITION A CASH TENDER OFFER? ☐ YES ☐ NO | BANKRUPTCY? ☐ YES ☐ NO

DO YOU REQUEST EARLY TERMINATION OF THE WAITING PERIOD? *(Grants of early termination are published in the Federal Register AND on the FTC web site www.ftc.gov)*
☐ YES ☐ NO

ITEM 1 – PERSON FILING

1(a) NAME and
HEADQUARTERS ADDRESS
of PERSON FILING

1(b) PERSON FILING NOTIFICATION IS
☐ an acquiring person ☐ an acquired person ☐ both

1(c) PUT AN "X" IN THE APPROPRIATE BOX TO DESCRIBE PERSON FILING NOTIFICATION
☐ Corporation ☐ Partnership ☐ Other *(Specify):* _____

1(d) DATA FURNISHED BY
☐ calendar year ☐ fiscal year *(specify period)* _____ (month/year) to _____ (month/year)

THIS FORM IS REQUIRED BY LAW and must be filed separately by each person which, by reason of a merger, consolidation or acquisition, is subject to §7A of the Clayton Act, 15 U.S.C. §18a, as added by Section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1390, and rules promulgated thereunder (hereinafter referred to as "the rules" or by section number). The statute and rules are set forth in the *Federal Register* at 43 FR 33450; the rules may also be found at 16 CFR Parts 801-03. Failure to file this **Notification and Report Form**, and to observe the required waiting period before consummating the acquisition in accordance with the applicable provisions of 15 U.S.C. §18a and the rules, subjects any "person," as defined in the rules, or any individuals responsible for noncompliance, to liability for a penalty of not more than $11,000 for each day during which such person is in violation of 15 U.S.C. §18a.

All information and documentary material filed in or with this Form is confidential. It is exempt from disclosure under the Freedom of Information Act, and may be made public only in an administrative or judicial proceeding, or disclosed to Congress or to a duly authorized committee or subcommittee of Congress.

Filing - Complete and return *two* copies (with one original affidavit and certification and one set of documentary attachments) of this Notification and Report Form to: Premerger Notification Office, Bureau of Competition, Room 303, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. *Three* copies (with one set of documentary attachments) should be sent to: Director of Operations and Merger Enforcement, Antitrust Division, Department of Justice, Patrick Henry Building, 601 D Street, N.W., Room #10013, Washington, D.C. 20530. (For FEDEX airbills to the Department of Justice, do not use the 20530 zip code; use zip code 20004.)

DISCLOSURE NOTICE - Public reporting burden for this report is estimated to vary from 8 to 160 hours per response, with an average of 39 hours per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this report, including suggestions for reducing this burden to:

Premerger Notification Office,
H-303
Federal Trade Commission
Washington, DC 20580

Office of Information and
Regulatory Affairs,
Office of Management and Budget
Washington, DC 20503

Under 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 OMB control number. That number is 3084-0005, which also appears in the upper right-hand corner of the first page of this form.

NAME OF PERSON FILING NOTIFICATION	DATE

1(e) PUT AN X IN THE APPROPRIATE BOX AND GIVE THE NAME AND ADDRESS OF ENTITY FILING NOTIFICATION (if other than ultimate parent entity)

☐ NA ☐ This report is being filed on behalf of a foreign person pursuant to § 803.4. ☐ This report is being filed on behalf of the ultimate parent entity by another entity within the same person authorized by it to file pursuant to § 803.2(a).

NAME OF ENTITY FILING NOTIFICATION	ADDRESS

1(f) NAME AND ADDRESS OF ENTITY MAKING ACQUISITION OR WHOSE ASSETS OR VOTING SECURITIES ARE BEING ACQUIRED IF DIFFERENT FROM THE ULTIMATE PARENT ENTITY IDENTIFIED IN ITEM 1(a)

PERCENT OF VOTING SECURITIES HELD BY EACH ENTITY IDENTIFIED IN ITEM 1(a)

1(g) IDENTIFICATION OF PERSON TO CONTACT REGARDING THIS REPORT

NAME OF CONTACT PERSON	
TITLE	
FIRM NAME	
BUSINESS ADDRESS	
TELEPHONE NUMBER	
FAX NUMBER	
E-MAIL ADDRESS	

(h) IDENTIFICATION OF AN INDIVIDUAL LOCATED IN THE UNITED STATES DESIGNATED FOR THE LIMITED PURPOSE OF RECEIVING NOTICE OF ISSUANCE OF A REQUEST FOR ADDITIONAL INFORMATION OR DOCUMENTS. (See § 803.20(b)(2)(iii))

NAME OF CONTACT PERSON	
TITLE	
FIRM NAME	
BUSINESS ADDRESS	
TELEPHONE NUMBER	
FAX NUMBER	
E-MAIL ADDRESS	

ITEM 2

2(a) LIST NAMES OF ULTIMATE PARENT ENTITIES OF ALL ACQUIRING PERSONS	LIST NAMES OF ULTIMATE PARENT ENTITIES OF ALL ACQUIRED PERSONS

2(b) THIS ACQUISITION IS *(put an X in all the boxes that apply)*

- ☐ an acquisition of assets
- ☐ a merger (see § 801.2)
- ☐ an acquisition subject to § 801.2(e)
- ☐ a formation of a joint venture of other corporation (see § 801.40)
- ☐ an acquisition subject to § 801.30 (*specify type*)
- ☐ other (*specify*) _____
- ☐ a consolidation (see § 801.2)
- ☐ an acquisition of voting securities
- ☐ a secondary acquisition
- ☐ an acquisition subject to § 801.31

2(c) INDICATE THE HIGHEST NOTIFICATION THRESHOLD IN § 801.1(h) FOR WHICH THIS FORM IS BEING FILED *(acquiring person only in an acquisition of voting securities)*

☐ $50 million (as adjusted) ☐ $100 million (as adjusted) ☐ $500 million (as adjusted) ☐ 25% (see Instructions) (as adjusted) ☐ 50%

2(d)(i) VALUE OF VOTING SECURITIES TO BE HELD AS A RESULT OF THE ACQUISITION	(ii) PERCENTAGE OF VOTING SECURITIES	(iii) VALUE OF ASSETS TO BE HELD AS A RESULT OF THE ACQUISITION	(iv) AGGREGATE TOTAL VALUE
$	%	$	$

NAME OF PERSON FILING NOTIFICATION	DATE

2(e) If aggregate total value in 2(d)(iv) is based in whole or in part on a fair market valuation pursuant to § 801.10(c)(3), identify the person or persons responsible for making the valuation *(acquiring persons only)*.

ITEM 3

3(a) DESCRIPTION OF ACQUISITION

NAME OF PERSON FILING NOTIFICATION	DATE

3(b)(i) ASSETS TO BE ACQUIRED (to be completed only for asset acquisitions)

3(b)(ii) ASSETS HELD BY ACQUIRING PERSON

3(c) VOTING SECURITIES TO BE ACQUIRED

3(c)(i) LIST AND DESCRIPTION OF VOTING SECURITIES AND LIST OF NON-VOTING SECURITIES:

3(c)(ii) TOTAL NUMBER OF SHARES OF EACH CLASS OF SECURITY:

3(c)(iii) TOTAL NUMBER OF SHARES OF EACH CLASS OF SECURITY BEING ACQUIRED:

NAME OF PERSON FILING NOTIFICATION	DATE

3(c)(iv) IDENTITY OF PERSONS ACQUIRING SECURITIES:

3(c)(v) DOLLAR VALUE OF SECURITIES IN EACH CLASS BEING ACQUIRED:

3(c)(vi) TOTAL NUMBER OF EACH CLASS OF SECURITIES TO BE HELD AS A RESULT OF THE ACQUISITION:

3(d) SUBMIT A COPY OF THE MOST RECENT VERSION OF CONTRACT OR AGREEMENT (or letter of intent to merge or acquire)

DO NOT ATTACH THIS DOCUMENT TO THIS PAGE ATTACHMENT OR REFERENCE NUMBER OF CONTRACT OR AGREEMENT _____

NAME OF PERSON FILING NOTIFICATION	DATE

ITEM 4 PERSONS FILING NOTIFICATION MAY PROVIDE BELOW AN OPTIONAL INDEX OF DOCUMENTS REQUIRED TO BE SUBMITTED BY ITEM 4 (See Item by Item instructions). THESE DOCUMENTS SHOULD NOT BE ATTACHED TO THIS PAGE.

4(a) DOCUMENTS FILED WITH THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION	ATTACHMENT OR REFERENCE NUMBER

4(b) ANNUAL REPORTS, ANNUAL AUDIT REPORTS, AND REGULARLY PREPARED BALANCE SHEETS	ATTACHMENT OR REFERENCE NUMBER

4(c) STUDIES, SURVEYS, ANALYSES, AND REPORTS	ATTACHMENT OR REFERENCE NUMBER

NAME OF PERSON FILING NOTIFICATION	DATE

ITEM 5 (See "References" listed in the General Instructions to the Form. Refer to the *North American Industry Classification System-United States, 1997* (*1997 NAICS Manual*) for the 6-digit (NAICS) industry codes. Refer to the *1997 Numerical List of Manufactured and Mineral Products* (EC97M31R-NL) for the 7-digit product class codes and the 10-digit product codes. Report revenues for the 7-digit product class codes and 10-digit product codes using the codes in the columns labeled "Product code." For further information on NAICS-based codes visit the www.census.gov web site.)

5(a) DOLLAR REVENUES BY INDUSTRY

6-DIGIT INDUSTRY CODE	DESCRIPTION	1997 TOTAL DOLLAR REVENUES

NAME OF PERSON FILING NOTIFICATION	DATE

ITEM 5(b)(i) DOLLAR REVENUES BY MANUFACTURED PRODUCTS

10-DIGIT PRODUCT CODE	DESCRIPTION	1997 TOTAL DOLLAR REVENUES

NAME OF PERSON FILING NOTIFICATION	DATE

ITEM 5(b)(ii) PRODUCTS ADDED OR DELETED

DESCRIPTION (10-DIGIT PRODUCT CODE)	ADD	DELETE	YEAR OF CHANGE	TOTAL DOLLAR REVENUES

ITEM 5(b)(iii) DOLLAR REVENUES BY MANUFACTURED PRODUCT CLASS

7-DIGIT PRODUCT CLASS	DESCRIPTION	YEAR |_____| TOTAL DOLLAR REVENUES
	(Item 5(b)(iii) continued on page 10)	

NAME OF PERSON FILING NOTIFICATION	DATE

ITEM 5(b)(iii) DOLLAR REVENUES BY MANUFACTURED PRODUCT CLASS - CONTINUED

7-DIGIT PRODUCT CLASS	DESCRIPTION	YEAR |_____| TOTAL DOLLAR REVENUES

ITEM 5(c) DOLLAR REVENUES BY NON-MANUFACTURING INDUSTRY

6-DIGIT INDUSTRY CODE	DESCRIPTION	YEAR |_____| TOTAL DOLLAR REVENUES

NAME OF PERSON FILING NOTIFICATION	DATE

5(d) COMPLETE ONLY IF ACQUISITION IS IN THE FORMATION OF A JOINT VENTURE OR OTHER CORPORATION

5(d)(i) NAME AND ADDRESS OF THE JOINT VENTURE OR OTHER CORPORATION

5(d)(ii)

(A) CONTRIBUTIONS THAT EACH PERSON FORMING THE JOINT VENTURE OR OTHER CORPORATION HAS AGREED TO MAKE

(B) DESCRIPTION OF ANY CONTRACTS OR AGREEMENTS

(C) DESCRIPTION OF ANY CREDIT GUARANTEES OR OBLIGATIONS

(D) DESCRIPTION OF CONSIDERATION WHICH EACH PERSON FORMING THE JOINT VENTURE OR OTHER CORPORATION WILL RECEIVE

5(d)(iii) DESCRIPTION OF THE BUSINESS IN WHICH THE JOINT VENTURE OR OTHER CORPORATION WILL ENGAGE

5(d)(iv) SOURCE OF DOLLAR REVENUES BY 6-DIGIT INDUSTRY CODE (non-manufacturing) AND BY 7-DIGIT PRODUCT CLASS (manufacturing)

NAME OF PERSON FILING NOTIFICATION	DATE

ITEM 6

6(a) ENTITIES WITHIN PERSON FILING NOTIFICATION

6(b) SHAREHOLDERS OF PERSON FILING NOTIFICATION

NAME OF PERSON FILING NOTIFICATION	DATE

6(c) HOLDINGS OF PERSON FILING NOTIFICATION

ITEM 7 DOLLAR REVENUES

7(a) 6-DIGIT NAICS CODE AND DESCRIPTION

7(b) NAME OF EACH PERSON WHICH ALSO DERIVED DOLLAR REVENUES

NAME OF PERSON FILING NOTIFICATION	DATE

7(c) GEOGRAPHIC MARKET INFORMATION

ITEM 8 PRIOR ACQUISITIONS (to be completed by acquiring person only)

NAME OF PERSON FILING NOTIFICATION	DATE

CERTIFICATION

This **NOTIFICATION AND REPORT FORM,** together with any and all appendices and attachments thereto, was prepared and assembled under my supervision in accordance with instructions issued by the Federal Trade Commission. Subject to the recognition that, where so indicated, reasonable estimates have been made because books and records do not provide the required data, the information is, to the best of my knowledge, true, correct, and complete in accordance with the statute and rules.

NAME (Please print or type)	TITLE
SIGNATURE	DATE

Subscribed and sworn to before me at the
City of _____, State of _____

this _____day of _____, the year _____

Signature _____

My Commission expires _____

[SEAL]

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 05–1679 Filed 1–28–05; 8:45 am]

BILLING CODE 6750–01–C

FEDERAL TRADE COMMISSION

Revised Jurisdictional Thresholds for Section 7A of the Clayton Act

AGENCY: Federal Trade Commission.

ACTION: Notice.

SUMMARY: The Federal Trade Commission announces the revised thresholds for the Hart-Scott-Rodino Antitrust Improvements Act of 1976 required by the 2000 amendment of Section 7A of the Clayton Act. Section 7A of the Clayton Act, 15 U.S.C. 18a, as added by the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94–435, 90 Stat. 1390 (''the Act''), requires all persons contemplating certain mergers or acquisitions, which meet or exceed the jurisdictional thresholds in the Act, to file notification with the Commission and the Assistant Attorney General and to wait a designated period of time before consummating such transactions. Section 7A(a)(2) requires the Federal Trade Commission to revise those thresholds annually, based on the change in gross national product, in accordance with Section 8(a)(5). The new thresholds, which take effect 30 days after publication in the **Federal Register**, are as follows:

Subsection of 7A	Original threshold (million)	Adjusted threshold (million)
7A(a)(2)(A)	$200	$212.3
7A(a)(2)(B)(i)	50	53.1
7A(a)(2)(B)(i)	200	212.3
7A(a)(2)(B)(ii)(i)	10	10.7
7A(a)(2)(B)(ii)(i)	100	106.2
7A(a)(2)(B)(ii)(II)	10	10.7
7A(a)(2)(B)(ii)(II)	100	106.2
7A(a)(2)(B)(ii)(III)	100	106.2
7A(a)(2)(B)(ii)(III)	10	10.7
Section 7A note: Assessment and Collection of Filing Fees [1] (3)(b)(1)	100	106.2
Section 7A note: Assessment and Collection of Filing Fees (3)(b)(2)	100	106.2
Section 7A note: Assessment and Collection of Filing Fees (3)(b)(2)	500	530.7
Section 7A note: Assessment and Collection of Filing Fees (3)(b)(3)	500	530.7

[1] Pub. L. 106–553, Sec. 630(b) amended Sec. 18a note.

Any reference to these thresholds and related thresholds and limitation values in the HSR rules (16 CFR Parts 801–803) and the Antitrust Improvements Act Notification and Report Form and its Instructions will also be adjusted where indicated by the term ''(as adjusted)'' as follows:

Original threshold (million)	Adjusted threshold (million)
$10	$10.7
50	53.1
100	106.2
110	116.8
200	212.3
500	530.7
1 billion	1,061.3

EFFECTIVE DATE: March 2, 2005.

FOR FURTHER INFORMATION CONTACT: B. Michael Verne, Bureau of Competition, Premerger Notification Office (202) 326–3100.

Authority: 16 U.S.C. 7A.

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 05–1684 Filed 1–28–05; 8:45 am]

BILLING CODE 6750–01–P

Federal Register

Monday,
January 31, 2005

Part VIII

Federal Trade Commission

16 CFR Parts 642 and 698
Prescreen Opt-Out Disclosure; Final Rule

FEDERAL TRADE COMMISSION

16 CFR Parts 642 and 698

[RIN 3084–AA94]

Prescreen Opt-Out Disclosure

AGENCY: Federal Trade Commission.

ACTION: Final rule.

SUMMARY: The Fair and Accurate Credit Transactions Act of 2003 (''FACT Act'' or ''Act'') directs the Federal Trade Commission (''FTC'' or ''Commission''), in consultation with the Federal banking agencies and the National Credit Union Administration, to adopt a rule to improve the required notice to consumers regarding their right to opt out of prescreened solicitations for credit or insurance. This final rule implements this requirement.

EFFECTIVE DATE: This rule is effective on August 1, 2005.

FOR FURTHER INFORMATION CONTACT: Jeanne-Marie Burke or Kellie Cosgrove Riley, Attorneys, (202) 326–3224, Division of Financial Practices, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580.

SUPPLEMENTARY INFORMATION:

Statement of Basis and Purpose

I. Background

Section 615(d) of the Fair Credit Reporting Act (''FCRA'') requires that any person who uses a consumer report in order to make an unsolicited firm offer of credit or insurance to the consumer (''prescreened offer'' or ''prescreened solicitation''), shall provide with each written solicitation a clear and conspicuous statement that: (A) Information contained in the consumer's consumer report was used in connection with the transaction; (B) the consumer received the offer of credit or insurance because the consumer satisfied the criteria for credit worthiness or insurability under which the consumer was selected for the offer; (C) if applicable, the credit or insurance may not be extended if, after the consumer responds to the offer, the consumer does not meet the criteria used to select the consumer for the offer or any applicable criteria bearing on credit worthiness or insurability or does not furnish any required collateral; (D) the consumer has a right to prohibit information contained in the consumer's file with any consumer reporting agency from being used in connection with any credit or insurance transaction that is not initiated by the consumer; and (E) the consumer may exercise the right referred to in subparagraph (D) by notifying a notification system established under section 604(e) [of the FCRA].

Section 615(d)(1) of the FCRA [15 U.S.C. 1681m(d)(1)] [1]

The Fair and Accurate Credit Transactions Act of 2003, Public Law 108–159, 117 Stat. 1952 (FACT Act or the Act) was signed into law on December 4, 2003. Section 213(a) of the FACT Act amends FCRA section 615(d) to require that the statement mandated by section 615(d) ''be presented in such format and in such type size and manner as to be simple and easy to understand, as established by the Commission, by rule, in consultation with the Federal banking agencies and the National Credit Union Administration.''

On September 27, 2004, the Commission issued, and sought comment on, a proposed Rule implementing the requirements of section 213(a) of the FACT Act (''the proposed Rule'').[2] In response to the proposed Rule, the Commission received approximately 60 comments from a variety of trade associations, creditors, insurers, consumer advocacy groups, and individual consumers. After carefully considering the comments received, the Commission adopts the proposed Rule with some modifications.

The final Rule carries out the Commission's mandate to improve the prescreen notice so that it is simple and easy to understand. The FACT Act specifies that ''simple and easy to understand'' is to be achieved by establishing a format, type size, and manner for the presentation of the notice. These three factors indicate that ''simple and easy to understand'' is meant to include both (1) the content, such as language and syntax, of the notice so that it effectively conveys the intended message to readers, and (2) the presentation and format of the notice such that it calls attention to the notice and enhances its understandability. Thus, the final Rule establishes certain baseline requirements for these two components to ensure that the notices meet the statutory mandate. As stated in the proposed Rule, the determination of whether a notice meets the ''simple and easy to understand'' standard is based on the totality of the disclosure and the manner and format in which it is presented, not on any single factor. Modifications have been made to the final Rule to make it clearer that the ''simple and easy to understand'' standard is a flexible one.

The final Rule: (1) Sets forth the purpose and scope of the Rule; (2) defines ''simple and easy to understand''; (3) requires a notice that consists of an initial statement that provides basic opt-out information (''short notice''), and a separate longer explanation that offers further information (''long notice''); (4) adds a definition for ''principal promotional document,'' the document in which the short notice must appear; (5) establishes the effective date for the Rule; and (6) proposes model notices that may be used for compliance.

Therefore, having consulted with the Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Office of Thrift Supervision, and National Credit Union Administration, the FTC issues the following Rule.

II. Overview of Comments Received

The Commission received approximately 60 comments concerning the proposed Rule.[3] The vast majority of these comments were from industry trade organizations [4] and the business community.[5] Individual consumers, five

[1] Section 604(e) of the FCRA requires that any consumer reporting agency that provides prescreened lists to marketers shall maintain a notification system through which consumers may choose to have their names and addresses excluded from such lists. That section also requires that consumer reporting agencies that compile and maintain files on consumers on a nationwide basis establish a joint notification system. The nationwide consumer reporting agencies have done so, and the current telephone number for the joint notification system is 1–888–5–OPT–OUT (1–888–567–8688).

[2] The notice of proposed rulemaking and proposed Rule were published in the **Federal Register** on October 1, 2004. 69 FR 58861.

[3] The public comments relating to this rulemaking may be viewed at *http://www.ftc.gov/os/comments/prescreenedoptout/index.htm*. Citations to comments filed in this proceeding are made to the name of the organization (if any) or the last name of the commenter, and the comment number of record.

[4] These included the Consumer Data Industry Association (''CDIA'') (the trade association that represents the nationwide consumer reporting agencies and a variety of other consumer reporting agencies), America's Community Bankers, American Bankers Association, American Council of Life Insurers, American Financial Services Association, the Coalition to Implement the FACT Act (representing trade associations and companies that furnish, use, collect, and disclose consumer information), Consumer Bankers Association, Credit Union National Association, Florida Association of Mortgage Brokers, Independent Community Bankers of America, Michigan Credit Union League, Mortgage Bankers Association, National Association of Federal Credit Unions, National Independent Automobile Dealers Association, National Retail Federation, Pennsylvania Credit Union Association, and Property Casualty Insurers Association of America.

[5] These included financial institutions, such as Bank of America Corporation, Countrywide Home Loans, MasterCard International Incorporated, MBNA America Bank, N.A., Navy Federal Credit Union, Union Federal Bank, and Visa U.S.A. Inc.;

members of Congress,[6] and consumer advocacy groups[7] also submitted comments on the proposed Rule. In addition to considering the comments received, the Commission reviewed and considered the Board of Governors of the Federal Reserve System's Report to the Congress on Further Restrictions on Unsolicited Written Offers of Credit or Insurance (''FRB Prescreen Report'').[8]

The Commission received comments on nearly all of the provisions contained in the proposed Rule. Most commenters, including consumers, businesses, trade associations, and consumer groups, expressed general support for a Rule requiring an improved and more understandable prescreen notice. However, commenters disagreed on what manner and format would best accomplish the goals of the FACT Act and what information should be contained in the notices.

The majority of industry commenters opposed the layered notice approach, asserting that a layered notice exceeds the FTC's statutory authority, would overshadow other important notices, and would lead consumers to make uninformed decisions about whether to opt out.[9] Some industry members, as well as consumer advocacy groups, supported the layered notice as an appropriate means of effecting the statutory directive of providing a simple and easy format for disclosing the required information.[10] Commenters also disagreed on whether the type-size requirements should be larger[11] or smaller[12] than proposed, and whether the notice should include additional information, such as the benefits of prescreened offers,[13] or prohibit any additional information from being included in the notice.[14]

In general, commenters also approved of the definition of ''simple and easy to understand,'' but some expressed concern that the proposed Rule's list of factors to be considered in determining whether a notice met this definition might be considered a ''checklist'' rather than examples.[15] In addition, commenters generally agreed that the Rule should also include a definition for ''principal promotional document.''[16]

Although commenters generally supported the proposed Rule's inclusion of model notices,[17] some commenters suggested changes or additions to the language of those notices to achieve various goals, including using more ''neutral'' language for the short notice,[18] adding language regarding collateral requirements,[19] and adding language regarding the benefits of prescreened offers.[20]

All of these comments, as well as others, are discussed more fully below.

III. Section-By-Section Analysis

A. Section 642.1: Purpose and Scope

Proposed section 642.1(a) set forth the purpose of the proposed Rule, which was to implement section 213(a) of the FACT Act. Section 213(a) requires the FTC to establish the format, type size, and manner in which the notices to consumers regarding the right to opt out of prescreened solicitations are to be presented. The Commission received no comments regarding this section and it is adopted as proposed.

Proposed section 642.1(b) set forth the scope of the proposed Rule. The Rule applies to any person who uses a consumer report on any consumer in connection with any credit or insurance transaction that is not initiated by the consumer, pursuant to section 604(c)(1)(B) of the FCRA. The Commission received no comments regarding this section and it is adopted as proposed.

B. Section 642.2: Definitions

1. ''Simple and Easy to Understand''

The proposed Rule contained one definition in section 642.2. ''Simple and easy to understand'' was defined to mean ''plain language designed to be understood by ordinary consumers.'' Proposed section 642.2 also listed eight factors that would be considered in determining whether a statement is ''simple and easy to understand.''[21]

The Commission received several comments concerning this definition. Some commenters noted that they supported the definition, did not suggest any changes, and encouraged the Commission to retain it in the final Rule.[22] Other commenters suggested that the Commission eliminate the eight factors from the definition. These commenters expressed various concerns about the factors, including that they unduly complicate an otherwise uncomplicated definition and could be interpreted as a checklist of requirements that must each be present in order to meet the definition.[23]

As the Commission noted in the notice of proposed rulemaking (''NPRM'') accompanying the proposed Rule, the eight factors are intended to provide guidance to companies in

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insurers, such as Progressive; and credit reporting agencies, such as Equifax Information Services LLC, Experian Information Solutions, Inc., and TransUnion LLC.

[6] Congressman Spencer Bachus, Chair of the Subcommittee on Financial Institutions and Consumer Credit, of the House Financial Services Committee (R–AL); Congressman Paul Kanjorski (D–PA); Congressman John Sweeney (R–NY); Senator George Allen (R–VA); and Senator Jim Bunning (R–KY).

[7] These included the Consumer Action, National Consumers League, Consumer Federation of America, and Privacy Rights Clearinghouse.

[8] See *http://www.federalreserve.gov/boarddocs/rptcongress/*.

[9] *See, e.g.*, Comment, America's Community Bankers #OL–100013; Comment, Discover Bank #OL–100016; Comment, Financial Services Roundtable #EREG–000004; Comment, Juniper Financial Corp., #000009; Comment, MasterCard International Incorporated #000012; Comment, Visa U.S.A. Inc. #000005; Comment, Wells Fargo & Company #000007; Comment, Wilmer Cutler Pickering Hale and Dorr LLP #OL–100045.

[10] *See, e.g.*, Comment, Boeing Employees' Credit Union #000020; Comment, Commerce Bancshares, Inc. #OL–100045; Comment, National Consumers League, *et al.* #OL–100011; Comment, Pennsylvania Credit Union Association #OL–100024; Comment, Privacy Rights Clearinghouse #OL–100015.

[11] *See, e.g.*, Comment, National Consumers League, *et al.* #OL–100011; Comment, Privacy Rights Clearinghouse #OL–10015.

[12] *See, e.g.*, Comment, Commerce Bancshares, Inc. #OL–100045; Comment, Mortgage Bankers Association #OL–100036; Comment, National Independent Automobile Dealers Association #OL–100021; Comment, Union Federal Bank #OL–100044.

[13] *See, e.g.*, Comment, Discover Bank #OL–100016; Comment, Financial Services Roundtable #EREG–000004; Comment, MBNA America Bank #OL–100031.

[14] *See, e.g.*, Comment, Connors #OL–100014; Comment, National Consumers League, *et al.* #OL–100011; Comment, Privacy Rights Clearinghouse #OL–100015.

[15] *See, e.g.*, Comment, Coalition to Implement the FACT Act #OL–100042; Comment, Juniper Financial Corp. #000009; Comment, MasterCard International Incorporated #000012.

[16] *See, e.g.*, Comment, Commerce Bancshares, Inc. #OL–100045; Comment, Credit Union National Association #000003; Comment, Mortgage Bankers Association #OL–100036; Comment, National Association of Federal Credit Unions #OL–100020; Comment, National Consumers League, *et al.* #OL–100011; Comment, Privacy Rights Clearinghouse #OL–100015.

[17] *See, e.g.*, Comment, Countrywide #000010; Comment, Visa U.S.A. Inc. #000005.

[18] *See, e.g.*, Comment, Juniper Financial Corp. #000009; Comment, MasterCard International Incorporated #000012; Comment, Visa U.S.A. Inc. #000005; Comment, Wells Fargo & Company #000007.

[19] *See, e.g.*, Comment, Mortgage Bankers Association #OL–100036.

[20] *See, e.g.*, Comment, JPMorgan Chase Bank #OL–100019; Comment, Juniper Financial Corp. #000009.

[21] The eight factors to be considered in determining whether a statement is ''simple and easy to understand'' were: (1) Use of clear and concise sentences, paragraphs, and sections; (2) use of short explanatory sentences; (3) use of definite, concrete, everyday words; (4) use of active voice; (5) avoidance of multiple negatives; (6) avoidance of legal and technical business terminology; (7) avoidance of explanations that are imprecise and reasonably subject to different interpretations; and (8) use of language that is not misleading.

[22] *See, e.g.*, Comment, Discover Bank #OL–100016; Comment, Wells Fargo & Company #000007.

[23] *See, e.g.*, Comment, Coalition to Implement the FACT Act #OL–100042; Comment, Equifax Information Services LLC #OL–100023; Comment, Juniper Financial Corp. #000009; Comment, MasterCard International Incorporated #000012.

complying with the Rule, while allowing them to maintain flexibility to determine how best to meet the definition.

The Commission has revised the Rule to clarify that use of clear and concise sentences, paragraphs, and sections is a mandatory part of the definition, but the remaining seven factors are simply examples to be considered in meeting the ''simple and easy to understand'' definition. These factors should neither be considered to be mandatory, nor to constitute an exhaustive list.

In addition, the Commission has determined to specify in the final Rule that the layered notice is a required component of the ''simple and easy to understand'' definition. The Commission has determined that the layered format makes the prescreen disclosures simpler and easier to understand, and it is appropriate that it specifically be incorporated into the definition.[24]

2. ''Principal Promotional Document''

Proposed section 642.3(a)(2) required that the short form of the layered notice be placed on the first page of the principal promotional document. The Commission noted in the NPRM that the question of what constitutes the ''principal promotional document'' is fact specific, but that, in general, the Commission would consider the cover letter or the document that is designed to be seen first by the consumer to be the ''principal promotional document.'' The proposed Rule did not define ''principal promotional document,'' however, and the Commission requested comment on whether such a definition was necessary.

The Commission received several comments requesting that the Commission provide a definition for ''principal promotional document.''[25] Some commenters suggested specific definitions for the term, such as the document intended to be seen first by the consumer, the document that addresses the consumer directly with the offer, the cover letter or other document used to introduce the offer, or the cover letter or other document that the consumer sees first when opening the solicitation. At least one commenter asserted that the proper location for the disclosure is in the application or the offer of credit.[26] Another commenter suggested that factors to be considered in determining whether a document is the principal promotional document should include (1) whether the document is the first page of a letter to a consumer, or (2) whether the document contains the credit terms being offered.[27]

In addition, some commenters expressed concern that the concept of a principal promotional document would not translate well to an electronic prescreened offer. Specifically, these commenters were concerned that a pop-up advertisement that appeared on the consumer's computer screen would have to contain the short notice.[28] These commenters suggested that pop-up advertisements should be considered similar to envelopes, and therefore not considered the principal promotional document.

The Commission agrees with the commenters that a definition would help companies to comply with the Rule and has considered all of the suggested definitions. The final Rule defines principal promotional document as the document that is designed to be seen first by the consumer, such as the cover letter. Requiring that the disclosure appear early in the solicitation enhances the noticeability of the disclosure, thereby aiding in making the disclosure simple and easy to understand. The final Rule does not link the definition to the credit terms or the application, because many different documents within the solicitation may contain some or all of the credit terms, and those consumers who are interested in opting out of receiving solicitations for future offers may not be likely to review the terms and conditions of the offer at hand. Therefore, linking the definition to credit terms would not provide guidance to businesses, nor would it ensure that those interested in opting out could easily locate the notice.

In addition, the Commission has considered the concerns expressed by the commenters regarding the application of the definition to electronic offers. The Commission is in agreement with those commenters who equated a pop-up promotional screen with an envelope. Therefore, the Commission will consider the principal promotional document in those circumstances to be the page designed to be seen first by the consumer who clicks on the pop-up promotional screen.

C. Section 642.3: Prescreen Opt-Out Notices

The proposed Rule required a ''layered'' notice—that is, a notice that includes both an initial short portion and a longer portion contained later in the solicitation. The short portion of the notice informed consumers about the right to opt out of receiving prescreened solicitations and specified a toll-free number for consumers to call to exercise that right. No additional information could be included in the short notice. The long portion of the notice provided consumers with all of the additional information required by section 615(d) of the FCRA. The long notice could contain additional information that did not interfere with, detract from, contradict, or otherwise undermine the purpose of the opt-out notice. The proposed Rule set forth certain baseline requirements for the type size of the notice, as well as the presentation of the notice.

Most of the comments the Commission received focused on various aspects of this section of the proposed Rule. Commenters addressed several topics pertaining to this section, including the Commission's statutory authority to prescribe a layered notice, the Commission's statutory authority to require the notice to appear in electronic solicitations, the content of the notice, the type size of the notice, and the format and manner in which the notice is presented, including within electronic solicitations. Each of these is addressed in turn below.

1. Statutory Authority for the Layered Notice

Several commenters questioned whether the Commission had exceeded its statutory authority by mandating a layered notice.[29] Many of these

[24] The Commission also notes that, in addition to meeting the ''simple and easy to understand'' definition set forth by the Rule, prescreen opt-out notices must continue to meet the ''clear and conspicuous'' standard required by the FCRA. One recent case from the Court of Appeals for the Seventh Circuit noted that, in determining whether a prescreen notice is ''clear and conspicuous,'' factors to be considered are: ''the location of the notice within the document, the type size used within the notice as well as the type size in comparison to the rest of the document * * * whether the notice is set off in any other way—spacing, font style, all capitals, etc.'' *Cole* v. *U.S. Capital, Inc.*, 389 F.3d 719, 731 (7th Cir. 2004). The court concluded, ''In short, there must be something about the way the notice is presented in the document such that the consumer's attention will be drawn to it.'' *Id.* Thus, the ''simple and easy to understand'' standard overlaps to some extent with the ''clear and conspicuous'' standard.

[25] *See, e.g.*, Comment, Commerce Bancshares, Inc. #OL–100045; Comment, Credit Union National Association #000003; Comment, Mortgage Bankers Association #OL–100036; Comment, National Association of Federal Credit Unions #OL–100020; Comment, National Consumers League, *et al.* #OL–100011; Comment, Privacy Rights Clearinghouse #OL–100015.

[26] Comment, Michigan Credit Union League #OL–100030.

[27] Comment, Mortgage Bankers Association #OL–100036.

[28] *See, e.g.*, Comment, Financial Services Roundtable #EREG–000004; Comment, GE Consumer Finance-Americas #OL–100018.

[29] See, *e.g.*, Comment, Consumer Bankers Association #OL–100028; Comment, HSBC North

commenters stated that the Commission was improperly specifying a definition of the clear and conspicuous standard contained in section 615(d) of the FCRA, including imposing a prominence requirement.[30] These commenters argued that Congress did not intend this disclosure to be more prominent than other disclosures required by law, such as the so-called ''Schumer box,''[31] or that any one element of the disclosure be more prominent than another. One commenter opined that the layered notice was actually two notices and therefore was contrary to the language in section 615(d) of the FCRA requiring ''a clear and conspicuous statement.''[32]

The Commission has considered these comments and has decided to retain the layered notice approach in the final Rule. The FACT Act requires that the notice be ''*presented* in a *format* and in such *type size* and *manner* as to be simple and easy to understand, as established by the Commission.'' (Emphasis added). Thus, the plain language of the statute provides that ''simple and easy to understand'' encompasses presentation of the notice. The Commission has concluded that the layered notice is an appropriate and effective means of achieving this goal, and that nothing in the FACT Act or the FCRA prohibits the use of a layered notice approach.

Under section 615(d) of the FCRA, the prescreen disclosure must be clear and conspicuous. Section 213(a) of the FACT Act imposed the *additional requirement that the disclosure be ''simple and easy to understand.'' Therefore, the statutory scheme establishes a different standard for the prescreen disclosure than it imposes on other disclosures that must only be clear and conspicuous. There is no evidence in the record that the layered notice required by this Rule will compromise the communication of other required disclosures in prescreened solicitations.*

Some commenters stated that, even if the Commission has authority to require a layered notice, it was improper for the Commission to rely upon the consumer survey that the Commission undertook as part of developing the proposed Rule as support for the layered notice requirement. These commenters criticized the methodology of the survey as unrepresentative of consumer reactions in a real-world setting.[33] The Commission recognizes the limitations of any survey testing methodology because of the artificial setting of the test environment, but maintains that the study approximated real-world conditions to the extent feasible.[34] The Commission believes that the survey provides probative evidence of the comparative effectiveness of the three versions of notices it tested (''current,'' ''improved,'' and ''layered'').[35] The survey found that the layered notice better communicated the central messages—consumers' right to opt out and how to exercise the right—than did the current version.[36]

A layered notice is particularly useful in cases such as this, where the information that must be disclosed consists of a relatively simple central proposition accompanied by a larger quantity of explanatory or ancillary information. The layered approach allows for clear communication of the central message with a clear reference to the additional required information. Those consumers interested in the additional information have the opportunity to view that information in another location.[37]

2. Statutory Authority To Require Notice in Electronic Solicitations

Several commenters suggested that the FCRA does not apply to solicitations that are transmitted electronically because such documents are not ''written,'' as that term is used in the FCRA.[38] The Commission believes that ''written'' refers to information that is capable of being preserved in a tangible form and read, as opposed to an oral statement that is intangible and transitory. As with information presented on paper, consumers using electronic media can read the information and preserve it for possible later review either by printing it on paper, saving it on disk, or by some other means. The Commission believes that the purpose of section 213(a) of the FACT Act was to enhance consumers' awareness of opt-out rights, under section 615(d) of the FCRA, whenever they receive a written solicitation in any form, regardless of the means of transmission. Therefore, the Commission has determined that the Rule should apply to all written solicitations, even if they are transmitted electronically.

3. Content of the Notice

Commenters expressed two primary concerns with the content of the short portion of the notice: (1) Whether it is appropriate to include a statement of the opt-out right and the telephone number of the opt-out system in the short portion of the notice; and (2) whether companies should be permitted to include additional information, beyond

American Holdings #000004; Comment, Juniper Financial Corp. #000009; Comment, MasterCard International #000012; Comment, Visa U.S.A. Inc. #000005; Comment, Wachovia Corporation #OL–100017.

[30] See, *e.g.*, Comment, Juniper Financial Corp. #000009; Comment, MasterCard International #000012; Comment, Wachovia Corporation #OL–100017.

[31] See 12 CFR 226.5a.

[32] Comment, Visa U.S.A. Inc. #000005.

[33] *See, e.g.*, Comment, Wilmer Cutler Pickering Hale and Dorr LLP #OL–100046. (For a discussion of the consumer survey, *see* 69 FR 58861, 58864.)

[34] The study used standard consumer testing methodology and consisted of an *initial exposure*, in which the test instrument was presented to the consumer and then removed from view, and a *forced exposure*, in which the consumer's attention was focused on specific information in the test instrument. *See* Manoj Hastak, Ph.D., *The Effectiveness of ''Opt-Out'' Disclosures in Pre-Screened Credit Card Offers*, at 3–4, located at *http://www.ftc.gov/reports/prescreen/040927optoutdiscprecreenrpt.pdf*. In the view of the Commission's consumer research expert consultant, the initial exposure was designed to simulate ''fairly natural viewing conditions.'' *Id.* at 4. The FRB Prescreen Report indicates that, for most of those consumers who actually open and review prescreened solicitations, this approach may indeed approximate real-world conditions. In a nationwide survey of consumers, the FRB found that 56% of consumers throw prescreened solicitations away without opening them, 34% merely ''glance'' at them, and the remaining 10% read them closely. *See* FRB Prescreen Report at 32. The initial exposure may have simulated the experience of consumers who glance at prescreened solicitations but do not examine them closely, that is, the experience of most consumers who actually open prescreened solicitations.

[35] The Commission has long recognized that methodological perfection is not required before a consumer survey can be probative and reliable; rather, imperfections in methodology affect the weight that is given to the survey. See, *e.g.*, *In re Stouffer Foods Corp.*, 118 F.T.C. 746, 799 (1994); *In re Bristol-Meyers Co.*, 85 F.T.C. 688, 743–44 (1975).

[36] *See* 69 FR 58861, 58864. In addition, although there was not a statistical difference between the improved and layered versions in the communication of the opt-out right, the layered version was more effective in the initial ''natural'' exposure (as compared to the second ''forced'' exposure) at communicating how to exercise that right.

[37] The results reported in the FRB Prescreen Report indicate that a layered notice may be a very effective means to ensure that consumers who open prescreened solicitations will see the prescreen disclosure. As noted, *supra* note 34, the FRB Prescreen Report found that 56% of consumers throw prescreened solicitations away without opening them, 10% of consumers open the solicitations and examine them, and the remainder (34%) open the solicitations and ''glance'' at them. *Id.* Those consumers who immediately throw the solicitation away are not likely to see the notice wherever it is located; those who examine the solicitation closely might see any disclosure, even one on the back of the page or in fine print; but those consumers who ''glance'' at the solicitation may be more likely to see a prescreen disclosure located on the first page of the principal promotional document that is printed in a noticeable type size and set apart from other text on the page. Thus, a layered notice seems more likely to be seen by the majority of consumers who open prescreened solicitations.

[38] *See, e.g.*, Comment, American Financial Services Association #OL–100038; Comment, Discover Bank #OL–100016.

that mandated by the statute, in any part of the layered notice.

Inclusion of opt-out right and telephone number in the short notice.

Several commenters suggested that it was improper for the Commission in the proposed Rule to require presentation of the opt-out right and the telephone number to opt out for placement in the short portion of the notice, while relegating other statutorily-required information to the long portion of the notice.[39] Some of these commenters stated that the Commission did not have the authority to make certain elements of the disclosure (in particular, the telephone number) more prominent than others by placing them in the short portion of the notice. Some were concerned that consumers would not read the long portion of the notice if they could obtain all of the information necessary to opt out from the short portion, which might lead them to make decisions about opting out without the benefit of all pertinent information.[40] Other commenters expressed concern that consumers may mistakenly assume they can use the opt-out telephone number to reply to the offer itself, leading to frustration and confusion.[41]

As stated above, Congress has directed the Commission to prescribe the presentation of the notice, including its manner and format. In exercising that authority, the Commission has determined to include the opt-out right and telephone number in the short notice in the final Rule.[42] Nothing in the statute prohibits the Commission from exercising its authority in this manner, and, in fact, the only legislative history specifically discussing the content of the required notice supports this result and indicates Congress' interest in highlighting the opt-out right.[43]

The FRB Prescreen Report seems to confirm Congress' concern that the existing notice under FCRA section 615(d) has not been especially effective at communicating to consumers that they have a right to opt out of prescreened solicitations. The FRB conducted a nationwide survey of consumers and found that only 20% of consumers were aware of the opt-out right, and that less than half of those had learned of it through the section 615(d) notice.[44] The Report cites the pending ''review of the presentation and the placement of the notice in written prescreened solicitations' mandated by the FACT Act (that is, the Commission's rulemaking proceeding), as one basis for its recommendation that further legislative changes are not necessary at this time.

The Commission has concluded that the statute's purpose is best accomplished by requiring that the short notice include the essential information that consumers need if they choose to opt out. Those consumers who are seeking more information about prescreened offers and their options are invited by the short notice to obtain further information from the long notice.

Finally, the Commission is not persuaded that consumers will be confused about the purpose of the telephone number, given that the short notice will explicitly state that the number is to be used for opting out of future prescreened offers.

Additional information in the notices.

The proposed Rule prohibited senders of prescreened solicitations from including information in the short portion of the notice other than that specified by the Rule—that is, consumers' right to opt out and how to exercise it. The proposed Rule contained no such restriction on the content of the long portion of the notice, so long as any additional content did not interfere with, detract from, contradict, or otherwise undermine the purpose of the notice.

Some commenters supported the proposed Rule's prohibition on additional information being included in the short notice, and encouraged the Commission to prohibit additional information in the long notice as well. These commenters argued that allowing additional information in the notices would be contrary to the Commission's statutory mandate, confuse consumers, and allow marketers to discourage consumers from opting out.[45] Other commenters, however, advocated allowing additional information, such as the benefits of prescreened offers and the consequences of opting out, in both the short and long notices in order to provide consumers with sufficient information to make an informed decision about whether to opt out.[46] Some of these commenters cited to an exchange between Representatives Bachus and Kanjorski during the House of Representatives' consideration of the bill, in which the Congressmen stated that consumers should be aware ''not only of the right to opt out of receiving prescreened solicitations, but also of the benefits and consequences of opting out.''[47] Representatives Bachus and Kanjorski submitted a comment to the Commission expressing the importance of consumer awareness of the benefits and consequences of opting out.

The Commission recognizes that prescreened offers may confer many benefits on consumers. As discussed in several of the comments, such offers may be an easy and efficient means for consumers to learn of competing credit or insurance offers and to identify those that best suit their needs. The Commission also acknowledges, as stated in certain of the comments, that the growth in prescreened offers has coincided with a general trend towards lower initial interest rates and certain other more favorable terms, and that a substantial percentage of credit card enrollments result from prescreened offers. Moreover, the Commission recognizes that if prescreened offers

[39] *See, e.g.*, Comment, Coalition to Implement the FACT Act #OL–100040; Comment, Direct Marketing Association #OL–100035; Comment, TransUnion LLC #000022; Comment, Wachovia Corporation #OL–100017.

[40] *See, e.g.*, Comment, American Bankers Association #OL–100040; Comment, Capital One Financial Corporation #OL–100033.

[41] *See, e.g.*, Comment, American Financial Services Association #OL–100038; Comment, Capital One Financial Corporation #OL–100033.

[42] Although the FCRA specifically mentions both the address and telephone number for the notification system, the Commission has determined that it is appropriate to require only the telephone number in the short notice because: (1) the Commission understands that space is at a premium in prescreened solicitations, particularly on the first page of the principal promotional document, and therefore does not want to require more information than necessary in the short notice; and (2) the communication of the central message is likely to be more effective with less verbiage in the short notice. The telephone number requires less space and less verbiage than the address.

[43] For example, FACTA section 213(a), amending FCRA section 615(d)(2), is entitled, ''Enhanced Disclosure of the Means Available to Opt Out of Prescreened Lists.'' Although the title of a statutory section cannot limit that section, it may assist in explaining what was intended by that section. *See also, e.g.,* 149 Cong. Rec. S13851–52 (daily ed. Nov. 4, 2003) (statement of Sen. Sarbanes) (noting that the amendments to the FCRA ''will require a summary of consumers'' rights to opt out of prescreened offers.''); 149 Cong. Rec. S13855 (daily ed. Nov. 4, 2003) (statement of Sen. Johnson) (noting that the amendments to the FCRA ''take[] important new steps to empower consumers to reduce unwanted credit solicitations.''); 149 Cong. Rec. S15806–07 (daily ed. Nov. 24, 2003) (statement of Sen. Sarbanes) (noting that the amendments to the FCRA will ''help ensure that consumers are aware of how to opt out of the prescreening process * * *. The FTC * * * will be required to write rules on the size and prominence of the disclosure of the opt-out telephone number that is included with offers of credit to consumers.'')

[44] FRB Prescreen Report at 32.

[45] *See, e.g.*, Comment, Connors #OL–100014; Comment, National Consumers League, *et al.* #OL–100011; Comment, Privacy Rights Clearinghouse #OL100015.

[46] *See, e.g.*, Comment, CDIA #OL–100026; Comment, Direct Marketing Association #OL–100035; Comment, Wilmer Cutler Pickering Hale and Dorr LLP #OL–100046.

[47] Congressional Record, November 21, 2003, page H12219. *See also infra* note 51.

became less viable, marketers may switch to direct mail solicitations, which may be more costly and carry less favorable terms.[48] At the same time, the Commission notes the concerns raised by certain commenters about the alleged costs of prescreening, such as the privacy implications for those consumers who do not wish to have their personal financial information shared or used to make unsolicited credit and insurance offers.[49]

Regardless of the costs and benefits of prescreening, the FCRA provides that consumers may opt out of prescreened offers, and simply directs the Commission to determine how best to inform consumers of this right and how to exercise it. Moreover, the FCRA does not require that marketers notify consumers of the consequences of opting out, nor does it direct the Commission to require such a disclosure. The final Rule, therefore, requires only the statutorily-mandated messages, but permits additional information where appropriate.

The Commission has concluded that permitting additional information in the short notice could significantly diminish the communication of the statutorily-mandated message.[50] The final Rule, like the proposed Rule, does allow additional information, including information about the benefits of prescreening, in the long notice, if that information does not interfere with, detract from, contradict, or undermine the purpose of the prescreen notices. The Commission believes this approach allows marketers to provide consumers with information that may be useful to them in making their decisions, while at the same time not interfering with the statutory mandate to make the notices simple and easy to understand. The Commission also notes that marketers are free to include information about prescreening elsewhere in their solicitations. Finally, section 213(d) of the FACT Act requires the Commission to undertake a public awareness campaign to alert consumers to the availability of the opt-out right. The Commission intends to use this campaign to educate consumers about the benefits and consequences of opting out.[51]

4. Type Size of the Notice

The proposed Rule required the short portion of the notice to be in a type size that is larger than the principal text on the same page, but in no event smaller than 12-point type, and the long portion of the notice to be in a type size that is no smaller than the type size of the principal text on the same page, but in no event smaller than 8-point type.

Some commenters asserted that the type size prescribed for the short notice was adequate, but that the type size for the long notice was too small.[52] Others found the type size required for the long notice to be appropriate, but opined that the type size for the short notice was too large.[53] Still others proposed that the Commission adopt the approach used in the commentary to the Truth in Lending Act's implementing Regulation Z, which deems disclosures in 12-point type to be readily noticeable, but permits smaller type size to be used.[54] A few commenters suggested that the Commission not impose a type-size requirement at all,[55] or that the requirement only be relative to surrounding text rather than specifying an absolute size.[56]

The Commission has considered these comments, but has determined not to change the type-size requirements for written prescreened solicitations. The FACT Act directs the Commission to prescribe a rule that establishes, among other things, a type size that is sufficient to render the notice simple and easy to understand. It is important that the notices be large enough to be noticed and readable by ordinary consumers. At the same time, the Commission understands that space is at a premium in prescreened solicitations. Requiring the short portion of the notice to be in a type size that is larger than the principal text on the same page, combined with a minimum 12-point type-size requirement, is sufficient to ensure that it is noticeable and readable without imposing unnecessary expense on marketers.

The long notice, which contains additional information, presents a somewhat different calculus. Consumers who see the short notice and are interested in learning further information are directed by the short notice to the long notice. Accordingly, the Commission believes that the long notice should be in a type size that is sufficiently large to be readable, but that there is less need for the long notice to be readily noticeable. Balancing these interests, the Commission concludes that the long notice should be no smaller than 8-point type and no smaller than the principal text on the same page.

Some commenters also expressed concerns about complying with the type-size requirements in electronic solicitations. Several commenters pointed out that because the settings of the computer on which a solicitation is viewed can alter a solicitation's format, meeting a specific minimum point requirement would be burdensome.[57] These commenters suggested that the Commission instead impose a standard of relative prominence for electronic solicitations, which would require, for example, that the short notice be larger than the principal text.[58] The Commission agrees that, for electronic solicitations, a standard of relative prominence is an appropriate means by which to accommodate the vast range of electronic devices that may be used to view the offer. Thus, the final Rule provides that, for electronic solicitations, marketers must take reasonable steps to ensure that the short notice is in a type size that is larger than the principal text on the same page. The long notice must be in a type size no smaller than the principal text on the same page.

[48] *See also* FRB Prescreen Report at 28–36 (discussing the benefits of receiving prescreened offers).

[49] *See also* FRB Prescreen Report at 37–46 (discussing the costs of receiving prescreened offers).

[50] *See, e.g.*, Funkhouser, *An Empirical Study of Consumers' Sensitivity to the Wording of Affirmative Disclosure Messages,* 3 J. Pub. Pol. & Mktg. at 31, 33 (finding that *''information must be presented simply and straightforwardly,''* and ''affirmative disclosures should say *exactly* what they are intended to mean.'') (Emphasis in the original).

[51] The colloquy between Representatives Bachus and Kanjorski cited by some commenters refers to this public awareness campaign as a vehicle for informing consumers of the benefits and consequences of opting out. *See* 149 Cong. Rec. H12,218–19 (daily ed. Nov. 21, 2003) (''Mr. KANJORSKI. Mr. Speaker, does the gentleman share with me the understanding that the FTC's public awareness campaign is to be designed to increase public awareness, not only of the right to opt out of receiving prescreened solicitations, but also of the benefits and consequences of opting out? Mr. BACHUS. Mr. Speaker, yes, I share that understanding.'').

[52] *See, e.g.*, Comment, National Consumers League, *et al.* #OL–100011. *See also* Comment, Privacy Rights Clearinghouse #OL–100015 (commenting that the long notice type size requirement was too small).

[53] *See, e.g.*, Comment, Boeing Employees' Credit Union #000020; Comment, Michigan Credit Union League #OL–100030; Comment, Mortgage Bankers Association #OL–100036; Comment, National Independent Automobile Dealers Association #OL–100021; Comment, Union Federal Bank #OL–100044.

[54] *See, e.g.*, Comment, Credit Union National Association #000003; Comment, Navy Federal Credit Union #000006.

[55] *See, e.g.*, Comment, Coalition to Implement the FACT Act #OL–100042; Comment, Consumer Bankers Association #OL–100028; Comment, TransUnion LLC #000022.

[56] *See, e.g.*, Comment, Countrywide #000010.

[57] *See, e.g.*, Comment, Credit Union National Association #000003; Comment, Countrywide #000010; Comment, Progressive #OL–100010.

[58] *See, e.g.*, Comment, Countrywide #000010; Comment, National Independent Automobile Dealers Association #OL–100021; Comment, Progressive #OL–100010.

5. Form of the Notice

The proposed Rule set forth certain baseline requirements for the form of both the long and the short portions of the notice. The proposed Rule required the short notice to be on the front side of the first page of the principal promotional document in the solicitation, or, if provided electronically, on the first screen; located on the page and in a format so that it is distinct from other text; and in a type style that is distinct from other type styles used on the same page. The proposed Rule required the long notice to begin with a heading identifying it as the ''*OPT-OUT NOTICE*''; be in a type style that is distinct from other type styles used on the same page; and be set apart from other text on the page. The Commission received several comments concerning these requirements generally, as well as specific comments regarding the required location, type style, and heading requirements. These are addressed in turn below.

General comments.

Some commenters asserted that the requirements regarding form did not provide companies with enough flexibility to determine the best method for making the notices clear and conspicuous, as well as simple and easy to understand.[59] Conversely, other commenters were concerned that the requirements were not specific enough to ensure that the notices would meet the statutory standards.[60] These commenters suggested, for example, that the Rule require businesses to use bolded type style, rather than allowing them the flexibility to determine how to comply with the distinct type style requirement.

The Commission has considered these comments and declines to alter the baseline requirements in the final Rule. The requirements are not overly restrictive and allow companies flexibility to determine how best to use the basic formatting tools set forth in the Rule to make a statement noticeable and understandable. At the same time, the requirements provide sufficient specificity to ensure that the notices are simple and easy to understand.

Location of notices in one-page solicitations.

Several commenters noted that certain prescreened solicitations may consist of only a single page, and recommended that the final Rule not require a layered format in that circumstance.[61] Others requested that the Commission clarify that the short and long portions of the notice could both appear on the first page of the principal promotional document.[62] Others stated that, because prescreened offers of insurance usually consist of a single page or a fold-out self mailer, the final Rule should not apply to prescreened offers of insurance.[63]

Section 615(d) of the FCRA clearly covers prescreened offers of insurance, and the Commission declines to establish an exemption for such offers from the final Rule. The Commission also declines to provide an exception from the layered notice requirement for one-page solicitations. Even in a one-page solicitation, the layered format contributes to making the notice simple and easy to understand. The Commission agrees that both the short and long portions of the notice may appear on the first page of the principal promotional document. As in the proposed Rule, the final Rule allows businesses to place the long notice in any location within the solicitation so long as that location is referenced in the short notice.

Location of notices in electronic solicitations.

Because the settings of the device on which an electronic solicitation is viewed can alter a solicitation's format, some commenters objected to the requirement that the short-form notice appear on the first screen of an electronic solicitation.[64] Some commenters proposed that the short portion of the notice simply be required to appear on the first page of an electronic solicitation,[65] or ''reasonably proximate to, or included in, the main marketing message,''[66] in order to accommodate variations among viewing devices. By contrast, other commenters supported requiring the short notice to appear on the first screen of the offer.[67]

The Commission has determined that, for the reasons stated in the comments, it is not practicable to require that the short portion of the notice always appear on the first page or first screen of electronic solicitations. Thus, the final Rule requires that, for electronic solicitations, the short notice be included on the same page and in close proximity to the principal marketing message. This standard ensures that consumers viewing the solicitation will be reasonably likely to see the short notice.

Distinct type style requirement.

Some commenters requested that the Commission modify the proposed Rule to clarify that the type style of the notice must contrast only with the *principal* type style used on the same page, rather than with all type styles on the page.[68] The Commission agrees that this clarification should be made. Companies should not be precluded, for example, from presenting the notices in bolded type style simply because a small portion of the text on the page is in bold.[69] Therefore, the final Rule specifies that both the short and long portions of the notice must be in a type style that is distinct from the type style of the principal text on the same page.

Long notice heading.

The proposed Rule required that the long portion of the notice include the heading ''*OPT-OUT NOTICE.*'' Some commenters suggested that this heading should reflect the totality of information in the long notice, rather than focusing on the opt-out information in the notice.[70] These commenters suggested a variety of new headings, such as ''*PRESCREEN DISCLOSURES.*''

The Commission has considered these comments and agrees that the long notice heading should be modified to reflect the totality of the information contained in that portion of the notice. Therefore, the final Rule requires that the long notice begin with a heading identifying it as the ''*PRESCREEN & OPT-OUT NOTICE.*''

D. Section 682.4: Effective Date

The Commission initially proposed to make the Prescreen Opt-Out Disclosure Rule effective 60 days after publication of the final Rule. Many industry commenters requested a longer effective date in order to allow covered entities to implement changes to their prescreened solicitations. These commenters explained that prescreened solicitations are generally prepared several months in advance, and

[59] *See, e.g.*, Comment, Property Casualty Insurers Association of America #000008.

[60] *See, e.g.*, Comment, National Consumers League, *et al.* #OL–100011; Comment, Privacy Rights Clearinghouse #OL–100015.

[61] *See, e.g.*, Comment, Coalition to Implement the FACT Act #OL–100042.

[62] *See, e.g.*, Comment, National Independent Automobile Dealers Association #OL–100021.

[63] *See, e.g.*, Comment, American Council of Life Insurers #OL–100027.

[64] *See, e.g.*, Comment, Credit Union National Association #000003.

[65] *See, e.g.*, Comment, Credit Union National Association #000003.

[66] *See, e.g.*, Comment, Wachovia Corporation #OL–100017.

[67] *See, e.g.*, Comment, Financial Services Roundtable #EREG–000004; Comment, MasterCard International Incorporated #0000012.

[68] *See, e.g.*, Comment, MasterCard International Incorporated #0000012.

[69] For example, 12 CFR part 226, appendix G, requires that the headings in certain Truth-in-Lending disclosures be in bolded type style. This would not preclude companies from also placing the prescreen disclosure in bolded type style.

[70] *See, e.g.*, Comment, Consumer Bankers Association #OL–100028; Comment, Juniper Financial Corp. #000009; Comment, MasterCard International Incorporated #100012.

therefore they need more time to comply with the final Rule in order to exhaust existing inventories of solicitations and to prepare and disseminate new compliant solicitations.[71] These commenters suggested time periods ranging from 90 days to 1 year after publication of the final Rule. After considering the comments, the Commission has extended the effective date to August 1, 2005. The Commission believes that this time period will provide businesses with sufficient time to implement the new requirements, while ensuring that the benefits to consumers of the improved opt-out notice occur as soon as reasonably practicable.

E. Appendix A to Part 698: Model Prescreen Opt-Out Notices

In the proposed Rule, the Commission set forth model notices, including both a short and long portion, in both English and Spanish. These notices included model language and also illustrated proper placement and display of the language.

Several commenters suggested changes to the language in the model notices, including specifying more ''neutral'' language for the short notice, adding information to the long notice, providing model language for collateral requirements, and clarifying that the telephone number is for the consumer reporting agencies, not the prescreen marketer. The Commission agrees that some changes to the proposed model notices are appropriate, and is making the modifications described below. Otherwise, the proposed notices are retained.

These model notices adopted in the final Rule may be used for purposes of complying with the Rule.[72]

1. Model Language in the Short Notice

The proposed Rule's model short notice stated, ''To stop receiving 'prescreened' offers of [credit or insurance] from this and other companies, call toll-free, [toll free number]. See *OPT-OUT NOTICE* on other side [or other location] for details.'' According to several commenters, this language implies that prescreened offers are undesirable and encourages consumers to opt-out.[73] These commenters requested that the Commission revise the model short notice to use less negative language.

The Commission has determined to revise the short notice language to remove any possible negative characterization of prescreened solicitations. The first sentence of the short notice in the final Rule states, ''You can choose to stop receiving 'prescreened' offers of [credit or insurance] from this and other companies by calling toll-free [toll-free number].'' The Commission believes that this language does not imply a recommendation of any course of action, but rather simply informs consumers of their statutory right.

In addition, for the same reasons that commenters suggested that the long notice heading should be modified, the Commission has determined that the model short notice's reference to the long notice should be modified to reflect to totality of the information in the long notice. Therefore, the second sentence of the model short notice in the final Rule states, ''See *PRESCREEN & OPT-OUT NOTICE* on other side [or other location] for more information about prescreened offers.''

2. Additional Information in Long Notices

Several commenters suggested that the model long notice should contain additional information, including information about the benefits and drawbacks of prescreening,[74] that opting out will not stop all offers of credit and insurance, or that consumers may be asked to provide their Social Security numbers when exercising the opt-out right.[75] The Commission believes that each of these messages can be useful to consumers, and notes that it tested the communication of each of these messages as part of its consumer survey.[76]

The Commission has considered these comments, but has determined not to include information beyond that required by the statute in the model notice. The model notice contains plain language statements of the statutorily-required information. Rather than single out other particular messages for inclusion in the model, and thereby imply that certain information is required or that other information is prohibited, the final Rule allows companies flexibility to determine what, if any, additional information should be included (so long as the additional information does not interfere with, detract from, contradict, or undermine the purpose of the opt-out notices).[77]

3. Collateral Requirement

The proposed Rule's model long notice contained a plain-language summary of the information required by section 615(d) of the FCRA to be included in prescreened offers. At least one commenter noted that, among other things, it must be disclosed when a prescreened offer is contingent upon the consumer providing adequate collateral. This commenter stated that the model notice did not specifically include this information, and requested that the Commission revise the model notices to include it.[78]

The Commission has considered this argument and agrees that the model long notice should contain additional language regarding the collateral requirement for use by creditors and insurers in appropriate circumstances. Therefore, the final Rule modifies the second sentence of the model long notice to state, ''This offer is not guaranteed if you do not meet our criteria [including providing acceptable property as collateral].''

4. Telephone Number

Some commenters recommended that the Commission make clear in the

[71] *See, e.g.*, Comment, American Council of Life Insurers #OL–100027; Comment, Boeing Employees' Federal Credit Union #000020; Comment, Wachovia Corporation #OL–100017; Comment, Wells Fargo & Company #000007.

[72] Some commenters suggested that the final Rule require marketers to use notices that substantially conform with the model notices. *See, e.g.*, Comment, National Consumers League, *et al.* #OL–100011. However, the Commission believes that there are sufficient requirements in the Rule to make the notices effective, and therefore it is not necessary to require that marketers' notices substantially conform with the model notices.

[73] *See, e.g.*, Comment, Direct Marketing Association #OL–100035; Comment, Discover Bank #OL–100016; Comment, Juniper Financial Corp. #000009; Comment, MasterCard International Incorporated #000012; Comment, Visa U.S.A. Inc. #000005; Comment, Wells Fargo & Company #000007.

[74] *See supra* text accompanying notes 48 and 49 discussing the benefits and drawbacks of prescreening that were raised by the commenters.

[75] *See, e.g.*, Comment, Coalition to Implement the FACT Act #OL–100042; Comment, Consumer Bankers Association #OL–100028; Comment, Wachovia Corporation #OL–100017. The potential benefits of prescreening were described above in Section III.C.3. In addition, as discussed in the NPRM, not all credit card or insurance offers consumers receive are prescreened offers. For example, some such offers are mass-mailed to consumers and do not derive from prescreened lists. Therefore, opting out of precreened offers will not end all mail solicitations. Finally, as explained in the NPRM, the opt-out system operated by the nationwide consumer reporting agencies requires a Social Security number for verification; including the need to provide a Social Security number in the notice might alleviate consumers' concerns about revealing this sensitive information.

[76] The survey found that the tested language used to convey these ancillary messages did not communicate well to consumers; at the same time, it does not appear that the tested language, at least under the conditions of the study, detracted from the primary message that consumers could choose to opt out. *See* 69 FR 58861, 58864.

[77] The Commission also notes that appropriate additional information might be a website address where consumers can obtain additional information about prescreening and the opt-out right.

[78] *See, e.g.*, Comment, Mortgage Bankers Association #OL–100036.

model notice that consumers would be calling the consumer reporting agencies that operate the toll-free number for opting out, and not the creditor or insurer, when exercising their opt-out right.[79]

The Commission has considered these comments and agrees that language should be added to the model long notice to clarify that the telephone number is that of the consumer reporting agencies, not the creditor or insurer. Therefore, the final Rule modifies the third sentence of the model long notice to state, ''If you do not want to receive prescreened offers of [credit or insurance] from this and other companies, call the consumer reporting agencies [or name of consumer reporting agency] toll free, [toll free number]; or write: [consumer reporting agency name and address].''

IV. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act, as amended, 44 U.S.C. 3501, *et seq.*, the Commission submitted the proposed Rule to the Office of Management and Budget (''OMB'') for review. The OMB approved the Rule's information collection requirements through November 30, 2007, and assigned OMB control number 3084–0132. In response to comments received, the Commission has revised its estimate of the burden for companies that issue many different prescreened solicitations and therefore will be required to revise multiple solicitations in order to comply with the Rule. On December 8, 2004, the OMB approved the new burden estimate.

As set forth in the NPRM, the Rule imposes certain disclosure requirements on makers of prescreened credit solicitations, as required by the FACT Act. Specifically, such solicitations must include a statement containing a short-form and a long-form notice, which provides consumers with information concerning prescreened solicitations and how to opt out of receiving such solicitations in the future. In addition, the Rule contains a model disclosure that companies may use to comply with the Rule's requirements.

The NPRM estimated the time to revise and re-format an existing solicitation to be about 8 hours per firm. At the same time, the NPRM estimated that between 500 and 750 entities would be affected, so that the total annual burden to the industry would be between 4000 and 6000 hours and the estimated total annual cost would be between $110,000 and $167,000.[80] Numerous commenters stated that the NPRM underestimated the costs of revising solicitations by failing to calculate the additional costs to be borne by larger companies that issue multiple solicitations.[81]

At the outset, the Commission notes that any new disclosure format, as required by the FACT Act's mandate to improve the existing opt-out disclosure, requires affected firms to revise their prescreened solicitations. Moreover, the Commission does not believe that the layered notice format of the final Rule appreciably increases the burdens on affected entities. Nevertheless, the Commission recognizes that companies that offer multiple solicitations will incur added costs to revise these notices. Thus, the Commission now estimates that the total annual burden to the industry will be between 43,600 and 45,600 hours. This figure reflects the Commission's estimate that approximately 100 entities will need additional time to revise multiple notices as follows: for each of these 100 entities, an additional four hours each for an estimated 99 solicitations not accounted for in the NPRM. Based on the time needed to bring these additional solicitations into compliance, the Commission now estimates that the total cost to the industry will be between $1,157,894 and $1,213,329. This figure reflects the 39,600 additional hours of skilled technical labor (at $26.44 per hour) that the Commission estimates will be required to revise the multiple solicitations.[82]

Although some commenters also estimated that more time would be needed to format and develop a disclosure than the eight hours estimated by the NPRM,[83] or that the labor costs to revise each notice would be higher than estimated,[84] the Commission has concluded that it is feasible to design a solicitation according to its original estimates. Nevertheless, in order to permit companies to implement such changes in a more cost-effective manner, the Commission has extended the time to comply with the rule to August 1, 2005.

V. Final Regulatory Flexibility Analysis

The Regulatory Flexibility Act (''RFA''), 5 U.S.C. 601–612, requires that the Commission provide an Initial Regulatory Flexibility Analysis (''IRFA'') with a proposed Rule and a Final Regulatory Flexibility Analysis (''FRFA''), with the final Rule, unless the Commission certifies that the Rule will not have a significant economic impact on a substantial number of small business entities.

The Commission hereby certifies that the final Rule will not have a significant economic impact on a substantial number of small business entities. The FCRA previously mandated the prescreen disclosure. The FACT Act requires the Commission to adopt a rule to make the required disclosure simple and easy to understand. The proposed Rule applies to any entity that makes prescreened offers of credit or insurance. The Commission has been unable to determine the number of small entities that purchase prescreened lists from consumer reporting agencies. However, the Commission believes that only a small number of small entities make prescreened offers. The Commission did not receive any comments to the IRFA that would allow it to determine the precise number of small entities that will be affected. Although there may be some small entities among the entities making prescreened offers, the economic impact of the final Rule is not likely to be significant on a particular entity, nor is the final Rule likely to have a significant economic impact on a substantial number of small entities. The minimal impact on creditors and insurers would likely consist of revising disclosures that they already give in order to make the disclosures simple and easy to understand.

The Commission requested comment on the IRFA and the proposed Rule's impact on small businesses. The Commission received a few comments in response. These comments, which are discussed in more detail below, requested more time to comply with the Rule[85] and suggested that the layered

[79] *See, e.g.*, Comment, Bank of America Corporation #OL–100032; Comment, Mortgage Bankers Association #OL–100036.

[80] This estimate was based on Bureau of Labor Statistics data (as of July, 2002), as follows: 2 hours of managerial/professional time at $31.55 per hour; plus 6 hours of skilled technical labor at $26.44 per hour; multiplied by 500 and 750 companies, for a total of $110,870 and $166,305, respectively.

[81] *See, e.g.*, Comment, Bank of America Corporation #OL–100032; Comment, JPMorgan Chase Bank #OL–100019; Comment, MasterCard International Incorporated #000012; Comment, Wachovia Corporation #OL–100017; Comment, Wells Fargo & Company #000007; Comment, Wilmer Cutler Pickering Hale and Dorr LLP #OL–100046.

[82] As in the NPRM, the hourly rate is based on Bureau of Labor Statistics data, as of July, 2002.

[83] *See, e.g.*, Comment, Countrywide #000010; Comment, JPMorgan Chase Bank #OL–100019; Wachovia Corporation #OL–100017.

[84] *See, e.g.*, Comment, American Bankers Association #OL–100040; Comment, Capitol One Financial Corporation #OL–100033.

[85] *See, e.g.*, Comment, Credit Union National Association #000003; Comment, National Independent Automobile Dealers Association #OL–100021.

notice requirement may be difficult for some small businesses.[86]

The Commission continues to believe that a precise estimate of the number of small entities that fall under the Rule is not currently feasible. However, based on the comments received and the Commission's own experience and knowledge of industry practices, the Commission also continues to believe that the cost and burden to small business entities of complying with the Rule is minimal and that the final Rule will not have a significant impact on a substantial number of small entities. Accordingly, this document serves as notice to the Small Business Administration of the agency's certification of no effect. Nonetheless, the Commission has decided to publish a Final Regulatory Flexibility Analysis with this final Rule. Therefore, the Commission has prepared the following analysis:

A. Need for and Objectives of the Rule

Section 213 of the FACT Act directs the FTC to adopt a rule to improve the required notice to consumers regarding their right to opt out of prescreened solicitations for credit or insurance. In this action, the FTC promulgates a final Rule that would implement this requirement of the FACT Act. The Rule is authorized by and based upon section 213 of the FACT Act.

B. Significant Issues Received by Public Comment

The Commission received a few comments in response to its IRFA. Some commenters, in particular, trade associations representing small businesses, were primarily concerned about the time allowed for compliance with the Rule. These commenters asserted that small businesses, which have more limited resources than larger marketers, needed more than the proposed 60 days to comply with the Rule. The commenters suggested an effective date ranging from 120 days to 6 months from the date the final Rule is issued.[87] The final Rule changes the effective date to August 1, 2005. Therefore, small businesses, as well as other entities, should have sufficient time to comply.

Other commenters suggested that the layered notice requirement may be difficult for some small entities.[88] Some of these comments noted that small entities often have one-page solicitations, and that the layered notice would likely require them to increase the length of their marketing materials, at great expense. As an alternative, these commenters suggested that a one-part notice, rather than the layered notice, should be permitted. The Commission has considered these comments, but does not believe that the layered notice requirement is overly burdensome for small businesses. The Commission has clarified in the statement of basis and purpose that accompanies the final Rule that both parts of the layered notice may appear in a single page solicitation, obviating the need for an additional page or document. Even on a single page solicitation, the layered format contributes to a notice that is simple and easy to understand. The Rule also allows companies flexibility as to the precise formatting and language of the notices. The Commission considers this flexibility sufficient to allow all entities, including small entities, to determine an appropriate means of complying with the Rule within the framework of their own solicitations.

C. Small Entities To Which the Rule Will Apply

As described above, the Rule applies to any entity, including small entities, that makes prescreened offers of credit or insurance. The Commission has been unable to ascertain a precise estimate of the number of small entities that are creditors or insurers, and received no specific comments to the IRFA that allow it to determine the precise number of small entities that will be affected. Entities potentially covered by the Rule include any entity that extends credit or insurance, including insurance companies, retailers, department stores, and banking institutions, if they are engaging in prescreened offers of credit. For these kinds of entities, the Small Business Administration defines small business to include, in general, a business whose annual receipts do not exceed $6 million in total receipts for insurance companies and retailers, and $23 million in total receipts for department stores. For banking institutions, the Small Business Administration defines small business to include entities whose total assets do not exceed $150 million.[89]

However, not all businesses that extend credit or insurance are required to comply with the Rule. Rather, only such entities that make prescreened solicitations will be subject to the Rule's requirements. Although the number of small businesses that offer credit or insurance is large, the Commission believes that only a small number of those businesses engage in prescreened solicitations. The Commission believes that many small businesses find it more cost effective to engage in other forms of solicitation, including point-of-sale solicitations and/or solicitations of existing customers.

D. Projected Reporting, Recordkeeping, and Other Compliance Requirements

Under the final Rule, any entity making a prescreened offer of credit or insurance will be required to provide recipients of the offer with a disclosure regarding their right to opt out of such offers. (There are no filing or recordkeeping requirements in the Rule.) These disclosures are to be in a form that is simple and easy to understand. As noted in the Paperwork Reduction Act analysis above, the estimated time to revise the notice and re-format solicitations is approximately 8 hours (one business day), and the total cost for all entities to comply with this Rule is between $1,157,894 and $1,213,329.

E. Steps Taken To Minimize Significant Economic Impact of the Rule on Small Entities

The Commission considered whether any significant alternatives, consistent with the purposes of the FACT Act, could further minimize the Rule's impact on small entities. The FTC asked for comment on this issue. Some commenters suggested that the layered notice requirement may be difficult for small businesses, and that a single notice would be more appropriate.[90] However, as discussed above, the Commission has determined that the layered format is the best way to ensure that the disclosures are simple and easy to understand and does not find that the layered notice approach poses a particular burden to small entities. The Rule allows small entities flexibility in determining how best to present the layered notice within the framework of their solicitations, and therefore does not impose a substantial burden.

The Commission also requested comment on the need to adopt a delayed

[86] *See, e.g.*, Comment, ChoicePoint Precision Marketing, Inc. #OL–100025; Comment, Wilmer Cutler Pickering Hale and Dorr LLP #OL–100046.

[87] *See, e.g.*, Comment, Credit Union National Association #000003; Comment, National Independent Automobile Dealers Association #OL–100021.

[88] *See, e.g.*, Comment, ChoicePoint Precision Marketing, Inc. #OL–100025; Comment, Wilmer Cutler Pickering Hale and Dorr LLP #OL–100046.

[89] These numbers represent size standards for most entities in the industries mentioned above. A list of the SBA's size standards for all industries can be found at *http://www.sba.gov/size/indextableofsize.html.*

[90] *See, e.g.*, Comment, ChoicePoint Precision Marketing, Inc. #OL–100025; Comment, Wilmer Cutler Pickering Hale and Dorr LLP #OL–100046.

effective date for small entities in order to provide them with additional time to come into compliance. The Commission received some comments on this issue;[91] the Commission has decided to extend the effective date for all entities subject to the Rule to August 1, 2005. This additional time will allow small entities to assess their compliance obligations and make cost-sensitive decisions concerning how best to comply with the Rule.

VI. Final Rule

List of Subjects

16 CFR Part 642

Consumer reporting agencies, Consumer reports, Credit, Fair Credit Reporting Act, Trade practices.

16 CFR Part 698

Consumer reporting agencies, Consumer reports, Credit, Fair Credit Reporting Act, Trade practices.

■ The Federal Trade Commission amends chapter I, title 16, Code of Federal Regulations, as follows:

■ 1. Add new part 642 to read as follows:

PART 642—PRESCREEN OPT-OUT NOTICE

Sec.
642.1 Purpose and scope.
642.2 Definitions.
642.3 Prescreen opt-out notice.
642.4 Effective date.

Authority: Pub. L. 108–159, sec. 213(a); 15 U.S.C. 1681m(d).

§ 642.1 Purpose and scope.

(a) *Purpose*. This part implements section 213(a) of the Fair and Accurate Credit Transactions Act of 2003, which requires the Federal Trade Commission to establish the format, type size, and manner of the notices to consumers, required by section 615(d) of the Fair Credit Reporting Act (''FCRA''), regarding the right to prohibit (''opt out'' of) the use of information in a consumer report to send them solicitations of credit or insurance.

(b) *Scope*. This part applies to any person who uses a consumer report on any consumer in connection with any credit or insurance transaction that is not initiated by the consumer, and that is provided to that person under section 604(c)(1)(B) of the FCRA (15 U.S.C. 1681b(c)(1)(B)).

§ 642.2 Definitions.

As used in this part:

(a) *Simple and easy to understand* means:

(1) A layered format as described in § 642.3 of this part;

(2) Plain language designed to be understood by ordinary consumers; and

(3) Use of clear and concise sentences, paragraphs, and sections.

(i) *Examples*. For purposes of this part, examples of factors to be considered in determining whether a statement is in plain language and uses clear and concise sentences, paragraphs, and sections include:

(A) Use of short explanatory sentences;

(B) Use of definite, concrete, everyday words;

(C) Use of active voice;

(D) Avoidance of multiple negatives;

(E) Avoidance of legal and technical business terminology;

(F) Avoidance of explanations that are imprecise and reasonably subject to different interpretations; and

(G) Use of language that is not misleading.

(ii) [Reserved]

(b) *Principal promotional document* means the document designed to be seen first by the consumer, such as the cover letter.

§ 642.3 Prescreen opt-out notice.

Any person who uses a consumer report on any consumer in connection with any credit or insurance transaction that is not initiated by the consumer, and that is provided to that person under section 604(c)(1)(B) of the FCRA (15 U.S.C. 1681b(c)(1)(B)), shall, with each written solicitation made to the consumer about the transaction, provide the consumer with the following statement, consisting of a short portion and a long portion, which shall be in the same language as the offer of credit or insurance:

(a) *Short notice*. The short notice shall be a clear and conspicuous, and simple and easy to understand statement as follows:

(1) *Content*. The short notice shall state that the consumer has the right to opt out of receiving prescreened solicitations, and shall provide the toll-free number the consumer can call to exercise that right. The short notice also shall direct the consumer to the existence and location of the long notice, and shall state the heading for the long notice. The short notice shall not contain any other information.

(2) *Form*. The short notice shall be:

(i) In a type size that is larger than the type size of the principal text on the same page, but in no event smaller than 12-point type, or if provided by electronic means, then reasonable steps shall be taken to ensure that the type size is larger than the type size of the principal text on the same page;

(ii) On the front side of the first page of the principal promotional document in the solicitation, or, if provided electronically, on the same page and in close proximity to the principal marketing message;

(iii) Located on the page and in a format so that the statement is distinct from other text, such as inside a border; and

(iv) In a type style that is distinct from the principal type style used on the same page, such as bolded, italicized, underlined, and/or in a color that contrasts with the color of the principal text on the page, if the solicitation is in more than one color.

(b) *Long notice*. The long notice shall be a clear and conspicuous, and simple and easy to understand statement as follows:

(1) *Content*. The long notice shall state the information required by section 615(d) of the Fair Credit Reporting Act (15 U.S.C. 1681m(d)). The long notice shall not include any other information that interferes with, detracts from, contradicts, or otherwise undermines the purpose of the notice.

(2) *Form*. The long notice shall:

(i) Appear in the solicitation;

(ii) Be in a type size that is no smaller than the type size of the principal text on the same page, and, for solicitations provided other than by electronic means, the type size shall in no event be smaller than 8-point type;

(iii) Begin with a heading in capital letters and underlined, and identifying the long notice as the ''PRESCREEN & OPT-OUT NOTICE'';

(iv) Be in a type style that is distinct from the principal type style used on the same page, such as bolded, italicized, underlined, and/or in a color that contrasts with the color of the principal text on the page, if the solicitation is in more than one color; and

(v) Be set apart from other text on the page, such as by including a blank line above and below the statement, and by indenting both the left and right margins from other text on the page.

§ 642.4 Effective date.

This part is effective on August 1, 2005.

PART 698—[AMENDED]

■ 2. Amend § 698.1 by revising paragraph (b) to read as follows:

§ 698.1 Authority and purpose.

* * * * *

[91] *See, e.g.*, Comment, Credit Union National Association #000003; Comment, National Independent Automobile Dealers Association #OL–100021.

(b) *Purpose*. The purpose of this part is to comply with sections 607(d), 609(c), 609(d), 612(a), and 615(d) of the Fair Credit Reporting Act, as amended by the Fair and Accurate Credit Transactions Act of 2003, and Section 211 of the Fair and Accurate Credit Transactions Act of 2003.

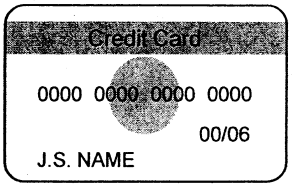
■ 3. Add Appendix A to Part 698 as follows:

Appendix A to Part 698—Model Prescreen Opt-Out Notices

In order to comply with part 642 of this title, the following model notices may be used:

BILLING CODE 6750–01–P

(a) *English language model notice.* (1) *Short notice.*



Here's a Line About Credit

J.S. Name
12345 Friendly Street
City, ST 12345

Dear Ms. Name,

Back in the last century, we saw how technology was changing the way people do things. So we set out to create a the last century, we saw how technology was changing the way people do things. Back in the last century, we saw how technology was changing the way people do things. So we set out to create a the last century, we saw how technology was changing the way people do things.

Back in the last century, we saw how technology was changing the way people do things. So we set out to create a smart kind of credit card. Back in the last century, we saw how technology was changing the way. Back in the last century, we saw how technology was changing the way people do things. So we set out to create a the last century, we saw how technology was changing the way people do things.

Back in the last century, we saw how technology was changing the way people do things. So we set out to create a smart kind of credit card. Back in the last century, we saw how technology was changing the way peop. So we set out to create a smart kind of credit card. Back in the last century, we saw how technology was changing the way people do things. So we set out to create a smart kind of credit a smart kind of credit card.

So we set out to create a smart kind of credit card. Back in the last century, we saw how technology was changing the way people. Back in the last century, we saw how technology was changing the way people do things. So we set out to create a smart kind of credit card.

We saw how technology was changing the way people do things. So we set out to create a smart kind of credit card. Back in the last century, we saw how technology.

Sincerely,

John W. Doe
President, Credit Card Company

PFOR 00 MON
FIXED ABC

■

BALANCE TR
FOR 00 MONTHS

■

NO MONTHS FEE

■

INTERNET SECURITY
SECURITY

■

ONLINE FRAUD PRO
GUARANTEE

■

YOUR BALANCE
PAY YOUR BILL

■

FEE-FREE REWARDS
PROGRAM

You can choose to stop receiving "prescreened" offers of [credit or insurance] from this and other companies by calling toll-free [toll-free number]. See PRESCREEN & OPT-OUT NOTICE on other side [or other location] for more information about prescreened offers.

(2) *Long notice.*

Back in the last century, we saw how technology was changing the way people do things. So we set out to create a smart kind of credit card. Back in the last century, we saw how technology was changing the way. Back in the last century, we saw how technology was changing the way people do things. So we set out to create a the last century, we saw how technology was changing the way people do things.

HEADER

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TERMS AND CONDITIONS

Back in the last century, we saw how technology was changing the way people do things. So we set out to create a smart kind of credit card. Back in the last century, we saw how technology was changing the way. Back in the last century, we saw how technology was changing the way people do things. So we set out to create a smart kind of credit card. Back in the last century, we saw how technology was changing the way. Back in the last century, we saw how technology was changing the way people do things. So we set out to create a smart kind of credit card. Back in the last century, we saw how technology was changing the way. Back in the last century, we saw how technology was changing the way people do things. So we set out to create a smart kind of credit card. Back in the last century, we saw how technology was changing the way. Back in the last century, we saw how technology was changing the way people do things. So we set out to create a smart kind of credit card. Back in the last century, we saw how technology was changing the way. Back in the last century, we saw how technology was changing the way people do things. So we set out to create a smart kind of credit card. Back in the last century, we saw how technology was changing the way. Back in the last century, we saw how technology was changing the way people do things. So we set out to create a smart kind of credit card. Back in the last century, we saw how technology was changing the way. Back in the last century, we saw how technology was changing the way people do things. So we set out to create a smart kind of credit card. Back in the last century, we saw how technology was changing the way. Back in the last century, we saw how technology was changing the way people do things. So we set out to create a smart kind of credit card. Back in the last century, we saw how technology was changing the way. Back in the last century, we saw how technology was changing the way people do things. Back in the last century, we saw how technology was changing the way. Back in the last century, we saw y, we saw how technology was changing the way. Back in the last century, we saw how technology was changing the way people do things.

Act Notice: the a smart kind of credit card. Back in the last century, we saw how technology was changing the way people do things. So we set out to create a smart kind of credit card. Back in the last century, we saw how technology was changing the way. Back in the last century, we saw.

PRESCREEN & OPT-OUT NOTICE: This "prescreened" offer of [credit or insurance] is based on information in your credit report indicating that you meet certain criteria. This offer is not guaranteed if you do not meet our criteria [including providing acceptable property as collateral]. If you do not want to receive prescreened offers of [credit or insurance] from this and other companies, call the consumer reporting agencies [or name of consumer reporting agency] toll-free, [toll-free number]; or write: [consumer reporting agency name and mailing address].

Notice to Some Residents: te a smart kind of credit card. Back in the last century, we saw how technology was changing the way. Back in the last century, we saw how technology was changing the way people do things. So we set out to create a smart kind of credit card. Back in the last century, we saw how technology was changing the way. Back in the last century. So we set out to create a smart kind of credit card. Back in the last century, we saw how technology was changing the way.

(b) *Spanish language model notice.*
(1) *Short notice.*

Aquí están líneas crédito

J.S. Nombre
1234 Calle Amistosa
Ciudad, ST 12345

PFOR 00 MON FIJO ABC

Estimada Señora Nombre:

En el siglo pasado vimos como la tecnología estaba cambiando la manera en que la gente hace las cosas. Así que creamos una tarjeta de crédito inteligente, vimos como la tecnología estaba cambiando la manera en que la gente hace las cosas. En el siglo pasado vimos como la tecnología estaba cambiando la manera en que la gente hace las cosas. Así que creamos una tarjeta de crédito inteligente. Vimos como la tecnología estaba cambiando la manera en que la gente hace las cosas.

Así que creamos una tarjeta de crédito inteligente. Vimos como la tecnología estaba cambiando la manera en que la gente hace las cosas. En el siglo pasado vimos como la tecnología estaba cambiando la manera en que la gente hace las cosas. Así que creamos una tarjeta de crédito inteligente, vimos como la tecnología estaba cambiando la manera en que la gente hace las cosas.

Vimos como la tecnología estaba cambiando la manera en que la gente hace las cosas. En el siglo pasado vimos como la tecnología estaba cambiando la manera en que la gente hace las cosas. Así que creamos una tárjeta de crédito inteligente, vimos como la tecnología estaba cambiando la manera en que la gente hace las cosas. En el siglo pasado vimos como la tecnología estaba cambiando la manera en que la gente hace las cosas.

Así que creamos una tarjeta de crédito inteligente. Vimos como la tecnología estaba cambiando la manera en que la gente hace las cosas. En el siglo pasado vimos como la tecnología estaba cambiando la manera en que la gente hace las cosas. Así que creamos una tarjeta de crédito inteligente. Vimos como la tecnología estaba cambiando la manera en que la gente hace las cosas.

Sinceramente,

John W. Doe
Presidente, Compañía

TRANSFERENCIA DE BALANCE POR MESES

SIN CUOTA MENSUAL

PAGO ELECTRÓNICO SEGURO

PROTECCIÓN CONTRA FRAUDE EN LÍNEA GARANTIZADO

SU BALANCE PAGA SU CUENTA

PROGRAMA DE RECOMPENSAS SIN CUENTA

Usted puede elegir no recibir más "ofertas de [crédito o seguro] pre-investigadas" de esta y otras compañías llamando sin cargos al [número sin cargo]. Ver la NOTIFICACIÓN DE PRE-INVESTIGACIÓN Y EXCLUSIÓN VOLUNTARIA al otro lado de esta página [o en otro lugar] para más información sobre ofertas pre-investigadas.

(2) *Long notice.*

En el siglo pasado vimos como la tecnología estaba cambiando la manera en que la gente hace las cosas. Así que creamos una tarjeta de crédito inteligente, vimos como la tecnología estaba cambiando la manera en que la gente hace las cosas. En el siglo pasado vimos como la tecnología estaba cambiando la manera en que la gente hace las cosas. Así que creamos una tarjeta de crédito inteligente.

AQUÍ ESTÁN

Protección Contra Fraude	Programa de Recompensas	Su Balance Paga	Sin Cuota Mensual	Protección Contra Fraude	Recompensas Sin Cuenta	Sin Cuota Mensual
En el siglo pasado vimos como la tecnología estaba cambiando la manera en que la gente hace las cosas.	Vimos como la tecnología estaba cambiando la manera en que la gente hace las cosas. Vimos como la tecnología estaba cambiando la manera en que la gente hace las cosas.	En el siglo pasado vimos como la tecnología estaba cambiando la manera en que la gente hace las cosas. En el siglo pasado vimos como la gente hace las cosas. Así que cremos.	Así que creamos una tarjeta de crédito inteligente.	En el siglo pasado vimos como la tecnología estaba cambiando la manera en que la gente hace las cosas.	Así que cremos.	Vimos como la tecnología estaba cambiando la manera en que la gente hace las cosas.

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TERMINOS Y CONDICIONA

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<u>NOTIFICACIÓN DE PRE-INVESTIGACIÓN Y EXCLUSIÓN VOLUNTARIA</u>: Esta oferta de [crédito o seguro] está basada en información contenida en su informe de crédito que indica que usted cumple con ciertos criterios [incluyendo la condición de tener propiedades aceptables como colateral]. Si usted no cumple con nuestros criterios, esta oferta no está garantizada. Si usted no desea recibir ofertas de [crédito o seguro] pre-investigadas de ésta y otras compañías, llame a las agencias de información del consumidor [o nombre de la agencia de información del consumidor] sin cargos, [número sin cargo]; o escriba a: [nombre de la agencia de información del consumidor y dirección de correo].

En el siglo pasado vimos como: la tecnología estaba cambiando la manera en que la gente hace las cosas. Así que creamos una tarjeta de crédito inteligente. Vimos como la tecnología estaba cambiando la manera en que la gente hace las cosas. Vimos como la tecnología estaba cambiando la manera en que la gente hace las cosas. Vimos como la tecnología estaba cambiando la manera en que la gente hace las cosas. Vimos como la tecnología estaba cambiando la manera en que la gente hace las cosas.

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 05–1678 Filed 1–28–05; 8:45 am]

BILLING CODE 6750–01–C

Federal Register

Monday,
January 31, 2005

Part IX

The President

Executive Order 13371—Amendments to Executive Order 13285, Relating to the President's Council on Service and Civic Participation

Federal Register
Vol. 70, No. 19
Monday, January 31, 2005

Presidential Documents

Title 3—

The President

Executive Order 13371 of January 27, 2005

Amendments to Executive Order 13285, Relating to the President's Council on Service and Civic Participation

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to modify the mission and functions of the President's Council on Service and Civic Participation (Council) and to extend the Council, it is hereby ordered that Executive Order 13285 of January 29, 2003, is amended as follows:

Section 1. (a) Sections 2(a) and 2(b) of Executive Order 13285 are revised to read as follows: ''(a) The mission and functions of the Council shall be to:

(i) promote volunteer service and civic participation in American society;

(ii) encourage the recognition of outstanding volunteer service through the presentation of the President's Volunteer Service Award by Council members and Certifying Organizations, thereby encouraging more such activity;

(iii) promote the efforts and needs of local non-profits and volunteer organizations, including volunteer centers;

(iv) promote greater public access to information about existing volunteer opportunities, including via the Internet;

(v) assist with the promotion of Federally administered volunteer programs and the link that they have to increasing and strengthening community volunteer service; and

(vi) promote increased and sustained private sector sponsorship of and engagement in volunteer service.

(b) In carrying out its mission, the Council shall:

(i) encourage broad participation in the President's Volunteer Service Award program by qualified individuals and groups, especially students in primary schools, secondary schools, and institutions of higher learning;

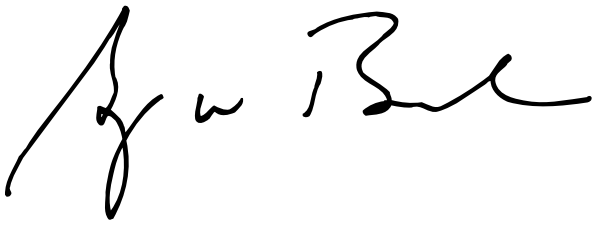
(ii) exchange information and ideas with interested individuals and organizations on ways to expand and improve volunteer service and civic participation;

(iii) advise the Chief Executive Officer of the CNCS on broad dissemination, especially among schools and youth organizations, of information regarding recommended practices for the promotion of volunteer service and civic participation, and other relevant educational and promotional materials;

(iv) monitor and advise the Chief Executive Officer of the CNCS on the need for the enhancement of materials disseminated pursuant to subsection 2(b)(iii) of this order; and

(v) make recommendations from time to time to the President, through the Director of the USA Freedom Corps, on ways to encourage greater levels of volunteer service and civic participation by individuals, schools, and organizations.''

Sec. 2. Section 4(b) of Executive Order 13285 is revised to read as follows: ''(b) Unless further extended by the President, this order shall expire on January 29, 2007.''



THE WHITE HOUSE,
Washington, January 27, 2005.

[FR Doc. 05–1886
Filed 1–28–05; 9:46 am]
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This is the first in a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with "P L U S" (Public Laws Update Service) on 202–741–6043. This list is also available online at *http://www.archives.gov/federal_register/public_laws/public_laws.html*.

A cumulative List of Public Laws for the second session of the 108th Congress will appear in the issue of January 31, 2005.

The text of laws is not published in the **Federal Register** but may be ordered in "slip law" (individual pamphlet) form from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202–512–1808). The text will also be made available on the Internet from GPO Access at *http://www.gpoaccess.gov/plaws/index.html*. Some laws may not yet be available.

H.R. 241/P.L. 109-1

To accelerate the income tax benefits for charitable cash contributions for the relief of victims of the Indian Ocean tsunami. (Jan. 7, 2005; 119 Stat. 3)

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1, 1–1 to 1–10		13.00	[3]July 1, 1984
1, 1–11 to Appendix, 2 (2 Reserved)		13.00	[3]July 1, 1984
3–6		14.00	[3]July 1, 1984
7		6.00	[3]July 1, 1984
8		4.50	[3]July 1, 1984
9		13.00	[3]July 1, 1984
10–17		9.50	[3]July 1, 1984
18, Vol. I, Parts 1–5		13.00	[3]July 1, 1984
18, Vol. II, Parts 6–19		13.00	[3]July 1, 1984
18, Vol. III, Parts 20–52		13.00	[3]July 1, 1984
19–100		13.00	[3]July 1, 1984
1–100	(869–052–00167–8)	24.00	July 1, 2004
101	(869–052–00168–6)	21.00	July 1, 2004
102–200	(869–052–00169–4)	56.00	July 1, 2004
201–End	(869–052–00170–8)	24.00	July 1, 2004
42 Parts:			
1–399	(869–052–00171–6)	61.00	Oct. 1, 2004
400–429	(869–052–00172–4)	63.00	Oct. 1, 2004
430–End	(869–052–00173–2)	64.00	Oct. 1, 2004
43 Parts:			
1–999	(869–052–00174–1)	56.00	Oct. 1, 2004
1000–end	(869–052–00175–9)	62.00	Oct. 1, 2004
44	(869–052–00176–7)	50.00	Oct. 1, 2004
45 Parts:			
1–199	(869–052–00177–5)	60.00	Oct. 1, 2004
200–499	(869–052–00178–3)	34.00	Oct. 1, 2004
500–1199	(869–052–00179–1)	56.00	Oct. 1, 2004
1200–End	(869–052–00180–5)	61.00	Oct. 1, 2004
46 Parts:			
1–40	(869–052–00181–3)	46.00	Oct. 1, 2004
41–69	(869–052–00182–1)	39.00	Oct. 1, 2004
70–89	(869–052–00183–0)	14.00	Oct. 1, 2004
90–139	(869–052–00184–8)	44.00	Oct. 1, 2004
140–155	(869–052–00185–6)	25.00	Oct. 1, 2004
156–165	(869–052–00186–4)	34.00	Oct. 1, 2004
166–199	(869–052–00187–2)	46.00	Oct. 1, 2004
200–499	(869–052–00188–1)	40.00	Oct. 1, 2004
500–End	(869–052–00189–9)	25.00	Oct. 1, 2004
47 Parts:			
0–19	(869–052–00190–2)	61.00	Oct. 1, 2004
20–39	(869–052–00191–1)	46.00	Oct. 1, 2004
40–69	(869–052–00192–9)	40.00	Oct. 1, 2004
*70–79	(869–052–00193–8)	63.00	Oct. 1, 2004
80–End	(869–050–00192–6)	61.00	Oct. 1, 2003
48 Chapters:			
1 (Parts 1–51)	(869–052–00195–3)	63.00	Oct. 1, 2004
1 (Parts 52–99)	(869–052–00196–1)	49.00	Oct. 1, 2004
2 (Parts 201–299)	(869–052–00197–0)	50.00	Oct. 1, 2004
3–6	(869–052–00198–8)	34.00	Oct. 1, 2004
7–14	(869–052–00199–6)	56.00	Oct. 1, 2004
15–28	(869–052–00200–3)	47.00	Oct. 1, 2004
29–End	(869–052–00201–1)	47.00	Oct. 1, 2004
49 Parts:			
1–99	(869–052–00202–0)	60.00	Oct. 1, 2004

Title	Stock Number	Price	Revision Date
*100–185	(869–052–00203–8)	63.00	Oct. 1, 2004
186–199	(869–052–00204–6)	23.00	Oct. 1, 2004
*200–399	(869–052–00205–4)	64.00	Oct. 1, 2004
400–599	(869–052–00206–2)	64.00	Oct. 1, 2004
600–999	(869–052–00207–1)	19.00	Oct. 1, 2004
1000–1199	(869–052–00208–9)	28.00	Oct. 1, 2004
1200–End	(869–052–00209–7)	34.00	Oct. 1, 2004
50 Parts:			
1–16	(869–052–00210–1)	11.00	Oct. 1, 2004
17.1–17.95	(869–050–00209–4)	62.00	Oct. 1, 2003
17.96–17.99(h)	(869–052–00212–7)	61.00	Oct. 1, 2004
17.99(i)–end and 17.100–end	(869–052–00213–5)	47.00	Oct. 1, 2004
18–199	(869–052–00214–3)	50.00	Oct. 1, 2004
200–599	(869–052–00215–1)	45.00	Oct. 1, 2004
600–End	(869–052–00216–0)	62.00	Oct. 1, 2004
CFR Index and Findings Aids	(869–052–00049–3)	62.00	Jan. 1, 2004
Complete 2004 CFR set		1,342.00	2004
Microfiche CFR Edition:			
Subscription (mailed as issued)		325.00	2004
Individual copies		2.00	2004
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Complete set (one-time mailing)		298.00	2002

[1] Because Title 3 is an annual compilation, this volume and all previous volumes should be retained as a permanent reference source.

[2] The July 1, 1985 edition of 32 CFR Parts 1–189 contains a note only for Parts 1–39 inclusive. For the full text of the Defense Acquisition Regulations in Parts 1–39, consult the three CFR volumes issued as of July 1, 1984, containing those parts.

[3] The July 1, 1985 edition of 41 CFR Chapters 1–100 contains a note only for Chapters 1 to 49 inclusive. For the full text of procurement regulations in Chapters 1 to 49, consult the eleven CFR volumes issued as of July 1, 1984 containing those chapters.

[4] No amendments to this volume were promulgated during the period January 1, 2003, through January 1, 2004. The CFR volume issued as of January 1, 2002 should be retained.

[5] No amendments to this volume were promulgated during the period April 1, 2000, through April 1, 2004. The CFR volume issued as of April 1, 2000 should be retained.

[6] No amendments to this volume were promulgated during the period July 1, 2000, through July 1, 2004. The CFR volume issued as of July 1, 2000 should be retained.

[7] No amendments to this volume were promulgated during the period July 1, 2002, through July 1, 2004. The CFR volume issued as of July 1, 2002 should be retained.

[8] No amendments to this volume were promulgated during the period July 1, 2003, through July 1, 2004. The CFR volume issued as of July 1, 2003 should be retained.